

# *Social Justice Movements and LatCrit Community*

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## On Making Anti-Essentialist and Social Constructionist Arguments in Court

One of my most intense disagreements with another lawyer during nearly a decade of lesbian and gay rights litigation<sup>1</sup> concerned social constructionism. The lawyer (a law professor, if truth be told) wanted to argue in an amicus brief to the United States Supreme Court that sexual orientation, like race, was a social constructed category.<sup>2</sup> He reasoned that since the Court had condemned race discrimination even while recognizing the “socio-political, rather than biological” nature of race,<sup>3</sup> it would

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<sup>1</sup> From 1991-2000, I was a staff attorney with Lambda Legal Defense and Education Fund.

<sup>2</sup> For discussion and application of social constructionist approaches by courts, see *infra* notes 78-93 and accompanying text. See also ARIELA J. GROSS, *DOUBLE CHARACTER: SLAVERY AND MASTERY IN THE ANTEBELLUM SOUTHERN COURTROOM* (2000); ALAN HYDE, *BODIES OF LAW* (1997); IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996) [hereinafter LÓPEZ, *WHITE BY LAW*]; Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 *UCLA L. REV.* 263 (1995). Cf. JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990). For discussion of the relationship between social construction and anti-essentialist theories, see *infra* notes 15-23 and accompanying text.

<sup>3</sup> See *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987). *Saint*

similarly be willing to invalidate a measure discriminating against lesbians, gay men and bisexuals,<sup>4</sup> even while recognizing the socially constructed nature of sexual orientation.<sup>5</sup>

To me, the argument that sexual orientation was a social construct rather than a biological or otherwise deeply rooted, “natural” trait seemed potentially more dangerous to the plaintiffs’ case than most of the arguments being made by our adversaries. My disagreement did not lie with the assertion that courts can and should remedy harms to members of socially constructed classes.<sup>6</sup> To the contrary, I concurred fully with the underlying Foucaultian point that society, not nature, has accorded sexual

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*Francis College* concerned the statutory interpretation question whether Arab Americans constituted a “race” distinct from whites for purposes of 42 U.S.C. § 1981. See also *infra* notes 82-86 and accompanying text (discussing *Saint Francis College* in detail).

<sup>4</sup> The amicus brief was being prepared for filing in support of the lesbian and gay respondents in *Romer v. Evans*, 517 U.S. 620 (1996), for whom I was co-counsel. The lawsuit challenged a Colorado state constitutional amendment that forbade all government entities from protecting lesbians, gay men and bisexuals against discrimination. The Amendment provided, in pertinent part:

No Protected Status Based on Homosexual, Lesbian, or Bisexual Orientation. Neither the State of Colorado, through any of its branches or departments, nor any of its agencies, political subdivisions, municipalities or school districts, shall enact, adopt or enforce any statute, regulation, ordinance or policy whereby homosexual, lesbian or bisexual orientation, conduct, practices or relationships shall constitute or otherwise be the basis of or entitle any person or class of persons to have or claim any minority status, quota preferences, protected status or claim of discrimination.

*Id.* at 624. The Supreme Court described the amendment as precluding protections for “the named class, a class we shall refer to as homosexual persons or gays and lesbians.” *Id.*

<sup>5</sup> See *Saint Francis College*, 481 U.S. at 610 n.4; see also *infra* text at notes 84-86 (discussing social construction analysis in *Saint Francis College*). My colleague sought to rely on *Saint Francis College* to show that the fact that a class is socially constructed, as opposed to naturally occurring, should not bear on a court’s ability to remedy harms to members of that class. That the source of the remedy was constitutional (the Equal Protection Clause) in *Romer* and statutory (42 U.S.C. § 1981) in *Saint Francis College* was not relevant to this argument.

<sup>6</sup> Janet Halley has made this point persuasively. See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503 (1994) [hereinafter Halley, *Sexual Orientation and the Politics of Biology*] (critiquing litigators’ use of essentialist explanations for sexual orientation); Janet E. Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian, and Bisexual Identity*, 36 UCLA L. REV. 915 (1989) [hereinafter Halley, *The Politics of the Closet*].

This essay does not aim to contest or refute this position. To the contrary, by highlighting the ways in which anti-essentialist arguments may interact with the judicial decision-making process regarding discrimination claims, I aim to draw attention to structural and theoretical barriers that may interfere with their acceptance.

orientation its significance.<sup>7</sup>

Instead, I feared the Court might seize on the social construction argument and find the category of “gays and lesbians”<sup>8</sup> too diffuse to amount to a cognizable class.<sup>9</sup> After all, a court needs to understand who has been harmed before deciding whether and how to order relief from an injurious classification.<sup>10</sup> If the Court had become persuaded that the trait of sexual orientation

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<sup>7</sup> See generally MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972-1977* (Colin Gordon ed., Colin Gordon et al., trans., 1980); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans. 1978); see also Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737 (1989) (maintaining that society, not biology, accords homosexuality its significance); Mary McIntosh, *The Homosexual Role*, 16 SOC. PROBS. 182 (1968) (characterizing homosexuality as a label attached by others and not a condition of certain individuals).

My colleague's principal aim in invoking social construction arguments, which I embraced in theory though not for litigation purposes as indicated above, was to find a way around the faulty reasoning that equated gay people with sexual acts. This unduly restricted analysis had led many courts to fail to uphold a wide range of discriminatory burdens on lesbians and gay men without meaningful review. See, e.g., *Steffan v. Perry*, 41 F.3d 677, 684 n.3 (D.C. Cir. 1994) (en banc) (citing *Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1997) (“It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause.”); see also *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed. Cir. 1989) (characterizing homosexuality as primarily behavioral and stating that “[a]fter [*Bowers v. Hardwick*, 478 U.S. 186 (1986)], it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm”). But see *Lawrence v. Texas*, 123 S. Ct. 2472, 2478 (2003) (reversing *Bowers v. Hardwick* and recognizing liberty interest of lesbians and gay men in decisions about private, consensual sexual intimacy). A social construction argument could effectively show lesbians and gay men as fully human beings with distinct identities comprised of more than the specifics of their sexual behavior. See *infra* notes 35-39 and accompanying text; *Sexual Orientation and the Politics of Biology*, *supra* note 6, at 511-13 (describing litigators' efforts to avoid the strictures imposed by the conduct-focused cases).

<sup>8</sup> See *Romer*, 517 U.S. at 627 (“gays and lesbians” is one of the two ways in which the Supreme Court referred to the class targeted by Colorado's constitutional amendment).

<sup>9</sup> Under the Equal Protection Clause, a class must be “cognizable” to qualify for relief. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 96 (1986); *Castaneda v. Partida*, 430 U.S. 482, 494 (1977) (defining cognizable class eligible for equal protection relief as “one that is a recognizable, distinct class, singled out for different treatment under the laws”).

<sup>10</sup> In its most strenuous assertion regarding the limitations of judicial power under the Equal Protection Clause, the Court rejected a challenge to a facially neutral measure with a clear disparate impact on a particular class on the grounds that the plaintiff must show the government intended to single out that class for unfair treatment. See *Washington v. Davis*, 426 U.S. 229 (1976); see also *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977) (suggesting ways in which plaintiffs might show discriminatory intent to prove the presence of a classification and thereby state a cognizable equal protection claim).

derived its meaning from shifting cultural understandings of gay identity, rather than a “natural” or fixed source, it could then have decided that sexual orientation, as a trait, was not susceptible to an administrable definition. As a result, the Court might have found that the lesbian and gay plaintiffs<sup>11</sup> did not comprise a meaningful, comprehensible group and did not suffer any shared or similar burden as a result of the measure.<sup>12</sup>

With this concern in mind, this essay will explore possible effects of arguing in litigation that identity traits lack a strictly definable essence and are, instead, socially constructed.<sup>13</sup> In particular, I argue that judicial reluctance to define personal traits may limit the effectiveness of anti-essentialist and social construction arguments in assisting courts to reach accurate, non-simplistic understandings of identity-based discrimination.

To develop this argument, I will first consider several ways in which anti-essentialist<sup>14</sup> and social constructionist arguments

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<sup>11</sup> Further complicating the class definition (and illustrating the anti-essentialist point) was the presence of a non-gay man among the initial group of plaintiffs to file suit. Brett Tanberg had joined the suit because, as a man with AIDS, he had experienced discrimination as a result of being perceived as gay. LISA KEEN & SUZANNE B. GOLDBERG, *STRANGERS TO THE LAW: GAY PEOPLE ON TRIAL* 28-29 (1998).

<sup>12</sup> *Cf.* *Equality Foundation v. City of Cincinnati*, 128 F.3d 289, 301 (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998). *See infra* note 60 (discussing Sixth Circuit’s invocation of this type of analysis in *Equality Foundation*). Shortly before this essay went to publication, the Supreme Court invalidated the Texas “Homosexual Conduct Law” in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003). The ways in which the Court appeared to understand the concept of gay and lesbian identity will be addressed *infra* at notes 64 and 103.

<sup>13</sup> The concern with anti-essentialism as a litigation theory is limited to lawsuits based on personal characteristics. Anti-essentialist arguments regarding non-corporal aspects of identity such as legal status (e.g., marriage, immigrant) or occupation (e.g., lawyer, psychologist) do not present the same risks as set forth below because these aspects of identity are generally thought of as acquired rather than inborn or genetically driven. *See infra* note 40 and accompanying text.

<sup>14</sup> In its simplest sense, anti-essentialism embraces the concept that the demographic categories that are often thought of as fixed in and by nature, such as race, sex, ethnicity, and sexual orientation, among others, actually “have their genesis in cultural practices of differentiation, rather than in genetics.” Ian F. Haney López, *Retaining Race: LatCrit Theory and Mexican American Identity in Hernandez v. Texas*, 2 HARV. LATINO L. REV. 279, 281 (1997) [hereinafter López, *Retaining Race*]. With respect to race, for example, Professor Haney López explains that genetics “play[ ] no role in racial fabrication other than contributing the morphological differences onto which the myths of racial identity are inscribed.” *Id.* at 281. *See also* Elizabeth M. Iglesias & Francisco Valdes, *Religion, Gender, Sexuality, Race and Class in Coalitional Theory: A Critical and Self-Critical Analysis of LatCrit Social Justice Agendas*, 19 CHICANO-LATINO L. REV. 503 (1998); Ian F. Haney López, *Race, Ethnicity, Erasure: The Salience of Race to LatCrit Theory*, 85 CAL. L. REV. 1143 (1997) [hereinafter López, *Race, Ethnicity, Erasure*]; Francisco Valdes, *Latino/o*

might be presented and the potential challenges these arguments could pose for plaintiffs seeking court-ordered recovery for discrimination based on a personal trait. Next, to complicate matters, I will turn to cases in which these types of arguments have been embraced in majority opinions. As the discussion below illustrates, courts have, in some instances, explicitly accepted the concept that society, not biology or nature, creates the categories that lead us to distinguish between “types” of people. Against this background, I will then offer preliminary hypotheses about the limits of courts’ willingness to accept social construction arguments in assessing identity-based discrimination claims and the continuing potential risks posed by anti-essentialist arguments in litigation. A last note will suggest some ways in which lawyers might present cases to counter essentialist notions of identity while not asking courts to grapple directly with social construction theory.

Before turning to these tasks, I should explain why I refer to anti-essentialism and social constructionism interchangeably, given that each has a different analytic emphasis<sup>15</sup> and that adherence to one approach does not necessarily require adherence to the other. Put another way, it is possible to believe that identity is socially constructed yet maintain an essentialist view of the effects of that identity (or vice versa).<sup>16</sup> In particular, anti-essen-

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*Ethnicities, Critical Race Theory, and Post-Identity Politics in Postmodern Legal Culture: From Practices to Possibilities*, 9 *LA RAZA L.J.* 1 (1996). Put another way, anti-essentialism asserts that there is no “essence” to any characteristic so that we cannot assume individuals sharing an identity trait such as race, sex, ethnicity, class or any other personal characteristic will necessarily have in common either world view or other aspects of identity. See Jane Wong, *The Anti-Essentialism v. Essentialism Debate in Feminist Legal Theory: The Debate and Beyond*, 5 *WM. & MARY J. WOMEN & L.* 273 (1999). In contrast, from an essentialist perspective, “the characteristics used to define a thing are thought to inhere in its very essence and, thus, to be unchangeable.” *Id.* at 275.

For additional discussions of essentialism, see, e.g., *Feminist Legal Theory: An Anti-essentialist Reader* (NANCY E. DOWD & MICHELLE S. JACOBS EDS., 2003); ANGELA HARRIS, *Race and Essentialism in Feminist Legal Theory*, 42 *Stan. L. Rev.* 581 (1990); *Forms of Desire: Sexual Orientation and the Social Constructionist Controversy* 25, 28 (EDWARD STEIN ED., 1990) [HEREINAFTER *Forms of Desire*].

<sup>15</sup> In comparing the two, Daniel Ortiz has suggested that “[t]he constructivist debate concerns the transhistorical and transcultural stability of identity categories, whereas the antiessentialism debate concerns [the categories’] contemporary reach.” Daniel Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 *VA. L. REV.* 1833, 1847 (1993).

<sup>16</sup> See, e.g., Drucilla Cornell, *Sexual Difference, The Feminine, and Equivalency: A Critique Of Mackinnon’s Toward A Feminist Theory Of The State*, 100 *YALE L.J.* 2247, 2264 (1991) (book review) (“[I]f [Catharine] MacKinnon clearly rejects natu-

tialist arguments challenge the essentialist notion that human identity categories are fixed and exist transhistorically and transculturally.<sup>17</sup> They emphasize, instead, that human identities lack an essence that would cause all people with the same trait (such as femaleness) to coalesce as a predictable category with common interests or experiences.<sup>18</sup> For example, anti-essentialists would maintain that the experience of being a woman<sup>19</sup> will vary significantly depending on social conditions and other aspects of one's identity. From an essentialist viewpoint, in contrast, all women across cultures and classes and over time can be said to share some common essence or connection.

Social construction arguments by contrast, focus on the process by which traits are imbued with significance. Through their attention to "how the identity category itself is formed," these arguments contend that identity categories are "social creations" that "result from social belief and practice, are themselves complex social practices, and may be evaluated in terms of whose interests they serve."<sup>20</sup> To return to the example of "woman" from above, social constructionists take the position that the category "woman" is given meaning by societies rather than by an external "natural" force.<sup>21</sup>

Although these different focuses render social constructionism

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ralism, she nevertheless remains a specific kind of essentialist. Under this patriarchal social reality, women's imposed 'sex' is women's 'essence,' her only 'being.'").

<sup>17</sup> Cheshire Calhoun, *Denaturalizing and Desexualizing Lesbian and Gay Identity*, 79 VA. L. REV. 1859, 1863 (1993). Essentialist arguments can be agnostic on the question whether the identity's stability is "due to the presocial, intrinsic nature of the identity . . . or the transhistorical and transcultural stability of certain social facts." *Id.* See also *supra* note 2.

<sup>18</sup> In making this point, essentialists also tend to neglect intersectional identities. See Martha Minow, *NOT ONLY FOR MYSELF, IDENTITY, POLITICS, AND THE LAW* 57 (1997).

<sup>19</sup> A compelling body of scholarship is emerging specifically to contest the stability of the category "woman" and the binary distinction between men and women. See, e.g., Taylor Flynn, *Transforming the Debate: Why We Need to Include Transgender Rights in the Struggles for Sex and Sexual Orientation Equality*, 101 COLUM. L. REV. 392, 418 (2001); Julie A. Greenberg, *When is a Man a Man, and When is a Woman a Woman*, 52 FLA. L. REV. 745 (2000); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex From Gender*, 144 U. PA. L. REV. 1 (1995). See generally BUTLER, *supra* note 3, at 16 (1990) (explaining that gender is performed and describing gender as "a complexity whose totality is permanently deferred, never fully what is given at any juncture in time. An open coalition . . . will affirm identities that are alternately instituted and relinquished according to the purposes at hand[.]").

<sup>20</sup> Ortiz, *supra* note 15, at 1836, 1838.

<sup>21</sup> "Woman is not born, but made" is one classic characterization of this point.

and anti-essentialism non-fungible in most respects, the important point for our purposes here is that both purposefully inject ambiguity into the definition of a trait.<sup>22</sup> By overtly allowing for the possibility that the meaning and significance of a trait may change over time or vary among individuals, either because society changes or because individuals experience the trait differently, both theories reject the existence of an absolute, fixed trait definition. This position, in turn, affects adjudication of trait-based anti-discrimination claims because it puts front and center the court's role in defining a trait's contours. In contrast, theories such as essentialism that disregard society's role in defining a trait or discount variations among trait-bearers shape a trait's definition leave courts in the seemingly passive position of receiving a trait definition that is mandated by or derived from "nature."<sup>23</sup>

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See SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley ed. & trans., Alfred A. Knopf 1953) (1952).

In the context of sexual orientation, Edward Stein has offered this helpful explanation of essentialism and social constructionism with regard to sexual orientation:

Essentialists hold that a person's sexual orientation is a culture-independent, objective and intrinsic property while social constructionists think it is culture-dependent, relational and, perhaps, not objective. . . . Essentialists think that being a heterosexual or homosexual is like having a certain blood type or being a person taller than six feet. The essentialist would have no problem saying that there were heterosexuals and homosexuals in Ancient Greece; it is just a matter of whether or not a person has the relevant properties (such as a certain gene, hormone, psychological condition, etc. or some combination of these). Even though people in past cultures may have had no idea what constitutes a gene, a hormone, an Oedipal complex or whatever the relevant properties are, they either did or did not have such properties, and thus the essentialist would claim that they were thereby either heterosexual or homosexual (or whatever the appropriate categories of sexual orientation are). In contrast, while social constructionists agree that people in all cultures engaged in sexual acts, they think that only in some cultures (e.g., our culture) are there people who have sexual orientations.

EDWARD STEIN, *Conclusion: The Essentials of Constructionism and the Construction of Essentialism*, in *FORMS OF DESIRE*, *supra* note 2, at 325-26.

<sup>22</sup> Although essentialist-based categories may also blur upon close examination, the anti-essentialist approach affirmatively invites courts to engage in the process of defining a trait, which foregrounds the issue of a trait's ambiguity. An essentialist approach may allow the court to elide the question of its own role in developing a trait's definition with the suggestion that any definition will derive from nature rather than the court's assessment of sociological factors.

Additional theories regarding identity might also lead to categorical instability. However, because anti-essentialism is a central tenet of the LatCrit project, it is the focus here.

<sup>23</sup> Of course, a "natural" definition would also have to be derived by the court,

## I

THE COMPLICATIONS OF ANTI-ESSENTIALIST AND  
SOCIAL CONSTRUCTION ARGUMENTS  
IN LITIGATION

As suggested above, one of the greatest difficulties presented by anti-essentialist arguments in litigation relates to the jurisdiction of courts and, more specifically, to how judges perceive their role in assessing discrimination claims. It is axiomatic that a court can order a defendant to redress a plaintiff's injury only if the plaintiff has asserted an injury that the court is empowered to remedy.<sup>24</sup> In the equal protection context, this means that a plaintiff must show that the government has drawn an impermissible, injurious classification based on a trait he or she possesses.<sup>25</sup> To prevail on a statutory claim, such as a Title VII race or sex discrimination claim,<sup>26</sup> a plaintiff must demonstrate that he or she has the trait protected by the legislation (i.e. membership in a "protected class")<sup>27</sup> and that he or she has been targeted

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albeit from ostensibly natural facts. The claim to a natural source suggests, however, that the definition would be objectively testable whereas the popular views embodied in a socially constructed definition would necessarily entail greater exercise of subjective judgment. This dependence on subjective views carries with it greater potential for ambiguity since differently-positioned people might offer varied and even contradictory perceptions of a trait in contrast to the more fixed characterization that would be expected from a natural source.

<sup>24</sup> See, e.g., FED. R. CIV. P. 12(b)(6) (providing procedural device for dismissal of lawsuit if plaintiff fails to state a claim upon which relief can be granted); see also *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997 (1988) ("[T]he ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times.") quoted in *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989). Cf. *St. Mary's Honor v. Hicks*, 509 U.S. 502, 506 (1993) (describing shifting burdens of proof that apply to plaintiffs' employment discrimination claims).

<sup>25</sup> See *supra* note 10 and accompanying text (explaining that a plaintiff must show that a cognizable class has been singled out for injury before stating an equal protection claim).

<sup>26</sup> 42 U.S.C. § 2000e-2 (2002).

<sup>27</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (explaining first requirement for plaintiff's prima facie case under Title VII's prohibition against race discrimination as a showing "that he belongs to a racial minority"); *Int'l Bd. Of Teamsters v. United States*, 431 U.S. 324, 358 (1977) ("The importance of McDonnell Douglas lies . . . in its recognition of the general principle that any Title VII plaintiff must carry the initial burden of offering evidence adequate to create an inference that an employment decision was based on a discriminatory criterion illegal under the Act.") (emphasis added).

As many have noted, the Court's initial focus on the plaintiff's possession of the trait, rather than on the defendant's reliance on the trait, is misplaced. All individuals have each of the traits protected by Title VII—such as race and sex. See E.

for discrimination based on that trait.

In either case, to decide whether the alleged discrimination can be remedied, a court must decide whether the discrimination occurred because of the trait in question. And to make that decision, the court must come to some understanding of the scope and definition of that trait. For example, if a court is to decide whether an instance of harassment occurred “because of sex”<sup>28</sup> or whether impermissible gender stereotyping occurred in an employment action,<sup>29</sup> the court must grasp the meaning of “sex.”<sup>30</sup> Similarly, if a Latina relies on statutory prohibitions of ethnicity-based discrimination to challenge her loss of a job because of her Spanish-inflected accent, the court must ascribe some meaning to ethnicity to determine whether the accent-based discrimination amounted to discrimination based on her ethnicity.<sup>31</sup> Likewise, if a lesbian files suit alleging abuse by police, and the police defend themselves by offering another explanation for their actions, the court cannot decide whether the plaintiff’s lesbian identity was the basis for the officers’ actions without an understanding of the term “lesbian.”<sup>32</sup>

As the final section of this essay will elaborate, in deciding

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Christi Cunningham, *The Rise of Identity Politics I: The Myth of the Protected Class in Title VII Disparate Treatment Cases*, 30 CONN. L. REV. 441, 452-53 (1998) (showing that courts have treated the first *McDonnell Douglas* requirement as referring to “protected class” membership and critiquing that modification).

Even an analysis that more properly considers the defendant’s action in response to a perceived trait rather than the plaintiff’s possession of that feature requires a court to engage in the process of understanding the trait’s scope to determine whether protection is available, thus implicating this essay’s concern with the role of courts in defining human characteristics.

<sup>28</sup> See *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998).

<sup>29</sup> See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

<sup>30</sup> This is not to suggest that a court needs to develop a complex or detailed understanding of the term. In some cases, direct evidence that includes specific reference to a plaintiff’s protected identity (e.g., an employer’s statement that “I won’t hire any women for this kind of work.”) may be sufficient to demonstrate discriminatory reliance on that trait without requiring a thorough understanding of the trait itself.

<sup>31</sup> See *infra* notes 74-76 and accompanying text (discussing accent discrimination cases).

<sup>32</sup> Cf. *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997). In cases lacking direct evidence, an additional analytic stage requires the court to assess whether the plaintiff’s evidence demonstrates that discrimination occurred based on his or her protected characteristic(s). An anti-essentialist perspective may shape this evidentiary review, as well, by calling into question assumptions regarding intent commonly accorded to certain words or actions. However, the focus here will remain on the first two stages identified above, as it is these stages in which anti-essentialist arguments concentrate on the definition of identity features.

trait-based discrimination cases, courts tend to assume the trait's definition without engaging openly in the project of defining that aspect of human identity, whether the discrimination was based on race, sex, ethnicity, sexual orientation, and/or other personal characteristics.<sup>33</sup> A random sampling of trait-based discrimination cases rarely reveals a court expending time defining the personal trait implicated.<sup>34</sup>

Anti-essentialist arguments, in their most vigorous forms, challenge this judicial tendency to gloss over the process of understanding and defining the trait that is alleged to be the basis for discrimination. For example, in seeking relief from employment discrimination, a Latina plaintiff might explicitly define ethnicity as comprising shared cultural heritage, shared language, and shared values<sup>35</sup> to help contextualize the discrimination she suffered. Or a plaintiff could urge that she is entitled to relief for losing her job after her religious wedding to another woman<sup>36</sup> and, in showing the connection between lesbian identity and the discrimination she suffered, portray lesbians as women who experience and/or express an emotional or erotic attraction to other women.<sup>37</sup> Or the plaintiff might, in a disability discrimina-

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<sup>33</sup> See *Oncale*, 523 U.S. 75 (emphasizing Title VII's protection against discrimination "because of sex" but not explaining that phrase); Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 *YALE L.J.* 1683, 1743-44 (1998) (observing that courts often "look for deep-seated sexual motivations . . . [avoiding] gender-based considerations that [are] closer to the surface.").

<sup>34</sup> For example, in neither *Romer v. Evans*, 517 U.S. 620 (1996), nor *J.E.B. v. Alabama*, 511 U.S. 127 (1994), did the Court define sexual orientation or sex, which were the traits at issue. The cases involving transgendered individuals defy this trend, with courts tending to delve deeply and energetically into the process of defining sex. See, e.g., Greenberg, *supra* note 19 (discussing cases). In a sense, these cases' obsession with defining sex help prove my point because of their stark contrast with non-transgender sex discrimination cases that never once mention secondary sex characteristics or X and Y chromosomes.

<sup>35</sup> See López, *Race, Ethnicity, Erasure*, *supra* note 2, at 1188-89; *Retaining Race*, *supra* note 2, at 279-80 (quoting Professor Perea's definition of ethnicity as "a set of traits that may include, but are not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols, all of which contribute to a sense of distinctiveness among members of the group"); see also Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 *LAW & SEXUALITY* 195, 208-09 (1994) (offering similar definition of ethnicity).

<sup>36</sup> See, e.g., *Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997) (en banc).

<sup>37</sup> This draws from the definition of sexual orientation generally accepted by psychologists. See, e.g., Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 *LAW & SEXUALITY* 133, 134 (1991). Another dimension of that definition emphasizes that sexual orientation is deeply rooted and fixed in place early in life, if not prenatally or genetically. *Id.* at 149-52.

tion action, maintain that she is viewed by others as having an impairment that interferes with her “daily activities of living”<sup>38</sup> and also allege that she experiences her deafness as a gift and a source of strength.<sup>39</sup> Yet another plaintiff might allege that her supervisor harassed her because of the way in which her Latina ethnicity, her lesbianism, and her deafness came together to form her identity, as opposed to linking the harassment to any one particular trait.

Although ethnicity, sexual orientation, and disability are often popularly thought of as innate or as inherent parts of an individual,<sup>40</sup> in each of these examples, the plaintiff self-consciously defines the traits she believes triggered the discriminatory acts.<sup>41</sup> In doing so, she adopts a definition that hinges on either self-identi-

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My example posits defining lesbian identity without regard to this portion of the definition.

Another view is that traits of “physical sexual activity, interpersonal affection, and erotic fantasies [and] cue-response patterns that constrain and mediate physiological response and arousal [and, as recently suggested, genetic make-up] . . . combine to form a sexual orientation or identity.” See Gutierrez, *supra* note 35, at 207 (quoting Michael Bailey & Richard Pillard, *A Genetic Study of Male Sexual Orientation*, in *ARCH. GEN. PSYCHIATRY* 48, 1089 (1991); DNA, *Lesbianism Linked in Study*, San Jose Mercury News, Mar. 12, 1993; Frederick Suppe, *In Defense of a Multidimensional Approach to Sexual Identity*, 9 *JOURNAL OF HOMOSEXUALITY* 7, 10 (1984)).

<sup>38</sup> See 42 U.S.C.A. § 12102(2)(A) (West 2002) (defining disability in part as “a physical or mental impairment that substantially limits one or more of the major life activities of such individual”). See also *Toyota Motor Mfg., Kentucky, Inc. v. Williams*, 534 U.S. 184 (2002) (interpreting 42 U.S.C. § 12102(2)(A)).

<sup>39</sup> Bahan, *Notes From A Seeing Person*, in *AMERICAN DEAF CULTURE* 29, 31 (Sherman Wilcox ed., 1989) (discussing organizing around the concept of Deaf Pride).

<sup>40</sup> Certainly, numerous other identities are not widely viewed as innate in the sense of being inborn. Religion, marital status, veteran’s status, source of income, and other identity features that may significantly shape an individual’s life are all widely recognized to be acquired or instilled. In those cases, protective legislation typically will define the class in detail and regulations will set forth independent methods for verifying class membership through documentation. Religion is one significant exception to this in that a person’s religious identity is neither inborn nor subject to a finite, verifiable definition. However, in some respects, religion is *sui generis* because of our nation’s history. The central commitment to free exercise of religion, bounded by the Establishment Clause’s barrier to excessive judicial involvement with assessing religious identity claims, has evolved into an acceptance of self-declaration as the means for establishing this type of class membership. As a consequence, the porous, socially constructed nature of the contours of this class is so deeply and widely known that claims seeking assessment of religious discrimination, which necessarily implicate the need for a court to understand “religion,” are not typically seen as requiring a court to venture beyond its areas of expertise.

<sup>41</sup> Often the perpetrator of discrimination responds to multiple traits of his or her target; however, a careful plaintiff will tailor the litigation to concentrate only on traits that receive protection.

fication or social interactions rather than involuntariness. None suggests that the trait is intrinsic, determined by birth, or understandable without reference to the society in which she lives. Put another way, these arguments embrace the idea that the traits at issue are only as significant as society deems them to be and that they would not exist as distinct identifiers absent social construction. In addition, these definitional moves also challenge a court to focus on rather than gloss over the trait's definition.

"So what?," you might say. We all know that people with the same ethnicity, sexual orientation, or disability are often thought of as a coherent group and frequently see themselves as having some connection to others with the same traits.<sup>42</sup> The source of that sense of coherence, whether it is nature or society, should not be terribly important to courts.

Moreover, social construction and anti-essentialist arguments sometimes do a better job than essentialist theories of incorporating and reflecting individuals' lived experiences of being classified by others (or by themselves) as fitting within a particular community.<sup>43</sup> They provide a mechanism for recognizing that identity categories both overlap and interact in individuals, unlike anti-discrimination laws and courts which typically conceive of discrimination in terms of single, clearly defined traits.<sup>44</sup> For example, the plaintiff who has been targeted for discrimination

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<sup>42</sup> See, e.g., *Zapata v. IBP, Inc.*, 19 F. Supp. 2d 1215, 1219 (D. Kan. 1988) (treating individuals of Mexican and Spanish descent and those with Spanish surnames as one unified group). Of course, the connection among trait-bearers is strongest where the trait is a minority trait within the community.

<sup>43</sup> In particular, many people who have features that would commonly be considered disabilities do not consider themselves "impaired" and do not want to adopt that self-presentation as a means to obtain protection against discrimination based on disability. See Paula E. Berg, *Ill/Legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 36-37 (1999) (describing how plaintiffs engaged in discrimination litigation must stigmatize and objectify their impairment to obtain legal protection); see also Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 252 (2001) (In seeking damages, the "client may be required to portray . . . a 'victim' identity, which may not only clash with how she sees herself, but may also be the exact image that she . . . is trying to eradicate."); Bahan, *supra* note 39.

<sup>44</sup> See Kathryn Abrams, *Title VII and the Complex Female Subject*, 92 MICH. L. REV. 2479, 2481 (1994) (observing that many courts "require[e] that claimants disaggregate and choose among the elements of their identities" rather than recognizing the ways in which different aspects of an individual's identity may, in the aggregate or in combination, result in an experience of discrimination not simply redressed under one identity category).

precisely because of her particular combination of identity traits<sup>45</sup>—as with our hypothetical plaintiff from above, who is Latina and lesbian and has a disability—needs a vehicle to express and seek relief for the discrimination she experiences based on her multidimensional identity.<sup>46</sup> Although courts tend to disregard that multidimensionality and instead dissect the plaintiff into distinct identity traits<sup>47</sup> or lapse into focusing on one identity category without attending to the others,<sup>48</sup> social construction arguments hold open the possibility for synergistic, holistic consideration of an individual and her legal claims.

In addition, even where scientific arguments might be available to support the existence and definition of a particular trait, arguments from social construction avoid the problem of making legal protection contingent on current scientific conclusions about group membership that might be revisited and revised as research continues.<sup>49</sup>

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<sup>45</sup> See Tanya Katerí Hernández, *Sexual Harassment and Racial Disparity: The Mutual Construction of Gender and Race*, 4 J. GENDER RACE & JUST. 183, 184-89 (2001) (discussing ways in which women's experience of sexual harassment may be affected by race); Abrams, *supra* note 44; see also Elizabeth M. Iglesias, *Structures of Subordination: Women of Color at the Intersection of Title VII and the NLRA. Not!*, 28 HARV. C.R.-C.L. L. REV. 395 (1993).

<sup>46</sup> See Berta Esperanza Hernandez Truyol, *Building Bridges—Latinas and Latinos at the Crossroads: Realities, Rhetoric, and Replacement*, 25 COLUM. HUM. RTS. L. REV. 369, 429 (1994) (discussing multi-dimensionality); see also Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 608 (1990) (discussing multiplicity); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241, 1242-44 (1991) (discussing intersectionality).

<sup>47</sup> See, e.g., *Williamson v. A.G. Edwards*, 876 F.2d 69 (8th Cir. 1989) (rejecting discrimination claim by black gay man on grounds that the discrimination suffered related to plaintiff's sexual orientation rather than race); see also Abrams, *supra* note 44.

<sup>48</sup> See Iglesias, *supra* note 45 at 470 (discussing "the unitary consciousness of law"); see also Wendi Barish, "Sex-Plus" Discrimination: A Discussion of *Fisher v. Vassar College*, 13 HOFSTRA LAB. & EMP. L.J. 239 (1995); Mary Elizabeth Powell, Comment, *The Claims of Women of Color Under Title VII: The Interaction of Race and Gender*, 26 GOLDEN GATE U. L. REV. 413, 422 (1996). Professor Devon Carbado has demonstrated that this failure to recognize the interrelationship of identity features occurs among advocates as well as judges. See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467, 1469 (2000) (showing how "black antiracism and white gay and lesbian civil rights advocacy continues to reflect essentialized notions of black and gay identity" so that blacks are presumed to be heterosexual and gay people are presumed to be white) (footnote omitted). Cf. ALL THE WOMEN ARE WHITE, ALL THE BLACKS ARE MEN, BUT SOME OF US ARE BRAVE: BLACK WOMEN'S STUDIES (Gloria T. Hull et al. eds. 1982).

<sup>49</sup> See Halley, *Sexual Orientation and the Politics of Biology*, *supra* note 6, at 513-14 (discussing dangers of relying on scientific proof of a characteristic's immutabil-

With the format and benefits of anti-essentialist arguments in mind, let us return to examine in greater depth the difficulty with making these arguments explicitly in the context of a lawsuit. As set out above, the critical background for this analysis concerns a court's task in deciding an anti-discrimination suit. To order relief, a court must find that a plaintiff has proven discrimination based on her particular identity trait (or combination of traits). If a plaintiff alleges discrimination based on ethnicity,<sup>50</sup> for example, the court will have to understand "ethnicity" as a precondition to deciding whether the alleged discrimination occurred because of that trait.<sup>51</sup>

As discussed above, by focusing on the question of a trait's definition, anti-essentialist arguments inhibit courts from simply eliding that issue while answering the ultimate question whether the alleged acts amounted to discrimination. Even more significantly, by emphasizing the socially constructed nature of an identity trait, they vividly demonstrate that the trait's contours are contingent and unstable rather than fixed.<sup>52</sup>

This point, at which the contours of the injured trait begin to

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ity); Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 377 (2000) (reviewing methodological problems with several major sexuality studies); KEEN & GOLDBERG, *supra* note 12, at 43-45 (reviewing dispute about using scientific evidence in *Romer v. Evans* litigation to demonstrate immutability of sexual orientation for purposes of suspect classification analysis).

<sup>50</sup> Of course, it is always possible to argue that the plaintiff falls within the protected class because he or she is "perceived as" a member of that class rather than because he or she is actually a class member. See 42 U.S.C. § 12102 (2)(C) (2002) ("The term 'disability' means, with respect to an individual . . . being regarded as having such an impairment."); see also, e.g., *Murphy v. United Parcel Service, Inc.*, 527 U.S. 516, 516-17 (1999) (mistaken belief is a way in which a person may be perceived as having a disability); *Sutton v. United Air Lines, Inc.*, 527 U.S. 471, 473 (1999) (*holding* "[p]etitioners . . . failed to allege properly that they [were] 'regarded as' . . . having an impairment that 'substantially limits' a major life activity."). Because this type of claim does not obviate the need for a plaintiff to characterize the perceived characteristic as either scientifically ordained or socially constructed, the additional layer added by the "perceived as" framing of a complaint does not affect the analysis here.

<sup>51</sup> In *Saint Francis College v. Al-Khazraji*, all parties agreed that the plaintiff fit within the class of Arab-Americans. Therefore, the anti-essentialist analysis in that case pertained only to whether Arab-Americans would be considered to be a race distinct from "whites" within 42 U.S.C. § 1981. *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604 (1987).

<sup>52</sup> But see Kenji Yoshino, *Assimilationist Bias in Equal Protection: The Visibility Presumption and the Case of "Don't Ask, Don't Tell,"* 108 YALE L.J. 485, 498 (1998) [hereinafter Yoshino, *Assimilationist Bias*].

There is no such thing as a purely biologically visible trait, for visibility is always relational, requiring a performer and an observer. Whether a trait

lose their rigid definition, marks the beginning of uncomfortable territory for most courts.<sup>53</sup> An anti-discrimination claim based on a trait acknowledged to be socially constructed calls not only for a judge to weigh the evidence of discrimination, which resonates as a judge-like activity, but also to engage in the sociological/anthropological enterprise of determining the indicia, or even the very existence, of a particular identity trait. Because this determination requires more than mere application of law to a set of findable facts, it appears to fall far outside the traditional zone of judicial expertise<sup>54</sup> and, consequently, may pose a threat to the judicial reputation for the exercise of fair-mindedness.<sup>55</sup>

Of course, as many scholars of the judicial process have pointed out, the traditionally embraced view of an impartial judiciary carefully applying neutral legal principles is itself mythic and illusory.<sup>56</sup> The business of judging, even in the most desic-

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is visible will thus depend not only on the trait but also on the 'decoding capacity of the audience,' which in turn will depend on the social context.

*Id.*

<sup>53</sup> Although the political realm is largely beyond this essay's scope, it bears noting that anti-essentialist arguments present significant challenges in the political/legislative realm as well. The political difficulties presented by a group's perceived indeterminacy have been reproduced in the national census, for example, which, in each recent decade, has adopted a new approach to asking individuals self-identify by race or ethnicity. See Enid Trucios-Haynes, *Why "Race Matters": LatCrit Theory and Latina/o Racial Identity*, 12 *LA RAZA* L.J. 1, 14-15 (2001) (identifying census code for Latina/os in 1960 as white (unless they were Black, Native American, or another race), as "Spanish heritage population" in 1970, as Mexican, Puerto Rican, Cuban or other Spanish/Hispanic origin in 1980, as requiring selections of race and ethnicity in 1990, and as requiring selection of race and ethnicity—"Hispanic or Latino" or "Not Hispanic or Latino"—in 2000. See generally Michael Omi, *Racial Identity and the State: The Dilemmas of Classification*, 15 *LAW & INEQ.* 7 (1997).

<sup>54</sup> Cf. Hernandez Truyol, *supra* note 46, at 388 (relying on social scientists to establish the emergence of Mexican American ethnic identity).

<sup>55</sup> This reference to courts' reputation for fairness is intended to be aspirational, not descriptive. Many scholars have sought to establish that fairness is not among courts' primary considerations. See, e.g., Jed Rubinfeld, *The Anti-Discrimination Agenda*, 111 *YALE* L.J. 1141 (2002) (suggesting the Supreme Court's political agenda based on recent cases); Girardeau A. Spann, *Affirmative Action and Discrimination*, 39 *HOW.* L.J. 1, 92 (1995) (maintaining that the Supreme Court has decided cases with racist, rather than fairness, considerations in mind).

<sup>56</sup> See, e.g., Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518 (1986) (challenging judicial claim to objectivity); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 *YALE* L.J. 1329, 1395 (1991) (noting the development of the "concept of positioned perspective" by feminists and critical race theorists); see generally Elizabeth M. Iglesias, *LatCrit Theory: Some Preliminary Notes Towards a Transatlantic Dialogue*, 9 *U. MIAMI INT'L & COMP. L. REV.* 1, 9-32 (2000/2001) (describing evolution of various forms of critical legal theory).

cated breach of contract case, always calls for decisions regarding a party's fit into a legally (i.e., socially) constructed category. In contract law, as in anti-discrimination law, society has determined, and then expressed through legal regulation, under what conditions an injured party deserves a remedy.

Yet somehow this judicial undertaking seems less fraught with difficulty in a contract dispute, perhaps because although the rules related to relief are socially/legally constructed, they do not seek to embody extant traits but instead shuffle people in and out of the class entitled to recover for breach of contract according to specific criteria defined by law (e.g., existence of a valid contract, breach, damages). In contrast, in an anti-discrimination suit, one of the critical elements—the trait to be protected—is not so neatly defined. Once a court admits that the assessment of the identity trait is not a science but rather a cultural practice, the illusion that the court is merely assessing claims according to fixed, jurisdiction-limiting categories is shattered.<sup>57</sup>

Thus, the judicial discomfort comes from squarely facing the question of how, if an identity category lacks fixed boundaries, a court should determine when a plaintiff is eligible for relief based on that category.<sup>58</sup> Cases analyzing claims of sexual orientation discrimination neatly illustrate this tension. Consider, for example, the Sixth Circuit's refusal to invalidate a measure that sought to preclude "protected status" for gay people in Cincinnati.<sup>59</sup>

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<sup>57</sup> Conceivably, a dictionary could serve as an external source of trait definition. However, unlike in *Saint Francis College*, where the Court looked to a dictionary for insights into historical understandings of race, *see infra* text accompanying note 87, most personal traits today are the subject of contested definitions. A court would have to choose among varied dictionaries and varied definitions to select its preferred definition and, in doing so, would implicate itself in the process of defining the trait.

<sup>58</sup> When settled categories become unsettled, judges, and people generally, lose "the security that all individuals draw from rigid social orderings." *See* Yoshino, *supra* note 49, at 428. Indeed, my discomfort regarding the use of a social construction argument to explain gay identity might have anticipated the Supreme Court's potential discomfort at the prospect of defining gay identity or sexual orientation, which the Court ultimately did not attempt to do in deciding the case.

The power of this contention is not limited to the litigation context. *Cf. id.* at 407, 409 (asserting that gay rights advocates have deemphasized bisexuals while pursuing civil rights for gay people because "stabilizing gay identity" allows for "effective political mobilization" by "ensuring that the line of battle is clearly drawn"). Indeed, it has taken on particular force in response to efforts to pass antidiscrimination laws that include the category of sexual orientation. *See also infra* text accompanying note 60.

<sup>59</sup> *Equality Foundation v. City of Cincinnati*, 128 F.3d 289 (6th Cir. 1997).

Because no external measure could indicate who possessed the trait of gay identity, the court wrote that it could not vouch for the existence of the class or apply heightened review to the measure's distinction based on sexual orientation.<sup>60</sup>

As the court stated, "any attempted identification of homosexuals by non-behavioral attributes could have no meaning, because the law could not successfully categorize persons 'by subjective and unapparent characteristics such as innate desires, drives, and thoughts.'"<sup>61</sup> Other courts have clung to a definition of sexual orientation that hinges on sexual relationships alone,<sup>62</sup> perhaps because anything broader seems more directly to concede the socially constructed nature of the category.<sup>63</sup> Still other

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<sup>60</sup> *Id.* The original Sixth Circuit panel to reject the lesbian and gay plaintiffs' challenge to Cincinnati's charter amendment that forbade "protected status" for gay people also maintained that a class without externally fixed boundaries could not even properly be the subject of an anti-discrimination measure.

The reality remains that no law can successfully be drafted that is calculated to burden or penalize, or to benefit or protect, an unidentifiable group or class of individuals whose identity is defined by subjective and unapparent characteristics such as innate desires, drives, and thoughts.

*Equality Foundation v. City of Cincinnati*, 860 F. Supp. 417 (S.D. Ohio 1994), *rev'd, vacated, and remanded*, 54 F.3d 261 (6th Cir. 1995), *vacated and remanded*, 518 U.S. 1001 (1996), *remanded to 128 F.3d 289* (6th Cir. 1997), *cert. denied*, 525 U.S. 943 (1998). On the related question of the origins of an individual's sexual orientation, the trial court in *Romer v. Evans*, declined to take a position, even after having heard extensive testimony on the topic. *Evans v. Romer*, No. 92 CV7223, 1993 WL 518586, at \*11 (D. Colo. Dec. 14, 1993). Judge Bayless wrote:

The preponderance of credible evidence suggests that there is a biologic or genetic "component" of sexual orientation, but even Dr. Hamer, the witness who testified that he is 99.5% sure there is *some* genetic influence in forming sexual orientation, admits that sexual orientation is not completely genetic. The ultimate decision on "nature" vs "nurture" is a decision for another forum, not this court, and the court makes no determination on this issue.

*Id.* (emphasis in original).

<sup>61</sup> *Equality Foundation*, 128 F.3d at 293 (quoting *Equality Foundation*, 54 F.3d at 267) (opinion on remand).

<sup>62</sup> *See, e.g., Padula v. Webster*, 822 F.2d 97, 103 (D.C. Cir. 1987) ("It would be quite anomalous [sic], on its face, to declare status defined by conduct that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause."); *Ben-Shalom v. Marsh*, 881 F.2d 454, 464 (7th Cir. 1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."); *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 571 (9th Cir. 1990); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir.1989) (describing homosexuality as behavioral).

<sup>63</sup> However, as strong social constructionists would maintain, attributing a person's selection of sexual partners to an innate sexual orientation fails to see that

courts accept that being gay implicates an identity or set of feelings and not simply sexual conduct with a same-sex partner.<sup>64</sup> And other courts have simply thrown up their hands when faced with a demand to define identity categories as they relate to sexuality.<sup>65</sup>

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sexual orientation would not exist as an aspect of identity but for society according weight to an individual's selections of sexual partners. *See* Stein, *FORMS OF DESIRE*, *supra* note 14.

<sup>64</sup> *See, e.g.*, *People v. Garcia*, 92 Cal. Rptr. 2d 359 (2000)

It cannot seriously be argued in this era of "don't ask; don't tell" that homosexuals do not have a common perspective—"a common social or psychological outlook on human events"—based upon their membership in that community. They share a history of persecution comparable to that of blacks and women. While there is room to argue about degree, based upon their number and the relative indiscernibility of their membership in the group, it is just that: an argument about degree. It is a matter of quantity, not quality. . . . This is not to say that all homosexuals see the world alike. The Attorney General here derides the cognizability of this class with the rhetorical question, "[W]hat 'common perspective' is, or was, shared by Rep. Jim Kolbe (R-Ariz.), RuPaul, poet William Alexander Percy, Truman Capote, and Ellen DeGeneres?" He confuses "common perspective" with "common personality." Granted, the five persons he mentions are people of diverse backgrounds and life experiences. But they certainly share the common perspective of having spent their lives in a sexual minority, either exposed to or fearful of persecution and discrimination.

*Cf.* *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (upholding Dale's termination as a Boy Scouts leader based on his expression rather than his identity); *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997) (en banc) (upholding state attorney general's decision to withdraw employment offer based on female lawyer's religious marriage to another woman); *see also* Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 HARV. C.R.-C.L. L. REV. 1, 26-27 (2000).

In *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the Court was asked to invalidate a restriction on particular sex acts when engaged in by same-sex partners on the grounds that the law violated the rights of gay people. Although none of the opinions fully engaged in the process of defining gay identity, the majority opinion appeared to recognize that sexual conduct is "but one element" of being lesbian or gay. In discussing the relationships of same-sex couples, the Court observed that "[w]hen 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." *Id.* at 2478.

<sup>65</sup> In *Ryczek v. Guest Services*, 877 F. Supp. 754, 762 (D.D.C. 1995), the court admitted that it was "not well-prepared to resolve" the question whether the defendant in a sexual harassment lawsuit was a lesbian or a bisexual. Commenting that "the prospect of having litigants debate and juries determine the sexual orientation of Title VII defendants is a rather unpleasant one," the court highlighted the definitional difficulties in the form of a discussion about proof. *Id.*

One can only speculate as to what would be legally sufficient to submit the issue of a supervisor's bisexuality to the jury. Would the supervisor's sworn statement of his or her bisexuality be adequate? Would the supervisor need to introduce affirmative evidence of his liaisons with members of both sexes? Surely Congress did not anticipate that the language of Title VII would eventually produce such concerns.

Ironically, in light of the popularity of the social construction literature on the existence of sexual orientation, the courts that do not discuss the definition of sexual orientation and those that appear to accept the definition of sexual orientation as innate or deeply rooted<sup>66</sup> tend to have less difficulty in finding that differential treatment based on identity may violate the rights of gay people.<sup>67</sup>

The diffuse attempts of courts to define ethnicity and assess ethnicity-based discrimination also point to a potential barrier to the effectiveness of anti-essentialist arguments for legal analysis of discrimination claims.<sup>68</sup> Some courts simply treat ethnicity as the same type of characteristic as race.<sup>69</sup> Others are less sure of how a particular ethnic group, such as Latinas/os, holds together but they express certainty that a core common trait exists.<sup>70</sup> Still

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*Id.* at 762 n.7.

<sup>66</sup> Psychological experts tend to define sexual orientation as deeply rooted and implicating the erotic attraction to others and the expression of that attraction. Herek, *supra* note 37, at 134.

<sup>67</sup> See, e.g., *Quinn v. Nassau Cty. Police Dep't*, 53 F. Supp. 2d 347 (E.D. N.Y. 1999) (upholding jury finding that police officials had violated gay officer's constitutional rights without discussing concept of sexual orientation); *Weaver v. Nebo School Dist.*, 29 F. Supp. 2d 1279 (D. Utah 1998) (invalidating school district's restriction on teacher's ability to speak about her sexual orientation outside the classroom without discussing meaning of sexual orientation); cf. *Watkins v. U.S. Army*, 837 F.2d 1428 (9th Cir. 1988), *rev'd by* 875 F.2d 699 (9th Cir. 1989) (en banc) (concluding that "homosexuals constitute a suspect class" after analyzing sexual orientation with respect to historical discrimination, its immutability, and its relationship to merit and then striking down military's prohibition on service by gay men and lesbians).

<sup>68</sup> See *Trucios-Haynes*, *supra* note 53, at 33 ("The Latina/o indeterminate racial group identity permits discrimination against Latina/os to be ignored and remain unremedied."); see generally *Matsuda*, *supra* note 56; George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-80*, 27 U.C. DAVIS. L. REV. 555 (1994); Lisette E. Simon, *Hispanics: Not a Cognizable Ethnic Group*, 63 U. CIN. L. REV. 497 (1994).

<sup>69</sup> See, e.g., *Cuiello-Suarez v. Autoridad de Energía Electrica de Puerto Rico*, 737 F. Supp. 1243, 1249 (D. P.R. 1990) (finding that "Dominicans and Puerto Ricans can both be considered to be part of the Hispanic race at the present time"); *Nieto v. United Auto Workers Local 598*, 672 F. Supp. 987, 989 (E.D. Mich. 1987) ("although the verbal harassment was replete with reference to green cards, boats, wetbacks and borderpatrols [sic], suggesting national origin discrimination, this is racial discrimination within the meaning of section 1981"); see also *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615, 617 (1987) (holding "Jews constituted a group of people that Congress intended to protect" within protections against race discrimination).

<sup>70</sup> See, e.g., *Zapata v. IBP, Inc.*, 19 F. Supp. 2d 1215, 1219 (D. Kan. 1988) ("In this holding we consider that Mexican American, Spanish American, Spanish-surname individuals, and Hispanos are equivalents, and it makes no difference whether these are terms of national origin, alienage, or whatever."). But see *United States v. Rodriguez*, 588 F.2d 1003, 1007 (5th Cir. 1979) (rejecting plaintiffs claim of discrimina-

others, including the United States Supreme Court, have incorporated some sense of social construction into the identification of ethnicity: whether persons of Mexican descent constitute a class distinct from whites for equal protection purposes, for example, is to be determined not by reference to race but instead by “community norm[s].”<sup>71</sup> As the Court in *Hernandez v. Tex.* put it, “Whether such a group exists within a community is a question of fact.”<sup>72</sup>

Regardless of how fixed or fluid these definitions sound,<sup>73</sup> a careful look illustrates that most courts gravitate toward a circumscribed view of ethnicity. The cases involving discrimination related to accent and language skill (e.g., fluency in Spanish) help illuminate the consequences of courts’ reluctance to embrace an expansive, realistic understanding of ethnicity. For example, courts have been faced with numerous cases in which a party alleges ethnicity discrimination after being denied a promotion because of her accent or after being terminated for speaking Spanish, rather than English, on the job. A conception of ethnicity discrimination that embraced social construction theory

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tion in jury selection based on statistical showing that registered voters of “Latin origin” were not included in jury pool; “This naked claim, however, does nothing to guide us to a finding that appellant has identified a single cognizable group rather than several, E.g. [sic] Cuban-Americans, Puerto-Ricans, Argentine-Americans, Spanish-Americans, etc.”)

<sup>71</sup> See *Hernandez v. Tex.*, 347 U.S. 475, 478 (1954); see also *id.* at 479 (“petitioner’s initial burden in substantiating his charge of group discrimination was to prove that persons of Mexican descent constitute a separate class in Jackson County, distinct from ‘whites.’”). Some lower courts have embraced this type of situational analysis for determining the existence of an ethnic group as a matter of law. See, e.g., *Commonwealth v. Rico*, 711 A.2d 990 (Pa. 1998)

We conclude that whether Italian-Americans comprise a cognizable group needing protection from community prejudices . . . is a question of fact . . . . In order to demonstrate cognizability, a defendant must show the ethnic group: (1) is defined and limited by some clearly identifiable factor or factors; (2) possesses a common thread of attitudes, ideas or experiences; (3) shares a community of interests such that the group’s interest cannot be adequately represented if the group is excluded from the jury selection process; and, (4) has experienced or is experiencing discriminatory treatment and is in need of protection from community prejudices.

*Id.* at 994.

<sup>72</sup> 347 U.S. at 478. Ian Haney López has suggested that “[t]he Court in *Hernandez* rejected a racial understanding of Mexican Americans in part because it subscribed to a concept of race as something natural and therefore stable, fixed, and immutable.” López, *Race, Ethnicity, and Erasure*, *supra* note 14, at 1179.

<sup>73</sup> As shown below, notwithstanding its flexible-sounding characterization, even *Hernandez* ultimately results in a definition of ethnicity that has a fixed, though not innate, component. See *infra* text at notes 110-11.

would appreciate the intimate connection between language skill (e.g., the ability to speak Spanish), accent, and ethnicity in American culture. Under this view, once a plaintiff alleged accent-based discrimination, the burden of persuasion would shift to the defendant to demonstrate that the accent/ethnicity discrimination was justified on some legitimate ground.

Yet most plaintiffs bringing accent discrimination suits lose,<sup>74</sup> and not because their accents impede their communication skills.<sup>75</sup> Instead, they seem to lose because the burden falls on them to justify their use of their own ethnic language or their accent as inflected by their primary, ethnic language<sup>76</sup> rather than on the employer to justify its actions.

If language comprised part of ethnicity, as it would likely do in a socially constructed definition, the burden would fall on the employer to disprove discrimination. Yet, under the narrow view of ethnicity that most courts apply, the employee typically bears the burden of proving the connection between ethnicity and harm based on accent.

It appears that the same disinclination of courts to define a trait based on non-fixed indicia discussed above, in connection with sexual orientation, also drives the definitional process here. Nothing about accents or language skills is fixed absolutely to ethnicity. Therefore, recognition of accent and language use as

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<sup>74</sup> See, e.g., *Garcia v. Spun Steak*, 998 F.2d 1480 (9th Cir. 1993) (rejecting claim that termination for speaking Spanish constituted national origin discrimination under Title VII); *Fragante v. Honolulu*, 888 F.2d 591, 596, 599 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990) (finding that “[a]ccent and national origin are inextricably intertwined in many cases” but rejecting plaintiff’s employment discrimination claim because of the “effect of his Filipino accent on his ability to communicate”) (emphasis in original); *Korpai v. A.W. Zengler’s Grande Cleaners, Inc.*, No. 85 C 9130, 1987 WL 20428, at \*2 (N.D. Ill. Nov 24, 1987) (“Discrimination based on foreign immigration and speech with an accent is not discrimination based upon Hungarian ancestry or Hungarian characteristics, for purposes of Section 1981.”); *Sirajullah v. Illinois State Medical Ins. Exch.*, No. 86 C 8668, 1989 WL 88301 (N.D. Ill. Aug. 2, 1989); see generally Christopher David Ruiz Cameron, *How the Garcia Cousins Lost their Accents: Understanding the Language of Title VII Decisions Approving English-Only Rules as the Product of Racial Dualism, Latino Invisibility, and Legal Indeterminacy*, 10 LA RAZA L.J. 261 (1998) (discussing the question of accent discrimination and its relation to race-based and ethnicity-based discrimination); Matsuda, *supra* note 55. But see *Carino v. Univ. of Oklahoma Bd. of Regents*, 750 F.2d 815 (10th Cir. 1984) (upholding determination that plaintiff suffered discrimination because of his national origin and related accent).

<sup>75</sup> See Matsuda, *supra* note 56 at 1337-38, 1345 (discussing in detail the excellent communication skills of Manuel Fragante and other plaintiffs in accent discrimination lawsuits).

<sup>76</sup> See cases cited *supra* note 74.

dimensions of ethnicity would require a court to engage actively in the complex process of gauging the meaning communities give to a trait rather than “simply” weighing evidence against fixed categories.<sup>77</sup> As we have seen above, courts are disinclined to take up this charge.

## II

### JUDICIAL COMFORT WITH ANTI-ESSENTIALIST ARGUMENTS

Having just demonstrated why courts may be ill at ease with anti-essentialist arguments, I will now show that the charge of discomfort is, in some respects, overstated. In fact, as highlighted above, at all levels of the judiciary, courts repeatedly affirm their awareness that certain identity features are socially constructed.

In one of the Supreme Court’s earliest pronouncements regarding the definition of “white person” within the federal naturalization statute, in 1923, the Court specifically embraced the popular, common understanding of race as distinct from the scientific definition of Caucasian<sup>78</sup> and expressed no discomfort with the lack of a clear scientific definition for group membership.<sup>79</sup> Finding that applicant Thind, a man from India, did not meet the racial eligibility standard for naturalization, the Court commented that the “popular as distinguished from [the] scientific application [of whiteness] is of appreciably narrower scope.”<sup>80</sup> At the same time, however, the Court suggested, in a quasi-scientific tone, that meaningful differences exist between

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<sup>77</sup> One could argue that courts engage in this type of weighing process in every anti-discrimination law suit where no direct evidence exists. However, the fundamental question in play in this example is not whether a particular piece of evidence supports a claim that a plaintiff was discriminated against because of his or her Latino/a surname but instead whether accent is part of ethnicity.

<sup>78</sup> See *United States v. Bhagat Singh Thind*, 261 U.S. 204, 208-09 (1923). Cf. *Ozawa v. United States*, 260 U.S. 178, 195 (1922) (“The intention [of the naturalization statute] was to confer the privilege of citizenship upon that class of persons whom the fathers knew as white, and to deny it to all who could not be so classified.”) (emphasis added).

<sup>79</sup> In distinguishing the narrower, popular understanding of “white,” the Court also observed that the term “‘Caucasian’ is a conventional word of much flexibility.” *Thind*, 261 U.S. at 208. See also *id.* (“as used in the science of ethnology, the connotation of the word [Caucasian] is by no means clear”). For discussion of similar lower court cases charting a course between the scientific and popular understandings of race, see generally LÓPEZ, *WHITE BY LAW*, *supra* note 3.

<sup>80</sup> *Thind*, 261 U.S. at 209.

people according to race.<sup>81</sup>

More recently, the Court faced the question whether a plaintiff of Arab ethnicity could make out a claim of race discrimination under 42 U.S.C. § 1981 against a university that denied his tenure application.<sup>82</sup> The Court made clear its understanding that conceptions of race change over time. “The understanding of ‘race’ in the 19th century . . . was different. Plainly, all those who might be deemed Caucasian today were not thought to be of the same race at the time § 1981 became law.”<sup>83</sup>

The Court then detoured from its discussion of popular understandings of race to emphasize, at some length, that many scientists have disavowed the significance of race as anything other than a social category.

There is a common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid. Many modern biologists and anthropologists, however, criticize racial classifications as arbitrary and of little use in understanding the variability of human beings. It is said that genetically homogeneous populations do not exist and traits are not discontinuous between populations; therefore, a population can only be described in terms of relative frequencies of various traits. Clear-cut categories do not exist. The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance. It has been found that differences between individuals of the same race are often greater than the differences between the “average” individuals of different races. These observations and others have led some, but not all, scientists to conclude that racial classifications are for the most part sociopolitical, rather than biological, in nature. S. Molnar, *Human Variation* (2d ed. 1983); S. Gould, *The Mismeasure of Man* (1981); M. Banton & J. Harwood, *The Race Concept* (1975); A. Montagu, *Man’s Most Dangerous Myth* (1974); A. Montagu, *Statement on Race* (3d ed. 1972); *Science and the Concept of Race* (M. Mead, T. Dobzhansky, E. Tobach, & R. Light eds. 1968); A. Montagu, *The Concept of Race* (1964); R. Benedict, *Race and Racism* (1942); Littlefield, Lieberman, & Reynolds, *Redefining Race: The Potential Demise of a Concept in Physical Anthropology*, 23 *Current Anthropology* 641 (1982); *Biological Aspects of Race*, 17 *Int’l Soc.Sci.J.* 71 (1965); Washburn, *The Study of Race*, 65 *American Anthro-*

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<sup>81</sup> *Id.* at 209 (“It may be true that the blond Scandinavian and the brown Hindu have a common ancestor in the dim reaches of antiquity, but the average man knows perfectly well that there are unmistakable and profound differences between them to-day.”).

<sup>82</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604 (1987).

<sup>83</sup> *Id.* at 610.

poloologist 521 (1963).<sup>84</sup>

The Court's unusual step of citing to nearly a dozen social science sources supporting the point that race is a socio-political category powerfully reinforced the justices' conceptualization of race as a trait without a naturally fixed, category-defining essence.<sup>85</sup>

Even further, the Court determined the scope of § 1981's protection by looking in dictionaries—the quintessential repositories of popular understanding, at the definition of race around the time of the statute's framing.<sup>86</sup>

On the same day that it issued the *Saint Francis College* opinion, the Court also found that Jews constitute a distinct race for purposes of bringing claims under 42 U.S.C. § 1981.<sup>87</sup> It rejected the circuit court's reasoning that “because Jews today are not thought to be members of a separate race,” they could not fit within § 1982's statutory protection against race discrimination.<sup>88</sup> Again, the Court acknowledged that contemporary definitions of race differ significantly from earlier understandings. In other words, the Court made clear that the definition of race depends not on science but instead on social views about who falls inside and outside of a particular racial category.<sup>89</sup> These observations echo the recognition in *Hernandez* that community norms rather than scientific fact dictate whether the class of Mexican Ameri-

<sup>84</sup> *Id.* at 610 n.4.

<sup>85</sup> See also *id.* at 613 (noting that “a distinctive physiognomy is not essential to qualify for § 1981 protection”).

<sup>86</sup> The Court also looked to the legislative history of § 1981 and found that the debates preceding the statute's passage made reference to Arabs and other ethnic groups as distinct races. *Id.* at 612. Notably, Spanish and Mexicans were also characterized as distinct races notwithstanding the Court's decision not to treat people of Mexican descent as a distinct race in *Hernandez v. Texas*, 347 U.S. 475 (1954) (finding that lack of Spanish-surnamed individuals serving on juries in a Texas county constituted discrimination based on *ancestry* in violation of equal protection guarantees).

<sup>87</sup> *Shaare Tefila Congregation v. Cobb*, 481 U.S. 615 (1987).

<sup>88</sup> *Id.* at 617.

<sup>89</sup> See also *Amini v. Oberlin College*, 259 F.3d 493, 503 (6th Cir. 2001) (characterizing Supreme Court's definition of race as “expansive” and finding that plaintiff's self-identification as Middle Eastern fit within § 1981's definition of race); *DeSalle v. Key Bank of Southern Maine*, 685 F. Supp. 282 (D. Me. 1988) (upholding claim of race discrimination based on plaintiff's Italian ethnicity); *Wamget v. State*, 67 S.W.3d 851, 855 (Tex. Crim. App. 2001) (“[W]e agree that the notion of ‘race’ ought to be as broadly understood for purposes of *Batson* and the Equal Protection Clause as it has been interpreted by the Supreme Court in the context of other post-civil war legislation such as Section 1981.”).

cans exists.<sup>90</sup>

In the context of sex, the Supreme Court also firmly rejected an essentialist argument that would have allowed a state to strike men from juries in suits seeking child support from fathers.<sup>91</sup> The state had argued that men, by virtue of their being male, would be more likely than women to side with the male defendant than with the female complaining witness.<sup>92</sup> In holding that governments could not constitutionally exercise peremptory challenges to jurors based on sex, the Court refused to assume that something about being male would lead all men to adopt the same point of view (or, for that matter, that all women are similarly predictable).<sup>93</sup>

### III

#### ON THE LIMITS OF ANTI-ESSENTIALIST AND SOCIAL CONSTRUCTION ARGUMENTS IN LITIGATION

We might think, if we did not know better from the doctrine, that courts that recognize the socially constructed nature of race would extend race discrimination protections beyond skin color to include all characteristics society has imbued as race-related. For example, if social construction-based understandings of identity were truly embraced, a termination from employment for wearing corn rows, a hairstyle associated with African Americans, would be punished under the same antidiscrimination provisions that are regularly applied to forbid discrimination according to skin color<sup>94</sup>--since both skin color and hair style are,

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<sup>90</sup> *Hernandez*, 347 U.S. at 478-79.

<sup>91</sup> *See J.E.B. v. Alabama*, 511 U.S. 127 (1994).

<sup>92</sup> *Id.* at 137-38.

[R]espondent maintains that its decision to strike virtually all the males from the jury in this case "may reasonably have been based upon the perception, supported by history, that men otherwise totally qualified to serve upon a jury in any case might be more sympathetic and receptive to the arguments of a man alleged in a paternity action to be the father of an out-of-wedlock child, while women equally qualified to serve upon a jury might be more sympathetic and receptive to the arguments of the complaining witness who bore the child."

*Id.* (citation and footnote omitted).

<sup>93</sup> *But see Nguyen v. INS*, 533 U.S. 53, 87 (2001) (O'Connor, J., dissenting) (criticizing the Court for upholding a law distinguishing between mothers and fathers for purposes of petitioning for a child's naturalization; "There is no reason, other than stereotype, to say that fathers who are present at birth lack an opportunity for a relationship on similar terms.")

<sup>94</sup> Although *Saint Francis College* and *Shaare Tefilah* discuss social construction

or can be, “raced.”<sup>95</sup> We might also think that post-civil war statutes forbidding discrimination based on race, which have been construed to forbid discrimination against ethnic groups that were recognized as races at the time of passage, would reach discrimination against individuals with Spanish-inflected accents, since language, like surname, forms part of Latina/o ethnic identity as it has been socially constructed. And we might also think, again if we did not attend to the doctrine, that courts would recognize gay identity as encompassing more than sexual conduct with a same-sex partner and would protect, when appropriate, the expression of that identity by coming out as gay or lesbian.

But as case law starkly demonstrates, judicial embrace of socially constructed identities has strict limits. After reviewing some of these limitations, this section will offer a few thoughts about why judicial acceptance of certain aspects of social construction and anti-essentialist theory regarding race and sex does not hold great promise for acceptance of social construction arguments generally.

If we look closely at the discussion of social construction in *Saint Francis College*, for example, we see that at the same time as the Court deconstructed race<sup>96</sup> and construed § 1981’s prohibition against race discrimination to encompass discrimination because of ancestry or ethnic characteristics,<sup>97</sup> it also embraced an essentialized view of ancestry and ethnicity as meaning an in-

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theory in the context of interpreting § 1981, the Court does not limit its embrace of that theory to the scope of that particular anti-discrimination statute.

For discussion of litigation regarding a termination of an employee for wearing corn rows, see Paulette M. Caldwell, *A Hair Piece: Perspectives on the Intersection of Race and Gender*, 1991 DUKE L.J. 365; see also *Rogers v. American Airlines, Inc.*, 527 F. Supp. 229 (S.D.N.Y. 1981) (holding that employer’s prohibition of braided hairstyles did not discriminate against black women).

<sup>95</sup> See Amy H. Kastely, *Out of the Whiteness: On Raced Codes and White Race Consciousness in Some Tort, Criminal, and Contract Law*, 63 U. CIN. L. REV. 269, 275 (1994) (“In the United States, numerous cultural details are raced: possessions, practices, even political opinions are tagged white or black and separated into oppositional groups.”); cf. Leslie Espinoza and Angela P. Harris, *Embracing the Tar-Baby—LatCrit Theory and the Sticky Mess of Race*, 85 CAL. L. REV. 1585, 1601 (1997) (In discussing “color prejudice,” the authors contend that “[i]n a perverse way . . . to be ‘authentically’ African American is to be noticeably dark-skinned, continually vulnerable to being raced as black.”).

<sup>96</sup> 481 U.S. 604, 610 n.4 (1989) (“The particular traits which have generally been chosen to characterize races have been criticized as having little biological significance.”).

<sup>97</sup> *Id.* at 613.

dividual's "stock" or ancestral lineage.<sup>98</sup> Not even a suggestion appeared that the insights just announced regarding the socially constructed nature of race should apply equally well to the "ethnic characteristics" category that the Court deemed protected.

Put in this context, the conceptualization of ethnicity within some LatCrit scholarship<sup>99</sup> as "a set of traits that may include, but [is] not limited to: race, national origin, ancestry, language, religion, shared history, traditions, values, and symbols"<sup>100</sup> appears far broader than the Court's crabbed conception of ancestral stock. Instead, as the Court conceived it, protection for ethnicity seems to be bounded by one's status at birth and not to include other attributes that evolve over time in connection with ethnic group membership.<sup>101</sup> Thus, although the Court has accepted social construction theory to a limited degree, this acceptance, alone, does not appear to mandate judicial remedies for ethnicity-based injuries targeted at accent, language use, appearance, or common cultural values or practices as a manifestation of ethnicity.<sup>102</sup> Similarly, the Court's flirtation with anti-essen-

<sup>98</sup> *Id.* at 610 (discussing dictionary definitions of race "as a 'continued series of descendants from a parent who is called the *stock*'") (citations omitted) (emphasis in original); *see also id.* at 613 (explaining that plaintiff-respondent Al-Khazraji could make out a race discrimination claim under § 1981 if he could show he was discriminated against because "he was born an Arab").

<sup>99</sup> For related scholarship outside of LatCrit, *see generally* CRITICAL RACE THEORY: THE KEY WRITINGS THAT FORMED THE MOVEMENT (Kimberle Crenshaw et al., eds., 1995); CRITICAL RACE THEORY: THE CUTTING EDGE (Richard Delgado ed., 1995).

<sup>100</sup> Juan F. Perea, *Ethnicity and Prejudice: Reevaluating "National Origin" Discrimination Under Title VII*, 35 WM. & MARY L. REV. 805, 833-34 (1994); *see also* López, *Race, Ethnicity, Erasure*, *supra* note 14, at 1188 and López, *Retaining Race*, *supra* note 14, at 280. Ethnicity has also been defined as both the sense and the expression of collective, intergenerational cultural continuity. JOSHUA A. FISHMAN, *THE RISE AND FALL OF THE ETHNIC REVIVAL: PERSPECTIVES ON LANGUAGE AND ETHNICITY* 4 (Joshua A. Fishman et al., eds., 1985) (internal quotations omitted).

<sup>101</sup> *See* Garcia, 13 F.3d at 298 (Reinhardt, J., dissenting from denial of rehearing en banc) ("Language is intimately tied to national origin and cultural identity: its discriminatory suppression cannot be dismissed as 'inconvenience' to the affected employees"); *see also* Ruiz Cameron, *supra* note 74, at 278 (describing the Spanish language as "central to Latino identity" and a "fundamental aspect of ethnicity").

One could argue that the Court's reference to ancestral stock does not foreclose successful claims for discrimination based on characteristics that are attributed to persons of a particular lineage, such as social style or accent or eating habits. However, the Court's indication that Al-Khazraji could make out a § 1981 claim only if he could prove that he suffered discrimination because he was "born an Arab" rather than because he acted in ways attributed to Arabs suggests that the judicial concern is with the narrowest conception of ethnic characteristics.

<sup>102</sup> Although the Supreme Court has not yet directly assessed the nature of

tialism should give little hope to gay rights advocates that discrimination based on expressions of gay identity, such as having a same-sex partnership or simply being openly lesbian or gay, will be penalized in the same manner as discrimination through measures like the Colorado amendment invalidated in *Romer v. Evans*, which the Court treated as directly singling out gay people for restrictions on civil rights.<sup>103</sup>

Why this internally contradictory vision that at once embraces and disavows anti-essentialism? From the language and context of the Supreme Court's discussion as well as lower courts' analyses, it becomes apparent that judicial willingness to embrace social construction theory increases to the extent the characteristic

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ethnicity-based discrimination since deciding *St. Francis College*, a number of circuit and district court decisions, particularly those dealing with linguistic discrimination, do not generally provide cause for optimism. In *Garcia v. Spun Steak*, for example, the court wrote that "[t]he fact that an employee may have to catch himself or herself from occasionally slipping into Spanish [to comply with an English-only rule] does not impose a burden significant enough to amount to the denial of equal opportunity." 998 F.2d 1480, 1488 (9th Cir. 1993). As Christopher David Ruiz Cameron put it, "[s]o insisting that somebody who has the ability to speak English now be required to do so does not seem nearly so serious to [Anglo judges] as situations in which employees are terminated because of the color of their skin." Ruiz Cameron, *supra* note 74, at 277 (1998); *see also* *Fragante v. Honolulu*, 888 F.2d 591 (9th Cir. 1997) (accepting connection between national origin and accent but finding that discrimination based on accent was justified); Beatrice Bich-Dao Nguyen, *Accent Discrimination and the Test of Spoken English: A Call for an Objective Assessment of the Comprehensibility of Nonnative Speakers*, 81 CAL. L. REV. 1325, 1342-43 (1993) (discussing unsuccessful accent-related discrimination claim by Chinese-born professor).

<sup>103</sup> Compare *Romer v. Evans*, 517 U.S. 620 (1996) (rejecting explicit classification discriminating against gay people), and *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997) (finding violation when officers failed to provide adequate protection to plaintiff because of her perceived sexual orientation), with *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000) (upholding plaintiff's termination from Boy Scouts on account of his expressed identity as gay), and *Shahar v. Bowers*, 120 F.3d 211 (11th Cir. 1997) (en banc) (validating state attorney general's decision to rescind offer of employment because of plaintiff's religious marriage to another woman). Technically, the amendment at issue in *Romer* referred to "homosexual, lesbian or bisexual orientation, conduct, practices or relationships." *Romer*, 517 U.S. at 625. However, because the Court treated the amendment as implicating the rights of "gays and lesbians," *id.* at 627, the potentially challenging questions of trait definition did not arise.

Likewise, in *Lawrence v. Texas*, 123 S. Ct. 2472 (2003), the restriction on same-sex sexual relations at issue was understood by the Court to target gay people. *See id.* at 2482 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres."), *id.* at 2486. ("While it is true that the law applies only to conduct, the conduct targeted by this law is conduct that is closely correlated with being homosexual.") (O'Connor, J., concurring).

at issue has some tangible distinguishing feature and decreases to the extent the distinctions between those with the characteristic and those without it are more difficult to grasp. Thus, the Supreme Court is able to disavow the biological significance of race because it conceives of race discrimination as differential treatment according to color, which is often visible.<sup>104</sup> Similarly, because the differences between women and men typically remain apparent,<sup>105</sup> the Court has little difficulty rejecting essentialized notions of women and men.<sup>106</sup>

In contrast, distinctions based on ethnicity are more difficult to grasp.<sup>107</sup> A “distinctive physiognomy” is frequently not apparent.<sup>108</sup> Consequently, in these kinds of cases, the commitment to an anti-essentialist approach seems to dissolve as well. Instead, as in *Saint Francis College*, once the Court recognized that § 1981’s reference to race should be construed as providing protection for distinct ethnic groups, it seized upon ancestral stock to structure clear boundaries for determining membership in ethnic groups.<sup>109</sup> In other words, just as it appeared to embrace a social constructionist perspective regarding race, the Court backtracked by relying upon the objectively traceable criterion of an-

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<sup>104</sup> *Saint Francis College v. Al-Khazraji*, 481 U.S. 604, 610 n.4 (1987) (noting the “common popular understanding that there are three major human races—Caucasoid, Mongoloid, and Negroid”). See also *id.* at 609 (distinguishing *Al-Khazraji*’s suit from earlier suit involving suit by “white person” against “a black”). Of course, notwithstanding this general assumption, color differences do not always predict a person’s race as socially constructed. See Judy Scales-Trent, *Commonalities: On Being Black and White, Different and the Same*, 2 YALE J.L. & FEMINISM 305 (1990).

<sup>105</sup> But see *supra* note 19. For additional discussion of case law addressing transgendered individuals’ challenges to binary concepts of sex, see Marvin Dunson III, *Sex, Gender, and Transgender: The Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465 (2001).

<sup>106</sup> See *supra* notes 91-93 and accompanying text; see also *Virginia v. United States*, 518 U.S. 515 (1996). But see *Tuan Anh Nguyen v. I.N.S.*, 533 U.S. 53 (2001).

<sup>107</sup> In *Saint Francis College*, the Supreme Court comments that “it may be that a variety of ethnic groups, including Arabs, are now considered to be within the Caucasian race.” 481 U.S. at 610. See also Ruiz Cameron, *supra* note 74, at 279 (observing that “Spanish-speaking ability is the historic basis upon which Anglo society discriminates against Latinos.”).

<sup>108</sup> Cf. *Saint Francis College*, 481 U.S. at 613 (“[A] distinctive physiognomy is not essential to qualify for § 1981 protection.”). The Court’s merged analysis of race and ethnicity contrasts with the more typical popular treatment of race and ethnicity as distinct categories. As Ian Haney López has suggested, “[i]n effect, race has been used as a marker of differences believed to be physical and innate, whereas ethnicity has been applied in ways suggesting cultural distance.” López, *Race, Ethnicity, Erasure*, *supra* note 14, at 1189.

<sup>109</sup> *Saint Francis College*, 481 U.S. at 610-13.

cestral stock as the tangible identifier of ethnicity. Likewise, in *Hernandez*, the embrace of a social constructionist approach to group definition, through the focus on community attitudes as the determinant of whether a group exists,<sup>110</sup> is belied, or at least counterbalanced, by the Court's observation that "just as persons of a different race are distinguished by color, these Spanish [sur]names provide ready identification of the members of this class."<sup>111</sup>

Thus, to the extent a feature that is usually independently observable or verifiable serves as the basis for determining group membership, social constructionist theories cause few difficulties. But where the feature in question is not so easily seen, catalogued, or traced, courts seem to become less willing to find that a particular identity feature can be the basis for a discrimination claim.<sup>112</sup> In other words, it appears that courts will embrace a social constructionist understanding of a trait when they view that trait as also having essential components.

Why? The visibility or verifiability of a characteristic may be needed to offset the judicial concerns about indeterminacy and lack of clear boundaries that come with social construction.<sup>113</sup>

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<sup>110</sup> See *Hernandez v. Tex.*, 347 U.S. at 475, 478-79 (1954).

<sup>111</sup> *Id.* at 481 n.12. *But see* Commonwealth v. Rico, 711 A.2d 990 (Pa. 1998) ("The mere spelling of a person's surname is insufficient to show that he or she belongs to a particular ethnic group.").

<sup>112</sup> In the context of equal protection, Kenji Yoshino has written about the strong "visibility" presumption that shapes a court's likelihood to designate a trait-based classification as suspect or quasi-suspect and, therefore, as warranting heightened judicial review. He points to corporeal visibility—"the perceptibility of traits such as skin color that manifest themselves on the physical body in a relatively permanent and recognizable way" as the key by which courts identify groups needing heightened judicial solicitude. Yoshino, *Assimilationist Bias*, *supra* note 52, at 497. The analysis here, while including physically visible features, extends further to other non-visible physical features, such as "hidden disabilities," and non-physical features subject to verification, such as ancestral lineage. *Id.* at 497-98. *Cf. id.* at 495:

[T]he courts appear to be making a distinction between "corporeal" and "social" traits. If a trait is perceived to be defined by nature rather than by culture, then the courts will be more likely to call it immutable. Race and sex, for example, are clearly viewed as biologically determined. If, on the other hand, the trait is perceived to be more defined by culture, the courts will withhold the immutability designation. Religion and alienage, for example, are viewed not to have a biological substrate and, thus, are not deemed immutable.

*Id.*

<sup>113</sup> Two additional reasons may also affect the courts' analyses in these cases. First, it may be that some courts perceive tangible features as the most salient in an antidiscrimination practice because they appear to be immutable and therefore involuntary in a way that warrants judicial protection. *But see* Halley, *Sexual Orienta-*

Without any external force dictating group membership, courts have little to rely on for assessing discrimination claims based on an identity feature other than their own sociological assessments of that characteristic. And that enterprise of shaping the contours of the characteristic entitled to relief from injury, as discussed earlier, sounds more like a legislative or social science effort than a judicial project.

As a result, it is cases involving characteristics with relatively unclear boundaries for which anti-essentialist arguments are most complicated. To the extent courts assume that individuals who share the same characteristic have connections to each other that are essential rather than socially constructed, those courts may be more likely to award remedies for injuries based on social group membership.<sup>114</sup> To the extent that legal arguments disturb a court's sense that a fixed group shares the particular trait at issue, however, the plaintiff may leave court with an intact identity but no court-ordered remedy.

How then, should we think about making anti-essentialist and social construction arguments in court? On the one hand, pursuit of essentialist arguments risk reinforcing circumscribed views about identity-based discrimination. While these arguments may be considered relatively "safe" from a litigation perspective because they do not ask courts to select among contested definitions of a trait, the strategic use of essentialism is not cost-free. Although this approach may make possible immediate litigation victories for some, it could, at the same time, undermine the ultimate aim of protecting from discrimination the full range of expression associated with a trait. In addition, narrow arguments cast in terms of "natural" or universal definitions of traits may not enable anti-discrimination protections to reach much of the

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*tion and the Politics of Biology*, *supra* note 6, at 507-11. In addition, courts might be more disposed to grasp social construction theory in cases involving racial classifications because the social status of whites is at stake. *See, e.g., United States v. Thind*, 261 U.S. 204, 208-09 (1923).

<sup>114</sup> One might argue that courts are concerned with the existence of a bright-line for distinguishing among characteristics rather than with the essential or non-essential nature of a characteristic. However, as the litany of recent decisions interrogating the meaning of disability under the Americans with Disabilities Act has shown, a bright line rule is not necessary to persuade a court to find discrimination. *See generally* Berg, *supra* note 43. Nor is the bright line of self-expression or self-identification as a trait-bearer typically deemed adequate to warrant protection, as the cases involving accent, language use, and sexual orientation-related expression demonstrate.

non-explicit identity-based discrimination that occurs today, as illustrated by our hypothetical plaintiffs above. Indeed, essentialist arguments about the meaning of traits may clash so fundamentally with the self-conception and life experiences of would-be plaintiffs as to render trait-based protections unavailing even before litigation occurs.<sup>115</sup>

On the other hand, social construction arguments may leave courts overwhelmed. Faced with having to define identity traits or with conceding the difficulty of setting out accurate, definitive parameters for trait-based discrimination, a court might instead revert to the narrowest and most rigid definition available for the traits at issue. The result, in turn, could be to limit even further the scope of applicable anti-discrimination protections.

By acknowledging these risks, this essay does not intend to suggest that anti-essentialist or social construction arguments should never, or always, be made in litigation. Certainly, when a judge has expressed a narrow conception of a protected characteristic, an advocate might have no choice but to introduce social construction theory, and ideally, an accessible explanation and application of it to the case before the court. In addition, as just suggested, a social construction analysis may be the only approach that enables an anti-discrimination measure to reach a particular injury.

But in some cases, striking the proper balance between vigorously representing an individual discrimination plaintiff and attempting to shift judicial thinking about the particular social group to which that individual belongs presents heightened challenges.<sup>116</sup> Where the injury at issue falls neatly within the popular, essentialist understanding of a particular trait, for example, the decision about whether to call those essentialist assumptions into question becomes more difficult. It is, however, possible to

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<sup>115</sup> A collateral cost for lawyers making strategic use of essentialist arguments may be to reinforce the perception of lawyers as insensitive to clients' needs and as willing to trade away justice for short-term victory. However, by declining to make an essentialist argument that might appeal to a judge, a lawyer also risks being criticized for being insensitive to clients' needs by potentially raising an additional barrier to recovery for a client. Further, lawyers making anti-essentialist and social construction arguments may find themselves accused of seeking to stretch the law beyond its intended reach.

<sup>116</sup> See Derrick A. Bell, Jr., *Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation*, 85 *YALE L.J.* 470 (1976); see also William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623 (1997).

make anti-essentialist presentations of cases without automatically inviting the difficulties enumerated above. For example, a complaint may convey a full picture of the plaintiff, rather than portraying the stripped-down sketch intended to highlight only the particular protected feature that provides the basis for the discrimination claim. Similarly, the direct examination of the plaintiff (and other witnesses) during trial can incorporate a fuller discussion of the plaintiff's multidimensional identity than the legal arguments will allow. In addition, in any multi-plaintiff suit making a claim based on one particular identity feature, plaintiffs can be selected to exemplify the wide range of individuals bearing that trait. To the extent that plaintiffs become spokespersons in the public discussion regarding a case, their simple presence can help shatter unidimensional views of any given trait.<sup>117</sup>

Because of the simultaneous risks of and need for social construction and anti-essentialist theories in anti-discrimination litigation, deployment of these theories requires great care. Their occasional embrace by some courts, while holding out some promise, does not signal smooth sailing for future arguments about any trait. Instead, the project of bringing legal categories more closely into line with lived experience will continue to demand that we remain attentive to what courts are and are not saying as they adjudicate individual discrimination claims by multidimensional plaintiffs.

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<sup>117</sup> For example, in challenges to sodomy laws and anti-gay measures filed while I was at Lambda Legal Defense, we sought to insure that our group of plaintiffs reflected the differences in age, occupation, race, sex, dis/ability, religion, ethnicity and other dimensions of identity to counter the widely held assumptions that gay people are monolithically white, male, and wealthy. However, while this strategy challenges the essentialist assumption that those who possess a particular trait have a common appearance, career path, or other demographically significant characteristics, it does not develop the ways in which sexual orientation interacts with those diverse identity traits in any one plaintiff or raise the possibility that the meaning of being gay or lesbian differs with each individual plaintiff.

