University of Maryland Law Journal of Race, Religion, Gender and Class

Volume 17 | Issue 2 Article 2

Reexamining the Integrity of the Binary: Politics, Identity, and Law

Marvin L. Astrada

Scott B. Astrada

REEXAMINING THE INTEGRITY OF THE BINARY: POLITICS, IDENTITY, AND LAW

Marvin L. Astrada & Scott B. Astrada*

ABSTRACT

Politicized identity, which finds expression in the law, is binary-based. In light of the role that it plays in national political and legal debates triggered by various groups challenging identity-based binaries, this article reexamines the integrity of the binary that lies at the core of how courts construe legal identity. Basic-identity binaries have and continue to play a profound role in legal thought and practice. This article thus explores the relationship and tension between law and binary-based identity signifiers. We explore the notion that the law's use of the binary-based identity signifier is premised on antiquated assumptions and simplified schemata that, to better recognize rights and apply judicial remedies and protections of individuals and groups that fall outside the binary, will perhaps require the courts to adopt a more flexible approach to identity. Politicized identity may be at the heart of contestations between those who wish to preserve and those who wish to obliterate basic binaries, but the law is a special case and will be uniquely affected by the fallout that results from this process. We thus employ case law and concepts from philosophy and legal theory to flesh out an emerging problem in the law. Our intent in this paper is to reexamine the basic binary nature of legal identity, the components and dynamics that undergird it, the consequences that result from its application, and the tensions and challenges that result from rejecting the integrity of the binary within law.

INTRODUCTION

In the present political environment, politicized identity encompasses a variety of disparate and passionate debates over the form and substance of public policy, from who is legally allowed to use which gendered public bathroom to reformulating trade policy from an "America First" perspective.[1] Recently, politicized identity has fueled

* Marvin L. Astrada (M.A., PhD., Florida International University; J.D., Rutgers University Law School; M.A., C.A.S., Wesleyan University; B.A. University of Connecticut) teaches in the Politics & History Department at New York University – Washington D.C. Scott B. Astrada (J.D., M.B.A, Marquette University; LLM, Georgetown University; B.A. University of Wisconsin–Madison) is a legislative and public policy professional in Washington, D.C.

widespread social protests (and counter-protests) against political parties, the Administration, and political or cultural entities such as the "media" or "Hollywood."[2] A major driver of identity-based protest and resistance in the present has been the Trump Administration's sociocultural, economic, and political agenda—one that is firmly rooted in traditional notions of societal order in place before the late 1960s.[3] Indeed, the proclaimed agenda to "Make America Great Again" involves breathing life into traditional sociocultural binaries that underpinned identity, such as White/Black,[4] Citizen/Alien,[5] and Male/Female,[6] and the corresponding privilege of one half of the binary over the other. Resistance to this agenda is based, in part, on the realization that a transition back toward traditional binaries is problematic and potentially harmful.[7] In fact, traditional binaries have historically been the basis for exclusionary, if not discriminatory, public policy.[8] In light of the modern historical struggle against identity-based binaries that began in the 1960s, and recent resistance and protests

[1] *See America First Foreign Policy*, WHITE HOUSE, http://www.whitehouse.gov/america-first-foreign-policy (last visited Dec. 23, 2017); *America First Energy Plan*, WHITE HOUSE, https://www.whitehouse.gov/america-first-energy (last visited Dec. 23, 2017).

[2] *See* Emanuella Grinberg & Madison Park, *Second Day of Protests over Trump's Immigration Policies*, CNN (Jan. 30, 2017, 1:42 AM), http://www.cnn.com/2017/01/29/politics/us-immigration-protests/index.html.

[3] *See* Gregory Krieg, *Donald Trump Reveals when He Thinks America was Great*, CNN (Mar. 28, 2016, 5:36 PM), http://www.cnn.com/2016/03/26/politics/donald-trump-when-america-was-great/index.html.

[4] *See* Jonathan Mahler, *Donald Trump's Message Resonates with White Supremacists*, N.Y. TIMES (Feb. 29, 2016), https://www.nytimes.com/2016/03/01/us/politics/donald-trump-supremacists.html.

[5] *See* Anna Brand, *Donald Trump: I Would Force Mexico to Build Border Wall*, MSNBC (June 28, 2015, 2:11 PM), http://www.msnbc.com/msnbc/donald-trump-i-would-force-mexico-build-border-wall.

[6] *See* Molly Ball, *What Kind of Man is Donald Trump?*, THE ATLANTIC (Oct. 8, 2016), https://www.theatlantic.com/politics/archive/2016/10/donald-trump-and-the-women/503402/.

[7] *See, e.g.*, *100 Ways, in 100 Days, that Trump Has Hurt Americans*, CENTER FOR AM. PROGRESS (Apr. 26, 2017), https://www.americanprogress.org/issues/general/news/2017/04/26/431299/100-ways-100-days-trump-hurt-americans/.

[8] *See generally* Audrey Smedley & Brian D. Smedley, *Race as Biology Is Fiction, Racism as a Social Problem Is Real: Anthropological and Historical Perspectives on the Social Construction of Race*, 60 AM. PSYCHOLOGIST 16 (2005) (discussing the role of race in conversations about the differences between groups).

centered on racial, ethnic, sex/gender, and socio-economic critiques of societal order, traditional binary-based identities require reexamination.[9] In particular, it is necessary to reevaluate the underlying assumptions and effects of a binary-based cultural and social identity matrix, as well as what place, if any, binary-based identity signifiers have in the present.[10]

As the defining ethos of the current Administration, the return of the U.S. to an idyllic time where identities were concrete and self-contained is based, in part, on interjecting traditional identity-based binaries with renewed energy and legitimacy in the realm of law and public policy. Consider, for instance, the legal and public policy debate that took place over which public restrooms transgender individuals must use in North Carolina—and the previous (Obama) and current (Trump) Administrations' antipodal reactions to the matter.[11] The bathroom controversy reveals a deeper tension that is emerging in the law regarding the role of politicized identity in the legal and policy realms.[12] Other states, such as Texas, also considered pursuing

[9] *See* Krieg, *supra* note 3.

[10] *See Oregon First US State to Add Third Gender Option on Driver ID*, BBC (June 16, 2017), http://www.bbc.com/news/world-us-canada-40309362 ("Beginning in July, Oregon residents who do not identify as male or female can mark X for sex on driver's licenses, learner's permits and state IDs."); Casey Parks, *Oregon Court Allows Person to Change Sex from "Female" to "Non-Binary,"* THE OREGONIAN/OREGONLIVE (June 10, 2016), http://www.oregonlive.com/portland/index.ssf/2016/06/oregon_court_allows_person_to.html (detailing *In the Matter of Sex Change of Jamie Shupe*, wherein an Oregon Circuit Court found "that a transgender person can legally change their sex to 'non-binary' rather than male or female in what legal experts believe is a first in the United States. Multnomah County Circuit Court Judge Amy Holmes Hehn legally changed 52-year-old Jamie Shupe's sex from 'female' to non-binary.").

[11] *See* Sandhya Somashekhar, et al., *Trump Administration Rolls Back Protections for Transgender Students*, WASH. POST (Feb. 22, 2017), https://www.washingtonpost.com/local/education/trump-administration-rolls-back-protections-for-transgender-students/2017/02/22/550a83b4-f913-11e6-bf01-d47f8cf9b643_story.html?utm_term=.469f6b2bb7ee.

[12] *See e.g.*, Daniel Trotta, *Trump Revokes Obama Guidelines on Transgender Bathrooms*, REUTERS (Feb. 23, 2017), http://www.reuters.com/article/us-usa-trump-lgbt-idUSKBN161243; Katy Steinmetz, *President Trump Just Rolled Back Guidelines That Protected Transgender Students*, TIME (Feb. 23, 2017), http://time.com/4679063/donald-trump-transgender-bathroom/ (At the time of this writing, the North Carolina legislature repealed the so-called bathroom bill and the Governor signed off on the repeal.); Mark Berman & Amber Phillips, *North Carolina Governor Signs Bill Repealing and Replacing Transgender Bathroom Law*

legislation to emplace people within a traditional Male/Female identity binary.[13]

In light of the role that politicized identity is playing in the present,[14] and the national political and legal debates that have been triggered by various groups challenging the integrity of identity-based binaries,[15] this article examines the fundamental conflict between the reactionary move toward reestablishing identity-based binaries (and their underlying assumptions), and resistance to such binaries, and contends that as the American polity has become increasingly more diverse, traditional binaries such as Male/Female, Heterosexual/Homosexual, and Black/White, have become representationally inadequate. American society has become more politically diversified along racial, ethnic, and sex/gender identity lines, and the culturally homogenous norm of the "average American" has drastically shifted since the late 1960s.[16]

The conflict between those adhering to traditional binaries and those questioning the assumptions underlying said binaries can be readily observed in law and public policy.[17] Indeed, law plays a central role in these present conflicts, as many of the actions taken and policies advanced by the current Administration are being challenged in the

Amid Criticism, WASH. POST (Mar. 30, 2017), https://www.washingtonpost.com/news/post-nation/wp/2017/03/30/north-carolina-lawmakers-say-theyve-agreed-on-a-deal-to-repeal-the-bathroom-bill/?utm_term=.25638df206ad.

[13] *See e.g.*, Katy Steinmetz, *Texas Senate Approves Controversial Bathroom Bill After Five-Hour Debate*, TIME (Mar. 15, 2017), http://time.com/4701658/texas-senate-bathroom-bill-sb6-transgender/; *Anti-Transgender Law Map*, EQUALITY FED'N, http://www.equalityfederation.org/lac/antitrans/ (showing several other states other states are currently considering similar bills) (last visited Dec. 23, 2017).

[14] *See supra* notes 8–11.

[15] *See supra* notes 17–18.

[16] *See generally* Robert D. Putnam, *E pluribus Unum: Diversity and Community in the Twenty-First Century: The 2006 Johan Skytte Prize Lecture*, 30 SCANDINAVIAN POL. STUD. 137 (2007) (discussing the long and short-term effects on communities as a result of sharp increases in immigration); Jean S. Phinney & Anthony D. Ong, *Conceptualization and Measurement of Ethnic Identity: Current Status and Future Directions*, 54 J. OF COUNSELING PSYCHOLOGY 271 (2007) (exploring how individuals understand their ethnic identities); Rodney, E. Hero & Caroline J. Tolbert, *Racial/Ethnic Diversity Interpretation of Politics and Policy in the States of the U.S.*, 40 AM. J. OF POL. SCI. 851, 856–59 (1996).

[17] *See, e.g.*, Chris Dolan, *Letting Go of the Gender Binary: Charting New Pathways for Humanitarian Interventions on Gender-Based Violence*, 849 INT'L REV. OF THE RED CROSS 485, 488 (2015).

courts.[18] Legal challenges to identity-based binaries have resulted in exposing a complex relationship between the courts' reliance on binary-based constructs to administer justice,[19] and combatting discriminatory policies and practices.[20] Ironically, in an age of increasing rejection of binary-based identity signifiers, the courts have relied on legal schema that utilize such signifiers to protect vulnerable and marginalized communities.[21]

We therefore utilize select case law, such as Footnote Four of *United States v. Carolene Products Co.*,[22] to illustrate and explore the deep binary-based nature of identity-based jurisprudence to further examine and discuss the conflicts between the basic binary nature of legal identity, the components and dynamics that undergird it, the consequences that result from its application, and the tensions and challenges that result from rejecting the integrity of the binary within law.[23] This article's reexamination of the integrity of the binary is designed to foster critical reflection and debate; it seeks to provoke discussion on whether it is desirable to scrap the binary, retain it, or if possible to apply it in the law to reflect changes in the make-up of society.[24] Going forward, we discuss the politics and complexity of

---

[18] *See, e.g.*, Meridith Mcgraw et al., *A Timeline of Trump's Immigration Executive Order and Legal Challenges*, ABC NEWS (June 29, 2017), http://abcnews.go.com/Politics/timeline-president-trumps-immigration-executive-order-legal-challenges/story?id=45332741.

[19] Smith v. Avanti, 249 F. Supp. 3d 1194, 1200–01 (D. Colo. 2017).

[20] *See, e.g.*, Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the affirmative action admissions policy of the University of Michigan Law School because the University had a compelling interest in pursuing a race-conscious admissions process that may favor underrepresented minority groups.); Shelley v. Kraemer, 334 US 1 (1948) (holding that courts cannot constitutionally enforce racial covenants on real estate).

[21] *See* United States v. Carolene Products, 304 U.S. 144, 155 n.4 (1938) (positing that discrete and insular minorities may require heightened judicial protection).

[22] *Id.*

[23] *See* Tara Dunnavant, *Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law*, 9 FED. CTS. L. REV. 15, 16–17, 20, 32, 35 (2016).

[24] Despite the Trump Administration's promises to further entrench the binary, a recent ruling from the District Court of Massachusetts, *Kosilek v. Spencer* illustrates how the law is reassessing the binary-based identity signifiers that have been relied upon to make sense of juridical subjects. 889 F. Supp. 2d 190 (D. Mass. 2012), *rev'd en banc*, 774 F.3d 63 (1st Cir. 2014). The *Kosilek* court found that the Department of Corrections violated the Eighth Amendment's "cruel and unusual punishment" clause in refusing to provide gender confirmation surgery to prisoner Michelle

identity within the law to contextualize the binary.[25] We then examine the relationship between politicized identity, culture, and the binary-based nature of identity in the law.[26] The complex relationship between the binary, identity, and the juridical subject is then critically examined.[27] We analyze and discuss the power dynamics and consequences of employing the binary in law.[28] Lastly, we conclude our reexamination of the integrity of the binary in the administration of justice.[29]

I. THE INTEGRITY OF THE BINARY – THE POLITICS & COMPLEXITY OF IDENTITY IN THE LAW

A. Contextualizing the Binary in the Law: Constructing Legal Identity

This section explores the role of the binary in law, and the conceptual integrity of the binary that lies at the core of legal identity

Kosilek, and granted injunctive relief for Kosilek to receive the surgery. *Id.* at 251. This case exemplifies how recent challenges to the binary nature of identity are affecting judicial remedies and protections. Notably, the *Kosilek* decision — which was overturned on appeal— is unique in its expansion of the scope of judicial remedies and protections under law. Despite being overturned, the decision is indicative of why, going forward, it is important to ask what insight can be gained by critically reexamining entrenched binary-based identity signifiers, especially in the context of civil rights and identity in the law. Dunnavant, *supra* note 23, at 15–16 ("The [*Kosilek*] decision represented the first time a U.S. prison was court ordered to provide a transgender prisoner with this type of surgery."). Although it was overturned, the decision is nevertheless instructive on discussions of binary-based identities and their use in the law. Dunnavant notes that, "Judge Thompson, in her dissenting opinion, criticizes the majority for employing *de novo* review to the highly factual issue of deliberate indifference, instead of a deferential, clear error standard. If the court had employed the proper standard, according to Thompson, they would have accepted the district court's factual determinations, as the majority of experts in the case concurred that gender confirmation surgery was medically necessary for Kosilek and the evidence presented at trial provided ample support for the district court's conclusions." *Id.* at 17 (citations omitted).

[25] *See infra* Part I.

[26] *See infra* Part II

[27] *See infra* Part III.

[28] *See infra* Part IV.

[29] *See infra* Conclusion.

that the courts have traditionally employed to adjudicate cases. The intent is to emphasize the importance of revisiting the binary as it is conceptualized and applied in law. First, it is necessary to define some key terms employed in the remainder of this work. The basic unit of analysis vis-à-vis the binary is that of the "juridical subject."[30] In its most basic form, a juridical subject is a doctrinal entity "endowed with juridical personality who [is] usually known as a collective person, social person, or legal entity."[31] A subject has rights and obligations under law, and may qualify for judicial protections if the courts find that a subject falls within a specified legal classification, e.g., "discrete and insular minority."[32] A "legal identity" is comprised of the space within which the subject and the law interact; it is an identity that is conferred upon the subject by law, e.g., race and ethnicity as legal classifications that entitle a subject to claim the protections of identity-based legislation.[33] Lastly, a "non-binary identity" is one in which the subject

[30] As used in this work, "subject" is shorthand for juridical subject.

[31] Elvia Arcelia Quintana Adriano, *The Natural Person, Legal Entity or Juridical Person and Juridical Personality*, 4 PENN. ST. J. OF L. & INT'L AFF. 363, 366 (2015). "The elements that contribute to the formation of a legal person are the following:

> • Existence of a being or subject: A subject of law is any being capable to act as holder of powers, or liable with obligations in a juridical relationship. The term subject of law or juridical being alludes to an unspecified person in terms of strict law.
>
> • Will of the subject or being. The action of a subject with the intention of producing certain legal effects, and should be highlighted its importance for the law, since this will should be also expressed in an appropriate manner to produce legal consequences.
>
> • Subjective rights. This refers to the power of the juridical norms which is granted to express or omit certain conduct that ensures the judicial protection
>
> • Juridical personality . . .
>
> • Obligations. The obligation is understood as the existing juridical bond between the demand of a subjective right by its holder and the duty to fulfill the conduct based on the norm that is imposed on the other subject who belongs to the relationship … In the juridical field, the word personality has several meanings. It is often used to indicate the quality of a person to be considered as a center of juridical norms or as a subject of rights and obligations." *Id*. at 375–76.

[32] United States v. Carolene Products, 304 U.S. 144, 155 n.4 (1938).

[33] *See, e.g.*, Village of Freeport v. Barrella, 814 F.3d 594, 607 (2d Cir. 2016) (holding that, under federal law, "Hispanic" qualifies as a "race" when determining if a plaintiff can be afforded protection from discrimination under Title VII of the Civil Rights Act of 1964). More specifically, the Second Circuit considered the

is not encased within a clear biaxial This/That classification, category, or structure.[34] A subject is therefore not immured in a racial, ethnic, sex, gender, or other identity category that is fundamentally binary-based.

Legal identity lays out the relationship between the State and the juridical subject.[35] From the founding, when various human beings were not fully recognized as human in the fundamental law as expounded upon in the initial U.S. Constitution—such as African slaves, Native Americans, women, and children—to the post-Civil War era, and continuing through to the present, identity has played a key role in the evolution of the law and its relationship to those it ostensibly serves.[36] In the present time, however, it seems that there are major developments occurring on the domestic sociocultural and political stages which are premised on either substantially modifying, e.g., the inclusion of the LGBTQ identity group into the traditional heterosexual-based Male/Female marriage institution,[37] or eradiating, e.g., the notion of our society being at the threshold of moving beyond He/She,[38] the

question of whether or not "Hispanic" constitutes a racial category when interpreting Title VII *Id.* at 606–07. The court, relying on the interpretation that ethnicity is a race for purposes of 42 U.S.C. § 1981, and held that the same should hold true for purposes of Title VII. *Id*. at 607. *See* Scott B. Astrada & Marvin L. Astrada, *Being Latino in the 21st Century: Reexamining Politicized Identity & the Problem of Representation*, 20 U. PA. J.L. & SOC. CHANGE 245, 247–48 (2017).

[34] *See, e.g*., Karen Kopelson, *Dis/Integrating the Gay/Queer Binary: 'Reconstructed Identity Politics' for a Performative Pedagogy*, 65 COLLEGE ENGLISH 17, 28 (2002).

[35] *See, e.g.*, The Combahee River Collective, *Combahee River Collective: A Black Feminist Statement*, 9 OFF OUR BACKS INC. 6, 6–8 (1979).

[36] *See, e.g.*, Brown v. Board of Education of Topeka, 347 U.S. 483 (1954) (prohibiting racial segregation of public schools); Bailey v. Patterson, 369 U.S. 31 (1962) (prohibiting racial segregation of interstate and intrastate transportation facilities); Loving v. Virginia, 388 U.S. 1 (1967) (holding that state laws prohibiting inter-racial marriage are unconstitutional); Jones v. Alfred H. Mayer Co. 392 U.S. 409 (1968) (holding that federal law bars all racial discrimination (private or public) in the sale or rental of property); Lau v. Nichols, 414 U.S. 563 (1974) (finding that a city school system's failure to provide English language instruction to students of Chinese ancestry amounted to unlawful discrimination); Regents of the Univ. of. Cal. v. Bakke, 438 U.S. 265 (1978) (holding that a public university may take race into account as a factor in admissions decisions); Batson v. Kentucky, 476 U.S. 79 (1986) (finding that a state denies Black defendants equal protection when members of his/her race have been purposefully excluded from a jury).

[37] Obergefell v. Hodges, 135 S.Ct. 2584 (2015).

[38] *See* Katy Steinmetz, *Beyond 'He' or 'She'*, TIME (Mar. 16, 2017), http://time.com/4703058/time-cover-story-beyond-he-or-she/ ("In state legislatures, lawmakers are . . . debating the very meaning of the words *sex* and *gender* in debates

traditional binary basis upon which legal identity has been premised.[39] This especially seems to be the case since the emergence of the Civil Rights Movement of the 1950s and 1960s, itself premised on the integrity of a binary racial identity signifier (Black, the antithesis of its polar opposite, White).[40]

Many aspects of a subject's social and legal reality—rights, freedoms, responsibilities, duties, and obligations—are directly impacted when courts interpret identity-based legislation, broadly construed.[41] Law, in the form of judicial interpretation, has been employed to recognize and confer legal status, protections, and benefits upon those who fall within certain identity-based group classifications.[42] Race, ethnicity, and sexuality are exemplars of identity-based signifiers that manifest in the law.[43] The law is able to recognize and infuse such signifiers with substantive benefits and protections.[44] Examples would be affirmative action programs designed to remedy past racial discrimination and the designation of racially motivated criminal conduct as felonious.[45] These programs and laws exist because identity-signifiers, at the most basic level, are ostensibly based on and rooted in a binary opposition.[46] That is, each of the

over so-called 'bathroom bills.' Lawsuits alleging that sexual orientation and gender identity are covered under bans on sex discrimination are fleshing out the meaning of that word too. But it is clear that for many people these binaries are bedrocks they will fight to defend.").

[39] *See generally* David Taylor, *Social Identity and Social Policy: Engagements with Postmodern Theory*, 27 J. SOC. POL'Y. 329 (1998) (arguing for the importance of the concept of social identity in contemporary analyses of social policy).

[40] Roy L. Brooks & Kirsten Widner, *In Defense of the Black/White Binary: Reclaiming a Tradition of Civil Rights Scholarship*, 12 BERKELEY J. AFR.-AM. L. & POL'Y 107, 117–18 (2010).

[41] *See* Taylor, *supra* note 39.

[42] *See, e.g.*, Bailey v. Patterson, 369 U.S. 31 (1962) (finding that racial segregation of interstate or intrastate transportation facilities is a litigable issue); Batson v. Kentucky, 476 U.S. 79 (1986) (holding that a prosecutor's use of peremptory challenge in a criminal case dismissing jurors without stating a valid cause for doing so may not be used to exclude jurors based solely on their race).

[43] *See generally* KATHERINE J. ROSICH, RACE, ETHNICITY, AND THE CRIMINAL JUSTICE SYSTEM (Am. Soc. Ass'n ed., 2007) (discussing racial and ethnic disparities in the criminal justice system).

[44] *Id*.

[45] *See, e.g.*, cases cited *supra* note 42.

[46] *See, e.g.*, Fisher v. U. of Tex. (*Fisher I*), 133 S. Ct. 2411 (2013) (holding that the lower court had not applied the standard of strict scrutiny, articulated in *Grutter v.*

foregoing signifiers is correlated to a specific identity group that exists, in part, by virtue of shared experiences and traits that devolve from being paired with an opposite. Prominent binaries that the law has employed and concretized in legal discourse include Black/White, Heterosexual/Homosexual, and Male/Female, to name a few.[47] These are some basic binaries that, though they have been complicated by efforts to broaden the scope of inclusion or clarify the nuances of sub-identities that are subsumed by the basic binary, continue to provide the judicial expositors of law with a primary basis for the administration of justice.

In light of recent history, from the late 1960s through the present, especially with the establishment of modern politicized identity groups challenging the power dynamics and composition of the traditional identity binary, it seemed that the basic identity binary, because of its simplicity and distortionary effects, was on its way to becoming an outdated construct. One of the most radical challenges to the binary notion of oppression and revolt, for instance, was the Combahee River Collective, a Black feminist lesbian organization active in Boston from 1974 to 1980.[48] The Collective articulated a viable sub-identity within the mainstream feminist movement, which was comprised primarily of white women, and based, in large part, on Male/Female, White/Black, and Heterosexual/Homosexual identity

Bollinger and *Regents of the U. of Cal. v. Bakke*, to its admissions program. The Court's ruling in *Fisher I* took *Grutter* and *Bakke* as given and did not directly revisit the constitutionality of using race as a factor in college admissions); Wisconsin v. Mitchell, 508 U.S. 476 (1993) (holding that a state may punish offenders more harshly when considering whether a crime was committed or initially considered due to an intended victim's status in a protected class).

[47] There are numerous examples of the Court's use of binary-based identity as a basis for articulating and adjudicating identity-based cases. *See, e.g.*, Tennessee v. Lane, 541 U.S. 509, 529 (2004) (expounding on the able-bodied/disabled dichotomy); Frontiero v. Richardson, 411 U.S. 677, 684–85 (1973) (detailing historical sex-based distinctions memorialized in the Court's jurisprudence such as Bradwell v. Illinois, 83 U.S. 130, 142 (1873)). It should also be noted that, while the binary provides the super-structure of the juridical enterprise—Guilty/Not Guilty in criminal adjudication, for instance—we are very much aware that variegated permutations have emerged and that the binary is far more complex in actuality than a purely biaxial framework upon which law, politics, and public policy are based.

[48] *See* Wini Breines, *What's Love Got to Do with It? White Women, Black Women, and Feminism in the Movement Years*, 27 J. OF WOMEN IN CULTURE AND SOC'Y 1095, 1095–96 (2002) (discussing the importance of the Combahee River Statement in Black feminism).

binaries.[49] Although challenges to and rejection of traditional binary-based identity signifiers persist in the 21st century, the binary has proven quite resilient.

Certain indicators point to a trend toward rejecting basic identity binaries and signifiers. Specifically, millennials tend to reject traditional basic identity binaries, especially in the realms of gender, sexuality, and race/ethnicity.[50] Similarly, there are calls for minorities (and sub-groups within minorities) to be distinguished from an overarching umbrella identity and receive equal treatment under law as far as legal benefits and protections are concerned.[51] Macro- and micro-scale resistance in the form of rejecting gender and sexuality identities—blurring the lines between and among identities, as well as rejecting pronouns that reflect a basic binary, e.g., replacing Latino/Latina with LatinX[52]—seem to be indicative of a trend wherein basic identity-signifiers are being discarded for alternative formulations of identity.[53] Identities once considered viable and concrete in the recent past, such as sexuality, gender, race, and ethnicity, seem to be quite fluid, and perhaps not

[49] The Combahee River Collective, *Combahee River Collective: A Black Feminist Statement*, 9 OFF OUR BACKS INC. 6, 6–8 (1979).

[50] Jacqueline J. Kacen, *Girrrl Power and Boyyy Nature: The Past, Present, and Paradisal Future of Consumer Gender Identity*, 18 MKTG. INTELLIGENCE & PLAN. 345, 345–46 (2000); PEW RES. CENTER, MILLENNIALS: CONFIDENT. CONNECTED. OPEN TO CHANGE (Feb. 2010), http://www.pewsocialtrends.org/files/2010/10/millennials-confident-connected-open-to-change.pdf.

[51] *See* Marjua Estevez, *Can Afro-Latinos Please Move Beyond The "I'm Black, Too" Rhetoric?*, VIBE (Nov. 1, 2016), https://www.vibe.com/2016/11/afro-latinos-beyond-im-black-too/.

[52] Vanessa Reyes, *More Than Just an Image: Pop Culture Representations of Latinxs and the Immigration Debate*, AUGUSTANA DIGITAL COMMONS (Feb. 18, 2015), http://digitalcommons.augustana.edu/mabryaward/1/.

[53] *See generally* JUDITH S. KAUFMAN & DAVID A. POWELL, *The Meaning of Sexual Identity in the Twenty-First Century*, *in* THE MEANING OF SEXUAL IDENTITY IN THE TWENTY-FIRST CENTURY (Judith S. Kaufman & David A. Powell eds., 2014); Darryl Fears, *Rejecting Race as an Identity*, LA TIMES (Apr. 23, 1999), http://articles.latimes.com/1999/apr/23/news/mn-30243; Karen L. Suvemoto, *Redefining "Asian American" Identity: Reflections on Differentiating Ethnic and Racial Identities for Asian American Individuals and Communities*, *in* ASIAN AMERICANS: VULNERABLE POPULATIONS, MODEL INTERVENTIONS, AND CLARIFYING AGENDAS 115–26 (Lin Zhan ed., 2002).

amenable to the present sociocultural and political actuality as we head into the mid-21st century.[54]

The recent election, however, seems to challenge this trend, and can be viewed as an attempt by the Administration to pander to and base public policy on select identity groups' interests, such as White working class and White rural Americans, that have been based on the integrity of binary-based identity signifiers.[55] Basic identity-based signifiers such as Pro (Patriot)/Anti-American, White/Non-White, Citizen/Non-Citizen, and Self-reliant/Welfare recipient,[56] seem to be at the heart of the present Administration's sociopolitical, sociocultural, and economic agendas.[57]

B. Law, Binaries, and the Administration of Justice

In addition to the political and public policy realms, the law, in particular, has relied upon identity binaries in fashioning legal tools. For example, the federal judiciary uses them to assess race-based

---

[54] *Supra* notes 50–53.

[55] *See* Rich Morin, *Behind Trump's Win in Rural White America: Women Joined Men in Backing Him*, PEW RES. CENTER (Nov. 17, 2016), http://www.pewresearch.org/fact-tank/2016/11/17/behind-trumps-win-in-rural-white-america-women-joined-men-in-backing-him/.

[56] President Trump recently stated: "I just don't want a poor person" in the billionaire-laden cabinet. "'Somebody said, 'Why'd you appoint rich person to be in charge of the economy,' said Trump, a billionaire himself. 'I said, 'Because that's the kind of thinking we want.'" "'They're representing the country. They don't want the money. They're representing the country. They had to give up a lot to take these jobs. They gave up a lot,' he said." Eugene Scott, *Trump: 'I Just Don't Want a Poor Person' in Cabinet Economic Jobs*, CNN (June 22, 2017), http://www.cnn.com/2017/06/22/politics/donald-trump-poor-person-cabinet/index.html.

[57] The Trump Administration has tried to push national security-based travel bans and border wall policies explicitly premised on politicized identity as well as socioeconomic policies premised on particular politicized identity groups. *See, e.g.*, Exec. Order No. 13788, 82 Fed. Reg. 18837 (Apr. 18, 2017) (Exec. Order on Buy American and Hire American); Exec. Order No. 13780, 82 Fed. Reg. 13209 (Mar. 6, 2017) (Exec. Order on The Nation From Foreign Terrorist Entry Into The United States); Exec. Order No. 13795, 82 Fed. Reg. 20815 (Apr. 28, 2017) (Exec. Order Implementing an America-First Offshore Energy Strategy); Traci Tong, *Will the Travel Ban and Building a Wall Fix America's Immigration Problems?*, PRI'S THE WORLD (Mar. 7, 2017), https://www.pri.org/stories/2017-03-07/will-travel-ban-and-building-wall-fix-americas-immigration-problems.

preferential programs in education and employment,[58] and applies strict scrutiny to race-based litigation to adjudicate claims based on identity.[59] These developments have been viewed, generally speaking, positively, and reflect a strategy of inclusion of the Other that can be traced back to the NAACP's use of the federal courts to recognize and reify a distinctly racial (Black contrasted with White) American identity that the law was required to recognize and protect.[60] Identities, especially those premised on basic binary signifiers such as Black/White, Equal/Unequal, and Segregated/Integrated, resulted in the law being able to fashion legal tools and remedies to identify and protect those who belonged to legally cognizable and protected groups.[61]

Yet, it seems that identities in the present have become more complex, fragmented, disparate, and expansively inclusive—to the point where the idea of identity may have become overly porous, easily breached, or so nuanced with sub-identities that the initial basic binary loses its integrity, coherency, and fails to provide clear criteria for defining any discernable identity.[62] Perhaps the most prevalent problem with legally redefining identity is defining it in a way that will withstand

[58] The Court has declared that race-based affirmative action programs, "imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny." Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995); *see also* Richmond v. Croson, 488 U.S. 469 (1989) (holding that affirmative action programs are only permitted when there is a showing that the program's aim is to eliminate effects of past discrimination).

[59] *See* Local 28 of the Sheet Metal Workers Int'l. v. EEOC, 478 U.S. 421, 474 (1986) ("The purpose of affirmative action is . . . to dismantle prior patterns of employment discrimination and to prevent discrimination in the future.").

[60] *See, e.g.*, Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Okla. State Regents, 339 U.S. 637 (1950); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954).

[61] This is a practice with a long history. *See* Buchanan v. Warley, 245 U.S. 60 (1917) (holding unanimously that a Louisville, Ky. city ordinance, prohibiting the sale of real property to blacks in white-majority neighborhoods or buildings and vice versa, violated the Fourteenth Amendment's protections for freedom (liberty) of contract).

[62] An extreme example of this phenomenon is the case of Rachel Dolezal, a racially white woman who claims to be trans-racial, and for whom, it appears, Black and Blackness are not socially constructed states of affairs premised on empirical experience and physical traits but which possess an immanent realness, substance, that defies the binary logic of the traditional Black/White or White/Other racial binaries. Chris McGreal, *Rachel Dolezal: "I wasn't identifying as black to upset people. I was being me,"* THE GUARDIAN (Dec. 13, 2015), https://www.theguardian.com/us-news/2015/dec/13/rachel-dolezal-i-wasnt-identifying-as-black-to-upset-people-i-was-being-me.

the test of time. Justice Traynor's opinion in *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*,[63] which addresses the difficulty in assigning a singular meaning to a particular word, can also be applied to the inherent problem in attempting to fix concepts and designations:

> If words had absolute and constant references, it might be possible to discover . . . intention in the words themselves and in the manner in which they were arranged. Words, however, do not have absolute and constant referents . . . The meaning of particular words or groups of words varies with the . . . "verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges) . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.[64]

Law, and the courts interpreting the law, have traditionally relied upon oversimplified, politicized identity-binaries that inform identity-signifiers.[65] This is significant because, as a celebrated observer of American politics has noted,

> [s]carcely any question arises in the United States that does not become, sooner or later, a subject of judicial debate; hence all parties are obliged to borrow, in their daily controversies, the ideas, and even the language, usual in judicial proceedings . . . . The language of the law thus becomes, in some measure, a vulgar tongue; the spirit of the law, which is produced in . . . the courts of justice, gradually penetrates beyond their walls into the

[63] 442 P.2d 641 (1968).

[64] *Id.* at 644–45 (quoting Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965)).

[65] *See* DANIEL CHANDLER, SEMIOTICS: THE BASICS 14–15 (2d ed. 2007) ("Focusing on linguistic signs (such as words), Saussure defined a sign as being composed of a 'signifier' (signifiant) and a 'signified' (signifié). Contemporary commentators tend to describe the signifier as the form that the sign takes and the signified as the concept to which it refers."). An identity signifier is thus comprised of a signifier, e.g., Black, Gay, or Latino, and a signified concept, e.g., Racial, Sexual, or Ethnic Identity.

> bosom of society, . . . so that at last the whole people contracts the habits and the tastes of the judicial magistrate.[66]

The parallel contexts, legal and social, exist alongside each other, continuously influencing and acting upon each other.[67] As a result, some sub-identities that have not been integrated are subjugated, and exist on the periphery of the binary, while others are in essence silenced because they are unable to be expressed in the dominant context.[68] The binary nature of identity, which includes the political and the legal, establishes what Michel Foucault has termed "grids of specification," which he defines as "the systems according to which the different 'kinds of [knowledge] are divided, contrasted, related, regrouped, classified, derived from one another as objects of … discourse.'"[69] Identity emerges within these grids, which we conceive of as binaries. These binaries delineate and make "real" the abstract space in which the law processes identity-based cases and controversies.[70] The federal courts' racial and civil rights jurisprudence, such as gauging the constitutionality of affirmative action programs in higher education, is a prime example of this space.[71]

The binary nature of the legal subject limits how one can define one's self in lived social experience.[72] The essential "tradeoff" between the efficiency of the binary and its inclusive nature, is that the law, in

---

[66] 1 ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 301–02 (Henry Reeve trans., D. Appleton & Co. 1904).

[67] *See, e.g.*, Megan Davidson, *Seeking Refuge Under the Umbrella: Inclusion, Exclusion, and Organizing Within the Category Transgender*, 4 SEXUALITY RES. AND SOC. POL'Y 60, 75 (2007).

[68] *Id*.

[69] MICHAEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE 42 (1982). "[G]rids of specification: these are the systems according to which the different 'kinds of [knowledge] are divided, contrasted, related, regrouped, classified, derived from one another as objects of . . . discourse." *Id*.

[70] *Id*.

[71] *See* David L. Gregory & Sarah Mannix, *Past as Prologue in the Affirmative Action Jurisprudence of the Supreme Court: Reflections on* Fisher v. University of Texas at Austin *and* Schuette v. Coalition to Defend Affirmative Action, 89 ST. JOHN'S L. REV. 499, 546 (2015).

[72] *See The Trouble With Diversity: An Argument Between Walter Benn Michaels And Katha Pollitt. Scott Stossel Moderates. The Atlantic Day of Ideas, N. Y. Public Library, South Court Auditorium*, LIVE FROM THE NYPL (Nov. 18, 2006), http://www.newyorkpubliclibrary.com/sites/default/files/events/diversity111806.pdf.

its limitation of perceiving juridical subjects in binary terms, cannot give a voice to subjects that exist, socially, outside a traditional binary structure.[73] Here is the crux of what Jean F. Lyotard labels "the differend," that is,

> the case where the plaintiff is divested of the means to argue and becomes for that reason a victim. If the addressor, the addressee, and the sense of the testimony are neutralized, everything takes place as if there were no damages [ ]. A case of differend between two parties takes place when the 'regulation' of the conflict that opposes them is done in the idiom of one of the parties while the wrong suffered by the other is not signified in that idiom.[74]

This silence is precisely what is at stake when the law cannot effectively "hear" a subject. The law does not oppress the non-binary subject, so much as it does not empower it to verbalize its needs and interests.[75] The language of the non-binary exists outside the "establishment procedure,"[76] and thus becomes only silence. The experience of a subject that is divested of speech as a result of not speaking the language of the law is of particular interest because the lived experience is bifurcated between the law that imposes an ulterior identity onto the subject, one that is un-relatable, and a lived experience that substantially differs from that identity.[77]

II. THE POLITICIZED AND BINARY-BASED NATURE OF IDENTITY IN LAW

This section discusses the politicized nature of binary-based identity and its relationship to the binary in the law. Politicized identity is premised on a basic binary basis.[78] Formal identity-based groups such as the National Council of La Raza or the NAACP create, to some

[73] *Id*.
[74] JEAN-FRANÇOIS LYOTARD, THE DIFFEREND: PHRASES IN DISPUTE 9 (GeorgesVan Den Abbeele, trans., Univ. Minn. Press 1988) (1983).
[75] *Id*. at 10.
[76] *Id*.
[77] *Id*.
[78] *See* Mary Bernstein, *Identity Politics*, 31 ANN. REV. OF SOC. 47, 56, 62 (2005).

extent, exclusive political enclaves based on a shared racial or ethnic history, traits, and/or culture, that are defined vis-à-vis an Other. Politicized identity, itself a creature of history and culture, though distinct from legal identity, has been utilized by the courts to adjudicate cases and controversies that hinge on identity classifications.[79] The question is not whether there is disconnect between identity based on lived experience and legal identity, but rather how radical the break is between the two. Turning to the question of how one experiences social identity, it is useful to draw from Martin Heidegger's essay concerned with how one "dwells"[80] as a subject. Applying this framework to understand how a subject experiences its politicized identity, and how that identity manifests in the law, provides additional insight into our inquiry. This section thus examines how the binary informs the present politics of identity, and how traditional binary-based identity signifiers continue to provide a framework for and insight into how identity and history impact dwelling in the present age.

In the context of exploring a subject's lived experience outside of a juridical structure, Heidegger's analysis of "dwelling"[81] is particularly pertinent. The central question of dwelling is how a subject manifests in law and policy within a continuously evolving sociocultural and historical context.[82] Dwelling is, to a large extent, sociocultural and historical in nature, and the foregoing actively shape the dwelling space within which a subject is defined, and sets the limits and possibilities of a subject's perception and interpretation.[83] For example, the idea of race, especially the legal definition of who is Black or Hispanic, emerges throughout various historical contexts—religious notions of race to scientific notions that have given way to a primarily sociocultural definition of race.[84] The various structural components of identity, e.g., culture, race, ethnicity, gender, ideology, and geography,

[79] *Id*.
[80] *See* MARTIN HEIDEGGER, *Building Dwelling Thinking*, *in* POETRY, LANGUAGE, THOUGHT 141–60 (Albert Hofstadter, trans., 1971).
[81] *Id*.
[82] *Id*.
[83] *Id*.
[84] *See* Bernstein, *supra* note 78.

are all inextricably linked as the background, the dwelling, from which a subject emerges and resides in.[85]

Ultimately, a subject dwells within its culture, which provides a behavioral system for a subject to interpret and define the world. Culture is the qualitative basis for the variability explaining how subjects dwell in an identity space, and how judges arrive at very different interpretations of the law. Culture lays the foundation for action, conduct, strategies, and thought, which finds ultimate expression in policy.[86] In the case of identity-based cases and controversies, the courts have approached various identity-based statuses, such as race, ethnicity, and national origin, from a cultural lens; the constitutional and legal reasoning employed and conclusions reached are tinctured with a culturally informed binary.[87] Culture can be conceived as a conceptual catalogue that catalogues possible interpretations of an experience, and political culture as a subset that itemizes the political dimension of experience.[88] Depending on the cultural legacy inherited by a particular society, social subjects will have an inventory of possible courses of action from which to choose.[89] The inventory of options contributes to identity, to what someone is or is not.[90] Groups and individuals grasp and comprehend their "essence," distinctive identity, by identifying

[85] *See* Paul Harrison, *"How shall I say it…?" Relating the Non-Relational*, 39 ENV'T AND PLAN. 590, 595 (2007) (discussing the elements of the self in relation to suffering).

[86] *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (holding that a state statutory scheme to prevent marriages between persons solely on the basis of racial classifications violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment); Hernandez v. New York, 500 U.S. 352 (1991) (holding that a prosecutor's peremptory challenges of Latino jurors based on doubts about the ability of such jurors to defer to official interpreter's translation of Spanish-language testimony did not violate the Equal Protection Clause); Hernandez v. Texas, 347 U.S. 475, 479 (1954) (holding that an equal protection of the laws is not directed solely against discrimination between whites and blacks; exclusion of eligible persons from jury service solely because of their ancestry or national origin is prohibited by the Fourteenth Amendment).

[87] *See, e.g.*, cases cited *supra* note 86.

[88] *See generally* Hazel Rose Markus & Shinobu Kitayama, *Culture and the Self: Implications for Cognition, Emotion, and Motivation*, 98 PSYCHOL. REV. 224 (1991) (discussing how the view of self is influenced by culture).

[89] *Id.* at 228.

[90] *See generally* JACQUES DERRIDA, BASIC WRITINGS (Barry Stocker ed., 2007) (providing select translations of Derrida's seminal works on deconstruction).

what they are not.[91] Culture thus consists of what Clifford Geertz dubs socially constructed "structures of meaning"[92] that mediate the terms that subjects of a polity utilize to situate, organize, and define relationships between space, place, and identity.[93] Knowledge is effectively transmitted spatially, temporally, via a cultural superstructure.[94] Culture thus effectively constrains rationality, so as to produce variegated sub-sets of perception and interest articulation in the realm of identity politics and law.[95]

The binary is so pervasive that it structures meta-discourse and narratives across various dimensions, e.g., identity, ideology, and politics.[96] The binary has been effective in providing the courts with a mechanism by which to effectively adjudicate cases and controversies that are identity-based. "[B]inaries serve as crucial legitimating reference points in the vocabulary"[97] of the courts in positing law that then informs and delineates policy. Court opinions, the textual products of interpretation, provide such reference points. The Court's interpretation of the Constitution—from *Plessy*[98] to *Brown*[99]

[91] *Id*.
[92] CLIFFORD GEERTZ, THE INTERPRETATION OF CULTURES: SELECTED ESSAYS 12–13 (1973).
[93] *Id*.
[94] *See generally* RAYMOND WILLIAMS, CULTURE AND MATERIALISM (rev. ed. 2006) (examining the role of power structures in setting culture and disseminating ideas).
[95] *See* Michael Walzer, *On the Role of Symbolism in Political Thought*, 82 POL. SCI. Q. 191, 194 (1967); SUSANNE K. LANGER, PHILOSOPHY IN A NEW KEY (3d ed. 1957) (describing the interrelationship between cultural norms and expressions and perceptions of reality).
[96] *See, e.g.*, Karen A. Cerulo, *Identity Construction: New Issues, New Directions*, 23 ANN. REV. OF SOC. 385 (1997) (discussing the shift from the "me" focus to a context-based analysis in sociological research); Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333 (2016) (discussing how individuals derive value form association with various binary groups).
[97] Cyrus Tata, *Sentencing as Craftwork and the Binary Epistemologies of the Discretionary Decision Process*, 16 SOC. & LEGAL STUD. 425, 448 (2007).
[98] Plessy v. Ferguson, 163 U.S. 537 (1896) (holding that separate but equal facilities did not violate the Thirteenth or Fourteenth Amendments).
[99] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954) (overturned *Plessy v. Ferguson* holding that separate educational facilities are not equal).

(White/Black binary), *Hardwick*[100] to *Lawrence*[101] (Heterosexual/Homosexual binary), for instance—is a manner of initiating "new" conceptual frameworks for comprehending legal actuality. The aforementioned opinions are exemplars of judicial opinions as a form of policy, and how opinions can retain high degrees of continuity but can also accommodate "change" vis-à-vis circumstances. Applying a cultural lens to identity, law, and policy better equips one to identify and gauge the influence of the varied cognitive maps that anchor and encapsulate thought and possibility, as utilized by interpreters such as Judge Thompson in her dissent in *Kosilek*.[102]

Court opinions, as expositions of truth, are, among other things, interpretations that seek to provide answers that are "part of a much larger network or system of questions and answers and further questions instead of being merely discrete self-contained units of information."[103] Behavior does not take place in a vacuum; in the case of interpretation, culture exerts a gravitational pull, so to speak, on the interminable ebb and flow of the meaning of identity in the law.[104] Identity (and policy) not only reflects the values, norms, content, and character of the interpreter, but more importantly the cultural superstructure that informs policy.[105] Court opinions establish a corpus of truth, a regime of truth based on knowledge that the courts apply and obtain through the interpretive process.[106] Opinions constitute a textual and ideational structure upon which meaning is produced and produces.[107] Culture serves to define, anchor, legitimate, and contextualize interpretation.

---

[100] Bowers v. Hardwick, 478 U.S. 186 (1986) (overturning the lower court's decision and holding that the Due Process Clause of the Fourteenth Amendment did not protect homosexual sex even in the privacy of one's bedroom).

[101] Lawrence v. Texas, 539 U.S. 558 (2003) (overturning *Bowers v. Hardwick* holding that the court should not criminalize acts in relationships outside of injury or abuse).

[102] Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014) (arguing that deference was due to the district court judge in a case concerning the denial of sex reassignment surgery to an inmate).

[103] DAVID FOSTER WALLACE, OBLIVION 131 (2004). *See also* J. B. Ruhl, *Law's Complexity: A Primer*, 24 GA. ST. U. L. REV. 885, 888 (2008).

[104] Ruhl, *supra* note 103, at 888.

[105] *See id*.

[106] *See, e.g.*, Jessica Knouse, *From Identity Politics to Ideology Politics*, 2009 UTAH L. REV. 749, 750 (2009).

[107] *Id*.

Interpretation and resultant policy are emplaced within culture, and are, among other things, expressions of the cultural orientations of an elite that exercises power in the legal context.[108] Culture has explanatory power when analyzing law and policy because it encompasses a "'complex whole which includes knowledge, belief, art, morals, law, Custom, and any other capabilities and habits acquired by man as a member of society' . . . [C]ulture . . . manifest[s] in customs, in beliefs, and in forms of government.'"[109] It is in this context that culture is the foundation that grounds the binary structure, while also privileging one term over the other (e.g., White/Black, Male/Female).[110]

III. THE INTEGRATED BINARY: LEGAL DISCOURSE, IDENTITY, AND THE JURIDICAL SUBJECT

[108] *See, e.g.*, Garcia v. Gloor, 618 F.2d 264, 270–71 (5th Cir. 1980) (upholding a district court ruling that an employer's policy requiring employees to speak English only while at work did not violate the Civil Rights Act of 1964 prohibition against national origin discrimination). 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. However, the language a person who is multi-lingual elects to speak at a particular time is by definition a matter of choice . . . We do not consider rules that turn on the language used in an employee's home, the one he chooses to speak when not at work or the tongue spoken by his parents or grandparents. In some circumstances, the ability to speak or the speaking of a language other than English might be equated with national origin, but this case concerns only a requirement that persons capable of speaking English do so while on duty. That this rule prevents some employees, like Mr. Garcia, from exercising a preference to converse in Spanish does not convert it into discrimination based on national origin. Reduced to its simplest, the claim is 'others like to speak English on the job and do so without penalty. Speaking Spanish is very important to me and is inherent in my ancestral national origin. Therefore, I should be permitted to speak it and the denial to me of that preference so important to my self-identity is statutorily forbidden.' The argument thus reduces itself to a contention that the statute commands employers to permit employees to speak the tongue they prefer. We do not think the statute permits that interpretation, whether the preference be slight or strong or even one closely related to self-identity. Mr. Garcia and the EEOC would have us adopt a standard that the employer's business needs must be accomplished in the manner that appears to us to be the least restrictive. The statute does not give the judiciary such latitude in the absence of discrimination." *Id.*

[109] Robert C. Tucker, *Culture, Political Culture, and Communist Society*, 88 POL. SCI. Q. 173, 173 (1973) (internal citation omitted).

[110] *Id*.

A. Carolene Products' *Footnote Four and Concretizing the Binary*

Binaries continue to shape the courts' approach to identity.[111] To undermine traditional notions of a legal binary identity is to blur the lines between the present and the past—to recognize the historical subjectivity of one's *now* and to destabilize the basis upon which an entire jurisprudence has been built.[112] The Court's Footnote Four in *United States v. Carolene Products Co*. is a vivid exemplar of law reflecting and reifying an historically based identity binary in the form of "discrete and insular minorities."[113] Such minorities, analytically and legally speaking, have pervaded the law; conceptually, they embody a legal-rational construct that permeates legal actuality as produced by court interpretation and opinions.[114] The binary has thus been the basis of the most "progressive" innovations in law and policy emanating from the bench.[115] In light of this, it seems paradoxical and problematic that the political and public policy realms are reflecting a rejection of the very basis that the law has employed to protect groups that have faced historical discrimination, violence, and exclusion from full and substantive participation in the polity.

---

[111] *See generally* Julie A. Greenberg, *Deconstructing Binary Race and Sex Categories: A Comparison of the Multiracial and Transgendered Experience*, 39 SAN DIEGO L. REV. 917, 942 (2002) (discussing how the binaries present in race classifications systems can provide solutions for the current gender binaries).

[112] *See* Planned Parenthood v. Casey, 505 U.S. 833, 854–55 (1992) ("[N]o judicial system could do society's work if it eyed each issue afresh in every case that it raised . . . the very concept of the rule of law underlying our own Constitution requires such continuity over time that a respect for precedent is, by definition, indispensable." (internal citations omitted)).

[113] United States v. Carolene Products, 304 U.S. 144, 153 n.4 (1938).

[114] *See, e.g.*, Adarand Constructors v. Pena, 515 U.S. 200 (1995) (holding that "race-based affirmative action programs, "imposed by whatever federal, state, or local governmental actor, must be analyzed by a reviewing court under strict scrutiny."); Sugarman v. Dougall, 413 U.S. 634, 642–46 (1973) (holding that aliens are a discrete and insular minority and therefore a statute barring aliens public employment on basis of citizenship).

[115] *See* CARLOS BALL ET AL., CASES AND MATERIALS ON SEXUALITY, GENDER IDENTITY, AND THE LAW (6th ed. 2016); DAVID M. ENGEL & FRANK W. MUNGER, RIGHTS OF INCLUSION: LAW AND IDENTITY IN THE LIFE STORIES OF AMERICANS WITH DISABILITIES 14–15 (2003) (explaining the negative impact of the tendency to consider those with disabilities to be a homogenous class).

One of the most famous footnotes in United States Supreme Court jurisprudence, i.e., Footnote Four from *Carolene Products*,[116] captures the entrenchment of the binary. It is, in Justice Powell's words, "the most celebrated footnote in constitutional law."[117] Although Footnote Four did not give rise to the binary nor mark the prominent moment when the Court embedded a binary framework into its jurisprudence,[118] it does mark a very clear moment in time when the binary is explicitly articulated as being an integral part of the genesis of modern equal protection jurisprudence and clarifies the juridical subject in the context of Court interpretation.[119] The Court ponders, in Footnote Four, "whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry."[120] Footnote Four becomes the self-referential basis upon which, among other things, the Court has based its tiered scrutiny framework, and adjudges the manner in which a right translates into a constitutional protection.[121]

Although Footnote Four is multidimensional, it is important to keep in mind "the fact that the *Carolene Products* Footnote is about values."[122] The primary value that Footnote Four memorializes is that of the Court's power to review legislation to further the protection of minority rights—minorities that are viewed in and derive protection from a basic binary basis.[123] The binary is one that can be characterized

---

[116] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).
[117] Lewis F. Powell, Jr., *"Carolene Products" Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982).
[118] *See e.g.*, Nixon v. Condon, 286 U.S. 73, 89 (1932) & Nixon v. Herndon, 273 U.S. 536, 541 (1926) (using the Black/White binary to find that a party cannot exclude blacks from voting in its primary); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (Private/Public binary to hold that states cannot require children to attend public, rather than parochial, schools). *See also* Meyer v. Nebraska, 262 U.S. 390, 401 (1923) (relying on a Citizen Nationalist/Alien Foreigner binary to find that states cannot forbid the teaching of a foreign language).
[119] *See e.g.*, cases cited *supra* note 118.
[120] *Carolene Products*, 304 U.S. at 153 n.4.
[121] *See* Peter Linzer, *The Carolene Products Footnote and the Preferred Position of Individual Rights: Louis Lusky and John Hart Ely vs. Harlan Fiske Stone*, 12 CONST. COMMENT. 277, 283 (1995).
[122] *Id.* at 302.
[123] *Id.* at 284–85.

as positing "insiders" and "outsiders" within the law and, by implication, in the greater societal context.[124] The identity-based binary is thus the fulcrum upon which courts are able to determine insider-outsider status and to apply the law accordingly.[125]

Granted, "discrete," "insular," and "minorities" are not explicitly defined, nor is it clear what kind of "prejudice" said "minorities"[126] must be subject to trigger judicial protection. A reasonable interpretation of the terms, as used in the Footnote, is that the minority groups to whom it refers to

> are not able to play their proper role in democratic politics. They are "discrete" in the sense that they are separate in some way, identifiable as distinct from the rest of society. They are "insular" in the sense that other groups will not form coalitions with them—and, critically, not because of a lack of common interests but because of "prejudice."[127]

Various jurists and parties to lawsuits have construed Footnote Four to encompass sundry groups as "discrete and insular minorities" entitled to judicial protection.[128] For example, relying upon Footnote

---

[124] *See. e.g.*, Lea Brilmayer, *Carolene, Conflicts, and the Fate of the Inside-Outsider*, 134 U. PA L. REV. 1291, 1293 (1986).
[125] *See id*. at 1316–19.
[126] *See* Dunnavant, *supra* note 23.
[127] David A. Strauss, *Is Carolene Products Obsolete?*, 2010 U. ILL. L. REV. 1251, 1257 (2010).
[128] *See, e.g.*, Matthews v. Lucas, 427 U.S. 495, 504 (1976) (arguing that illegitimate children were a suspect class and therefore classifications that disadvantaged them should be subject to strict scrutiny); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 461–65 (1985) (Marshall, J., dissenting) (stating that mentally retarded persons have been subjected to a long history of discrimination and should be viewed as a suspect class); James v. Valtierra, 402 U.S. 137, 144–45 (1971) (Marshall, J., dissenting) (stating that legislative classifications that discriminate on the basis of poverty are "suspect" and demand "exacting judicial scrutiny"); Rowland v. Mad River Sch. Dist., 470 U.S. 1009, 1012–17 (1985) (Brennan, J., dissenting from denial of cert.) (arguing that homosexuals constitute a significant and insular minority of this country's population, and that discrimination has in fact deprived this group of fundamental rights); Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313 (1976) (stating that "old age does not define a 'discrete and insular' group"); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973) (concluding that residents of poorer school districts were not "relegated to such a

Four in *Washington v. Seattle School District No. 1*,[129] the Court held that

> when the State's allocation of power places unusual burdens on the ability of racial groups to enact legislation specifically designed to overcome the "special condition" of prejudice, the governmental action seriously "curtail[s] the operation of those political processes ordinarily to be relied upon to protect minorities." In a most direct sense, this implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[130]

It seems, therefore, that binary-based identity has been key in the application of Footnote Four's interpretative framework.

A list of such physical/behavioral trait-based minorities "arguably includes not only groups defined in terms of race and national origin," but also Sane/Mentally Ill, Rich/Poor, Heterosexual/Homosexual, and Adult/Child.[131] The *Carolene Products* identity-based binary in Footnote Four utilizes and reaffirms the binary as the base of recognition, reasoning, interpretation, and adjudication.[132] When articulated in 1938, race was perhaps the clearest, preeminent binary-based identity signifier that the Court (and the lower federal and state courts) could emplace within Footnote Four's interpretive architecture.[133] In light of Reconstruction and the Post-Reconstruction South's implementation of Jim Crow laws, the Black/White binary, which could readily be distilled from the historical experience of both races, fit into the "discrete and insular"[134] criteria of Footnote Four, thereby triggering judicial scrutiny and protection. As construed by the Court, equal protection has been squarely built upon a binary-based

position of political powerlessness as to command extraordinary protection from the majoritarian political process").

[129] Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 486 (1982).

[130] United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

[131] Brilmayer, *supra* note 124, at 1295.

[132] *Carolene Products*, 304 U.S. at 153 n.4.

[133] *Id*.

[134] Brilmayer, *supra* note 124, at 1295.

edifice; the binary was and remains key to making sense of legal facts, the law, and its application.[135]

B. Beyond Footnote Four

Footnote Four has become part of a larger legal meta-discourse on how the Court will view identity, generally speaking, and this of course impacts lower federal and state courts as well. The Court's employment of binary-based identity signifiers is part of a long history of race-conscious legislation and judicial opinions.[136] The modern manifestation of affirmative action, for instance, which began with the Philadelphia Plan[137] in the late 1960s and has been the basis of racial identity-based cases such as *Richmond v. J.A. Croson Co.*,[138] *Metro*

[135] *See* Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) ("'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decision-maker . . . selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." (internal citation omitted)).

[136] *See, e.g.*, cases cited *supra* note 118.

[137] *See* Nicholas Pedriana & Robin Stryker, *Political Culture Wars 1960s Style: Equal Employment Opportunity–Affirmative Action Law and the Philadelphia Plan*, 103 AM. J. SOC. 633, 635 (1997). The 1969 Philadelphia Plan has been described as "'the first effective use of affirmative action to implement civil rights legislation directing employers to guarantee equal employment opportunity.' As the first highly visible federal government affirmative action initiative in the wake of Title VII of the Civil Rights Act of 1964, the Philadelphia Plan crystallized arguments of both affirmative action's early opponents and its early supporters. Just as past policies shaped how both sides crafted their arguments about the Philadelphia Plan, these arguments and their resolution fed forward to help shape later government employment policy." *Id.*

[138] City of Richmond v. J.A. Croson Co., 488 U.S. 469, 474 (1989) (plurality opinion).

Broad. Inc. v. FCC,[139] and *United Steelworkers of Am. v. Weber*,[140] is thoroughly steeped in binary-based identity. Binary-based identity has been the basis for articulating, examining, discussing, debating, arguing, and impassioned contestation over what constitutes correct/proper law and policy.[141] It is an indispensable part of the legislative and interpretive process.

In the case of the binary-based identity signifier, despite its simplification of complex reality, it has managed to remain a viable aspect of the legal enterprise in adjudicating cases and controversies because, despite the artificial nature of dyadic frameworks, as the Court noted long ago, "[c]ontroversies have arisen and will no doubt arise again in respect of the proper classification of individuals in border line cases."[142] Indeed, the binary has proven resilient in the face of progressive change, and has been (and can be) maintained to retain the status quo regarding identity-based signifiers. For example, in *Gong Lum v. Rice*,[143] the Court, in affirming an example of segregation based on race, declared that

> [m]ost of the cases cited arose, it is true, over the establishment of separate schools as between white pupils and black pupils;

[139] Metro Broad., Inc. v. FCC, 497 U.S. 547, 552–53 (1990), *overruled by* Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 201 (1995). Justice Brennan's majority opinion declared: "We hold that benign race-conscious measures mandated by Congress—even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination—are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives." *Id.* at 564–65. For an example of gender and its binary nature, *see* Craig v. Boren, 429 U.S. 190, 197 (1976) ("[C]lassifications by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.").

[140] *See* United Steelworkers of Am. v. Weber, 443 U.S. 193, 204 (1979) (analyzing Title VII, the Court declared that, it "would be ironic indeed if a law triggered by a Nation's concern over centuries of racial injustice and intended to improve the lot of those who had 'been excluded from the American dream for so long' constituted the first legislative prohibition of all voluntary, private, race-conscious efforts to abolish traditional patterns of racial segregation and hierarchy.").

[141] *See, e.g.*, Greta Fowler Snyder, *Multivalent Recognition: Between Fixity and Fluidity in Identity Politics*, 74 THE J. OF POL. 249, 251 (2012); Rogers Brubaker & Frederick Cooper, *Beyond "Identity,"* 29 THEORY & SOC. 1, 3 (2000).

[142] Takao Ozawa v. United States, 260 U.S. 178, 198 (1922).

[143] Gong Lum v. Rice, 275 U.S. 78 (1927).

> but we cannot think that the question [of the legality of segregation] is any different, or that any different result can be reached, assuming the cases above cited to be rightly decided, where the issue is as between white pupils and the pupils of the yellow races.[144]

Courts that have construed the law to step significantly outside of the traditional identity-based binaries have been met with resistance. In the case of *Kosilek v. Spencer*,[145] discussed *supra*, its reversal by the First Circuit[146] could be recast in terms of protecting and reifying the sex/gender binary that is essential to the continuity that has undergirded how the law conceives and interprets legal protections for identity groups, especially "discrete and insular minorities."[147] The tension and dissonance between the district court's legal reasoning and conclusions and the appellate court's reasoning and conclusions may point to the "collective anxiety in our culture surrounding gender, and anyone who may bring light to the inadequacy of the gender binary, by blurring the lines between 'male' and 'female.'"[148] Judge Thompson, in her dissent also directly confronts the conflict between the integrity of the binary and challenges to its usage in grounding the law's approach to identity-based signifiers and the judicial provision of remedies and protections.[149] Judge Thompson contends that the majority's opinion "aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary."[150] In the case of the sex/gender binary:

> It is widely accepted in the dominant culture that there are two sexes and two genders and no room for anything in between. We organize our daily interactions, our values, our social institutions, the law, our very understanding of reality, around these assumptions. One is not fully cognizable as human without a designation as male or female. The categories of sex and gender and the differences we ascribe to them are legitimized

[144] *Id.* at 87.
[145] *See supra* note 24.
[146] Kosilek v. Spencer, 774 F.3d 63 (1st Cir. 2014).
[147] *Id*.
[148] Dunnavant, *supra* note 23, at 18.
[149] *Kosilek*, 774 F.3d at 96-113 (Thompson, J., dissenting).
[150] *Id*. at 113 (Thompson, J., dissenting).

> through naturalizing them, insisting that they are based on real, inevitable differences and thus go unquestioned. Yet as gender theorists have long known, this binary system is not natural, but socially and politically constructed.[151]

Kosilek v. Spencer points to the contest that is taking place in the realms of law and policy between time-tested binaries and the stability and "objective" basis they provide vis-à-vis identity signifiers.[152] The case exemplifies the challenges based on fluidity and inclusiveness that the binary eschews by its dyadic nature of making complex states of affairs more manageable for the purpose of pragmatic and prudential management of the administration of justice.[153]

When moving beyond the binary, certain subjects and groups may experience serious cognitive dissonance as to what is believed about the world and one's place in it—as well as conceptions of Self, Other, and World.[154] What defines the ethos and essence of what it means to be and why, may also be called into question for those same groups. With the introduction of alternative voices, interpretations, worldviews, and experiences, the simplified binary becomes subject to destabilization. When "one recognizes the emergence of multiple different voices—including … feminist, critical race, and more recently, gay and lesbian theorists—then modernist claims to identify

---

[151] Dunnavant, *supra* note 23, at 20. *See also* JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY 147 (1999) (discussing how the repeated naming of sexual differences creates the appearance of an organic sexuality regarding a binary of Male/Female). For a discussion of the relationship between sex, inter-sexed, and law and policy, *see* Sara R. Benson, *Hacking The Gender Binary Myth: Recognizing Fundamental Rights For The Inter-Sexed*, 12 CARDOZO J.L. & GENDER 31 (2005).

[152] *See generally* Jessica A. Clarke, *Identity and Form*, 103 CAL. L. REV. 799 (2015) (identifying and describing the phenomenon of "formal identity," in which the law recognizes those identities individuals claim for themselves by executing formalities); Clarissa R. Hayward & Ron Watson, *Identity and Political Theory*, 33 WASH. U. J. L. & POL'Y. 9 (2010) (discussing strong multiculturalism, liberal multiculturalism, and the Foucaultian view in identity politics).

[153] *Kosilek*, 774 F.3d at 63–96.

[154] *See* CHARLES TAYLOR, *The Politics of Recognition*, *in* MULTICULTURALISM: EXAMINING THE POLITICS OF RECOGNITION 25–51, 56–58, 60–73 (1994).

essential truths and ground knowledge on firm foundations become highly problematic."[155]

In the case of race, the basic binary that undergirds identity signifiers that the courts utilize to conceptualize and build a jurisprudential edifice that has, at its core, a racial dyad within which racial identity is ensconced, contours and delimits explanation and understanding of racial identity.[156] The binary is significant because it provides an abridged and selective field of perception and interpretation that becomes the basis of what race is, what it means, and what will it encompass as far as legal reasoning and judicial resolution of cases and controversies that have an identity-basis upon which results depend.[157] The racial binary

> shapes our understanding of what race and racism mean and the nature of our discussions about race. It is crucial, therefore, to identify and describe [the binary] and to demonstrate how it binds and organizes racial discourse, limiting both the scope and the range of legitimate viewpoints in that discourse."[158]

In the context of racial identity and the binary framework within which it has been emplaced, the law has relied very heavily upon the Black/White identity signifier, to the point where other people of color such as Latinos, Asians, and Native Americans may (or appear to) drop out, and all that remains is an unadulterated Black/White binary for assessing redress and protections for the historically oppressed and exploited.[159] Yet, other people of color and other groups deemed racially Other have suffered the same effects of race-based genocide (e.g., Native Americans), prejudice and discrimination in every aspect

---

[155] STEPHEN M. FELDMAN, AMERICAN LEGAL THOUGHT FROM PREMODERNISM TO POSTMODERNISM: AN INTELLECTUAL VOYAGE 159 (2000).

[156] *See* cases cited *infra* notes 162–67.

[157] *Id*.

[158] Juan F. Perea, *The Black/White Binary Paradigm of Race: The "Normal Science" of American Racial Thought*, 10 LA RAZA L.J. 1213, 1214 (1998) [hereinafter Perea, *The Black/White Binary*].

[159] *See generally* Leslie Espinoza & Angela P. Harris, *Embracing the Tar-Baby - LatCrit Theory and the Sticky Mess of Race*, 10 LA RAZA L.J. 499 (2015) (reflecting on LatCrit theory and identifying submerged themes); Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177 (1999) (reflecting on and critiquing LatCrit theory).

of their lives (e.g., Chinese), internment (e.g., Japanese), and prejudicial immigration polices (e.g., Irish, Latinos).[160] Yet, the Black/White binary has been the basis of "landmark" legal opinions that have altered the fabric of law and policy in the 20th century.[161] For example, a plethora of cases, from *Missouri ex rel Gaines v. Canada*,[162] *Sipuel v. Board of Regents*,[163] *Sweatt v. Painter*,[164] and *McLaurin v. Oklahoma State Regents*,[165] to *Brown v. Board of Education*,[166] are premised exclusively on the Black/White binary.

Each of the above cases, jointly and severally, has contributed to re-conceptualizing the law's view of disparate treatment and the judicial role in protecting identity groups, generally speaking. Although the Court has applied judicial remedies and protections to other racial identity groups—such as the case of *Hernandez v. Texas*[167] (wherein the Court held that Mexican-Americans and other nationality-based identity groups in the US were entitled to equal protection of the law under the Fourteenth Amendment)—the basic binary structure is still employed

---

[160] *See, e.g.*, DEE BROWN, BURY MY HEART AT WOUNDED KNEE: AN INDIAN HISTORY OF THE AMERICAN WEST (1971) (documenting "a narrative of the conquest of the American west as the [Native Americans] experienced it."); CHARLES J. MCCLAIN, IN SEARCH OF EQUALITY: THE CHINESE STRUGGLE AGAINST DISCRIMINATION IN NINETEENTH-CENTURY AMERICA (1996) (exploring the Chinese-American experience and use of the legal system to fight discrimination); ANDREA GEIGER, SUBVERTING EXCLUSION: TRANSPACIFIC ENCOUNTERS WITH RACE, CASTE, AND BORDERS, 1885-1928 (2015) (discussing Japanese and other Asian's experience with immigration); NOEL IGNATIEV, HOW THE IRISH BECAME WHITE (2009) (discussing the historical events that lead to the Irish being considered white in the U.S.).

[161] Perea, *The Black/White Binary*, *supra* note 158, at 156. Struggles "over the legal status of Blacks have been central in shaping the Constitution and the Supreme Court's decisions on race and equality. All the civil rights enactments and court decisions deemed major in this area have sought to redress harms to Blacks. The Thirteenth and Fifteenth Amendments abolished slavery and race discrimination in voting, respectively. The first sentence of the Fourteenth Amendment established federal and state citizenship for Blacks, reversing the Dred Scott decision. The Equal Protection Clause of the Fourteenth Amendment was enacted principally to protect the civil equality of the newly freed slaves from hostile state action." *Id.* at 155.

[162] 305 U.S. 337 (1938).

[163] 332 U.S. 631 (1948).

[164] 339 U.S. 629 (1950).

[165] 339 U.S. 637 (1950).

[166] 347 U.S. 483 (1954).

[167] 347 U.S. 475 (1954).

in modified form, such as White/Non-White.[168] The basic integrity of the binary is preserved and further utilized to make sense of and resolve legal cases and controversies that are identity-based in nature.

In *Hernandez*, the Court declared that the "Fourteenth Amendment is not directed solely against discrimination due to a 'two-class theory'—that is, based upon differences between 'white' and 'Negro.'"[169] Describing some of the racial prejudice and discrimination faced by Mexican-Americans at the time, the Court stated that the

> testimony of . . . officials and citizens contained the admission that residents of the community distinguished between 'white' and 'Mexican.' The participation of persons of Mexican descent in business and community groups was shown to be slight. Until very recent times, children of Mexican descent were required to attend a segregated school for the first four grades.[170]

Even where the historical White/Black binary is broadened to include other races, the integrity of the binary is nonetheless preserved to some significant degree, and the courts are able to expand protections to the Other in such a schema.[171] This dynamic seems to pervade the courts' approach to inclusiveness and diversity as far as expansion of remedies and protections based on identity is concerned.[172]

IV. POWER DYNAMICS OF THE BINARY: HOW THE BINARY CONSTRUCTS A TRUTH REGIME

The historical modernist binary that the law has employed is based upon a classificatory schema that builds legal actuality from a politicized construct that is the product of relations of power. The historical or traditional binary creates a point on which identity-based signifiers can be employed to settle legal cases and controversies that involve decision-making processes being based on simplified identity-

[168] *See* cases cited *supra* notes 162–67.
[169] *Hernandez*, 347 U.S. at 478.
[170] *Id.* at 479 (internal citations omitted).
[171] *See* Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1297–96 (1982).
[172] *Id*.

based signifiers.[173] A prominent example of this can be observed in equal protection doctrine and law, which is identity-based jurisprudence.[174] Judicial remedies and protections rooted in equal protection hinge

> on the identity trait—such as race or gender—implicated by an alleged act of discrimination. In those instances, the identity trait stands in to represent a set of assumptions about the group it describes: Because that group has been subjected to discrimination or politically marginalized in the past, or because its identifying characteristic is irrelevant to its members' ability to contribute to or participate in society, the law is particularly sensitive to state action that targets such groups.[175]

A definitive counterpoint therefore emerges in the law concerning identity-based signifiers. For example, the Court has posited and built upon a racial basis[176] for upholding[177] or modifying[178] the legal understanding of race-based educational access policies. The federal courts (as well as state courts) are bound by the binaries that the Supreme Court employs to expound upon what the Constitution means.[179] The employment of the binary-based identity signifier thus enables a power dynamic to emerge that creates a space that is at once

---

[173] *See* Richard T. Ford, *Race as Culture? Why Not?*, 47 UCLA L. REV. 1803, 1805 (2000). "Racism must not be understood as a set of practices that targets a group because of some preexisting characteristic of its members, but instead as a set of practices that establishes racial hierarchy and assigns individuals to distinctive statuses within that hierarchy." *Id.* Racial identity—defining and applying it—is a product and producer of power.

[174] *See* Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1179–80 (1977).

[175] Lauren Sudeall Lucas, *Identity as Proxy*, 115 COLUM. L. REV. 1605, 1607 (2015).

[176] *See* Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 495 (1954) (holding that state laws establishing separate public schools for black and white students is unconstitutional and overruling the Plessy v. Ferguson, 163 U.S. 537 (1896) doctrine of "separate but equal").

[177] *See* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the affirmative action admissions policy of the University of Michigan Law School and declaring that the Law School had a compelling interest in promoting class diversity).

[178] *See* Regents of the Univ. of. Cal. v. Bakke, 438 U.S. 265 (1978) (upholding affirmative action, allowing race to be one of several factors in a college admission policy, but also holding that racial quotas were unconstitutional).

[179] *See* cases cited *supra* notes 176–78.

determined by, and determines, identity structures as they are manifested in a subject's actions and thoughts as they enter the realms of law, policy, and institutions. "[I]n using identity as its organizing principle, law is confined to operating within the very structures that subordinate and is similarly confined to focusing on the product rather than the cause of inequality."[180]

The binary has thus been and continues to be the site where the courts construct legal identity.[181] It is also the site where the political contestation for the power to define identity takes place, and thus has a formative effect on how law conceptualizes, processes, and adjudicates cases and controversies. The political and legal dimensions of the binary thus establish the binary as a fulcrum wherein limits are set as to how an identity manifests in law and society.[182] That there is a call for moving "Beyond He/She"[183] provides a clear example of how a traditional identity signifier (Male/Female) is being undermined, destabilized, and ultimately how attempts are being made to dispense with the binary that has structured law and policy. The law, however, despite the pitfalls that attach from subscribing to the binary, has relied upon the basic binary to establish legal schema to protect identity, to remedy violations of law based on specific identity signifiers.[184] The persistence of the binary, despite calls to blur or discard the identity signifiers that create an enclosed and identifiable identity space, is illustrative of the complex processes that are at work in the evolution of thought pertaining to identity and the configuration of identity politics and the law.[185] Yet it seems that those who rail against the identity signifier dwell within the structures of the Other, in law, society, and identity politics as construed by the modernist identity signifier.

---

[180] Lucas, *supra* note 175, at 1608.

[181] *See* ROBERT L. HAYMAN, JR. & NANCY LEVIT, *Un-Natural Things: Constructions of Race, Gender, and Disability*, *in* CROSSROADS, DIRECTIONS AND A NEW CRITICAL RACE THEORY 173 (Francisco Valdez et al. eds., 2002) (stating that the Supreme Court, in many cases, considers the physical differences between men and women in making its decisions).

[182] *See, e.g.*, Lucas, *supra* note 175, at 1627 (arguing that categorizing identity in the legal context is "inherently exclusionary" and may "stunt its development" in other contexts).

[183] Steinmetz, *supra* note 38.

[184] *See* Lucas, *supra* note 175, at 1626–27.

[185] *Id*.

The foregoing presents a central question: how can (or rather, should) the law go forward with identity-based signifiers without importing the negative trappings of said signifiers? Similarly, how can the law adapt or reconfigure identity-based signifiers, which are the basis of equal protection law,[186] among other realms of law and practice, so that the courts can fashion a pragmatic and prudential mechanism that can withstand change and that transcends the historicity of identity-based signifiers that serve as benchmarks for measuring progress? The identity signifier appears to be at odds with political and sociocultural efforts to undermine and discard the binaries that have permeated modern law and history. In the case of the standard racial binary of Black/White, for instance, one commentator contends that,

> [t]here are at least three reasons, however, why an exclusive focus on Blacks and Whites is not justified. First, it is important to work to eradicate all racism, not just the racism experienced by Blacks. Second, it is wrong to assume that racism against [other racial identity groups such as Latinos is] simply a less . . . virulent form of the same racism experienced by Blacks. . . . Finally, our national demographics are changing significantly.[187]

In the case of the traditional racial binary of White/Black, for instance, some commentators contend that

> [t]he Court has considered race to be the principal protected characteristic under the Constitution. The Court has, therefore, encouraged an underinclusive, binary discourse about race in which the primary views expressed are the white and the [black] . . . We are a long way from . . . legal discourse that includes all the voices that must be heard.[188]

The binary, whether or not one agrees with the foregoing contention, remains the basis upon which the law is or is not able to conceive and

---

[186] *Id*. at 1618.
[187] Perea, *The Black/White Binary*, *supra* note 158, at 167.
[188] Juan F. Perea, *Ethnicity and the Constitution: Beyond the Black and White Binary Constitution*, 36 WM. & MARY L. REV. 571, 573 (1995) [hereinafter Perea, *Ethnicity and the Constitution*].

incorporate a juridical subject into preexisting legal-rational constructs to adjudicate and administer justice.[189]

There perhaps is a growing frustration with attempts to find and posit identities that can clearly encompass relevant and unique criteria, such as the discrete and insular qualities or traits of a group, that neatly ties together such traits with an identity that the law can then act on and build upon.[190] Before the law, one has to be Either/Or, one or the other.[191] A juridical subject stands before the law as a legal subject infused with a binary nature: in criminal matters, one can only be "guilty" or "not guilty," in civil matters one's claim is found credible or dismissed. In effect, the binary re-imagines the subject and the case or controversy as "rational and orderly but obscure[s] the power mediations at play."[192] The binary has become inextricably integrated into the process "of converting individuals and circumstances to cases"[193] so that the courts may engage and participate in the meta-narratives of politicized identity that structure the binary-based identity signifier. In the *Slaughter House Cases*,[194] when considering the Reconstruction Amendments, that is, the Thirteenth, Fourteenth, and Fifteenth Amendments, the Court stated,

> We do not say that no one else but the negro can share in this protection . . . Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter. If Mexican peonage or the Chinese coolie labor system shall develop slavery of the Mexican or Chinese race within our territory, this amendment may safely be trusted to make it void. And so if other rights are assailed by the States which properly and necessarily fall within the protection of these articles, that

[189] *Id.*; Lucas, *supra* note 175, at 1619 (noting that the current legal construction of equal protection is based on general categories of identity).
[190] *See* Perea, *Ethnicity and the Constitution*, *supra* note 188, at 573 (arguing that the law's current racial discrimination paradigm is inadequate adequately to encompass ethnicity).
[191] *Id*.
[192] Jennifer Lee, *Binary Determination of Guilt or Innocence: Reading Between the Lines of* People v. Du, 37 COLUM. J.L. & SOC. PROBS. 181, 183 (2003).
[193] Tata, *supra* note 97, at 428.
[194] 83 U.S. (16 Wall.) 36 (1873).

> protection will apply, though the party interested may not be of African descent.[195]

Yet, even when the binary is expanded, that is, stretched beyond its initial formulation, the underlying base and resultant conversion of subjects into juridical subjects remains.[196] For example, the White/Black binary, even though it has been expanded to include other races/ethnicities, retains its reductionist character and cultural understanding of politicized identity. The Black identity signifier as it has been construed in the law since the founding of the U.S. in the larger White/Black binary continues to inform key terms and rules of formation such as prejudice, discrimination, hate speech, and racial animus.[197] The binary has thus proven resilient – despite its pitfalls. It seems that, despite efforts to make identity more fluid, porous, less exclusive in nature, the law requires some degree of the opposite of the foregoing to maintain its ability to adjudicate identity-based cases. Herein lies the rub. What is or should be the fate of the binary going forward?

CONCLUSION

The law and the courts, generally speaking, treat identity in a similar fashion: one either does or does not qualify for remedies, protections, etc., of the law based on whether a subject fits or does not fit into a legal identity signifier.[198] Why are those the only alternatives? Why can a subject not be neither or both? The law cultivates historically based identity binaries when converting sociocultural and economic realities into legal discourse. Subjects find themselves emplaced within politicized binary identities; an identity is manufactured and given to subjects by various elites, be it political, economic, social, or legal

[195] *Id.* at 72.

[196] Perea, *Ethnicity and the Constitution*, *supra* note 188, at 608–11 (stating that, despite expanding the equal protection clause to ethnicity, apparent court confusion hampered "meaningful protection").

[197] Perea, *The Black/White Binary*, *supra* note 188, at 155.

[198] *See* Lucas, *supra* note 175, at 1626–27 (stating that the Court's defining of identity requires the Court to determine who does or does not fit within the category).

actors.[199] A disconnect exists between the subject and history: if the racial binary is undermined and subjects are free to choose their racial identities and affiliations independent of whether or not a subject possesses what was once the requisite experience that stems from a racial identity signifier, then the law will find itself in a predicament. It becomes a conflict surrounding the meaning of identity, rather than an exercise of inclusion and giving voice and substance to an identity group based on modernist-based identity signifiers. The problem with retaining symbols of identity is that they are imprinted solely in an historically lateral sense, as lynchpins of identity, devoid of the historical culmination of social relationships.[200] In discarding the experiential elements that ground an identity signifier—and the experiential dimension is by nature binary in that it is premised on a this/that, either/or cognitive framework—what results is a detached and exclusionary basis of identity that the subject cannot grasp.[201]

The contradictory nature of identity seems to be characterized by the notion that there is and is not a center, a basis, for what one is. Yet the law views actuality in terms of categories, classifications, identity-based signifiers. The Self breathes life into the historical structures of identity, so it is both historically determined and irrefutably existential. To deconstruct binaries without discarding them, i.e., to identify and explicitly acknowledge the deep effect that the binary has and the serious distortions and limitations that are immanent within it, we can begin a process of productively "destabilizing" binaries. [202] "In so doing, these binaries can be recognized as dynamic rather than static, fundamentally contingent rather than universal, and

[199] *See, e.g.*, Lucas, *supra* note 175, at 1605 (stating that the Equal Protection Clause's use of identity as the basis of its doctrine can "force people to identify in a particular way to lay claim to legal protection").

[200] *See* Charlie Gerstein, Comment, *What Can the Brothers Malone Teach Us About* Fisher v. University of Texas?, 111 MICH. L. REV. FIRST IMPRESSIONS 97, 98–99 (2014) (stating that each state had a system for defining who was considered Black, despite a person's contrary self-identification); *see also* Andrés Acebo, *Life, Liberty & the Pursuit of Whiteness: A Revolution of Identity Politics in America*, 2 COLUM. J. RACE & L. 149, 153–54 (2012) (noting that the Court in Ozawa v. United States, 260 U.S. 178 (1922) stated that absent clearly classifying people by race would create problematic racial overlap).

[201] *See* Lucas, *supra* note 175, at 1627 (noting that legal identity categories are "inherently exclusionary" and result in over-simplification).

[202] Tata, *supra* note 97, at 427.

synergistic rather than discrete and oppositional . . . binaries are revealed as fluid, mutable, and, protean."[203]

The need for order, stability, clarity, and pragmatic and functional bases upon which to adjudicate issues and administer justice can be acknowledged without the trappings of objectivity that renders the binary a rigid and overly artificial and distortionary construct. Judicial opinions encompass "choice and order; implicit routine and explicit normative principle; analysis and intuition; individualization and consistency; rationality and emotion . . . These qualities co-exist dynamically, are synergistic, and inhabit each other."[204] While it is pragmatic and useful to construct notions such as binary identity to create the illusion of concretized identity classifications, the world filtered through such classifications reflects a model of a "real world"—a model that is useful for dealing with the world but that is not in fact reflective of any objective truths about the world.[205] The model, the binary, manufactures truth-value, but it is also subject, like all models and constructs, to revision and reconfiguration. The contradictory nature of identity, in the locus of a subject that shapes the world and is shaped by it, may clear a space for accountability in the culturally relativist landscape contoured by law and policy.

[203] *Id*.
[204] *Id*.
[205] RICHARD DAWKINS, THE GOD DELUSION 416–17 (2008).