In Defense of Immutability

Nicholas Serafin
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Over the last forty years, the concept of immutability has been central to Equal Protection doctrine. According to current doctrine, a trait is immutable if it is beyond the power of an individual to change or if it is fundamental to personal identity. A trait that meets either of these criteria receives heightened legal protection under constitutional antidiscrimination law. Yet most legal scholars who have addressed the topic have called for the abandonment of the immutability criterion on the grounds that the immutability criterion is conceptually confused, morally indefensible, and bound to stigmatize subordinate groups.

A rejection of the immutability criterion is unwarranted. The immutability criterion must be understood as targeting social, as opposed to personal, identities. In this Article, I introduce work from social psychology and sociology to unpack the concept of social identity. I show that stigmatized individuals are denied access to high-status groups, institutions, relationships, and occupations because of their immutable social identities. I conclude that, for Equal Protection doctrine, it is entirely irrelevant whether “immutable” traits are physically unchangeable or are part of an individual’s personal identity.

After defending this “social” conception of immutability, I show that social immutability ties together a number of threads running throughout antidiscrimination law, namely, animus and stigma jurisprudence under the Fourteenth Amendment and the “badges of slavery” reading of the Thirteenth Amendment. I then demonstrate how the social conception of immutability extends antidiscrimination protection to signifiers associated with gender expression, culture, and ethnicity.

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INTRODUCTION

In Obergefell v. Hodges, Justice Kennedy observes that homosexuality is “both a normal expression of human sexuality and immutable.”1 Because homosexuality is immutable, Kennedy argues that same-sex marriage is the only recourse for gay individuals who seek the “profound commitment” that marriage offers.2 Kennedy does not define immutability, nor does he explain why immutability is relevant to Equal Protection. Nevertheless, his statement places Obergefell squarely within a class of cases that, over the past fifty years, has dramatically expanded the scope of antidiscrimination law.3 If Obergefell is any indication, the concept of immutability continues to play a substantial role in the Court’s Equal Protection analysis.

2. Id. at 2594.
3. See infra Part I.
At the same time, immutability is a perennial target of scholarly criticism. The immutability criterion has been attacked as, among other things, conceptually confused, over-inclusive, under-inclusive, irrelevant, and stigmatizing. As Kenji Yoshino argued decades ago, “academic commentary seems univocal in calling for [the immutability criterion’s] retirement.” More recent scholarship has largely borne out Yoshino’s observation. Indeed, since Obergefell, calls to abandon the immutability criterion have continued apace.

There are good reasons to resist such calls. First, it is hard to deny that wrongful discrimination most often targets individuals on the basis of individual traits that are deeply difficult to change. As an analytical tool for understanding and addressing wrongful discrimination, the immutability criterion thus is roughly on the right track. Moreover, it is doubtful that legal scholars have identified a suitable replacement for the immutability criterion; in fact, some proposals seem bound to raise even thornier problems. Yet abandoning the immutability criterion without a suitable replacement would dramatically weaken Equal Protection doctrine.

The immutability criterion should not be rejected, but it must be revised. In this Article, I propose a new conception of immutability, which I call “social immutability.” As I discuss in Part I, legal scholars and jurists have traditionally conceived of immutability as referring to individual traits that are physically or

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4. See infra Sections I.B and I.C.
5. 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, 518 (1998) (citations omitted); Susan R. Schmeiser, Changing the Immutable, 41 CONN. L. REV. 1497, 1511 (2008) (observing that “[s]cholars argued convincingly in the 1990s that courts should discard immutability as a requirement for heightened scrutiny, compiling instances where courts already had done so”) (citations omitted); MARTHA C. NUSBAUM, FROM DISGUST TO HUMANITY: SEXUAL ORIENTATION AND CONSTITUTIONAL LAW 118–22 (2010) (arguing that “the legal notion of immutability is confused”).
6. See Schmeiser, supra note 5.
8. Compare, e.g., id. (arguing that the immutability criterion ought to be rejected in favor of expanded Title VII remedies such as statutory disparate impact standards) with Richard Primus, Of Visible Race-Consciousness and Institutional Role: Equal Protection and Disparate Impact After Ricci and Inclusive Communities, in TITLE VII OF THE CIVIL RIGHTS ACT AFTER 50 YEARS: PROCEEDINGS OF THE NEW YORK UNIVERSITY 67TH ANNUAL CONFERENCE ON LABOR 295 (2015) (noting that statutory disparate-impact standards are likely to survive only “in partly truncated form, as compared to what they once were”).
psychologically unchangeable. By contrast, according to the social conceptions of immutability, courts should not attempt to identify traits that are immutable in either sense. Instead, courts should focus on the immutability of particular social signifiers. As I explain below, a social signifier is any observable property or relation commonly used to sort individuals into different social groups.9 Traits associated with race or sex are social signifiers in this sense. But many other properties and relations may also signify group membership, including hairstyle, gender expression, language, and much else.10 On the social conception of immutability, a signifier satisfies the immutability criterion when it possesses a low social status that persists throughout various social and political domains, regardless of the underlying nature of the signifier in question.11

In Part II, I unpack the social conception of immutability. The social conception of immutability comprises two components: a descriptive account of trait-based discrimination and a normative account of Equal Protection. In Section II.A, I introduce the empirical work that underlies the descriptive account of trait-based discrimination. This work indicates that in settings characterized by group inequality individuals will tend to be assigned to high- or low-status social groups on the basis of observable signifiers.

9. Describing human traits in terms of their semiotic functions naturally calls to mind Ferdinand de Saussure’s analysis of language systems in terms of the “signifier” and the “signified” as well as Charles Sanders Peirce’s analysis of signs in terms of the “object,” and the “interpretant.” See, respectively, FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 65–67 (2011) and CHARLES S. PEIRCE, THE ESSENTIAL PEIRCE, VOLUME 2, 478 (Peirce Edition Project ed., 1998). Though my account of human traits as signifiers loosely draws upon these bodies of work, the social conception of immutability does not presuppose any particular account of language, sign systems, or signification.

10. See infra Part IV.

11. While my view is novel, it is not entirely without precedent. See, e.g., Samuel Marcosson, Constructive Immutability, 3 U. PA. J. CONST. L. 646, 681 (2001) (arguing that because immutable characteristics are “socially constructed,” the immutability criterion ought to cover characteristics “experienced by individuals within [a] culture as immutable”). By contrast, my account is concerned with ascriptive social identities, not with first-personal, subjective experience. Moreover, I do not claim that all characteristics that fall under the immutability criterion are socially constructed. See infra Section II.A. Richard Ford offers an account of “socially immutable” characteristics. See RICHARD THOMPSON FORD, RACIAL CULTURE: A CRITIQUE 102 (2005). However, my account differs significantly in that I offer an empirical account of the social processes that generate immutable characteristics and defend changes to Equal Protection that Ford opposes. See infra Section IV.B. Finally, Jack Balkin connects immutability to status and stable social meaning. See J.M. Balkin, The Constitution of Status, 106 YALE L.J. 2313 (1997). His work, however, predates important doctrinal developments that my view explains and justifies.
Often these signifiers will be very difficult to change; however, this will not necessarily be true of all such signifiers. It is more apt to think of certain social signifiers as “fixed,” in the sense that—regardless of their biological or psychological bases and regardless of how difficult they are to change—these signifiers possess a stable social meaning in a variety of social and political settings. When a social signifier possesses a stable social meaning, individuals who bear the signifier can be reliably identified as belonging to a high- or low-status group. Low-status individuals will then face discrimination on the basis of the low-status social signifiers that they bear.

I then discuss, in Section II.B, the normative principles underlying the social conception of immutability. Drawing on recent developments in moral philosophy, I argue that relational egalitarianism provides a compelling normative basis for the immutability criterion. For relational egalitarians, justice requires that the state work to disestablish unjust group hierarchies. Relational egalitarianism thus shares much conceptual overlap with Equal Protection doctrine, which has long been construed as forbidding class and caste hierarchy. While relational egalitarians have not focused specifically on legal doctrine, relational egalitarian insights are directly relevant to the immutability debate. For example, relational egalitarian arguments suggest that, for the purposes of Equal Protection analysis, it is largely irrelevant whether immutable traits are biological or psychological in origin, or whether they are due strictly to accidents of birth or involve individual choice in some respect. Rather, on this view, a social signifier warrants protection under the immutability criterion when it is associated with low-status groups and is used to deny members of low-status groups access to material resources or high-status institutions, relationships, and occupations.

In the remainder of the Article, I consider the relationship between the social conception of immutability and legal doctrine. In Part III, I argue that social immutability is consonant with existing Thirteenth and Fourteenth Amendment jurisprudence. In a number of areas—specifically, animus and stigma jurisprudence

12. See, e.g., Jack M. Balkin, Abortion and Original Meaning, 24 CONST. COMMENT 291, 314 (2007) (citing the anti-caste arguments of the Joint House-Senate Committee on Reconstruction, whose members drafted the Fourteenth Amendment); see also infra Section II.B.
under the Fourteenth Amendment and the “badges of slavery” reading of the Thirteenth Amendment—Equal Protection requires that courts extend special solicitude to easily identifiable, low-status social groups. The social conception of immutability similarly directs courts to pay particular attention to the ways in which members of low-status groups are wrongfully singled out. One virtue of the social conception of immutability is that it provides a unified account of these seemingly disparate aspects of Constitutional antidiscrimination law.

Finally, in Part IV, I show how the social conception of immutability resolves existing controversies within Equal Protection doctrine surrounding gender expression, hair, and language. By relying on the traditional understanding of immutability, courts have issued a series of conflicting and confused rulings in each of these areas. The social conception of immutability, by contrast, provides a coherent rationale for extending Fourteenth Amendment protection to individuals who face discrimination on the basis of these signifiers. Overall, I demonstrate in the latter half of this Article that the social conception of immutability is central to understanding the past and shaping the future of antidiscrimination law.

I. THE IMMUTABILITY CRITERION

In this Part, I discuss the origins and development of the immutability criterion. The Court has never offered a complete definition of immutability, and scholars have offered a variety of reconstructive accounts. Additionally, the immutability criterion has evolved over time to incorporate multiple factors. It is therefore helpful to think of contemporary immutability as a synthesis of two distinct standards, which I shall refer to as “old” immutability and “new” immutability.13

A. Old Immutability

The Court first sets forth the immutability criterion in *Frontiero v. Richardson*.14 In *Frontiero*, a married female Air Force officer sought to obtain for her husband and for herself various

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13. This framing follows Clarke, *supra* note 7, at 13–27.
government benefits, which required the officer to claim her husband as a “dependent.”15 Under federal law, a married serviceman could claim his wife as a dependent without providing proof of her dependence, whereas a married servicewoman could only claim her husband as a dependent after proving that he in fact relied upon her for over half of his financial support. In defense of the law, the military argued that, because wives are much more often financially dependent upon their husbands, it would be administratively convenient to require only servicewomen to prove the dependence of their partners.16

Holding that the law constituted unconstitutional discrimination against servicewomen, the Court explains:

[S]ince sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate “the basic concept of our system that legal burdens should bear some relationship to individual responsibility.”17

The Court here characterizes sex as immutable by virtue of its similarity to race. But this simply raises further questions: How does the Court understand race? And in which respects, in the Court’s view, is sex like race?

Perhaps, in the Court’s view, race and sex are alike in that traits associated with race or sex are biologically heritable and unchangeable. Immutability, on this interpretation, would refer to biologically heritable and unchangeable traits. However, there are two problems with this reading. First, it is unclear at best that American courts historically have viewed race as biologically heritable. Certainly, the theory of hypodescent undergirding various state racial classifications—from Tennessee’s “one drop” rule to Virginia’s one-fourth rule—indicated that some legislators considered race to be in some sense biologically heritable.18 Yet throughout the nineteenth century and into the early twentieth century, courts generally avoided endorsing a strictly biological

15. Id. at 678.
16. Id. at 688.
17. Id. at 686 (citation omitted).
account of race.\textsuperscript{19} Instead, it was often left to local institutions and local actors to define and enforce racial categories.\textsuperscript{20} Courts “consistently held that juries . . . should have great discretion in finding the ‘facts’ of race,” which included an individual’s behavior, dress, and social associates.\textsuperscript{21} Thus, if we are to rely on the Court’s historical understanding of race, immutability does not necessarily refer to biologically heritable traits.

Second, national origin, alienage, and illegitimacy are also among the class of immutable traits that trigger heightened scrutiny.\textsuperscript{22} National origin, alienage, and illegitimacy, however, are plainly not biologically heritable. Rather, these traits are matters of social and political fact. By contrast, the Court has refused to grant protected class status to other traits, such as certain forms of mental disability, that at least in some cases are biologically heritable.\textsuperscript{23} As Cass Sunstein has pointed out, it seems that biological heritability is neither necessary nor sufficient for meeting the immutability criterion.\textsuperscript{24}

Perhaps instead the \textit{Frontiero} Court simply means that an immutable trait is a trait that is, for whatever reason, impossible to shed. This, at least, is how Justice Brennan casts immutability in later cases. In \textit{Bakke}, for example, Brennan claims that an immutable trait is simply a trait that an individual is “powerless to escape or set aside.”\textsuperscript{25} Yet note that the \textit{Frontiero} Court’s definition of immutability also includes explicitly normative criteria. According to the \textit{Frontiero} Court, discrimination on the basis of an immutable trait violates the principle that “legal burdens should bear some relationship to individual responsibility.”\textsuperscript{26} Discrimination on the

\textsuperscript{20} Id. at 1381.
\textsuperscript{22} Parham v. Hughes, 441 U.S. 347, 351 (1979) (noting that “the presumption of statutory validity may also be undermined when a State has enacted legislation creating classes based upon certain other immutable human attributes,” including national origin, alienage, and illegitimacy) (citations omitted).
\textsuperscript{23} See City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985) (refusing to recognize the mentally disabled as a “quasi-suspect class”).
\textsuperscript{25} Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265, 360 (1978) (Brennan, J., concurring in part and dissenting in part).
basis of race or sex is unfair, on this view, because such discrimination burdens individuals on the basis of traits that they did not choose to adopt. Of course, whether an individual should be held responsible for possessing a particular trait has no bearing upon whether the trait itself is impossible to change. The former question concerns moral or legal norms, whereas the latter concerns the nature of the trait itself. A coherent understanding of immutability therefore must make sense of both the empirical and the normative criteria that indicate for the Court whether a particular trait satisfies the immutability criterion.

According to the old immutability criterion, then, a trait is immutable if it meets two conditions. First, the trait must be such that an individual is powerless to escape it or set it aside. Second, an individual must bear no moral responsibility for possessing the trait; the trait must be, in the language of Frontiero, an “accident of birth.”27 As the Frontiero Court notes, this second condition reflects a moral concern, namely, that individuals should not be burdened on the basis of traits that they did not choose and cannot change.

B. Against Old Immutability

In the decades after Frontiero, legal scholars advanced a number of influential criticisms of old immutability. As these criticisms are by now fairly well known, I shall only briefly canvas their main points. It is important to survey these criticisms, however, because, as I discuss below, while courts responded by adopting a new conception of immutability, it is doubtful that the new conception of immutability is a sufficient corrective.

According to Kenji Yoshino, old immutability is “both over- and underinclusive.”28 It is overinclusive because “it is impossible for society to operate without discriminating on the basis of some immutable characteristics.”29 For example, suppose that height or intelligence are immutable characteristics. If immutable traits deserve protection, then the immutability criterion requires that Courts submit to heightened scrutiny legislation that differentially affects individuals on the basis of height or intelligence. Yet this is an implausible conception of the Equal Protection principle.

27. Frontiero, 411 U.S. at 686.
28. See Yoshino, supra note 5, at 504.
29. Id.
Whereas Equal Protection has traditionally been understood as forbidding “caste and class” legislation, individuals who differ in height or intelligence do not inhabit separate castes or classes. More broadly, expanding the scope of Equal Protection to all immutable traits—as the immutability criterion seemingly requires—risks opening the floodgates to new Equal Protection claims.

In *Frontiero*, the Court acknowledges this point, suggesting that some immutable characteristics, such as intelligence or physical disability, do not receive protection because, unlike race or sex, intelligence and physical disability may be relevant to job performance or to one’s ability to contribute to society. As John Hart Ely pointed out, however, this suggests that immutability is not actually a factor in the Court’s Equal Protection analysis; rather, it is relevance to legislative purpose that is truly important for determining when legislation wrongfully burdens a particular class of individuals. The *Frontiero* Court’s answer to the overinclusiveness objection, in other words, effectively vitiates immutability as a component of Equal Protection analysis.

According to the underinclusiveness objection, the immutability criterion rests on the assumption that “legislation is less problematic if it burdens groups that can assimilate into mainstream society by either converting or passing.” That is, the immutability criterion seemingly permits wrongful discrimination against individuals or groups, so long as these individuals or groups are able to hide or shed their distinctive traits. Gays, lesbians, and religious minorities, for example, might find it relatively easy to conceal their group identities. Yet permitting such discrimination would inflict a number of serious harms upon those targeted.

Ultimately it is unclear why the wrongfulness of discrimination should turn on whether a particular trait is mutable or immutable. As Laurence Tribe has pointed out, “even if race or gender became readily mutable by biomedical means, I would suppose that laws burdening those who choose to remain Black or female would

31. See JOHN HART ELY, DEMOCRACY AND DISTRUST 150 (1980).
32. Yoshino, supra note 5, at 504; see also Janet Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 509 (1994) (observing that “the characteristics that define anonymous and diffuse groups are often acutely mutable, especially when they can be hidden”).

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properly remain constitutionally suspect.”  

Here, again, immutability seems at best indirectly relevant to the wrongfulness of discriminatory legislation.

Another line of attack takes aim at the moral principle underlying old immutability. Recall that, according to the *Frontiero* Court, the immutability criterion protects individuals who are blameless for possessing stigmatized, immutable traits. But what about individuals who consciously choose to take on stigmatized traits? As Jessica Clarke argues, the fairness principle in *Frontiero* suggests that such individuals are to some extent morally culpable for their own misfortune and so are not owed legal protection. Individuals who are responsible for possessing certain stigmatized traits may choose “to dissemble about their status, conceal the trait, or avoid seeking needed assistance,” lest they be subjected to permissible discrimination. Yet this outcome seems likely only to further stigmatize members of subordinate groups. Overall, by focusing on the individual responsibility of victims of discrimination, the old immutability criterion “deflect[s] attention from questions about whether those in power have [legitimate] reasons for imposing moralizing judgments on citizens or employees.”

**C. From Old Immutability to New Immutability**

Partly in response to the criticisms of old immutability, in a number of post-*Frontiero* cases courts revised the immutability criterion. The new immutability criterion focuses less on accidents of birth, emphasizing instead the relationship between immutable traits, personal identity, and individual liberty. New immutability first gained judicial recognition in *Watkins v. U.S. Army*. At issue in *Watkins* were new army regulations requiring the dismissal of all homosexual personnel. The case was brought by former U.S. Army Sergeant Perry J. Watkins, who had marked “yes” on a pre-

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34. *Frontiero*, 411 U.S. at 686.

35. See Clarke, *supra* note 7, at 17.


37. *Id.* at 20.

enrollment medical form in response to a question regarding whether he had "homosexual tendencies." Acting pursuant to the new regulations, the army discharged Sergeant Watkins and refused his reenlistment.

Watkins challenged the discharge and reenlistment regulations as a violation of Equal Protection. According to Watkins, the regulations invidiously discriminated against individuals on the basis of sexual orientation. Moreover, he argued, because homosexuals constitute a suspect or quasi-suspect class, the Army regulations had to be submitted to strict scrutiny. The Ninth Circuit Court of Appeals, finding for Watkins, declined to address these claims, holding instead that the Army was equitably estopped from refusing Watkins’ reenlistment.

In a concurring opinion, however, Judge Norris takes up Watkins’ Equal Protection arguments. In order to determine whether homosexuals constitute a suspect or quasi-suspect class, Judge Norris canvasses previous accounts of immutability and concludes that "by ‘immutability’ the Court has never meant . . . that members of the class must be physically unable to change or mask the trait defining their class." As Norris points out, non-white individuals may "pass" as white or even undergo pigment injections to effectively change their racial identity. Thus, while race is the paradigm case of immutability, at least some traits associated with race are, in fact, mutable. Similarly, Norris writes, "[i]t may be that some heterosexuals and homosexuals can change their sexual orientation through extensive therapy, neurosurgery or shock treatment." Norris’s point is that if immutability is understood strictly, nothing is truly immutable, in which case the immutability criterion is worthless.

However, Norris argues, the conception of immutability contained in prior case law can be read in “a more capacious manner” as having been based not on physical immutability, strictly speaking, but upon the personal effects of changing certain

39. Id. at 701.
40. Id. at 712.
41. Id.
42. Id. at 711.
43. Id. at 726 (Norris, J., concurring).
44. Id.
deeply held traits. According to Norris, “immutability” refers to “those traits that are so central to a person’s identity that it would be abhorrent for government to penalize a person for refusing to change them, regardless of how easy that change might be physically.” Norris concludes that under this definition sexual orientation is an immutable characteristic.

Some evidence suggests that the Supreme Court has adopted the new immutability criterion. For example, Kennedy’s majority opinion in Obergefell begins with the claim that the Constitution grants certain rights “that allow persons, within a lawful realm, to define and express their identity.” For gay couples, Kennedy claims, “their immutable nature dictates that same-sex marriage” is the only way to exercise this liberty. Here Kennedy ties together liberty and privacy with the right to foster and maintain certain core features of one’s personal identity, which are themes familiar from Norris’s concurring opinion in Watkins. In light of Kennedy’s opinion in Obergefell, it seems plausible that new immutability will constitute an important part of Equal Protection doctrine going forward.

Nevertheless, many legal scholars remain critical of the immutability criterion as a component of Equal Protection analysis. First, while new immutability shifts the focus from unalterable, physical traits to identity-related traits that are especially difficult to change, new immutability still takes into account whether an individual is responsible for possessing certain stigmatized traits. Thus, new immutability calls for “the same moralizing judgments as the old immutability.”

A good example of this problem can be seen in Varnum v. Brien, a pre-Obergefell gay marriage case. In Varnum, the Iowa Supreme Court notes that the new immutability criterion allows for a separation of “truly victimized individuals from those who have invited discrimination by changing themselves so as to be

45. Id.
46. Id.
47. Id.
49. Id. at 2594.
50. See Clarke, supra note 7, at 34 (citation omitted).
identified with the [stigmatized] group.” 52 As Clarke rightly points out, the Varnum holding requires “stigmatizing judgments about who is ‘truly’ victimized, based on whether a victim might have been able to change, hide, or downplay a disfavored characteristic.” 53 According to the reasoning in Varnum, for example, a man who chooses to dress in traditionally feminine attire and who faces discrimination on this basis is not truly victimized, given that these aspects of his social presentation are matters of choice. But this is hardly a defensible result. Surely wrongful discrimination does not become permissible simply because its target has chosen to be identified with a stigmatized group.

New immutability also fails to protect individuals whose stigmatized traits are inessential to their personal identity. For example, Justice Blackmun, dissenting in Bowers v. Hardwick, notes that “[h]omosexual orientation may well form part of the very fiber of an individual’s personality.” 54 For Blackmun, this meant that the state could not punish homosexual individuals merely because of their status as homosexuals. Yet some individuals may be ambivalent or apathetic about the traits that supposedly form the fiber of their personality. 55 Some homosexual individuals, for instance, might believe that their homosexuality is not essential to their personal identity. Either the contemporary immutability criterion does not protect these individuals, or the Court must hold that, despite their protestations to the contrary, these individuals are in fact defined by their traits. But this, too, is an implausible result. Homophobic legislation presumably violates Equal Protection regardless of the personal identities of its victims, and individuals should not be forced to accept the Court’s definition of their personal identity in order to receive protection from wrongful discrimination.

Overall, new immutability fails as a replacement for old immutability. At the same time, however, it is difficult to ignore the tension to which I alluded in the Introduction, namely, that while

52. Id. at 893.
53. See Clarke, supra note 7, at 35 (citation omitted).
55. See Clarke, supra note 7, at 41 (arguing that the immutability criterion fails to cover traits “that individuals would prefer to disclaim as constitutive of their authentic selves, and those traits that individuals would prefer to change due to shame or stigma”).
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scholarly critiques of immutability continue to “fill volumes,” the Court’s actual uses of the immutability criterion have been, on the whole, broadly defensible. Employing the immutability criterion, the Court has expanded Equal Protection doctrine to include women, gays and lesbians, and individuals facing discrimination on the basis of national origin, alienage, and illegitimacy. Few critics of immutability take issue with this expansion of the doctrine; presumably critics of immutability would agree that affording heightened legal protection to these groups reflects a proper understanding of the moral principles underlying Equal Protection. For critics of immutability, then, while immutability is conceptually incoherent, the Court nevertheless managed to guide the doctrine in roughly the right direction.

I draw a different lesson from the academic criticisms surveyed above. In my view, it is no accident that the Court was drawn to the concept of immutability. The Court was so drawn because the concept of immutability roughly captures an important truth about systemic discrimination, namely, that discrimination most often targets individuals on the basis of widely recognized traits that are, in some sense, difficult to change. Thus, what the academic criticisms surveyed above reveal is not that the immutability criterion should be abandoned but that the Court’s immutability analysis requires a better empirical account of trait-based discrimination and a more plausible normative justification for the immutability criterion as a component of Equal Protection. I take up these desiderata in the following Part.

II. SOCIAL IMmutABILITY

In this Part I present a new conception of immutability, which I call “social immutability.” In Section II.A, I set forth the empirical work that underlies my account of trait-based discrimination. In Section II.B, I discuss the normative justification for the immutability criterion as a component of Equal Protection. And in Section II.C, I introduce the social immutability criterion. First, though, I must be clear about the concepts and terminology used throughout the rest of the Article. Equal Protection jurisprudence is replete with references to immutable “traits” and

“characteristics,” terms often understood as referring to settled features of individuals that are in some sense biologically or psychologically fixed. However, I aim to defend a conception of immutability that is agnostic with regard to individual biology and psychology. To avoid the scientific connotations of “trait” and “characteristic” I shall therefore use the term “social signifier.”

I define a social signifier as any observable property or relation in which the individual is involved and which is commonly used to sort individuals into groups. The function of a social signifier, as I am defining the concept, is to convey information about the various social groups to which an individual belongs. The groups to which an individual belongs comprise that individual’s social identity.

Social signifiers may be visible characteristics of the body, such as skin color or hair texture. But social signifiers acquire their meaning as a matter of intersubjective recognition, and so a variety of properties and relations can come to be associated with different social groups. Social signifiers may comprise properties or relations such as speech patterns, names, addresses and much else.

57. See, e.g., Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (asserting that “sex, like race and national origin, is an immutable characteristic”); see also City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 472 n.24 (1985) (Marshall, J., concurring in part, dissenting in part) (noting that “many immutable characteristics, such as height or blindness, are valid bases of governmental action and classifications under a variety of circumstances”); Plyler v. Doe, 457 U.S. 202, 220 (1982) (considering whether “undocumented status” is “an absolutely immutable characteristic”).

58. Merriam-Webster, for example, includes the following definition: “Trait. (n.d.). I.a: a distinguishing quality (as of personal character) curiosity is one of her notable traits; b: an inherited characteristic.” Trait, WEBSTER’S NEW INTERNATIONAL DICTIONARY, UNABRIDGED (3d ed. 2018).

59. See Benjamin Munson & Molly Babel, Loose Lips and Silver Tongues, or, Projecting Sexual Orientation Through Speech, 1 LANGUAGE & LINGUISTICS COMPASS 416, 420 (2007) (reviewing studies on perceived differences between gay, lesbian, and straight patterns of speech, the authors note the “growing consensus in the fields of laboratory phonology, psycholinguistics, and sociolinguistics that individuals invoke social expectations and social stereotypes when processing language”).


61. Id. at 1003.

62. See infra Part IV.
Social signifiers convey information about the status of the social groups to which the individual belongs. Broadly speaking, the predominant social beliefs about various groups can be expected to take the following form: members of low-status social groups will be stereotyped as characteristically possessing vices, disabilities, dispositions to act in morally discreditable ways, or other social deficiencies. Members of high-status social groups will be stereotyped as characteristically possessing virtues, capabilities, dispositions to act in morally creditable ways, or other social competencies. Social signifiers associated with particular groups will then take on the moral valence of the stereotypical characteristics associated with that group.

With this understanding of social signifiers in mind, it is possible to distinguish broadly between two types of wrongful discrimination. The first type consists of bare hostility towards...
members of a particular group. The second type consists of differential treatment of individuals who bear low-status social signifiers. An employer, for example, might refuse to hire an individual who bears a low-status social signifier, on the grounds that the signifier reliably indicates (in the employer’s eyes) the possession of morally discreditable characteristics that fail meritocratic hiring criteria.

The introduction of the term “social signifier” marks substantive differences between the social conception of immutability and current doctrine. First, current doctrine assumes that group boundaries simply fall out of natural differences in biologically or psychologically fixed traits. However, distinctions drawn between social groups often have no basis in the biological or psychological study of human traits and characteristics. Even in cases where a group boundary roughly tracks some empirically determinate difference, the social meaning of the boundary is often deeply conditioned by historical practices, material inequalities, cultural norms, folk knowledge, etc.

On my view, social signifiers possess a functional role in group dynamics: they are used by dominant groups to reinforce social boundaries. Importantly, social signifiers can perform this function regardless of whether they are physically or psychologically unchangeable. Indeed, the underlying nature of social signifiers is irrelevant here. To maintain the boundaries between high- and low-status groups, it is simply necessary that either a sufficient number of individuals associate a particular signifier with a particular social group and believe that this signifier cannot be changed or that members of low-status groups are unwilling to shed the signifier, which is itself taken to be a morally discrediting fact about such individuals. Ultimately, as the social psychologist Henri Tajfel observes, “[t]he only ‘reality’ tests that matter with regard to group

67. U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (arguing that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”) (emphasis in original). I discuss the relationship between the social conception of immutability and animus doctrine in Section III.A.

68. As Charles Tilly notes with regard to gender boundaries, for instance, “[t]hey correspond approximately to genetically based variations in physiology, yet they incorporate long historical accumulations of belief and practice.” CHARLES TILLY, DURABLE INEQUALITY 64 (1998).
characteristics are tests of social reality.” In other words, social signifiers and group boundaries will tend to be real to the extent that individuals understand them to be real and to the extent that individuals act on this understanding.

The second important difference between my account and current doctrine is that on the current conception of immutability a stigmatized characteristic is protected if it is fundamental to personal identity. However, this conflates personal identity and social identity. As I noted above, an individual who bears some socially salient characteristic may judge that this characteristic is not a fundamental part of their personal identity. This is because personal identities are idiosyncratic and dependent upon an individual’s self-understanding.

By contrast, an individual’s social identity does not so depend upon the individual’s self-understanding. Social identities are ascriptive: if an individual is taken to meet the criteria for membership within a particular social group, they will be identified as a member of that group and will be treated according to the relevant set of social norms, regardless of whether the individual personally identifies as a member of this group.

Social identities are constructed on the basis of widely understood and relatively stable social judgments regarding the signifiers typically associated with various social groups. Of course, to say that these social judgments are widely understood is not to say that they are widely shared; the meaning and status of a signifier will likely be contested, particularly as subordinate groups


70. See supra Section I.C.


seek to overturn the negative connotations of the signifiers associated with their group.\textsuperscript{73} As I argue in Section II.B, social immutability targets caste hierarchies; thus, it is the social judgments of dominant groups that merit scrutiny. For now, the important point is that, for the social immutability criterion, it is unnecessary for courts to examine an individual’s personal identity. Instead, courts need only consider whether an individual faced discrimination for bearing a signifier that is constitutive of or associated with a low-status social identity.

\textit{A. Identity and Impermeability}

In this Section, I discuss some empirical research concerning the processes by which social identities are formed and group hierarchies are maintained. It is important to present such work for two reasons. First, having argued that immutability should not be understood as referring to biological or psychological traits of individuals, it is necessary to provide an account of what it is that the immutability criterion should protect. The empirical work introduced below is part of this account. Second, in antidiscrimination cases litigators, advocates, and other interested parties may frame their arguments around (their understanding of) the Court’s immutability analysis.\textsuperscript{74} An empirical account of signifiers and group hierarchy may thus help to inform the legal and political strategies of parties seeking to expand Equal Protection to new signifiers and to new social groups.

I begin with social identity theory, a theoretical framework for explaining and predicting certain recurrent features of intergroup status conflict. Social identity theory posits three psychological

\textsuperscript{73} See, e.g., Claud Anderson & Rue L. Cromwell, “Black Is Beautiful” and the Color Preferences of Afro-American Youth, 46 J. NEGRO EDUC. 76–77 (1977) (describing the “Black is Beautiful” slogan as an attempt to counter skin color discrimination by asserting a “positive self-concept and self-acceptance for people of African descent in America”); see also Kenji Yoshino, COVERING: THE HIDDEN ASSAULT ON OUR CIVIL RIGHTS 106 (2007) (describing the slogan “Gay is good” as performing a similar function for the gay rights movement).

\textsuperscript{74} See, e.g., Brief for Am. Psych. Ass’n et al. as Amici Curiae Supporting Respondents, Romer v. Evans, 517 U.S. 620 (1996) (citations omitted) (“A number of researchers have found familial patterns and biological correlates of adult homosexual orientation, suggesting that genetic, congenital, or anatomical factors may contribute to its development. . . . The scientific literature thus strongly indicates that sexual orientation is far from being a voluntary choice.”). Though the Brief does not explicitly mention the immutability criterion, such language is reminiscent of old immutability.
processes that drive group formation and intergroup conflict: categorization, comparison, and identification. Social categorization refers to the tendency of individuals to sort themselves and others into groups on the basis of meaningful criteria. Social categories are often constructed around visually salient features of the human body. As I discuss below, social categorization may take place regardless of whether these embodied features are physically unchangeable.

The mere fact of categorization affects individual cognition and behavior with regard to members of other groups. Once a social category has been constructed and disseminated widely, individuals tend to rely on these categories and their associated signifiers, in some cases automatically, as cognitive shortcuts for processing social information. For instance, individuals tend to accentuate the perceived differences between groups or categories; ingroup members tend to view outgroups as more homogenous than the ingroup; and, ingroup members are...
more willing to engage in cooperative behavior with and to expect reciprocation from fellow ingroup members.81

In a status hierarchy, individuals will also form beliefs about the moral character of members of outgroups. Members of high-status groups, for example, will seek to attribute to members of low-status social groups stereotypical characteristics that possess a negative moral valence: vices, disabilities, dispositions to act in morally discreditable ways, or other social deficiencies.82 When a social signifier becomes associated with a low-status social group, the signifier will also take on the negative moral valence of the characteristics stereotypically attributed to this group.

*Social comparison* is the process by which social signifiers acquire social meaning. As Tajfel argues, the status of social signifiers is a result of intergroup comparisons: social signifiers associated with a particular group “achieve most of their significance in relation to perceived differences from other groups and the value connotation of these differences.”83 In other words, social signifiers may have no biological basis and may have little or no significance outside of a particular social setting. Nevertheless, so long as individuals treat them as indicative of significant group differences, social signifiers will be no less real and no less meaningful for individuals than other aspects of their environment.

Finally, *social identification* denotes “the extent to which people define themselves (and are viewed by others) as members of a certain social category.”84 Simply identifying as a member of a group is sufficient to prompt discriminatory treatment of outsiders.85 Individuals tend to overestimate the similarities between themselves and fellow members of their groups, and ingroup members tend to rate their own group higher on positive

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82. See Fiske et al., supra note 63.
84. See Ellemers, supra note 75, at 29.
85. See generally Billig & Tajfel, supra note 77.
characteristics and lower on negative characteristics. By contrast, ingroup members tend to believe that outgroups are relatively homogenous, particularly with regard to characteristics stereotypically associated with the outgroup. Likely these phenomena are due, in part, to the fact that, beginning at a young age, individuals tend to conceive of social groups in terms of essences or “natural kinds,” particularly when members of an outgroup are perceived as sharing the same visual signifiers.

I note here one departure from social identity theory. According to social identity theory, as originally conceived, a social identity is a type of self-description. However, in what follows I shall focus specifically on ascriptive social identities. As the anthropologist Fredrik Barth observed in his classic study of ethnic group boundaries, ascriptive social identities result from a process of social labeling, whereby a social category is imposed upon a set of individuals who (it is believed) possess a common set of signifiers. Crucially, it is not necessary that a particular individual endorse or identify with the social identity she has been ascribed; rather, so

86. Jordan M. Robbins & Joachim I. Krueger, Social Projection to Ingroups and Outgroups: A Review and Meta-Analysis, 9 PERSONALITY & SOC. PSYCH. REV. 32 (2005); Rupert Brown, Social Identity Theory: Past Achievements, Current Problems and Future Challenges, 30 EUR. J. SOC. PSYCH. 745, 747 (2000) (citing a variety of studies, the author notes that “it is by now a common-place that group members are prone to think that their own group (and its products) are superior to other groups (and theirs), and to be rather ready behaviourally to discriminate between them as well”).

87. See, e.g., Mark Rubin & Constantina Badea, Why Do People Perceive Ingroup Homogeneity on Ingroup Traits and Outgroup Homogeneity on Outgroup Traits?, 33 PERSONALITY & SOC. PSYCH. BULL. 31 (2007).

88. See, e.g., The Psychology of Group Perception: Perceived Variability, Entitativity, and Essentialism 81 (Vincent Yzerbyt et al. eds., 2004) (reviewing literature demonstrating that “[w]hen one or several perceptual cues point to the entitativity of a group of people, perceivers are inclined to infer the presence of some essence shared by these people” and that “[a]s a result, they may often end up making strong assumptions about the inductive potential and unalterability associated with group membership”); see also SUSAN A. GELMAN, THE ESSENTIAL CHILD: ORIGINS OF ESSENTIALISM IN EVERYDAY THOUGHT 89–98 (2003) (discussing evidence demonstrating “that five-year-olds believe that not only race but also a range of biological[,] though not psychological[,] properties are fixed at birth and immutable over the life span” and that “[b]y late preschool, children reliably presume that innate propensities shape race, language, and gender, suggesting that children may hold nativist expectations about a broad range of phenomena”).

89. ETHNIC GROUPS AND BOUNDARIES: THE SOCIAL ORGANIZATION OF CULTURE DIFFERENCE 10 (Fredrik Barth ed., 1998).
long as an ascriptive social identity is “intersubjectively widely recognized” it will continue to shape social reality.90

Social categorization, social comparison, and social identification are processes that characterize the formation of group identities and their associated signifiers. To explain how these processes affect intergroup dynamics, I will introduce one last piece of terminology. Much work on intergroup conflict focuses on the relative permeability of group boundaries—that is, the extent to which individuals in a social system can move between groups.91

In order to maintain their dominant social position, high-status groups will generally seek to maintain relatively impermeable group boundaries. This is because when most members of a low-status group are barred from high-status groups or social positions it is far more difficult for lower status groups to improve their standing in the status hierarchy. Ascribing to others a low-status social identity—especially a low-status ethnic, racial, or gender identity—is a common method by which dominant groups maintain impermeable group boundaries. As Barth puts it, such identities are “superordinate to most other statuses, and define[ the permissible constellations of statuses, or social personalities” that low-status individuals may assume.92

To be sure, group boundaries will be absolutely impermeable only in the most extreme caste hierarchies; in all other cases, there will be varying degrees of individual mobility. Yet it is important to note that permeability is not simply reducible to the number of low-status individuals who are able to join higher status groups, for even where individual mobility is possible, conditions of entry and exit are often tied to a particular group’s position in the status hierarchy. For instance, in hypergamous caste societies, women are expected to raise their status by “marrying up” into a higher class or caste but are generally forbidden from “marrying down.”93 In other cases, entry into higher status groups is conditioned upon hiding, downplaying, or shedding a signifier associated with a low-

90. RICHARD JENKINS, SOCIAL IDENTITY 154 (2004).


92. ETHNIC GROUPS AND BOUNDARIES, supra note 89, at 17.

status identity. As these examples indicate, even when group boundaries are permeable in some respects, they may nevertheless serve to reinforce the subordinate position of low-status groups.

Note also that group boundaries often will exhibit a certain symmetry with respect to high- and low-status individuals. Relatively impermeable group boundaries function most obviously to prevent low-status individuals from joining high-status groups. However, in many cases higher status individuals will be generally prevented from joining lower status groups as well. This is because, for a status hierarchy based on ascriptive social identities to operate, there must exist clearly demarcated signifiers that possess separate meanings and separate statuses. Clearly demarcated signifiers effectively identify who is to receive and who is to be denied access to material goods and to high-status occupations, roles, and relationships. When enough individuals adopt signifiers associated with statuses or ascriptive identities different from their own, the meaning or status of the signifier may become ambiguous and thus ineffective for distinguishing between members of high- and low-status groups. As I discuss below, it is for this reason that Equal Protection immutability doctrine affords protection to individuals from high-status groups who bear relatively lower status signifiers.

Overall, relatively impermeable group boundaries can be successfully maintained when low-status individuals are ascribed a social identity that possesses a uniformly low status across a variety of social and political contexts. In order to ensure this outcome, high-status groups can be expected to claim that certain traits associated with low-status groups are immutable, regardless of the underlying biological or psychological facts. Furthermore, high-status groups will seek to ensure that these purportedly immutable characteristics carry a negative moral valence. An individual who bears these characteristics will be taken to possess morally discreditable attributes and dispositions that can be

94. See Yoshino, supra note 5, at 490 (arguing that “courts [are] more likely to withhold heightened scrutiny from groups that can change or conceal their defining trait”).
95. See infra Section IV.A.
96. For an example of this phenomenon, see Ramaswami Mahalingam, Essentialism, Culture, and Power: Representations of Social Class, 59 J. SOC. ISSUES 733, 742–45 (2003) (discussing evidence indicating that members of dominant social groups in India conceive of caste in essentialist terms, whereas members of low-status groups do not).
invoked as grounds for denying the individual equal access to high-status roles, occupations, and relationships.

The critical point is that members of high-status groups do not need to possess an accurate understanding of human traits or personal identity in order to exclude members of low-status groups. To be sure, low-status social identities are often constructed on the basis of signifiers that are physically difficult to change, such as skin pigmentation and hair texture. By protecting signifiers that are difficult to change, the contemporary immutability criterion is thus broadly on target. But any signifier that is closely associated with members of low-status groups and that, in relation to low-status individuals, possesses a negative moral valence, will suffice for maintaining relatively impermeable social boundaries. Any plausible conception of immutability must take this fact into account.

B. Relational Equality and Equal Protection

In this Section, I turn to the normative basis of the immutability criterion. As I noted above, the Frontiero Court’s concern for individual responsibility fails to justify the immutability criterion: presumably Equal Protection would still forbid discrimination on the basis of race, even if an individual were to intentionally take on the visible characteristics associated with a different race. In other words, the normative principle introduced in Frontiero is effectively at odds with one of the central purposes of the Equal Protection clause, namely, eliminating racial discrimination in order to ensure equal citizenship for Blacks and other subordinated groups.

A more plausible normative foundation for the immutability criterion can be found by considering the history of Equal Protection as a bulwark against the formation of caste hierarchies. Throughout the nineteenth century, antislavery activists and politicians regularly invoked the metaphor of caste to describe the unequal status of racial groups within the United States. These references to caste were not mere rhetorical flourishes but instead represented a fairly sophisticated understanding of the mechanics of group hierarchy and social group formation.

97. See supra Section I.C.
For example, in his public lecture, “The Question of Caste,” Charles Sumner observes that caste hierarchies entrench permanent inequalities of status. At the heart of a caste hierarchy, Sumner argues, there lies a division of social groups into those who receive “hereditary rank and privilege” and those who receive “hereditary degradation and disability.” According to Sumner, within the United States “the Caste claiming hereditary rank and privilege is white; the Caste doomed to hereditary degradation and disability is black or yellow, and it is gravely asserted that this difference of color marks difference of race, which in itself justifies the discrimination.” Though his language is reminiscent of the biological conception of immutability that I considered above and rejected, Sumner is identifying one of the key mechanisms by which group status hierarchies are sustained over time: namely, the association of subordinate groups with low-status social signifiers, which are taken as grounds for discriminatory treatment. Other discussions of caste, both before and after Sumner’s time, evince a similar sophistication with regard to social signifiers and caste hierarchy.

Sumner’s observations suggest that a plausible normative justification for the immutability criterion must directly address the relationship between the imposition of legal burdens and the processes that sustain status hierarchies. Recently, egalitarian moral philosophers such as Elizabeth Anderson and Samuel Scheffler have focused specifically on the nature of group status hierarchy, and their analyses are instructive for the immutability debate. For these “relational egalitarians,” equality comprises “a kind of social relation between persons” and egalitarian justice requires that all persons receive “an equality of authority, status, or standing” with regard to important social relationships. On this view, whether an individual or a group is regarded as an equal can only be determined by looking at how the individual or group fares across a wide range of social and political settings. This is so for two

100. Id. at 10.
101. Id.
102. Grinsell, supra note 98, at 320. (characterizing 19th century discussions of caste as a “richly articulated set of arguments about the nature of status-based harm”).
reasons: first, what constitutes equal status will depend upon the social norms and shared meanings within particular contexts, and, second, an individual or group may receive equal treatment in one setting but yet may be subject to degradation and other status harms in other settings.

To be sure, relational egalitarians do not ignore the importance of individual responsibility; relational egalitarians would agree with the Frontiero Court’s insight that, in general, legal burdens ought to bear some relationship to individual responsibility. However, for relational egalitarians, the primary aim of just political institutions is to ensure that individuals are regarded as full and equal members of society. This requires first and foremost the elimination of “social relationship[s] by which some people dominate, exploit, marginalize, demean, and inflict violence upon others.”\(^{104}\) The elimination of these relationships is required, relational egalitarians argue, even when individuals bear some responsibility for their own misfortune.\(^{105}\)

Relational egalitarian arguments, though primarily philosophical, are directly relevant to the immutability debate. First, relational egalitarianism requires that individuals receive protection from wrongful discrimination regardless of whether they have chosen to adopt signifiers associated with low-status groups. Adapting the language of Frontiero, a relational egalitarian justification of the immutability criterion might run as follows: irrespective of individual responsibility, legal burdens ought not be such that they create or maintain socially immutable, low-status social identities.

Relational egalitarianism also provides a coherent framework for other aspects of the immutability criterion. For example, because they view equality as a social relationship, relational egalitarians recognize that a group’s social position is not simply reducible to its share of political power or its control over material resources and economic opportunities. Whether a group is regarded as an equal depends upon whether the members of the group are allowed equal access to a variety of status-conferring social institutions, practices, occupations, and relationships.


\(^{105}\) For relational egalitarians, just criminal punishment, which may carry a stigma, is permissible, though even here there are limitations upon the extent to which a person may be stigmatized for breaking the law.
By comparison, consider Justice Scalia’s observation that gays constitute a “politically powerful” group with a “high disposable income,” and hence do not warrant the Court’s protection. While accurate in some respects, Scalia’s argument overlooks the fact that singling out a group for exclusion from a traditionally status-conferring social institution—such as marriage—plainly signals that the group is of low standing. In fact, it is not uncommon for low-status groups to possess certain circumscribed advantages over high-status groups. For example, in late nineteenth-century Germany Jewish individuals claimed an above-average share of national income, and many individual Jews attained prominent positions in social and political life. Nevertheless, German Jews were excluded from Gentile dueling clubs, which were at the time important status signifiers. Dueling “allow[ed] for people to make claims to equality as individuals,” a claim that non-Jewish Germans refused to recognize. The point is that the relative status of a group can only be determined by looking closely at a range of status-conferring practices, norms, and institutions, which is just what the social immutability criterion requires.

Finally, relational egalitarianism provides support for expressivist aspects of Equal Protection doctrine. Broadly speaking, expressivist accounts of law hold that, in addition to their regulative functions, laws also may express commonly understood, public meanings. The public meaning of a law may be inferable from the writings, statements, intentions, or other actions of legislators, but the public meaning of a law is not necessarily a product of these actions. As a communal form of expression, the

107. Christopher Carpenter & Samuel Eppink, Does It Get Better? Recent Estimates of Sexual Orientation and Earnings in the United States, 84 S. ECON. J. 426, 433–34 (2017) (finding both that “gay men earn significantly higher wages than comparable heterosexual men” and that “lesbians have significantly higher annual earnings than similarly situated heterosexual women, conditional on full-time work”).
110. Id. at 716.
expressive content of a law can be ascertained only “in light of the community’s other practices, its history, and shared meanings.” 112

Social immutability is an expressivist view in two respects. First, social immutability is concerned with ascriptive social identities, which are constructed on the basis of widely understood and relatively uniform social judgments regarding social signifiers associated with particular groups. Relational egalitarian principles thus cannot be put into practice without a clear understanding of these social judgments. In order to eliminate hierarchies based on race or gender, for example, it is necessary to first understand which signifiers are publicly recognized as expressing a racial or gender identity.

Second, it is to be expected that politically dominant groups will seek to formalize their status judgments through law. 113 Relational egalitarianism thus requires courts to scrutinize legislation for impermissible expressive content; that is, content which “express[es] contempt, hostility, or inappropriate paternalism toward racial, ethnic, gender, and certain other groups, or that constitute[s] them as social inferiors or as a stigmatized or pariah class.” 114 When the Court ignores or overlooks the status judgments expressed in law, dominant groups are able to use the authority of the state to maintain relatively impermeable boundaries between high- and low-status groups. 115

C. The Social Immutability Criterion

I now turn to the social immutability criterion itself. A social signifier satisfies the social immutability criterion when it meets two conditions: first, the signifier is constitutive of or closely associated with a low-status social identity; second, those who are taken to bear the signifier generally face relatively greater obstacles to joining high-status groups, taking on high-status social roles and occupations, or acquiring the means necessary for obtaining

112. Id. at 1525.
113. See, e.g., infra Section IV.B.
114. See Anderson & Pildes, supra note 111, at 1533.
115. Compare, e.g., Plessy v. Ferguson, 163 U.S. 537, 551 (1896) (asserting that if “the enforced separation of the two races stamps the colored race with a badge of inferiority,” then “it is . . . solely because the colored race chooses to put that construction upon it”) with Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954) (holding that separate facilities are “inherently unequal”).
higher status. Such obstacles include but are not limited to wrongful discrimination, stigmatization, stereotyping, and other forms of arbitrary bias.

To be sure, one might wonder whether, by focusing on ascribed, low-status social identities as opposed to unchangeable human traits, I have offered a theory of immutability as that term is ordinarily understood. However, it is important to keep in mind that “immutability” is a legal term of art, and, as such, departures from ordinary usage may be warranted, particularly when such departures serve a useful legal function. As Judge Norris observes in Watkins, most human traits, including those associated with race and gender, are changeable to some extent. Nevertheless, racial and gender identities are longstanding means by which to sort individuals into groups of differing social status. Indeed, in some case, the social import of these identities, as well as of their associated signifiers, has endured over centuries. It is this critical fact about social hierarchy that the doctrine of immutability tracks.

The mere fact that the legal doctrine of immutability fails to track the dictionary definition of “immutability” provides insufficient grounds for depriving Equal Protection of an important framework for understanding how ascribed identities reinforce unjust status hierarchy.

In the next two Parts, I discuss some practical matters of application. In Part III, I consider the relationship between social immutability and existing antidiscrimination doctrine. To get a sense of how the social immutability criterion would operate in practice, I then demonstrate, in Part IV, that the social conception of immutability resolves some ongoing problems within antidiscrimination law.

III. SOCIAL IMMUTABILITY AND JUDICIAL PRECEDENT

Social immutability ties together three longstanding doctrines within antidiscrimination law: (a) the Court’s hostility toward legislation that evinces animus towards identifiable social groups; (b) the Court’s hostility toward legislation that stigmatizes certain social identities; and, (c) the Court’s endorsement of the authority of Congress, under Section 2 of the Thirteenth Amendment, to

117. See infra Section IV.B.
abolish the “badges and incidents” of slavery. Each of these doctrines requires the Court to closely scrutinize legislation targeting low-status social identities and social signifiers. To be sure, each of these doctrines addresses low-status social identities and social signifiers in a different fashion, each has its own political and legal history, and each has its own source of Constitutional authority. Regardless, the social conception of immutability provides a conceptually unified account of these seemingly disparate aspects of constitutional antidiscrimination law, which suggests that social immutability is less a departure from and more an extension of legal and normative principles immanent within Equal Protection doctrine.

A. Animus

Animus has often been glossed as an illicit subjective intent—a bare desire to harm\textsuperscript{118} or a “fit of spite.”\textsuperscript{119} Yet Akhil Amar and Susannah Pollvogt have convincingly shown that the Court’s animus jurisprudence is best understood as targeting public laws that irrationally disadvantage particular groups based on their social status, regardless of the subjective intent behind such laws.\textsuperscript{120} For example, according to Amar, a piece of legislation evinces unconstitutional animus when it “singles out a named class of persons for status-based disadvantage.”\textsuperscript{121} This was, Amar argues, the constitutionally sound principle underlying Justice Kennedy’s majority opinion in \textit{Romer v. Evans}, a case taking up an amendment to the Colorado Constitution which preemptively overruled attempts to grant “protected status” to gays, lesbians, and bisexual individuals.\textsuperscript{122} As Amar rightly points out, Kennedy does not argue that a hostile intent per se is unconstitutional; rather, Kennedy holds that Equal Protection is violated because the Colorado

\begin{itemize}
  \item \textsuperscript{118} U.S. Dep’t of Agric. v. Moreno, 413 U.S. 528, 534 (1973) (holding that “a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest”).
  \item \textsuperscript{119} Romer v. Evans, 517 U.S. 620, 636 (1996) (Scalia, J., dissenting).
  \item \textsuperscript{120} See Akhil Reed Amar, \textit{Attainder and Amendment 2: Romer’s Rightness}, 95 MICH. L. REV. 203 (1996); Susannah W. Pollvogt, \textit{Unconstitutional Animus}, 81 FORDHAM L. REV. 887 (2012).
  \item \textsuperscript{121} Amar, supra note 120, at 225.
  \item \textsuperscript{122} Id.; Romer, 517 U.S. at 623–25.
\end{itemize}
amendment constituted “a status-based enactment[,] . . . a classification of persons undertaken for its own sake.”

According to Pollvogt, explicitly singling out a particular group is neither necessary nor sufficient for the Court to conclude that a particular piece of legislation evinces unconstitutional animus. As Pollvogt argues, it is unclear that the anti-miscegenation law at issue in *Loving v. Virginia* explicitly singled out Blacks as a group, for the law as written applied equally to Blacks as well as to whites; nevertheless, the Court correctly concluded that the law constituted an expression of white supremacy. *Loving* suggests, then, that explicitly singling out a social group is not a necessary component of animus-based legislation.

Conversely, singling out may not be sufficient for a finding of animus. For example, in *City of Cleburne v. Cleburne Living Center*, the Court states that legislation singling out the mentally disabled is not inherently unconstitutional, for such legislation often “reflects the real and undeniable differences between the [mentally disabled] and others.” The problem instead was that the Cleburne City Council had failed to demonstrate the existence of a rational relationship between the trait of mental disability and the zoning ordinance at issue, which suggested to the Court that the ordinance in fact rested upon “vague generalizations” about and “irrational prejudice[s]” toward the mentally disabled.

The unifying principle behind *Romero, Cleburne*, and other animus cases is that unconstitutional animus exists when public laws arbitrarily “create and enforce distinctions between social groups—that is, groups of persons identified by status rather than conduct.” As the Court has recognized, while the specific motivation for drawing such distinctions may vary, in all such cases low-status groups are arbitrarily targeted on the basis of their social identities or on the basis of signifiers with which they are associated. Animus doctrine and the social conception of immutability thus share the same foundational insight, which is...
that low-status signifiers associated with subordinated groups are often regarded—due to prejudice, stereotyping, unsubstantiated fear, and other forms of arbitrary bias—as proxies for morally condemnable conduct. Moreover, both animus doctrine and the social conception of immutability recognize that the Fourteenth Amendment forbids legislation that enshrines such biases in law.

B. Stigma

While Cleburne is typically read as an animus case, Justice Marshall observes in his concurring opinion that animus is often directed towards stigmatized social groups. Though Marshall does not draw the connection, animus jurisprudence arguably shares much conceptual and sociological overlap with another area of Equal Protection, namely, the Court’s Fourteenth Amendment stigma jurisprudence. The Court has acknowledged that a concern for stigmatic racial harm is central to the Fourteenth Amendment. Notably, the Court has extended stigma doctrine to reach cases of sex discrimination, drawing explicitly upon cases involving racially stigmatic harm, as well as to sexual orientation discrimination. Most recently, for instance, in Obergefell, Justice Kennedy points out that legislation banning same sex marriage will result in “children suffer[ing] the stigma of knowing their families are somehow lesser,” an echo of the “Doll Test” famously cited in Brown.

While the Court has not always been clear as to what constitutes a legislative imposition of stigma, the general thrust of the doctrine is clear: a law imposes stigma when it demeans, degrades, or otherwise marks as possessing inherently low-status a particular social identity. Thus, both stigma jurisprudence and the social

130. City of Cleburne, 473 U.S. at 466 (Marshall, J., concurring in part).
136. The locus classicus for work on stigma is, of course, ERVING GOFFMAN, STIGMA: NOTES ON THE MANAGEMENT OF SPOILED IDENTITY 3 (Simon & Schuster 2009) (1963) (defining stigma as “an attribute that is deeply discrediting”). But legal scholars differ over how to apply Goffman’s insights to legal doctrine. See, e.g., Paul Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 8 (1976) (describing stigma as a type of
conception of immutability recognize that dominant groups will seek to maintain their position in the status hierarchy by marking certain social identities as inherently inferior. Yet, as the Court has long recognized, the existence of an underclass of stigmatized social identities is incompatible with the egalitarian promise of the Fourteenth Amendment. Overall, this suggests that the Court’s stigma jurisprudence and the social conception of immutability draw upon the same empirical and normative framework.

C. The Badges of Slavery

The social conception of immutability also has a foot planted in Thirteenth Amendment jurisprudence. While there is a long history of understanding Section 2 of the Thirteenth Amendment as granting Congress the power to abolish the “badges of slavery” in the United States, only recently has the meaning of this phrase been brought to light. According to George Rutherglen, for example, a “badge of slavery” generally referred to the fact that “[f]rom certain external features, an individual’s social position could be inferred.” Within the American antislavery movement, “badge of slavery” was used more specifically to refer to the fact that Black skin color was publicly and widely associated with subordinate political status. After the ratification of the Thirteenth Amendment, this phrase was transformed into a term of art referring more narrowly to postbellum legal restrictions placed upon Black citizens.


139. Id. at 165.

140. Jennifer Mason McAward, Defining the Badges and Incidents of Slavery, 14 U. PA. J. CONST. L. 561, 575 (2012) (asserting that the phrases’s “meaning appeared to evolve from the antebellum to postbellum eras, particularly as it migrated from colloquial to legal use”).
The social conception of immutability and the “badges of slavery” understanding of the Thirteenth Amendment presuppose that status hierarchies operate by associating certain social groups with observable and widely understood low-status signifiers. Consider, for example, that nineteenth century usages of the phrase “badges of slavery” referred to observable signifiers, such as skin color or hair texture, commonly associated with different racial groups, as well as to postbellum laws targeting Blacks.\(^{141}\) The badges metaphor thus referred to an observable property or relation (in this case, a legal relation) used to sort individuals into racial groups and to convey information about the relative status of these groups.

On my account, then, while the social conception of immutability falls under a Fourteenth Amendment heading, it is nevertheless closely related to the “badges of slavery” component of the Thirteenth Amendment. This is a welcome result given that the Thirteenth and Fourteenth Amendments are both based on a principle of Equal Protection.\(^{142}\) The Civil Rights Act of 1866, for example, enacted shortly after the ratification of the Thirteenth Amendment, promised to all the “full and equal benefit of all laws.”\(^{143}\) Doubts about the constitutionality of the Act under the Thirteenth Amendment led to the passage of the Fourteenth Amendment, which, by affording to all citizens “the equal protection of the laws,” incorporated and expanded upon the Equal Protection principles contained within the 1866 Act.\(^{144}\)

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141. As Senator Lyman Trumbull argued in defense of the constitutionality of the Civil Rights Act of 1866, “any statute which is not equal to all . . . is, in fact, a badge of servitude which, by the Constitution, is prohibited.” See CONG. GLOBE, 39th Cong., 1st Sess. 474 (1866).

142. Jacobus tenBroek, Thirteenth Amendment to the Constitution of the United States: Consummation to Abolition and Key to the Fourteenth Amendment, 39 CALIF. L. REV. 171, 200 (1951) (demonstrating that “[a]t the very foundation of the system constructed out of the Thirteenth Amendment and the Freedmen’s Bureau and Civil Rights Bills is an idea of ‘equal protection’”); see Michael Kent Curtis, No State Shall Abridge: The Fourteenth Amendment and the Bill of Rights 48 (1986) (noting that “Republicans believed that the Thirteenth Amendment effectively overruled Dred Scott so that Blacks were entitled to all rights of citizens”).

143. See Civil Rights Act of 1866, ch. 31, § 1, 14 Stat. 27 (1866) (current version at 42 U.S.C. §§ 1981-82 (1968)).

144. See Curtis, supra note 142, at 103 (noting that, while most Republicans denied that the Act and the 14th Amendment were identical, “[i]t is clear that the amendment incorporated the principles of the bill”).
Given their historical backgrounds and shared normative principle, the Thirteenth and Fourteenth Amendments are best read in conjunction. And this is just what the social conception of immutability implies. The social conception of immutability joins the normative principle of Equal Protection with a generalized account of status hierarchies and social signification. Thus, though it is intended primarily as a Fourteenth Amendment doctrine, social immutability draws constitutional authority from the Thirteenth Amendment as well. At the same time, it helps to explain the close connection between the two amendments.

D. Conclusion

My aim in this Part was to show that the insights and principles underlying social immutability appear in roughly similar form throughout constitutional antidiscrimination law. No doubt my analysis has glossed over many significant differences between the cases and doctrines surveyed above. Offhand, animus doctrine seems best suited for merely occasional instances of legislative bias, as in Moreno, and for legislation that arbitrarily targets groups of individuals who evince genuine differences, as in Cleburne. Stigma doctrine seems better suited for legislative attempts to more permanently affix a low status to particular social identities, as was the case in Obergefell. Finally, a badges of slavery analysis may be particularly relevant for addressing public and private practices that subordinate individuals on the basis of race. But the important point is that some of the main insights of the social conception of immutability are already present within existing Equal Protection doctrine.

IV. Applications

In this Part, I show how the social conception of immutability can guide Equal Protection doctrine moving forward. The argument here is that by adopting a principled agnosticism with regard to the underlying nature of protected signifiers, the social

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145. See Akhil Reed Amar, The Case of the Missing Amendments: R.A.V. v. City of St. Paul, 106 HARV. L. REV. 124, 157 n.180 (1992) (arguing that “doctrinal rules implementing the Fourteenth Amendment’s basic principles must be sensitively crafted in light of Thirteenth Amendment principles” and that “[n]either Amendment ‘trumps’ the other; rather they must be synthesized into a coherent doctrinal whole”).
conception of immutability extends antidiscrimination protection to signifiers associated with gender identity, culture, and ethnicity.

A. Gender Identity and Expression

Over the last two decades, Equal Protection principles have expanded to include gays and lesbians within the scope of those protected under antidiscrimination law. The same cannot be said, however, for transgender individuals, despite the fact that transgender individuals face widespread public and private discrimination. Seeking to build on the legal victories won by gays and lesbians, some transgender activists have argued that gender identity satisfies the contemporary immutability criterion. Other transgender advocates worry, however, that the immutability argument will fail to advance transgender rights, for it may be the case that some identities or practices that fall under the transgender heading reflect individual choice. But acknowledging that at least some aspects of transgender identity or expression are (to some extent) a matter of choice risks undermining the immutability argument, both in the courtroom and in the public sphere.

Social immutability opens up a promising source of legal protection for transgender individuals. Social immutability depicts transgender discrimination as a form of caste-preserving, social boundary enforcement. Transgender individuals—particularly those who are publicly visible as such—threaten to undermine the traditionally rigid distinction between masculine and feminine

147. Paisley Currah, Gender Pluralisms Under the Transgender Umbrella, in TRANSGENDER RIGHTS 16 (Paisley Currah et al. eds., 2006) (noting that “the litigation strategies of transgender rights advocates are very much informed by the legacies of the civil rights movement . . . especially in the emphasis on immutability”).
148. Heidi M. Levitt & Maria R. Ippolito, Being Transgender: The Experience of Transgender Identity Development, 61 J. HOMOSEXUALITY 1727, 1754 (2014) (a study of transgender identity development concluding that transgender identity and expression may reflect “highly individualized choices in relation to available resources as well as the benefits and dangers . . . within social contexts at hand”); see also Currah, supra note 147, at 18 (noting the potential of “construct[ing] gender as a choice in legal arguments”).
gender signifiers. It is for this reason that gender boundary enforcement measures often focus on gender presentation in public spaces. For instance, a number of nineteenth century laws made it a crime for an individual to appear in public in “dress not belonging to his or her sex.” Though no longer formally regulated to this extent, gender boundaries are often informally enforced in public spaces, particularly through verbal harassment or physical violence directed towards individuals who are perceived as deviating from the traditional sex-gender system.

According to the social conception of immutability, whether individual choice is involved in any aspect of sex or gender is irrelevant. In fact, social immutability does not purport to explain how or why an individual comes to personally identify one way or another. The social conception of immutability instead attempts to identify and explain cases in which individuals are generally prevented from crossing social boundaries, where those crossings threaten existing social hierarchies. The relevant inquiries thus concern, first, whether an individual is arbitrarily discriminated against on the basis of a signifier that is associated with a low-status

150. See generally Ki Namaste, Genderbashing: Sexuality, Gender, and the Regulation of Public Space, 14 ENV’T & PLAN. D 221, 221 (1996) (discussing evidence of public assaults motivated by “perceived transgression of normative sex-gender relations”). One complication worth noting here is that gender boundaries are asymmetrically enforced, in that transgender women seem to face far more hostility than transgender men. One plausible explanation for this asymmetry is that, for many cisgender heterosexual men, homophobia is used to police the boundaries of masculinity, such that any same-sex sexual contact throws into serious doubt one’s masculine identity. Cisgender heterosexual men thus may fear that they will be “tricked” into forming intimate relationships with opposite gender but same-sex individuals. Sexual deception is often cited, for example, as the motivating factor behind the murder of transgender women by cisgender heterosexual men. The infliction of brutal violence upon transgender women, who are cast as “effeminate” and therefore deviant men, serves as a means by which to reaffirm one’s masculinity. By contrast, this logic does not obtain for cisgender heterosexual women, for it is the infliction of violence, and not same-sex sexual contact, that is destabilizing to conventional feminine identity. See generally Kristen Schilt & Laurel Westbrook, Doing Gender, Doing Heteronormativity: “Gender Normals,” Transgender People, and the Social Maintenance of Heterosexuality, 23 GENDER & SOC’Y 440 (2009).
151. For the sake of space, I must elide a more detailed analysis of hierarchy and social boundaries accounting for the more specific differences between various social boundaries. For example, transgender women, who move from a dominant to a subordinate status group, seem to face more persecution than transgender men, but this is not true for whites who attempt to pass as Black and tend to face derision but not persecution. Blacks who pass as whites, however, face both.
social identity and, second, whether those who are taken to bear the signifier generally face discriminatory treatment in various social and political domains.

Of course, one might argue that transgender discrimination does not quite fit this mold. An individual who, say, transitions from presenting as a woman to presenting as a man may face discrimination not because he bears male signifiers per se but simply because he bears gender signifiers that do not match his assigned sex at birth. But here it is important to recall why the social conception of immutability focuses on signifiers in the first place. Clearly demarcated signifiers of masculinity and femininity are required in order to maintain a gender hierarchy. According to the social conception of immutability, however, Equal Protection forbids arbitrary discrimination that reinforces unjust status hierarchies, and this remains so regardless of the signifiers borne by victims of discriminatory treatment.

The argument that social immutability extends to transgender identity is further bolstered by recent developments in asylum law. Under the Immigration and Nationality Act of 1956, an individual is eligible for asylum if they are unwilling to return to their country of origin due to a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

The Act leaves undefined, however, what constitutes membership in a “particular social group.” The Board of Immigration Appeals (BIA) first defined “particular social group” as “a group of persons all of whom share a common, immutable characteristic.” While courts have not settled on a uniform definition of “immutable characteristic” in the asylum context, a few recent cases have come strikingly close to adopting something like social immutability.

In Hernandez-Montiel v. INS, for instance, the Ninth Circuit reviewed the BIA’s denial of asylum to Geovanni Hernandez-Montiel, a gay, transgender asylum seeker who testified to being raped by Mexican police and “attacked with a knife by a group of young men who called him names relating to his sexual orientation.” An immigration judge denied Hernandez-Montiel’s

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request for asylum, arguing that because Hernandez-Montiel “wears typical female clothing sometimes, and typical male clothing other times, he cannot characterize his assumed female persona as immutable or fundamental to his identity.” Upon review, however, the Ninth Circuit rejected this reasoning. The Ninth Circuit identified Hernandez-Montiel as belonging to a class of “gay men with female sexual identities.” These men, the court wrote, face persecution because they “outwardly manifest their identities through characteristics traditionally associated with women, such as feminine dress, long hair[,] and fingernails.” In other words, in the Ninth Circuit’s view, gender signifiers, though mutable, may nonetheless constitute fundamental parts of an individual’s personal identity.

Of course, the Hernandez-Montiel decision still relies on the “personal identity” conception of immutability I rejected above. However, other circuit courts have begun to recognize, at least in asylum cases, that individuals are often targeted for persecution on the basis of an ascriptive social identity. The Second Circuit, for example, has defined “particular social group” as a group “comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general.” Similarly, the Third Circuit has developed a doctrine of “imputed membership in a social group” that explicitly includes individuals who do not personally identify as homosexual but who are socially identified as homosexual and persecuted on these grounds. As one scholar has argued, transgender individuals may be able to bring a claim under an “imputed identity” standard.

These recent developments in asylum law find direct support from the social conception of immutability. Descriptively, the social

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155. Id. at 1089 (internal citation omitted).
156. Id. at 1094.
157. Id.
158. See also Reyes-Reyes v. Ashcroft, 384 F.3d 782 (9th Cir. 2004).
159. See supra Section I.C.
160. Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (citation omitted).
conception of immutability explains how mutable signifiers may be fundamental to an ascribed, low-status social identity. Normatively, the social conception of immutability extends legal protection to individuals who face discrimination on the basis of their imputed (which is to say, ascribed) identity. The Second Circuit’s claim that certain social groups face persecution because they share a “fundamental characteristic . . . in the eyes of the outside world” nicely captures both the empirical and normative dimensions of social immutability.163 And from the other direction, litigators and scholars of asylum law have argued that these asylum cases should inform Equal Protection.164 The social conception of immutability provides a unified account of why antidiscrimination law must extend to transgender individuals both in asylum law and in constitutional Equal Protection law.

B. Hair

Social immutability also extends Equal Protection to signifiers associated with particular racial groups, regardless of whether the adoption and display of these signifiers is the result of individual choice. This constitutes a departure from current doctrine, according to which signifiers resulting from accidents of birth denote race, which is protected under antidiscrimination law, while signifiers resulting from individual choice denote ethnicity or culture, which is not. This distinction, however, is implausible.

For example, in a number of cases Black employees have challenged corporate grooming policies forbidding hairstyles, such as cornrows or dreadlocks, commonly associated with Black individuals. Plaintiffs typically claim that these policies place undue burdens on individuals for adopting cultural practices associated with their racial group.165 Renee Rogers, for instance,

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163. Gomez, 947 F.2d at 664.


165. For an incisive overview of hair discrimination caselaw, see Paulette M. Caldwell, A Hair Piece: Perspectives on the Intersection of Race and Gender, 1991 DUKE L.J. 365. See also
challenged American Airlines’ policy forbidding cornrows on the grounds that cornrows are “reflective of cultural, historical essence of the Black women in American society.” 166 Similarly, Charles Eatman, challenging a United Parcel Service policy forbidding uncovered dreadlocks, claimed that his hair was an important connection to “African identity and heritage.” 167 Though acknowledging that their hairstyles were in part due to choice, both plaintiffs argued that burdening an individual on the basis of a cultural signifier associated with race is effectively a form of race-based discrimination.

Hair discrimination cases are generally resolved in favor of the employer, and most of these cases follow a similar dialectic. Defendant employer offers (what courts take to be) a legitimate business rationale for their grooming policy, such as the need to present a conventional, professional image. Courts tend to argue that the forbidden hairstyles are commonly but not exclusively adopted by or associated with Black individuals; hence, policies forbidding these hairstyles are formally race neutral. And while acknowledging that the hair of many Black individuals is particularly well-suited for locked hairstyles, courts often assert that, because adopting a particular hairstyle is a matter of individual choice, hairstyles reflect culture, not race, and so are not eligible for protection under antidiscrimination law. 168

As a number of scholars have pointed out, these arguments do not take into account the history of using hair texture to classify and subordinate Black individuals. For example, Thomas Jefferson, in his Notes on the State of Virginia, claimed that Blacks could never be incorporated into the state due to their supposed “physical and moral” differences, among which he included the absence of “flowing hair.” 169 Indeed, hair type, to a greater extent than skin color, was often determinative of racial categorization. 170 In the 1806 decision Hudgins v. Wrights, for instance, the Supreme Court

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170. Orlando Patterson, Slavery and Social Death: A Comparative Study 60–62 (1st ed. 1982).
of Virginia asserted that a “woolly head of hair” was the predominant “ingredient in the African constitution.”

In light of this history, the judicial reasoning evident in hair discrimination cases seems especially implausible. In Eatman, for instance, Blacks constituted ninety-four percent of the employees affected by UPS’s grooming policies. Various UPS managers “told [Eatman] that he looked like an alien and like Stevie Wonder, twice compared his hair to ‘shit,’ linked his hair to ‘extracurricular’ drug use, requested a pair of scissors (as if to cut off the locks), and pulled his hair.” Nevertheless, the court held that these comments were not racially discriminatory because they did not, in the court’s view, mention Eatman’s race.

To be sure, one might argue that courts have not overlooked this history but are simply working within the constraints of current Equal Protection doctrine, according to which mutable characteristics are not protected. Curiously, however, courts have repeatedly reaffirmed the holding of Jenkins v. Blue Cross Mutual Hospital Insurance, according to which corporate grooming policies forbidding “Afro” hairstyles could be considered racially discriminatory. In this case, Beverly Jeanne Jenkins was denied a promotion on the grounds that “[she] could never represent Blue Cross with [her] Afro.” According to the majority opinion, “[a] layperson[’]s description of racial discrimination could hardly be more explicit. The reference to the Afro hairstyle was merely the method by which the plaintiff’s supervisor allegedly expressed the employer’s racial discrimination.”

This is a puzzling result, given that one could offer the same arguments in defense of corporate grooming policies forbidding Afro hairstyles. After all, not all individuals racialized as Black grow hair suitable for an Afro hairstyle, whereas some non-Black individuals do. Moreover, growing and maintaining an Afro is to some extent due to individual choice, given that an individual could simply keep their hair closely cropped or shaved entirely.

173. Id.
174. Id.
176. Id.
177. Id. at 168.
Nevertheless, courts have repeatedly (and, in my view, correctly) observed that policies forbidding Afro hairstyles support an inference of racial discrimination, on the grounds that Afros are immutable whereas locked hairstyles are not.

Why do courts seem to understand the connotations of an “Afro ban” but not the connotations of a ban on locked hair styles? On my reading, the real crux of the hair discrimination cases lies in the fact that since at least the mid-1960s the Afro has been commonly associated with a more self-consciously confrontational style of Black political activism. Indeed, the association of the Afro with militant Black political movements is widely accepted among scholars of the subject. Consider that Jenkins was decided in 1976; in this cultural moment, it would have been difficult to ignore the connotations of a workplace policy forbidding Afros. By contrast, locked hairstyles do not seem to have acquired the same widespread political valence, at least among a (generally white) judiciary. This partly explains why courts perceive the social connotations of an Afro ban as opposed to the social connotations of a ban on locked hairstyles.

Ultimately the logic in hair discrimination cases falters because no hairstyle is immutable, strictly speaking. As Kobena Mercer observes, all hairstyles rely on “artificial techniques to attain their characteristic shapes and hence political significance.” Courts should thus abandon the traditional immutability analysis and consider directly the political significance of corporate grooming policies.

It is important to be cautious here, however, since much scholarship critical of hair discrimination urges courts to expand antidiscrimination law to protect an individual’s self-conceived ethnic, cultural, or racial identity. Camille Gear Rich, for example, argues that plaintiffs like Charles Eatman are engaged in acts of “race/ethnicity performance,” which she defines as “any behavior or voluntarily displayed attribute which, by accident or design,
communicates racial or ethnic identity or status.”  According to Rich, the current conception of immutability “devalues the psychological and dignitary interests that employees have in race/ethnicity performance.”

While sympathetic to such proposals, I believe that they face two decisive objections. First, it is unnecessary for courts to consider whether an individual is adopting or performing a particular identity. This objection is similar to the objection raised above against the personal identity conception of immutability: just as a gay individual might not believe that their sexual orientation is fundamental to their personal identity, it is likely that at least some Black individuals adopt a locked hairstyle not because it is essential to their ethnic, cultural or racial identity but out of, say, aesthetic preference or simple convenience. Yet racial and cultural identity models would deny protection to such individuals. This outcome is implausible. Suppose that a Black individual “passing” as white were “exposed” and then subjected to humiliating treatment at work. Surely antidiscrimination law should afford this individual relief, even though they had clearly refused to perform their racial identity. As the social conception of immutability makes clear, antidiscrimination law must protect individuals from arbitrary discrimination regardless of how they personally relate to their stigmatized signifiers.

Second, ethnic or cultural identity models require that courts identify which aspects of a culture are essential to identity. However, there are good reasons to be skeptical that courts can or even should engage in this sort of inquiry. Cultures, especially in a multicultural society, are dynamic and overlapping. It is unclear how courts would decide which cultural phenomena belong to which groups, especially given that social groups themselves often internally disagree over what is essential to their group’s

183. See id. at 1211.
identity.\textsuperscript{184} Even if a consensus were to emerge, a court’s decision to ratify certain cultural signifiers as expressive of an authentic racial identity will “discredit anyone who does not fit the culture style ascribed to her racial group.”\textsuperscript{185} At least one court has declined to protect cultural signifiers for these reasons,\textsuperscript{186} and it seems unlikely that other courts will be more inclined to wade into these murky waters, especially given that courts have consistently declined to engage in similar inquiries with regard to religious beliefs and practices.\textsuperscript{187}

On the social conception of immutability, signifiers constitutive of or closely associated with stigmatized or subordinated social identities, whether mutable or immutable, receive protection under antidiscrimination law. To be sure, there will likely be cases in which it is unclear that a signifier meets these criteria; thus, courts must still inquire into how particular social identities are constructed. However, with regard to hair discrimination, it is not just that hair texture is associated with Black individuals; hair texture has also been used historically and legally to construct Blackness as a racial category.\textsuperscript{188} Thus, corporate grooming policies and workplace behaviors that implicitly or explicitly demean hairstyles associated with Black individuals thereby contribute to the stigmatization of Black identity.\textsuperscript{189}

\textsuperscript{184} Compare, e.g., Yoshino, supra note 73, at 845 (drawing up a list of attributes constitutive of gay culture) with Ford, supra note 11, at 71–72 (criticizing attempts, including Yoshino’s, to “define group differences with sufficient formality as to produce a list of traits at all”).


\textsuperscript{186} EEOC v. Catastrophe Mgmt. Sols., 837 F.3d 1156, 1170–72 (11th Cir. 2016).

\textsuperscript{187} See, e.g., Hernandez v. Comm’r, 490 U.S. 680, 699 (1989) (asserting that it is “not within the judicial ken to question the centrality of particular beliefs or practices to a faith, or the validity of particular litigants’ interpretations of those creeds”); see also United States v. Lee, 455 U.S. 252, 263 n.2 (Stevens, J., concurring) (asserting an “overriding interest in keeping the government . . . out of the business of evaluating the relative merits of differing religious claims”); Lyng v. Nw. Indian Cemetery Protective Ass’n, 485 U.S. 439, 457 (1988) (asserting that it is not the Court’s role to find “that some sincerely held religious beliefs and practices are not ‘central’ to certain religions, despite protestations to the contrary from the religious objectors who brought the lawsuit”).

\textsuperscript{188} Hudgins v. Wrights, 11 Va. (1 Hen. & M.) 134, 139 (1806).

\textsuperscript{189} To be clear, my analysis is limited to corporate grooming policies that specifically target hairstyles commonly associated with Black individuals. I do not address the more difficult question of whether all corporate grooming policies that draw distinctions based on social identities—such as gender-specific grooming policies—are impermissible. For a
It is also important to distinguish my view from a similar view defended by Richard Ford. Ford argues that bans on locked hairstyles violate Title VII only when such bans are used by employers as *proxies* for racial identity.\(^{190}\) Thus, he claims, if Renee Rogers were able to demonstrate that American Airlines banned cornrows in order to screen out Black women from the applicant pool, then Rogers’ claim should be sustained. However, on Ford’s view the same would be true if Rogers was able to demonstrate that American Airlines banned, say, hoop earrings in order to screen out Black women from the applicant pool, even if hoop earrings are not generally associated with Black social identity. In both cases, Ford argues, the grooming policy might constitute evidence of a discriminatory intent, but the existence of a discriminatory intent still must be proved in court.\(^{191}\) In the absence of an intent to discriminate, he concludes, neither policy is objectionable.\(^{192}\)

Though the conception of immutability that I have been defending similarly forbids discrimination by proxy, the differences between Ford’s view and mine are significant. Ford introduces the notion of discrimination by proxy because, in his view, bans on locked hairstyles do not themselves constitute disparate treatment nor do they constitute wrongful disparate impact. According to Ford, if a ban on mutable traits or behaviors is to constitute disparate treatment, it must be shown that these traits or behaviors are essential to a particular group’s identity, “such that a workplace rule prohibiting the behavior or trait would be illicit discrimination per se, just as a rule requiring that all employees have fair skin would be racial discrimination per se.”\(^{193}\) Ford is highly skeptical, however, of claims that certain mutable traits or behaviors are essential to racial group identity.\(^{194}\)

Moreover, Ford argues, bans on locked hairstyles do not constitute disparate impact, because such bans “do not *deprive*
anyone of job opportunities.”195 Rather, Ford claims, such bans merely disfavor employees who prefer “unconventional hairstyles.”196 According to Ford, when faced with a ban on locked hairstyles, “[p]resumably some will change their hairstyle in order to get or keep the job.”197

While Ford is rightfully skeptical of claims that locked hairstyles are essential to Black cultural identity, he fails to consider that mutable signifiers can become part of a group’s social identity. To see this point, consider Ford’s observation that, while a grooming policy banning locked hairstyles might constitute evidence of a discriminatory intent, a grooming policy banning or disfavoring dark skin constitutes discrimination per se. Why would this latter policy constitute discrimination per se? Ford’s approach suggests that this policy is racially discriminatory per se because it constitutes irrefutable evidence of a racially discriminatory intent.198 However, this might not be true in all cases. Suppose, for example, that the employer is a newly arrived foreigner who is totally unfamiliar with the American racial caste system. For this employer, hiring employees with lighter skin, regardless of their racial categorization, is important for projecting a conventional, business-like image. Though this policy will disadvantage potential employees who prefer not to engage in skin lightening treatments, presumably some will change their skin tone in order to get or keep the job.

Despite the absence of a racially discriminatory intent, this policy would plainly constitute discrimination per se. What makes the act discriminatory per se is not the intent, or lack thereof, but the fact that the act targets a signifier that is constitutive of a low-status social identity. That is, even if an employer were entirely unaware of the relationship between dark skin and American racial categories, a policy disfavoring dark skin would inherently stigmatize Black social identity because dark skin is partly

195. Id. at 185 (emphasis in original).
196. Id. at 139.
197. Id. at 199.
198. Id. at 180 (arguing that per se arguments, “if accepted . . . would make the claim of discrimination irrefutable”).
constitutive of Black social identity.\textsuperscript{199} This holds true even if some individuals would change their skin tone in order to get or keep the job, for the expressive meaning of the policy—that dark skin is unconventional and unprofessional—plainly stigmatizes Black social identity, regardless of the employer’s intent.

But once this point is acknowledged the inquiry turns to determining which signifiers are constitutive of the relevant social identity. Given that, as we saw above, hair texture and hairstyle have long been used to construct Blackness as a racial category, it is hardly plausible to argue that policies disfavoring hairstyles associated with Black individuals merely disfavor unconventional and mutable cultural preferences. To be sure, my account takes on board Ford’s insight regarding discrimination by proxy: intent is relevant in cases where employers adopt idiosyncratic policies in order to screen out protected social groups. My account differs from Ford’s, however, in two important respects: first, in my view, discrimination \textit{per se} is not simply a matter of intent: it is also a matter of the objective social meaning of policies that disfavor signifiers constitutive of or closely associated with protected social groups; second, because mutable signifiers can be used to define particular social groups, policies that disfavor these signifiers constitute discrimination \textit{per se}. Thus, the social conception of immutability provides support for the claim that workplace grooming policies targeting hairstyles adopted by or associated with Black individuals are discriminatory \textit{per se}.

\textbf{C. Language}

In a number of cases, courts have held that the possession of a foreign accent and the ability to speak multiple languages are protected characteristics under antidiscrimination law, on the grounds that patterns of speech often denote racial or ethnic background. Yet language discrimination cases, like hair discrimination cases, often follow a tortuous logic. In language discrimination cases, courts have struggled to distinguish between

the immutable and mutable characteristics of language; to identify the connections between language, ethnicity, and personal identity; and to separate out legitimate language regulation from mere arbitrary bias. As I shall argue in this Section, the results have been scattershot and unconvincing.

The Supreme Court recognized nearly one century ago that language can be used to identify and subordinate ethnic or cultural outsiders. In the 1923 case *Nebraska v. Meyer*, the Court subtly addressed the post-World War I, anti-German bias underlying the state’s restrictions on foreign language instruction. In the Court’s view, the desire to form a linguistically homogenous polity is understandable, given the “[u]nfortunate experiences during the late war and aversion toward every characteristic of truculent adversaries.” However, the Court concluded, the chosen means are impermissible because “[t]he protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue.” These aspects of the case suggest that *Meyer*, though most often read as a touchstone for substantive due process rights, can plausibly also be read as an early animus case, wherein language is targeted as a proxy for national origin.

This reading of *Meyer* gains plausibility from another language discrimination case close in time. In the 1926 case *Yu Cong Eng v. Trinidad*, the Court invalidated Act No. 2972 of the Philippine Legislature—the so-called Chinese Bookkeeping Act. The Act made it unlawful for any person or corporation engaged in commercial activity in the Philippine Islands “to keep its account books in any language other than English, Spanish, or any local dialect.” The claimed purpose of the Act was to facilitate the accurate tally and collection of a general sales tax. While the vast majority of the 12,000 Chinese merchants to whom the tax applied could neither read nor write in any of the local languages, violators of the Act could be fined up to $5,000 and could be imprisoned for up to two years.

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201. *Id.* at 401.
204. *Id.* at 508.
205. *Id.* at 513–14, 518.
The Court, citing *Meyer*, framed its holding in terms of due process: in the Court’s view, the Act constituted an “oppressive and arbitrary” infringement upon the liberty of the affected Chinese merchants.\(^{206}\) However, just as in *Meyer*, there was a clear Equal Protection issue at stake, which came out in the Court’s analysis of the Act itself. Rejecting a number of alternate constructions, some of which may have preserved the constitutionality of the Act, the Court asserted that there was no “doubt that the Act . . . was chiefly directed against the Chinese merchants” and that the Act was “obviously intended chiefly to affect [Chinese merchants] as distinguished from the rest of the community.”\(^{207}\) On these grounds the Court declared the Act a violation of Equal Protection.

In light of *Meyer* and *Yu Cong Eng*, there is ample precedent for including language discrimination within antidiscrimination law, and contemporary courts accept that speakers of foreign languages deserve protection. Yet there is considerable disagreement over the grounds for providing such protection. As one court noted recently, “[t]hat minority language groups are vulnerable to majoritarian politics is clear . . . [but] what is not yet clear is how best to protect them.”\(^{208}\)

Some courts have applied a conventional immutability analysis. In *Garcia v. Gloor*, for instance, the Fifth Circuit considered a Title VII challenge to an employer’s rule prohibiting bilingual employees engaged in sales work from speaking Spanish on the job.\(^{209}\) Finding in favor of the employer, the Court noted that “[t]o a person who speaks only one tongue or to a person who has difficulty using another language than the one spoken in his home, language might well be an immutable characteristic like skin color, sex or place of birth.”\(^{210}\) Yet the workplace regulation in question applied only to bilingual employees, and, according to the Court, “the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice.”\(^{211}\) Thus, in the

\(^{206}\) Id. at 525.
\(^{207}\) Id. at 514, 528.
\(^{209}\) Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).
\(^{210}\) Id. at 270.
\(^{211}\) Id.
Court’s view the employer’s policy did not discriminate on the basis of a protected characteristic.\footnote{Id. at 272.}

In other cases, courts have focused on the significance that language often has for an individual’s personal identity. In \textit{Gutierrez v. Municipal Court}, for instance, the Ninth Circuit considered a challenge to a municipal court policy forbidding employees from speaking any language other than English, except when acting as translators or during breaks or lunchtime.\footnote{Gutierrez v. Mun. Ct., 838 F.2d 1031 (9th Cir. 1988).} Holding that “English-only rules generally have an adverse impact on protected groups and . . . should be closely scrutinized,” the court argued that an individual’s primary language “remains an important link to . . . ethnic culture and identity.”\footnote{Id. at 1039–40; see also Smothers v. Benitez, 806 F. Supp. 299, 309 (D.P.R. 1992) (holding that “[t]he use of one’s language is an important aspect of one’s ethnicity, and should not be sacrificed to government or business interests without good cause”).} The \textit{Gutierrez} opinion, and others like it, invoke language familiar from the personal identity conception of immutability I discussed above.\footnote{See supra Section I.C.}

Other courts, however, have avoided the immutability question, reasoning instead that language is often a proxy for, if not partly constitutive of, race or national origin. In \textit{Hernandez v. New York}, for example, the Supreme Court reviewed a New York state prosecutor’s decision to exercise peremptory challenges to exclude Spanish-speaking individuals from serving as jurors for a trial in which Spanish language testimony would be central.\footnote{Hernandez v. New York, 500 U.S. 352 (1991).} Three of the four excluded individuals were Hispanic; yet, the prosecutor denied that he sought to exclude Hispanic individuals, maintaining instead that he wished to exclude only individuals who “might have difficulty in accepting the translator’s rendition of Spanish-language testimony,” a category that extended to Hispanics and non-Hispanics alike.\footnote{Id. at 361.}

While deeming the prosecutor’s reasoning race-neutral, the plurality opinions split over how to conceive of the connection between language and race or national origin. Citing \textit{Meyer} and \textit{Yu Cong Eng}, Justice Kennedy observed that “for certain ethnic groups and in some communities . . . proficiency in a particular language,
like skin color, should be treated as a surrogate for race under an [E]qual [P]rotection analysis.” By contrast, according to Justice O’Connor, “[n]o matter how closely tied or significantly correlated to race the explanation for a peremptory strike may be, the strike does not implicate the Equal Protection Clause unless it is based on race.” For Justice O’Connor, a language-based peremptory challenge would violate Equal Protection only if it served as a pretext for racial discrimination.

Despite these differences, in most language cases the practical upshot is the same: regardless of how they conceive of language and the relationship between language and race or national origin, courts tend to carefully scrutinize language-based regulations. Since, in my view, this is as it should be, it may seem pedantic to insist upon a clearer understanding of language for antidiscrimination law. However, the persistence of such varied and conflicting rationales is indicative of deeper flaws in the doctrine.

First, attempts to distinguish between the immutable and mutable aspects of language have led to implausible results. For example, while the Garcia court argued that monolinguism is immutable, this characteristic can be changed; for some individuals, the change may be relatively easy. Second, though there is no doubt that language can constitute a central part of an individual’s ethnic identity, this is not true in every case. An individual may decide to speak in their native tongue merely for convenience, while a native English speaker who adopts a second language may not identify as a member of the associated ethnic group. Yet, if language ought to receive some form of protection under antidiscrimination law, presumably such individuals ought to receive protection. An employer who discriminates on the basis of ethnicity should not be shielded from legal repercussions merely because the victim does not identify with the relevant ethnic group.

Finally, while it may be unclear whether language is constitutive of race or ethnicity, Justice O’Connor’s suggestion—that no matter how closely language serves as a proxy for race, language discrimination is not race discrimination—is untenable.

218. Id. at 371.
219. Id. at 375 (O’Connor, J., concurring).
220. Garcia v. Gloor, 618 F.2d 264, 270 (5th Cir. 1980).
As the Court properly recognized in *Meyer* and *Yu Cong Eng*, language discrimination is often a form of racial or ethnic discrimination. At the same time, however, it is plausible that some workplace regulations restricting language choice reflect legitimate business needs and that, when properly tailored, such regulations neither express nor cater to racial or ethnic hostility. For instance, a business might reasonably require that, when carrying out business transactions, employees communicate in the language of the business’s customers. The same cannot be said, however, for workplace regulations that cater to customers who prefer to be served only by same-race employees.

On my view, there is no need to shoehorn language into the traditional immutability framework. What is needed for antidiscrimination law is not an account of what language is but an account of how language functions within status hierarchies. On the social conception of immutability, language is of particular interest as a social signifier because a spoken language, like hair texture, skin color, and gender expression, is an easily observable property that is often used by dominant groups to categorize and subordinate minority groups. While Justice Kennedy is exactly right to claim that language, in some cases, is akin to race or ethnicity, this is not because of any intrinsic features of language itself. It is instead because language, like skin color, is often used to sort individuals into distinct social groups. The social conception of immutability thus requires that language restrictions be carefully scrutinized.

To some extent courts have already adopted this view. For example, in *Pemberthy v. Beyer*, another case dealing with the exclusion of Spanish-speaking jurors, the Third Circuit argued that “[b]ecause language-speaking ability is so closely correlated with ethnicity, a trial court must carefully assess the challenger’s actual motivation even where the challenger asserts a rational reason to discriminate based on language skills.”  

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222. *Id.*
language minorities may face a difficult task in demonstrating intent,” the holding in Pemberthy “affords them an opportunity to challenge some of the most common (and often the most invidious) types of language discrimination.”

On my view, Pemberthy falls short in two respects. First, as I have discussed in this Part, signifiers such as hair, dress, and language are not only used as proxies for a particular social identity; rather, they may be used to construct the identity itself. Thus, there is no reason to require that plaintiffs prove the existence of a discriminatory intent in addition to the intent to discriminate against signifiers that are constitutive of a particular social identity. This would be akin to requiring that plaintiffs prove the existence of an intent to discriminate against Blacks in addition to an intent to discriminate against Black skin. Second, requiring subordinate groups to prove the existence of a discriminatory intent is both unfair and bound to underprotect. Linguistic minorities, which are often politically and socially isolated, are likely to be at a disadvantage with regard to investigating economic and political majorities. Moreover, given that, as various courts have recognized, language discrimination has a long history in the United States, there is more than enough reason to shift the evidentiary burden to those who seek to impose language restrictions.

CONCLUSION

Overall, the social conception of immutability is able to explain recent developments within the law and to provide a principled basis for deciding future cases in a manner consistent with historical Equal Protection principles. The basic insight of the social conception of immutability is that immutability analysis should be used to prevent dominant groups from constructing or relying upon relatively fixed, stigmatized signifiers in order to maintain socially impermeable group boundaries. For this purpose, the biological or psychological traits, individual choices, and personal identities of stigmatized individuals are normatively irrelevant.

The move away from focusing on individual choice and personal identity is also important, given the demographic

trajectory of American society. Consider Wendy Greene’s astute observation:

[I]n light of increased immigration, cultural diversity, interracial marriage, and transracial adoption, as well as the formal recognition of multi-racial identity and more fluid self-characterizations of racial, ethnic, religious, and gender identity, claims stemming from misperceptions about a plaintiff’s protected status may become as commonplace as traditional claims of discrimination based upon an individual’s self-classified identity.224

Current political trends notwithstanding, it does seem likely that future generations will increasingly be able to choose among a panoply of racial, cultural, ethnic, and gender identities. Yet if current immutability doctrine is retained, these choices will undercut an important source of protection against discriminatory treatment, thereby allowing impermeable group boundaries to persist and caste hierarchy to endure. As I hope to have demonstrated in this Article, however, the social conception of immutability is a promising alternative.

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