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EQUAL PROTECTION'S ANTINOMIES AND THE PROMISE OF A CO-CONSTITUTIVE APPROACH

Julie A. Nice†

*At the present as well as at any other time, the center of gravity of legal development lies not in legislation, nor in juristic science, nor in judicial decision, but in society itself.*¹

INTRODUCTION

An emerging phenomenon in the study of discrimination and inequality is the application of co-constitutive theory to equal protection jurisprudence. As developed by law and society scholars, co-constitutive theory explores both how law shapes society and how society shapes law.² Law and society researchers, for example, have “examined the ways in which the boundaries of race, religion, social class, gender, ethnicity, and nationality help constitute and give meaning to legal phenomena, as well as the ways in which the law’s intended and unintended consequences help constitute these social categories.”³ To understand these co-constitutive relations between social identity and anti-discrimination law, many law and society scholars have favored research that “decenters” law; that is, they focus attention on

† Associate Professor, University of Denver College of Law. For helpful comments I thank the organizers and participants in Cornell Law Review’s Symposium on *Discrimination and Inequality: Emerging Issues*, the participants in the University of Michigan Law School’s Law and Equality Workshop, the faculty of the University of Utah College of Law, as well as Don Herzog, Jeremy Paul, Jane Schacter, Susan Sterett, Joyce Sterling, Jessica West, and especially Martha Ertman.

¹ EUGEN EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* at xv (Walter L. Moll trans., 1936).

² See ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY: TOWARD A CONSTITUTIVE THEORY OF LAW* 3 (1993) (describing constitutive theory as focusing “on the way in which law is implicated in social practices, as an always potentially present dimension of social relations, while at the same time reminding us that law is itself the product of the play and struggle of social relations”). Because law and society scholars sometimes use the phrase “constitutive theory” to refer to the unidirectional impact of law on society, I use the phrase “co-constitutive theory” to emphasize the mutually constitutive relations of law and society. See, e.g., Frank Munger, *Sociology of Law for a Postliberal Society*, 27 *LOY. L.A. L. REV.* 89, 101-05 (1993) (describing the initial turn to constitutive theory and the more recent emphasis on the mutual interaction between legal and nonlegal spheres).

³ Austin Sarat et al., *The Concept of Boundaries in the Practices and Products of Sociolegal Scholarship: An Introduction*, in *CROSSING BOUNDARIES: TRADITIONS AND TRANSFORMATIONS IN LAW AND SOCIETY RESEARCH* 4 (Austin Sarat et al. eds., 1998) (collecting and summarizing sources).

understanding societal practices rather than jurisprudence.⁴ Departing somewhat from this decentered norm, this Article recenters law by exploring how co-constitutive theory informs equal protection theory and doctrine.

This Article explores three major points. Part I suggests that equal protection theory and doctrine are embedded in an antinomic discourse—a perpetual debate revolving around choices between two purportedly plausible but conflicting principles. This examination of equal protection jurisprudence reveals ten antinomies and shows that current law favors the conservative preference within each antinomy. Part II posits that co-constitutive theory offers a framework for understanding how both the antinomic debates and their attendant choices become internalized and naturalized throughout law and society. I then suggest that co-constitutive theory implies not only that making choices between the antinomic alternatives is unnecessary, but also that making such choices impairs a more comprehensive understanding of the co-constitutive shaping of sociological meanings. Thus, a co-constitutive approach transcends equal protection's antinomic discourse. Finally, Part III illustrates that co-constitutive theory is already at work in both doctrine and scholarship. I review how three prominent Supreme Court cases illustrate co-constitutive theory in practice, arguing that the reasoning underlying these decisions reveals a co-constitutive understanding of law and society. I submit that the Court's reasoning implies an emerging third (co-constitutive) strand to accompany the first (suspect class) and the second (fundamental right) strands of equal protection doctrine.⁵ Moreover, I suggest that other contributions to this Symposium reflect co-constitutive insights. Taken together, these three points show that co-constitutive theory offers a useful and largely unmined framework for further theoretical and doctrinal development regarding sociolegal inequality.

⁴ See, e.g., Munger, *supra* note 2, at 120-21 (linking the turn toward decentering law to the popularity of Michel Foucault's insight that power emanates from everywhere). For examples of decentered research, see KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 52-70 (1988) (using interviews with people who have experienced discrimination to illuminate how antidiscrimination law is constrained by and reinforces the social system that constructs victims as powerless); PATRICIA EWICK & SUSAN S. SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE passim* (1998) (exploring the meaning of law by analyzing open-ended interviews with adults who were asked to talk about their home, work, and community problems). For a recent example of law-centered research grounded in social context, see SALLY ENGLE MERRY, *COLONIZING HAWAII: THE CULTURAL POWER OF LAW* (2000) (using archival court records to explore the role of law in transforming one Hawaiian community).

⁵ See *infra* Part III.A (reviewing *Romer v. Evans*, 517 U.S. 620 (1996), *Plyler v. Doe*, 457 U.S. 202 (1982), and *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996)). For further discussion of this third strand of equal protection doctrine, see Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Constitutive Nature of Rights and Classes*, 1999 U. ILL. L. REV. 1209 *passim*.

I

EQUAL PROTECTION'S ANTINOMIC DISCOURSE

In order to consider what co-constitutive theory has to offer equal protection theory and doctrine, we must first review the contemporary state of equal protection jurisprudence. Taking a bird's eye view, several patterns immediately become apparent. First, equal protection jurisprudence has evolved into a discourse revolving around ten principle antinomies. These binary discourses are not dichotomies but are better understood as antinomies, because they typically present choices between two plausible albeit conflicting principles. These antinomies have defined the terms of a seemingly perpetual debate between conservative and progressive theorists, and sometimes those within each camp. They inform definitions of the ends of equal protection, the means for achieving those ends, and the identities on which equal protection turns. One should keep in mind that the antinomies overlap considerably with one another, and the differences between them are often subtle. Nonetheless, each antinomy occurs, at least occasionally, as an independent strand of discourse.

The first antinomy is foundational and concerns whether the ultimate end of equal protection should be to eliminate subordination or to promote assimilation. Reaching consensus regarding the goal of equal protection would set the standard for evaluating the effectiveness of the means aimed at achieving that end. However, no guiding consensus has emerged. Seven other antinomies pose choices regarding various means for achieving equal protection. These means-based antinomies engage theorists in a perpetual debate regarding the appropriate way to implement equal protection, including choices between the following: sameness or difference, backward-looking or forward-looking, blindness or consciousness, classification or class, intent or effects, public or private, and process or substance. Two final dilemmas revolve around the identities on which equal protection doctrine turns. These antinomies are whether identity is singular or multiple and whether identity is fixed or fluid. A brief description and a few examples of each antinomy follow.

A. The Ten Antinomies

1. *Assimilation or Antisubordination*

The fundamental question underlying the equal protection mandate is what end it requires. Conservative scholars have insisted that equal protection requires that government treat every individual the same.⁶ This approach leads to ignoring the distinguishing trait—tak-

⁶ See, e.g., THOMAS SOWELL, CIVIL RIGHTS: RHETORIC OR REALITY? 37-38 (1984) (arguing in favor of a conception of civil rights in which "all individuals should be treated the

ing a so-called color-blind or gender-neutral position—and endorses a standard of sameness for all classes within a classification (e.g., treating African Americans the same as whites, or treating women the same as men). Presumably, this approach would prohibit the government from considering or promoting differences among individuals.⁷

Rejecting this formalist, conservative approach, progressive scholars have argued that equal protection's primary end should be to disrupt the use of law as an instrument for perpetuating hierarchical power relations. Some scholars label this as the antisubordination⁸ or anticaste principle.⁹ Scholars advancing this approach charge that formal equal protection doctrine serves as an instrument of social power to mark some people as superior and others as inferior, thus creating and perpetuating rather than disrupting hierarchical power relations.¹⁰

These scholars have assailed the assimilationist approach as de facto protection of the very discrimination it formally denounces.¹¹ Formal equality, they argue, furthers subordination by hiding its key elements: it requires a standard for comparison, and the presumed standard has been the experiences of those marked dominant.¹² In

same under the law, regardless of race, religion, sex or other such social categories" and decrying the civil rights movement's shift toward affirmative action, which "requires that [people] be judged *with regard* to such group membership"); Charles Fried, *Metro Broadcasting, Inc. v. FCC: Two Concepts of Equality*, 104 HARV. L. REV. 107, 107-13 (1990) (criticizing the Supreme Court's application of intermediate scrutiny to affirmative action programs in the principal case); Lino A. Graglia, *Race-Conscious Remedies*, 9 HARV. J.L. & PUB. POL'Y 83, 83 (1986) (arguing that affirmative action is discriminatory and not remedial).

⁷ One irony of the formal-equality approach is that it treats individuals as if they all are the same while one argument against implementation of the equal protection mandate is that it will enforce an undesirable sameness.

⁸ See, e.g., Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. REV. 1003, 1007-09 (1986) (arguing "that courts should analyze equal protection from an anti-subordination perspective"); Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 298 n.74, 312 (1994) (discussing other scholars who advocate the goal of antisubordination).

⁹ Justice Harlan, in his famous dissent, stated that "[t]here is no caste here." *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* *Brown v. Board of Educ.*, 347 U.S. 483 (1957). Contemporary scholars, such as Catharine MacKinnon, have argued forcefully that gender matters in society precisely because of its "consequences for social power." CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 40 (1987).

¹⁰ See, e.g., Colker, *supra* note 8, at 1012 ("The anti-differentiation principle, in contrast, does a disservice to this history and fundamental aspiration by asserting that discrimination against whites is as problematic as discrimination against blacks.").

¹¹ See Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1346 (1988) ("[T]o the extent that antidiscrimination law is believed to embrace color-blindness, equal opportunity rhetoric constitutes a formidable obstacle to efforts to alleviate conditions of white supremacy.").

¹² Even before we consider how the assimilationist approach plays out within a social context, we find that it suffers from logical flaws. For example, it is unreasonable to hold

other words, if all individuals are to be treated the same, the question arises: the same as *what*? The judicial default rule has been to treat individuals deemed superior as the standard, thus comparing subordinated people to dominant people and granting subordinated people only those rights that dominant people need or value.

This first antinomy between the goals of antisubordination and assimilation recurs throughout the antinomies that follow. One might understand the remaining antinomies as presenting debates over the appropriate means to equal protection's end. Yet the quarrels over means ultimately relate to the first antinomy's conflict over the end itself. This means-end relation is illustrated nicely by the following examination of the second antinomy, which uses constructs of sameness and difference to explore the conflict.

2. *Sameness or Difference*

The second antinomy concerns whether law should treat subordinated people the same as or different than dominant people. This debate has raged particularly within feminist theory, with scholars questioning whether women should be treated the same as or different than men. In an early article, Wendy Williams argued that law should treat women the same as men because treating women differently reinforces inequalities unfavorable to women.¹³ Mary Ann Case continues this tradition, defending the wisdom of a sameness approach.¹⁴ Other commentators have criticized the sameness approach. For example, Christine Littleton has criticized equality analysis for failing to recognize that, even if gender itself does not make a difference, the social construction of gender makes an enormous difference, and the impact of this difference must be eradicated.¹⁵ Martha Fineman also has argued that equal protection rules must account for "the different structural positions of women and

subordinated individuals to a standard of the dominant group because subordinated persons are differently, rather than similarly, situated to dominant persons with regard to their power in society. Moreover, not everyone can enjoy dominance. By definition, the higher status of the dominant depends on the existence of the lower status of the subordinated, creating a hierarchy of status.

¹³ See Wendy W. Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 196 (1982); see also Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 956 (1984) (rejecting a difference approach because "[n]o constitutional principle . . . allows courts to effectuate the range of changes needed to allow equality between men and women" and further noting that "constitutional concepts of equality are important both because of their concrete impact on legislative power and individual right and because constitutional ideas reflect and shape culture").

¹⁴ See Mary Ann Case, *"The Very Stereotype the Law Condemns": Constitutional Sex Discrimination Law as a Quest for Perfect Proxies*, 85 CORNELL L. REV. 1447, 1471-72 (2000).

¹⁵ See Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1332 (1987) ("[I]t is not gender difference, but the difference gender makes, that creates a divide.").

men in our society" in order to achieve "result-equality."¹⁶ In a different vein, Kimberlé Crenshaw has criticized the sameness approach for its essentialism, contending that it fails to account for differences among women by focusing on singularly disadvantaged groups such as white women or African-American men.¹⁷ In so doing, the sameness approach fails to address the problems of those whose multiple identities make them more disadvantaged, such as African-American women.¹⁸

While the sameness/difference debate focuses on the means for providing equal protection, it relates back to the first antinomy's debate over the ultimate end. Catharine MacKinnon emphasizes this connection in her rejection of the sameness/difference model on the grounds that it perpetuates the subordination of women by using a masculine standard in evaluating both sameness and difference.¹⁹ She argues that this model evaluates those who most need action to achieve equal treatment, namely those who are most dissimilar to men, according to a standard set by men.²⁰ As a replacement, she proposes a dominance approach that focuses on dismantling hierarchical distribution of power.²¹

¹⁶ MARTHA ALBERTSON FINEMAN, *THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM* 3 (1991). Professor Fineman explains that "[r]ules that focus on result-equality . . . are attempts to ensure that the effects of rules as they will be applied will place individuals in more or less equal positions." *Id.* Further, she framed the difference approach as an instrumental understanding of equality that requires treating men and women differently so that "they end up on the same level." *Id.*

¹⁷ See Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 139 (criticizing the single-axis analysis that tends to "treat race and gender as mutually exclusive categories of experience and analysis"); Crenshaw, *supra* note 11, at 1349 ("The struggle, it seems, is to maintain a contextualized, specific world view that reflects the experience of Blacks."). For a discussion of the antinomy between singular and multiple identities, see *infra* Part I.A.9.

¹⁸ See Crenshaw, *supra* note 17, at 139-40.

¹⁹ See MacKinnon, *supra* note 9, at 37.

²⁰ See *id.* at 37. MacKinnon writes:

Why should you have to be the same as a man to get what a man gets simply because he is one? Why does maleness provide original entitlement, not questioned on the basis of *its* gender, so that it is women—women who want to make a case of unequal treatment in a world men have made in their image . . .—who have to show in effect that they are men in every relevant respect, unfortunately mistaken for women on the basis of an accident at birth.

Id.

²¹ See *id.* at 40-45. Mary Becker replies that MacKinnon's focus on power itself perpetuates patriarchy and that "[i]t is relational feminism, with its valuation of caretaking, relationships, and empathy, that has the potential to improve well-being for women, children, and men." Mary Becker, *Patriarchy and Inequality: Towards a Substantive Feminism*, 1999 U. CHI. LEGAL F. 21, 39, 85.

3. *Backward-Looking or Forward-Looking*

The third antinomy concerns whether the removal of prejudicial classifications from the face of laws satisfies the mandate of equal protection or whether government has the obligation, or at least the authority, to take affirmative actions designed to counteract ongoing subordination effectuated by these laws. The Supreme Court has thwarted affirmative action by subjecting governmental antisubordination efforts to strict scrutiny, a standard that is extremely difficult to meet.²² Many commentators have condemned the narrowness of a backward-looking approach. In *The Alchemy of Race and Rights*, for example, Patricia Williams reflects on the many ways in which racial subordination still permeates American culture.²³ Moreover, some constitutional scholars have argued that equal protection must be forward-looking, anticipating the shifting, subtle ways in which dominant people maintain the status quo.²⁴ Still others, such as Charles Lawrence, have argued for circumvention of the backward/forward distinction, maintaining that equal protection must be both backward-looking to remedy the effects of historical subordination and forward-looking to fight racism and other types of subordination.²⁵

4. *Blindness or Consciousness*

The fourth antinomy asks whether government actors should remain blind to traits the courts deem irrelevant or consciously consider such traits in order to rectify discrimination based on those traits. The answer to this question typically determines one's perspective on equal protection analysis. Generally, conservative thinkers tend to favor a blindness approach, while various progressive scholars typically defend consciousness of the trait. Both sides of this antinomy are represented in Justice Harlan's celebrated dissent in *Plessy v. Ferguson*, in which he asserted: "Our Constitution is color-blind, and neither

²² For example, with regard to one city's effort to remedy its awarding less than one percent of construction contracts to minority businesses, the Court made clear that the city would have to further identify its participation in past discrimination with particularity. See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 492 (1989) (O'Connor, J., plurality opinion). With respect to a federal program creating incentives for awarding contracts to disadvantaged businesses, the Court held that it would subject consideration of race for even benign purposes to strict scrutiny. See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 226 (1995).

²³ PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

²⁴ See Kathleen M. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80-81 (1986); Cass R. Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, 55 U. CHI. L. REV. 1161, 1174-75 (1988).

²⁵ See Charles R. Lawrence III, *Each Other's Harvest: Diversity's Deeper Meaning*, 31 U.S.F. L. REV. 757, 765-66 (1997).

knows nor tolerates classes among citizens."²⁶ While one interpretation of Justice Harlan's language supports the blindness approach,²⁷ one might argue that he used this imagery to decry the majority's use of color-blindness to uphold racial segregation under the guise of formal equality. Harlan argued that the social context underlying racial segregation made obvious the state's intent to exclude persons of color—because of their inferiority—from railroad cars occupied by white persons.²⁸ The Supreme Court's subsequent, unanimous decision in *Brown v. Board of Education*²⁹ similarly dismissed the defense, advanced by those advocating color-blindness, that racial segregation operates equally to separate people according to assigned racial identities. Instead, the Court recognized the manifest social message of racial hierarchy that underlies formally color-blind segregation.³⁰

Commentators have exhaustively scrutinized the Supreme Court's reasoning in *Brown*, seeming more suspicious of the Court's invalidation of legislative choices than of the state legislatures' subordination of racial minorities.³¹ Yet *Brown's* result, invalidating de jure racial segregation in public education, enjoys nearly unanimous support, even among many conservative commentators.³² Perhaps this consensus, rather than the scholarly hand wringing over doctrinal and theoretical justifications, should inform our understanding of equal

²⁶ *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by Brown v. Board of Educ.*, 347 U.S. 483 (1954). The Supreme Court adopted Justice Harlan's language one hundred years later in *Romer v. Evans*, 517 U.S. 620 (1996), to invalidate a law that explicitly targeted certain classes (gay, lesbian, and bisexual people) and prohibited them from seeking legal protection from discrimination. *See id.* at 623.

²⁷ Justice Harlan also argued, in a color-blind fashion, that the "fundamental objection" to the statute was that it interfered with the "personal freedom" of both white and black persons to occupy the same public conveyance. *See Plessy*, 163 U.S. at 557.

²⁸ As Justice Harlan explained,

Every one knows that the statute in question had its origin in the purpose, not so much to exclude white persons from railroad cars occupied by blacks, as to exclude colored people from coaches occupied by or assigned to white persons. . . . What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens? That, as all will admit, is the real meaning of such legislation as was enacted in Louisiana.

Id. at 557, 560.

²⁹ 347 U.S. 483 (1954).

³⁰ *See id.* at 494.

³¹ *See, e.g.*, Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959). Wechsler's article has been credited as posing "a challenge to legal scholars to justify *Brown* along lines of traditional, consent-based theories of democracy. . . ." FARBER ET AL., *CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY* 101 (2d ed. 1998).

³² *See, e.g.*, FARBER ET AL., *supra* note 31, at 89-100 (describing the different ways in which Alexander Bickel, Robert Bork, and Herbert Wechsler indicated agreement with *Brown's* result, but not its reasoning).

protection. The social consensus favoring *Brown* declares, at a minimum, that law shall not perpetuate a formal racial hierarchy in public education. Interpreted more broadly, it suggests that we must consider the constitutionality of a law in relation to its social context.

Whether a narrower or broader interpretation of *Brown* endures, the decision reveals the futility of the distinction between blindness and consciousness. From a critical perspective, the choice between blindness and consciousness begs the constitutional question. Blindness could mean that laws treating the races equally in a formal sense, such as segregation laws, are constitutional, thus making *Brown's* result wrong. In contrast, blindness could mean that government cannot impose racial hierarchy's effects on people of any color, thus legitimizing *Brown's* result. Accordingly, the harm is not the racial classifications themselves (problematic though they may be) for which blindness may be a formal cure. Instead, the harm is the racial hierarchy that these classifications serve. Therefore, the law must be conscious of how racial hierarchy operates in society in order to eliminate its impact on people of all colors.³³ As Patricia Williams has explained:

The rules may be colorblind, but people are not. The question remains, therefore, whether the law can truly exist apart from the color-conscious society in which it exists, as a skeleton devoid of flesh; or whether law is the embodiment of society, the reflection of a particular citizenry's arranged complexity of relations.³⁴

5. *Classifications or Classes*

The fifth antinomy represents a particularly strange turn in equal protection doctrine—the shift from protecting classes of people who suffer prejudice, such as African Americans or females, to prohibiting any use of classifications, such as race or sex, thus extending protection to dominant classes that historically have not suffered prejudice (such as whites and males). In other words, by prohibiting legal recognition of any classes within a classification, the judiciary no longer

³³ For an interesting analysis arguing that strict scrutiny should not apply to race-conscious, nonpreferential affirmative action, see Michelle Adams, *The Last Wave of Affirmative Action*, 1998 Wisc. L. Rev. 1395, 1436-38. Adams writes:

Race-conscious, nonpreferential affirmative action programs ensure enhanced and vigorous competition for benefits such as employment and housing, and seek to even what has historically been an extraordinarily skewed playing field. As such, these programs promote the American ideal of a truly colorblind society and are necessary to ensure equal opportunity for all its citizens.

Id. at 1463.

³⁴ Patricia J. Williams, *The Obliging Shell (An Informal Essay on Formal Equal Opportunity)*, in *AFTER IDENTITY* 103, 121 (Dan Danielsen & Karen Engle eds., 1995).

protects only classes marked "inferior" but also protects classes marked "superior."

The remarkable thing about this turn is that it necessitated a change of purpose that has remained virtually unmarked. Here, again, the aftermath of *Brown* provides insight. While the search to legitimize judicial protection of African Americans in *Brown* has proceeded, the Supreme Court meanwhile has extended judicial protection to members of the most dominant multiple-identity group, white men, when they were denied opportunities in the following contexts: to compete for sixteen percent of the seats in a medical school,³⁵ to attend an all-female nursing school,³⁶ to compete for thirty percent of construction contracts,³⁷ and to enjoy federal monetary incentives supporting their bids for government contracts.³⁸ This judicial protection of white men from legislative choices disfavoring them has not produced a scholarly search for justification equivalent to that following *Brown*. Why not? Why was it *counterintuitive* that subordinated groups might require judicial protection but somehow *intuitive* that dominant groups would?

The Supreme Court's answer lies in its shift from class to classification—from protecting subordinated classes (such as African Americans) to prohibiting any use of those classifications the Court deems irrelevant (such as race). This transformation remains confusing considering the Court's ongoing use of a class-based approach to deny heightened protection to other classes. For example, in a recent decision, the Court again blended class and classification when it followed a class-based approach in concluding that older persons, as a class, have not suffered historical discrimination and do not constitute a discrete and insular minority. Therefore, the Court determined that age is not a suspect classification.³⁹ Yet the Court has had no difficulty

³⁵ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 275, 319-20 (1978).

³⁶ See *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 720, 733 (1982).

³⁷ See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 477 (1989).

³⁸ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 206 (1995).

³⁹ See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645-46 (2000). The *Kimel* Court explained:

Older persons, again, unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a "history of purposeful unequal treatment." Old age also does not define a discrete and insular minority because all persons, if they live out their normal life spans, will experience it. Accordingly, . . . age is not a suspect classification under the Equal Protection Clause.

Id. (citations omitted). Similarly, in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), the Supreme Court held that a class of residents of impoverished school districts did not have "the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.* at 28. During the same term the Court decided *Rodriguez*, it also decided *Frontiero v. Richardson*, 411 U.S. 677 (1973), in which the

extending and defending heightened judicial protection of whites, who also do not meet the criteria of suspectness and, indeed, continue to enjoy benefits derived from their historical and ongoing advantages over less dominant groups.⁴⁰

The Court has constructed this extension of heightened judicial protection of whites in the name of individualism. As Justice O'Connor wrote in *Adarand*:

the Fifth and Fourteenth Amendments to the Constitution protect *persons*, not *groups*. It follows from that principle that all governmental action based on race—a *group* classification long recognized as 'in most circumstances irrelevant and therefore prohibited'—should be subjected to detailed judicial inquiry to ensure that the *personal* right to equal protection of the laws has not been infringed.⁴¹

In its recent decision invalidating a federal law prohibiting age discrimination by state employers, however, the Court clarified that the only individuals entitled to this personal right to equal protection are those who are members of groups that receive heightened scrutiny.⁴²

plurality opinion argued that women met the test for suspectness. *See id.* at 682 (plurality opinion). The Court now treats sex classifications as quasi-suspect, deserving "at least" intermediate scrutiny. *Id.* at 686 (plurality opinion); *see* *United States v. Virginia*, 518 U.S. 515, 531 (1996). *See generally* ERWIN CHERMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 601-05 (1997) (describing the "emergence of intermediate scrutiny" for gender classifications).

⁴⁰ *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1709, 1766-68 (1993) (arguing that white supremacy has been "nurtured over the years").

⁴¹ *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (citation omitted). For an earlier statement of this approach, *see Regents of the University of California v. Bakke*, 438 U.S. 265, 295-97 (1978), which argues that equal protection extends to all individuals, not to certain groups. For a critique of this approach, *see*, for example, Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 147-57 (1976), who argues for a group-disadvantaging principle as the standard for equal protection. *See also* Tracy E. Higgins & Laura A. Rosenbury, *Agency, Equality and Anti-Discrimination Law*, 85 CORNELL L. REV. 1194, 1213-15 (2000) (criticizing the Supreme Court's group-blind standard and arguing against importing it from constitutional doctrine to statutory interpretation).

⁴² *See Kimel*, 120 S. Ct. at 645-47. The Court explained:

[T]he constitutionality of state classifications on the basis of age cannot be determined on a person-by-person basis. Our Constitution permits States to draw lines on the basis of age when they have a rational basis for doing so at a class-based level, even if it 'is probably not true' that those reasons are valid in the majority of cases.

Id.; *see also id.* at 646 ("Application of the [Age Discrimination in Employment Act] therefore starts with a presumption in favor of requiring the employer to make an individualized determination. . . . Measured against the rational basis standard of our equal protection jurisprudence, the ADEA plainly imposes substantially higher burdens on state employers."); *id.* at 647 ("Under the Constitution, . . . States may rely on age as a proxy for other characteristics. . . . Congress, through the ADEA, has effectively elevated the standard for analyzing age discrimination to heightened scrutiny." (citations omitted)). Six weeks after deciding *Kimel*, the Supreme Court issued a per curiam opinion holding that a complaint brought by a class of one alleging an intentional, irrational, and arbitrary zoning action

6. *Intent or Effects*

The sixth antinomy asks whether equal protection prohibits not only prejudicial intent but also disproportionate effects. Equal protection jurisprudence distinguishes laws that discriminate on their face from laws that are facially neutral but have a discriminatory or disparate impact. Although courts presume the existence of prejudicial intent when a law is facially discriminatory, current equal protection doctrine requires that plaintiffs alleging disparate impact prove discriminatory intent as a condition of receiving heightened judicial scrutiny and protection.⁴³

The history of equal protection doctrine has taken another perverse twist as a result of this dichotomy between intent and effects. As courts increased their enforcement of equal protection, legislatures gradually removed many facially discriminatory laws from the books, only to replace them with more subtle means of perpetuating racial hierarchy.⁴⁴ When prejudicial intent was overt, the Supreme Court declared that a law could not "violate equal protection solely because of the motivations of the men who voted for it."⁴⁵ Once the prejudicial intent of a law became less evident, disparate impact replaced facial discrimination as the culprit in contemporary lawsuits challenging invidious discrimination. However, as an increasing number of plaintiffs relied on disparate impact, judges changed equal protection doctrine to require that these plaintiffs must first prove that the legislature harbored a discriminatory intent. Thus the Court now requires that plaintiffs show that the government "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."⁴⁶

Proving any individual decision maker's state of mind, let alone a collective mind-set, is extremely difficult.⁴⁷ Moreover, although this

stated a sufficient equal protection claim. *Village of Willowbrook v. Olech*, 120 S. Ct. 1073, 1074-75 (2000) (per curiam).

⁴³ See *Personnel Adm'r v. Feeney*, 442 U.S. 256, 272 (1979); *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977); *Washington v. Davis*, 426 U.S. 229, 245-48 (1976).

⁴⁴ For an illustration of the various historical reasons offered to justify racial subordination, see Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1119 (1997) ("Assuming that something of value is at stake in such a struggle, it is highly unlikely that the regime that emerges from reform will redistribute material and dignitary 'goods' in a manner that significantly disadvantages the beneficiaries of the prior, contested regime."); see also Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 260 (1998) (incorporating Siegel's equal protection analysis into a consideration of a move away from formal equality).

⁴⁵ *Palmer v. Thompson*, 403 U.S. 217, 224 (1971).

⁴⁶ *Feeney*, 442 U.S. at 279.

⁴⁷ The Supreme Court has identified the following as relevant factors for finding discriminatory intent: 1) the impact of the government's action; 2) the historical background

burden of proof technically applies equally to all disparate impact plaintiffs, the plaintiffs who bring disparate impact claims typically are members of subordinated, not dominant, groups.⁴⁸ For example, a plaintiff challenging government action that disproportionately impacts African Americans has the burden of proving intent. But courts do not impose this burden of proof on most white plaintiffs. Because legislatures rarely harbor prejudicial intent against whites, a white plaintiff typically challenges so-called reverse discrimination caused by government efforts to assist racial minorities, like affirmative action. Because affirmative action programs usually employ an overt racial classification, courts often assert that these programs involve facial discrimination, which does not require proof of discriminatory intent. The bottom line is that the typical claim brought by a white plaintiff challenging affirmative action enjoys strict judicial scrutiny of the government's action even without proof of prejudicial intent, while the typical discrimination claim brought by an African-American plaintiff suffers judicial deference to the government unless the plaintiff can prove the government's actual discriminatory intent. This effectively creates a double standard.

7. *Public or Private*

The seventh antinomy turns on the prevailing interpretation that the Constitution imposes the duty of equal protection on only certain government action.⁴⁹ This state action requirement depends on a distinction between public and private actors. A narrow view of state action includes only actions taken by government officials acting within the sphere of their proper authority.⁵⁰ A broader view of state action includes all private actions that benefit from governmental recogni-

of the action; 3) the sequence of events leading to the action; 4) departures from normal procedure or substantive considerations; and 5) evidence in legislative or administrative history. See *Arlington Heights*, 429 U.S. at 266-68. These factors reinforce judicial deference to the government by presuming that discriminatory intent would be signaled by explicit statements in the record or obvious departures from normal behavior patterns.

⁴⁸ This double standard (disfavoring disadvantaged plaintiffs and favoring advantaged plaintiffs) is particularly ironic given the formal equality underlying the Court's current equal protection reasoning.

⁴⁹ The Supreme Court has interpreted the Constitution to mandate that both the states and the federal government provide equal protection of the laws. The Equal Protection Clause of the Fourteenth Amendment applies to the states, see U.S. CONST. amend. XIV, § 1, and the Due Process Clause of the Fifth Amendment includes an equal protection component that applies to the federal government, see *Bolling v. Sharpe*, 347 U.S. 497, 498-500 (1954). An important difference between the federal and state governments is that Section 5 of the Fourteenth Amendment authorizes the federal government to enforce the requirement that states provide equal protection. See U.S. CONST. amend. XIV, § 5.

⁵⁰ This narrower view of state action presumably fits the more limited sphere of government action existing prior to expansion of the administrative welfare state.

tion or support, such as those that enjoy government subsidy or those that depend on judicial enforcement of private rights.⁵¹

As with the other antinomies, the Supreme Court has adopted the conservative approach: equal protection doctrine has embraced the public/private dichotomy and endorsed only the narrow view of state action. As a result, most so-called private actions not involving government officials are immune from equal protection challenges.⁵² In yet another interesting twist, the Supreme Court recently expanded state immunity to include immunity from congressional age discrimination regulation, thereby protecting a broader range of state actions from congressional attempts to enforce the equal protection mandate.⁵³

Among progressive scholars, Robin West has theorized that the public/private distinction rests in the Constitution's firm commitment to a negative view of liberty that "necessarily creates the sphere of non-interference and privacy within which the abuse of private power can proceed unabated."⁵⁴ Moreover, West argues that this negative conception of liberty confines the Constitution's conception of equality to a "liberal understanding" that protects only universal attributes such as autonomy and dignity, rather than those attributes that mark "non-

⁵¹ See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 19-21 (1948) (holding that racially exclusionary covenants are not enforceable in court).

⁵² See, e.g., *CHEMERINSKY*, *supra* note 39, at 385 (1997) (explaining that the Constitution "generally does not apply to private entities or actors").

⁵³ See, e.g., *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645-46 (2000) (holding that states retain Eleventh Amendment immunity from the federal statute prohibiting age discrimination in employment because Congress exceeded its power under Section 5 of the Fourteenth Amendment, and thereby allowing age discrimination in public employment that is rationally related to legitimate state interests). In *Kimel*, the Court held that sovereign immunity protected states from age discrimination suits brought by state employees. *Id.* at 646-47. To reach this conclusion, the Court had to hurdle several obstacles. First, although the text of the Eleventh Amendment only protects states from suits by out-of-state or foreign plaintiffs, the Court noted that it has long extended its application to suits brought by citizens against their own state. See *id.* at 640 (citing, *inter alia*, U.S. CONST. amend. XI ("The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.") and *Hans v. Louisiana*, 134 U.S. 1 (1890)). Second, although Section 5 of the Fourteenth Amendment affirmatively grants Congress "the authority to abrogate the States' sovereign immunity," although congressional determinations about what legislation is needed to enforce the Fourteenth Amendment are entitled to "much deference" and given "wide latitude," and although congressional power under Section 5 extends to prohibiting "a somewhat broader swath of conduct, including that which is not itself forbidden by the Amendment's text," the Court nevertheless held that it will invalidate any congressional enforcement of the Fourteenth Amendment where there is an insufficient "congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Id.* at 644 (internal quotation marks and citations omitted).

⁵⁴ Robin L. West, *Constitutional Skepticism*, 72 B.U. L. REV. 765, 778 (1992); see ROBIN WEST, *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 166 (1994).

universal subordinate groups.”⁵⁵ West ultimately contends that the Constitution’s liberal understanding of equality not only prevents its use as a mechanism to challenge most subordination, which lies in concentrations of private power, but also assures its aggressive protection of such power hierarchies. Nevertheless, West argues that “[t]he Court is wrong to read into the Fourteenth Amendment a state action requirement, not because the Fourteenth Amendment prohibits private action as well, but rather, because the Fourteenth Amendment, properly and naturally read, prohibits state *inaction* in the face of private injustice or violation.”⁵⁶

8. *Process or Substance*

The eighth antinomy relates to whether equal protection is ultimately a procedural or substantive commitment. In *Carolene Products*’s familiar footnote four, the Supreme Court suggested that courts should more carefully scrutinize legislative decisions that harm discrete and insular minorities.⁵⁷ This construction engendered the suspect class strand of equal protection doctrine.⁵⁸ Building on *Carolene Products*, John Hart Ely, in his landmark theory of representation-reinforcement, defended the judiciary’s use of equal protection to correct defects in the legislative process.⁵⁹ Ely reasoned that judges may, and should, apply heightened scrutiny to legislative choices that harm those groups that are under-represented in the political process.⁶⁰

Many commentators have criticized both the *Carolene Products* justification for scrutinizing legislative decisions and Ely’s extension of it. For example, Bruce Ackerman has contended that, rather than supporting judicial protection of discrete and insular minorities, the political-process-correction theory actually justifies judicial protection of “anonymous and diffuse” groups because they are more likely to suffer political disadvantage.⁶¹ Charles Lawrence has argued that a political-process-correction justification limits equal protection’s reach to instances of discriminatory legislative intent, thus insuffi-

⁵⁵ West, *supra* note 54, at 778.

⁵⁶ Robin West, *Is Progressive Constitutionalism Possible?*, 4 WIDENER L. SYMP. J. 1, 12 (1999).

⁵⁷ See *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938).

⁵⁸ See discussion *supra* Part I.A.5 (regarding the fifth antinomy between classification or classes).

⁵⁹ See JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 135-79 (1980).

⁶⁰ See *id.* at 73-77, 101-04; see also Nice, *supra* note 5, at 142-49 (considering Ely’s representation-reinforcement theory in relation to equal protection’s co-constitutive third strand).

⁶¹ Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 724 (1985).

ciently enforcing the broader substantive equal protection mandate.⁶² Like the other antinomies, the procedure/substance discourse has not achieved progressive inroads in equal protection jurisprudence.⁶³

9. *Singular or Multiple*

The ninth antinomy turns on one of the most criticized aspects of identity-based equality theory—the isolation and treatment of one aspect of an individual's identity as singular (sometimes called "essential")⁶⁴—thereby ignoring and marginalizing the multiplicity of a person's identities. The ninth antinomy's choice between singular identity and multiple identities has garnered increasing attention among progressive scholars. Both Kimberlé Crenshaw and Angela Harris, for example, criticize feminist theorists for treating the experiences of white women as the norm.⁶⁵ Crenshaw has illustrated that feminist literature criticizing the social assignment of the private realm to women based on the stereotype of women as dependent and passive fails to acknowledge that historically, many African-American women have worked outside of the home and have been stereotyped as overly-strong matriarchs.⁶⁶ Similarly, Harris has illustrated that the dominant template of rape (symbolized by "the strange black man in the bushes") is a white women's prototype that leaves out the para-

⁶² See Charles R. Lawrence III, *The Id, The Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 345-49 (1987); see also Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1077 (1980) (criticizing process-based approaches to deciding the question of whom to protect). Tribe argues:

The crux of any determination that a law unjustly discriminates against a group—blacks, or women, or even men—is not that the law emerges from a flawed process, or that the burden it imposes affects an independently fundamental right, but that the law is part of a pattern that denies those subject to it a meaningful opportunity to realize their humanity. Necessarily, such an approach must look beyond process to identify and proclaim fundamental substantive rights.

Id. (footnotes omitted).

⁶³ See, e.g., Kimberlé Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 *passim* (1998) (criticizing constitutional process theory).

⁶⁴ I do not use the word "essential" because the concept of "essentialism" has been used somewhat differently within various discourses. Some scholars employ the term essential to mean singular and universal, as compared to multiple, see, e.g., MARY BECKER ET AL., *FEMINIST JURISPRUDENCE: TAKING WOMEN SERIOUSLY* 118-35 (1994), while others use it to mean fixed or immutable or natural, see, e.g., DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE & DIFFERENCE* at xi (1989). See also *infra* Part I.A.10 for a discussion regarding the tenth antinomy between fixed or fluid identity.

⁶⁵ See Crenshaw, *supra* note 17, at 152-60; Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585-86 (1990); see also Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J.L. & FEMINISM 217, 221 (1993) (criticizing MacKinnon's method as reproducing "a white norm" by stripping away differentiations among women).

⁶⁶ See Crenshaw, *supra* note 17, at 154-56.

digm experience of black women (symbolized by “the white employer in the kitchen or bedroom”).⁶⁷ Further, other theorists claim that feminism and critical race theory presume a universal heterosexual experience⁶⁸ and that queer legal theory often presumes a universal white and nonpoor experience.⁶⁹

These are a few examples of the many instances in which scholars have identified analytical errors caused by a singular identity focus in legal theory. Given that identity remains a basis for subordination, the question remains how scholars can challenge identity-based subordination without reifying narrow identity categories that fail to capture the whole of any person’s experience. Although some postmodern scholars reject any reliance on identity, others defend its use as a means to further the solidarity of subordinated communities⁷⁰ and to pursue anti-subordination ends.⁷¹ Again, neither pole of this antinomy provides an adequate solution, leaving equal protection jurisprudence without a theoretical basis for recognizing new groups or rights in need of legal protection.

⁶⁷ Harris, *supra* note 65, at 598.

⁶⁸ For a critique of feminist theory, see Patricia A. Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN’S L.J. 191, 213 (1989) (“The problem with current feminist theory is that the more abstract and universal it is, the more it fails to relate to the lived reality of many women. One problem with much feminist legal theory is that it has abstracted and universalized from the experience of heterosexual women.” (footnote omitted)), and Patricia A. Cain, *Lesbian Perspective, Lesbian Experience, and the Risk of Essentialism*, 2 VA. J. SOC. POL’Y & L. 43, 46-54 (1994). For a critique of critical race theory, see Darren Lenard Hutchinson, *Ignoring the Sexualization of Race: Heteronormativity, Critical Race Theory and Anti-Racist Politics*, 47 BUFF. L. REV. 1, 116 (1999). Hutchinson asserts:

The various internal critics of progressive social movements have compiled a formidable array of works that allow willing scholars and activists to disavow narrow and partial theories of equality and to replace them with more complete and inclusive models. . . . By offering multidimensionality as a paradigm for theorizing equality, I hope to push willing anti-racists (and other equality theorists) along this vital path of racial reconstruction.

Id.; see also BLACK MEN ON RACE, GENDER, AND SEXUALITY (Devon W. Carbado ed., 1999) (featuring wide variety of antisubordination agendas).

⁶⁹ See Darren Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse*, 29 CONN. L. REV. 561, 566 (1997) (proposing a “‘multidimensional framework’—a *multidimensionality*—to analyze and challenge sexual subordination”).

⁷⁰ See, e.g., Regina Austin, “*The Black Community, Its Lawbreakers, and a Politics of Identification*,” 65 S. CAL. L. REV. 1769, 1769-1775 (1992); Angela P. Harris, *Foreword: The Jurisprudence of Reconstruction*, 82 CAL. L. REV. 741, 766-78 (1994).

⁷¹ See Francisco Valdes, *Afterword: Beyond Sexual Orientation in Queer Legal Theory: Majoritarianism, Multidimensionality, and Responsibility in Social Justice Scholarship or Legal Scholars as Cultural Warriors*, 75 DENV. U. L. REV. 1409, 1448 (1998) (urging “strategic quasi-essentialism” as a means of using identity to further antisubordination); Stephanie M. Wildman, *Reflections on Whiteness and Latina/o Critical Theory*, 2 HARV. LATINO L. REV. 307, 311 (1997) (“Naming Latinas/os, being strategically essentialist, instead of relying on the umbrella categories ‘race’ or ‘people of color,’ can help us reveal the hierarchies that exist within the category race.”).

10. *Fixed or Fluid*

The last antinomy is also identity-based, and asks whether we understand identity as either fixed or fluid. This antinomy marks a disagreement between those committed to identity-based movements and those who envision a post-identity world. One context where this debate has played out is discourse between gay rights activists and queer legal theorists. Gay rights litigators frequently argue that gay people have an absolutely or predominantly fixed (sometimes called "essential"⁷²) same-sex sexual orientation, which, they argue, should not serve as a basis for discrimination.⁷³ Queer legal theorists, however, have challenged that sex, gender, and sexual orientation are not fixed, but rather socially constructed, fluid, indeterminate, contingent, and complex.⁷⁴

A different version of this antinomy plays out between gay rights supporters and conservatives. Conservatives seemingly have conceded that sexual identity is fluid, but only in the sense that they believe sexual identity is based on sexual conduct. Indeed, the debate over whether gay people suffer discrimination because of their sexual ori-

⁷² See discussion regarding essentialism, *supra* note 64.

⁷³ For an example of such reasoning in a judicial opinion regarding whether a state constitution's prohibition of sex discrimination proscribes discrimination based on sexual orientation, see *Baehr v. Lewin*, 852 P.2d 44, 70 (Haw. 1993) (Burns, J., concurring). Judge Burns asserted that

the questions whether heterosexuality, homosexuality, bisexuality, and asexuality are "biologically fated" are relevant questions of fact which must be determined before the issue presented in this case can be answered. If the answers are yes, then each person's "sex" includes both the "biologically fated" male-female difference and the "biologically-fated" sexual orientation difference, and the Hawaii Constitution probably bars the State from discriminating against the sexual orientation difference by permitting opposite-sex Hawaii Civil Law Marriages and not permitting same-sex Hawaii Civil Law Marriages.

Id.

⁷⁴ See JUDITH BUTLER, *BODIES THAT MATTER: ON THE DISCURSIVE LIMITS OF "SEX"* 10 (1993) (finding that "construction is neither a single act nor a causal process initiated by a subject and culminating in a set of fixed effects" that "not only takes place *in* time, but is itself a temporal process which operates through the reiteration of norms; sex is both produced and destabilized in the course of this reiteration."); *id.* at 239 ("For surely it is as unacceptable to insist that relations of sexual subordination determine gender position as it is to separate radically forms of sexuality from the workings of gender norms."); JUDITH BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 142 (1990) (stating that "[t]he foundationalist reasoning of identity politics tends to assume that an identity must first be in place in order for political interests to be elaborated and, subsequently, political action to be taken," and further asserting "that there need not be a 'doer behind the deed,' but that the 'doer' is variably constructed in and through the deed"); Martha M. Ertman, *Oscar Wilde: Paradoxical Poster Child for Both Identity and Post-Identity*, 25 L. & Soc. INQUIRY 153 (2000) (using Wilde to show the historical contingency of sociolegal understandings of same-sex sexuality); Katherine M. Franke, *The Central Mistake of Sex Discrimination Law: The Disaggregation of Sex from Gender*, 144 U. PA. L. REV. 1, 1-9 (1995) (arguing that sex is as socially constructed as gender).

entation and status or because of their sexual conduct has sidetracked much of the litigation and theory about whether the Constitution protects gay people from discrimination. For example, in his dissent in *Romer v. Evans*, Justice Scalia argued that because the Supreme Court has allowed states to criminalize same-sex sexual conduct and because such conduct defines the class of gay people, they cannot receive legal protection from discrimination based on their status or identity.⁷⁵ While the *Evans* majority did not directly address the issue, other judicial opinions argue that gay people are defined by their orientation, not their conduct.⁷⁶ As queer legal theorists continue to deconstruct the notion of fixed identity, however, the argument between status and conduct continues to confound the discourse.⁷⁷

B. The Prevailing (Conservative) Preferences

Despite critical legal theorists' criticism of the falsity of such dichotomies, these antinomies frame the discourse about equal protection theory. Moreover, a bird's eye view of these antinomies reveals a second apparent pattern: a hierarchical arrangement prioritizing the conservative preference over the progressive one.⁷⁸ This is so even though progressive scholars and litigators persistently articulate compelling arguments on behalf of the progressive preferences. The fact remains that judges developing equal protection doctrine generally follow conservative patterns: they (1) adopt an assimilationist (not antisubordination) goal;⁷⁹ (2) treat subordinated persons the same as

⁷⁵ See *Romer v. Evans*, 517 U.S. 620, 641 (1996) (Scalia, J., dissenting).

⁷⁶ See, e.g., *Watkins v. United States Army*, 847 F.2d 1329 (9th Cir. 1988), *vacated en banc*, 875 F.2d 699 (9th Cir. 1989).

⁷⁷ See, e.g., Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507-10 (1994) (arguing that immutability of any trait, including sexual orientation, should not be relevant for equal protection purposes). For a detailed examination of "the recalcitrance of the status-conduct distinction" in Title VII law, see Karen Engle, *The Persistence of Neutrality: The Failure of the Religious Accommodation Provision to Redeem Title VII*, 76 TEX. L. REV. 317, 432 (1997).

⁷⁸ For an argument that such a hierarchy should not be surprising, see, for example, Crenshaw, *supra* note 11, at 1372-73 (applying the philosophy of Jacques Derrida to argue that racism follows the pattern of Western thought that is structured into oppositional dichotomies arranged in a hierarchical order).

⁷⁹ See *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment) ("In the eyes of government, we are just one race here. It is American."); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 505-06 (1989) ("The dream of a Nation of equal citizens in a society where race is irrelevant to personal opportunity and achievement would be lost in a mosaic of shifting preferences based on inherently unmeasurable claims of past wrongs."). Justice Ginsburg's opinion for the Court in *United States v. Virginia*, 518 U.S. 515, 532-34 (1996), reflects both equal protection goals when she describes full citizenship as "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities," but explains that sex classifications "may not be used, as they once were, to create or perpetuate the legal, social, and economic inferiority of women." *Id.* (citation omitted).

(not different than) dominant persons;⁸⁰ (3) look backward toward remediation (not forward toward achieving substantive equality);⁸¹ (4) require blindness (not consciousness) of the marked and marking trait;⁸² (5) focus on the classification (not the disadvantaged class);⁸³ (6) require proof of prejudicial intent (not disproportionate effects);⁸⁴ (7) limit equal protection's reach to public (not private) action;⁸⁵ (8) focus on process (not substance);⁸⁶ (9) understand identity as singular (not multiple);⁸⁷ and (10) treat identity as fixed (not fluid).⁸⁸

This brief overview of the ten antinomies of equal protection, while far from exhaustive, shows that the antinomies themselves may exhaust the discursive possibilities within their parameters. One way out of this stagnate and limited understanding may well be a co-constitutive theory of law and society taking shape within the law and society scholarship.

⁸⁰ See *Adarand*, 515 U.S. at 224 (“[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny.”). But see *Michael M. v. Superior Court*, 450 U.S. 464, 471 (1981) (“We need not be medical doctors to discern that young men and young women are not similarly situated with respect to the problems and the risks of sexual intercourse. Only women may become pregnant. . .”).

⁸¹ See *J.A. Croson Co.*, 488 U.S. at 505-06 (requiring local government to identify evidence of specific past discrimination as one necessary element of defending its affirmative action program).

⁸² See *id.* at 494 (plurality opinion) (“[T]he standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefitted by a particular classification.”).

⁸³ See *Adarand*, 515 U.S. at 230 (“[A]ny individual suffers an injury when he or she is disadvantaged by the government because of his or her race, whatever that race may be.”).

⁸⁴ See *Personnel Adm’r v. Feeney*, 442 U.S. 256, 279 (1979) (describing “discriminatory purpose” as taking “a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group”); *Washington v. Davis*, 426 U.S. 229, 240 (1976) (requiring that the “invidious quality” of a law “must ultimately be traced to a racially discriminatory purpose”); see also *J.A. Croson Co.*, 488 U.S. at 500 (“Racial classifications are suspect, and that means that simple legislative assurances of good intention cannot suffice.”).

⁸⁵ See *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163, 171-82 (1972) (holding that the racially discriminatory behavior of a private club, licensed by the state to sell liquor, did not constitute “state action,” and therefore the Fourteenth Amendment was not implicated); *The Civil Rights Cases*, 109 U.S. 3, 25 (1883) (holding that Section 1 of the Fourteenth Amendment applies only to state action).

⁸⁶ See *High Tech Gays v. Defense Indus. Sec. Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990) (“[H]omosexuals are not without political power . . .”).

⁸⁷ See *Jefferson v. Hackney*, 406 U.S. 535, 545-57 (1972) (separating the analysis of the disparate racial impact of Texas’s welfare system from the analysis of the low-income status of the plaintiffs).

⁸⁸ See *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (plurality opinion) (treating sex as an “immutable characteristic determined solely by the accident of birth”).

II

THE PROMISE OF A CO-CONSTITUTIVE APPROACH

Part I of this Article revealed the antinomic discourse both created by and constraining equal protection theory and doctrine. This Part explores what co-constitutive theory offers equal protection discourse. I suggest that co-constitutive theory enhances equal protection discourse by providing a framework for both understanding and transcending equal protection's antinomies.

Two considerations suggest that law and society scholarship is not the most likely source of a theory that helps constitutional law out of its antinomic binds. First, law and society scholarship is not known for developing grand theory.⁸⁹ Second, the grounded-theory characteristic of most law and society research⁹⁰ does not seem to fit well with what one prominent law and society scholar has termed the "[i]nflated claims and ambitions" of "constitutional theology."⁹¹ Nevertheless, law and society scholarship has been at the forefront of the major turns in twentieth-century legal theory. As one outgrowth of the legal realist movement, law and society scholarship at first utilized and promoted its instrumentalist,⁹² problem-solving focus.⁹³ It then shifted its focus to exploiting the so-called gap paradigm—"the gap between the ideals and reality of liberal legalism"⁹⁴—by empirically

⁸⁹ See Marc Galanter & Mark Alan Edwards, *Introduction: The Path of the Law Ands*, 1997 Wis. L. Rev. 375, 383 ("At the risk of overgeneralizing, we would say that law and society scholars tend to be less enthralled by comprehensive theory, more willing to muddle through with partial theories, and less persuaded that theory can yield up unambiguous prescriptions for policy.").

⁹⁰ See *id.*

⁹¹ Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 777 (1986). Professor Friedman further describes much constitutional scholarship as focused on "the endless search for the magic bullet in fourteenth amendment cases" and "the endless search for the key to constitutional problems." *Id.* at 774, 776. Yet his disdain for the lofty aims of constitutional scholarship (as compared to the careful grounding of empirical work) itself risks the criticism of perpetuating a false dichotomy between law and society.

⁹² See *id.* at 764 ("The law and society movement presupposes an instrumental theory of law."); Austin Sarat & Thomas R. Kearns, *Beyond the Great Divide: Forms of Legal Scholarship and Everyday Life*, in LAW IN EVERYDAY LIFE 21, 26 (Austin Sarat & Thomas R. Kearns eds., 1993) (describing instrumental legal scholarship as "begin[ning] with legal rules (or with cognate legal standards) and end[ing] in an examination of their effectiveness in regulating or changing everyday life, that is, in a study of the extent to which this law has, or has failed to have, the intended role in shaping the domain of activity in question.").

⁹³ See Friedman, *supra* note 91, at 775 ("The law and society movement inside American law schools got seriously underway in the 1920s and 1930s. One trait of this early phase was the idea—or fallacy—that social science techniques could solve actual legal problems."); Munger, *supra* note 2, at 95 (describing the problem-focused research of the law and society movement as examining law "within a framework constructed from the qualities or characteristics of actors and their settings not attended to by the legal system").

⁹⁴ Munger, *supra* note 2, at 98; see also Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 122 (1984) (describing "the gap between legal principles in high-sounding pretension and in seamy operation").

confirming critical claims regarding law's "lack of instrumental capacity and its biased distributive effects."⁹⁵ After articulating this gap paradigm, law and society scholarship supplemented its demonstration of the gap with an internal criticism of the gap paradigm's limitations.⁹⁶ One outgrowth of the effort to move beyond the gap paradigm is the recent law and society scholarship that is developing more general theory,⁹⁷ such as constitutive theory.⁹⁸

Law and society's constitutive theory posits "the fundamentally constitutive character of legal relations in social life."⁹⁹ As Robert Gordon has described it, law "is omnipresent in the very marrow of society,"¹⁰⁰ meaning that

the power exerted by a legal regime consists less in the force that it can bring to bear against violators of its rules than in its capacity to persuade people that the world described in its images and categories is the only attainable world in which a sane person would want to live.¹⁰¹

⁹⁵ Munger, *supra* note 2, at 101; *see also* Gordon, *supra* note 94, at 69 ("[E]mpirical investigations of the law 'in action' have exploded forever the Formalist fantasy that a universal scheme of neutral, general rules controls equally and impersonally the discretion of every class and faction of civil society.").

⁹⁶ *See* Munger, *supra* note 2, at 96 n.39 (collecting critical sources, especially Richard L. Abel, *Taking Stock*, 14 L. & Soc'y Rev. 429, 438-39 (1980)); *id.* at 99 (summarizing that "[t]he gap paradigm has been 'exhausted'; that is, critics say it produces repetitive findings that the legal system does not live up to its ideals while it reinforces those ideals by failing to offer a coherent alternative understanding of the role of the legal system").

⁹⁷ *See id.* at 123 (describing sociology of law as "moving slowly toward a general theory of the role of law in society"); *id.* at 124 (foreseeing "opportunities to develop satisfactory general understandings of the role of law based on the evolving work on 'constitutive' theory, theory of the state, the contextual actor, reformation of bureaucracies, the post-industrial legal profession, the interpretation of law, and many other points of creative research activity").

⁹⁸ For an overview of constitutive theory's development, *see* John Brigham, *The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies*, 10 YALE J.L. & HUMAN. 421, 425-29 (1998). Like the development and criticism of the gap paradigm, law and society scholars have engaged in an internal debate regarding the recent turn to critical theory, including constitutive theory. *See* Frank Munger, *Mapping Law and Society, in* CROSSING BOUNDARIES, *supra* note 3, at 21, at 34-39. In my view, both traditional empirical and critical theoretical research have made, and will continue to make, important contributions to sociolegal understandings.

⁹⁹ Gordon, *supra* note 94, at 104. Professor David Trubek has explained that [l]aw, like other aspects of belief systems, helps to define the role of an individual in society and the relations with others that make sense. At the same time that law is a system of belief, it is also a basis of organization, a part of the structure in which action is embedded. In this way, law forms consciousness and influences outcomes.

David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 604 (1984). *See generally* HUNT, *supra* note 2 *passim* (exploring themes in sociology of law).

¹⁰⁰ Gordon, *supra* note 94, at 109.

¹⁰¹ *Id.*; *see also* Sarat & Kearns, *supra* note 92, at 30 ("Law is part of the everyday world, contributing powerfully to the apparently stable, taken-for-granted quality of that world and to the generally shared sense that as things *are*, so *must* they be.").

Some law and society scholars have come to believe that the relation between law and society is not unidirectional; rather, "legal life and everyday social life are mutually conditioning and constraining."¹⁰² I use the term "co-constitutive" to emphasize the mutual relations of law and society.¹⁰³

Some scholars view co-constitutive theory as depending on "decentering" law, that is, shifting the research focus from law produced by institutional legal actors to the understandings and practices of law drawn from wider society.¹⁰⁴ Decentered research may be espe-

¹⁰² Alan Hunt, *Law, Community, and Everyday Life: Yngvesson's Virtuous Citizens and Disruptive Subjects*, 21 L. & SOC. INQUIRY 173, 178-79 (1996); see also EWICK & SILBEY, *supra* note 4, at 22 (1998) ("Because law is both an embedded and an emergent feature of social life, it collaborates with other social structures . . . to infuse meaning and constrain social action."); Sarat & Kearns, *supra* note 92, at 55 ("Law is continuously shaped and reshaped by the ways it is used, even as law's constitutive power constrains patterns of usage."). Viewing law as part of, rather than distinct from, society is similar to the sociological account of statutory antidiscrimination law offered by Robert Post. See Robert Post, *Prejudicial Appearances: The Logic of American Antidiscrimination Law*, 88 CAL. L. REV. 1, 17 (2000) (noting that "antidiscrimination law is itself a social practice, which regulates other social practices, because the latter have become for one reason or another controversial").

¹⁰³ Following the body of law and society scholarship that is exploring co-constitutive theory, I use "constitutive" to mean "making something what it is" and "co-constitutive" to mean "mutually making things what they are." I do not mean to imply that law necessarily or completely makes society what it is or that society necessarily or completely makes law what it is. One need only agree that each at least partially shapes the other, a proposition that is likely self-evident to most readers. Yet some may not agree with the co-constitutive view of law and society. As one possibility, consider John Rawls's famous distinction between two logical conceptions of rules. See JOHN RAWLS, *Two Concepts of Rules*, in COLLECTED PAPERS 20, 20-46 (Samuel Freeman ed., 1999). Rawls characterizes one type—"rules of thumb" or summary rules—as those rules that are constituted by social practices (practices that constitute rules). See *id.* at 34-36, 40. He describes the second type—defining rules or rules of practice—as those rules that constitute practices. See *id.* at 36-39. Rawls suggests that legal arguments relate more to defining rules (rules that constitute practices). See *id.* at 43 n.27. Departing from this analysis, a co-constitutive view of law and society suggests that law might have characteristics of both types of rules. In other words, legal rules both constitute, and are constituted by, social practices.

How does Rawls's distinction relate to a co-constitutive approach? Is the Rawlsian account inconsistent with the co-constitutive approach? Rawls might reject a co-constitutive approach for two reasons. First, he denies that rules and practices have a chicken-and-egg problem, arguing instead that: (1) for a rule of thumb, the practice comes first logically and constitutes the rules; and (2) for a defining rule, the rule comes first logically and constitutes the practice. See *id.* at 34, 36. Second, Rawls posits that each rule is one type or the other. See *id.* at 40. One also can argue that Rawls might embrace a co-constitutive approach. Each conception of rules recognizes a unidirectional interaction between rules and practices. One might combine Rawls's two unidirectional interactions to get something resembling the co-constitutive approach.

For now, it seems to me that comparing a co-constitutive approach to the Rawlsian approach underscores that the co-constitutive approach posits simultaneously and mutually constitutive relations, rather than independent and mutually exclusive unidirectional relations, between legal rules and social practices. The issues raised by this comparison merit a fuller account, which I leave to another day or other scholars.

¹⁰⁴ See, e.g., MICHAEL W. MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* 278-310 (1994); see also Munger, *supra* note 2, at 120-21 (supporting law and society's decentered research with Michel Foucault's insight that power

cially helpful in revealing the influence of society and culture on law.¹⁰⁵ Yet a decentered approach is not necessary to co-constitutive theory.¹⁰⁶ This Article's call for exploration of co-constitutive understandings of equal protection encourages a standard legal focus—analysis of United States Supreme Court decision making. Co-constitutive theory offers insights not only for those interpreting constitutional decisions but also for the Supreme Court's own interpretation of the Constitution.

What is the relation between equal protection's antinomies and a co-constitutive theory of law and society? On one level, co-constitutive theory explains how the antinomic discourse frames the debate about inequality. First, because of the nature of antinomies, the alternatives are viewed as posing choices between two conflicting and mutually exclusive principles. For example, should courts interpret equal protection to require elimination of subordination or promotion of assimilation? Should courts follow the approach of sameness or difference, look backward or forward, consider or ignore the distinguishing trait, focus on the class or the classification, prohibit intent or effects, limit public or private action, enforce procedural or substantive protection, and treat identity as singular or multiple and as fixed or fluid? Courts resolve each purported conflict by choosing only one of the two alternatives, in effect assigning one alternative to the legal realm and relegating the other alternative to the societal sphere. Second, because of the co-constitutive nature of sociolegal discourse, the antinomies are constantly reinforced in both social and legal discourses. One comes to view them as comprehensively identifying available options. Over time, this reinforcement limits our ability to imagine other alternatives.

The role of co-constitutive theory is not limited to explaining how equal protection discourse fossilized into an antinomic framework. I suggest that co-constitutive theory offers an approach for disrupting and transcending the antinomies. Put simply, co-constitutive theory suggests that the antinomic alternatives are not mutually exclusive,

emanates from everywhere); Sarat & Kearns, *supra* note 92, at 55 ("In our view, scholarship on law in everyday life should abandon the law-first perspective and should proceed, paradoxically, with its eye not on law, but on events or practices that seem on the face of things, removed from law, or at least not dominated by law from the onset.").

¹⁰⁵ As Professor Gordon cautioned:

Specialized elites may exercise a disproportionate influence on the manufacture of the forms that go into the constitution of legal relations, but the forms are manufactured, reproduced, and modified for special purposes by everyone, at every level, all the time. Critics are not going to get this insight across if they don't switch their focus [from engaging traditional doctrine].

Gordon, *supra* note 94, at 123.

¹⁰⁶ See Brigham, *supra* note 98, at 452 (similarly arguing that the decentered view should not constrain constitutive research).

contradictory, or even dichotomous. At a minimum, then, the choices posed are unnecessary ones. Moreover, the choices posed are harmful because eventually they impair our ability to understand more comprehensively the complex interactions, including the simultaneous, ongoing, and mutual constitution of law and society. Examining the various antinomies demonstrates both the explanatory power and transcendent potential of co-constitutive theory.

For example, much scholarship has already revealed both the internalization and the falsity of the public/private dichotomy. In Robert Gordon's words:

A familiar example of the way in which legal categories affect social perceptions would be the carryover into common speech and perceptions of the legal distinction between Public and Private realms of action, the Public being the sphere of collective action for the welfare of all through the medium of government (and thus the only realm of legitimate coercion), and the Private being the sphere of individual self-regarding action.¹⁰⁷

Thus the public/private distinction has been internalized "as part of the natural order of things,"¹⁰⁸ and, as such, "sets fairly severe limits on the ways in which we can imagine the world and how to change it."¹⁰⁹ It is not surprising then to find this distinction embedded in and enveloping equal protection doctrine.¹¹⁰ This is true both because the distinction operates as a legal construct, and also because it is powerfully internalized within cultural consciousness. The distinction's power is grounded in its use in legal doctrine, its internalization throughout society, and law and society's mutually reinforcing understandings of the distinction.

While a co-constitutive understanding reveals the very real internalization of the public/private distinction throughout law and society, it also uncovers the ephemeral potential of such a conception. Once we understand the co-constitutive nature of the public/private distinction, we can de-naturalize the distinction and imagine transcending it. In order to transcend this distinction we must imagine a different construction of how the public and private spheres relate.¹¹¹ This requires understanding the falsity of the dichotomy, or acknowledging that, as Kristin Bumiller explicated Emile Durkheim's analysis,

¹⁰⁷ Gordon, *supra* note 94, at 109. I am less certain than Professor Gordon that the public/private distinction was constructed by law and then imported into society. It could have been constructed by society and then imported into law. More likely, it was mutually constituted by law and society simultaneously.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 109-10.

¹¹⁰ See discussion of the antinomy between public and private *supra* Part I.A.7.

¹¹¹ See Munger, *supra* note 2, at 89-90, 112, 125 (encouraging use of the sociological imagination).

"all law is private in that it involves individual activity, and all law is public in that it involves social functions and roles."¹¹² Thus, the public/private distinction is not much of a dichotomy at all because the two spheres are neither mutually exclusive nor contradictory, but rather mutually constitutive.¹¹³

The other antinomies similarly lack dichotomous characteristics. Even the first antinomy's dispute over the ultimate goal of equal protection fails to rise to the level of a dichotomy because equal protection conceivably might seek to both promote assimilation and eliminate subordination. The landmark cases of *Brown v. Board of Education*¹¹⁴ and *Loving v. Virginia*¹¹⁵ imagine and reflect both possibilities. In these decisions, the Court recognized how laws prohibiting people of different racial backgrounds from intermingling in school and marriage socially stigmatized racial minorities.¹¹⁶ The Court might plausibly have viewed the harm as either subordination itself or as a barrier to assimilation. For example, the Court in *Loving* noted that Virginia's statutes prohibiting interracial marriage rested upon racial distinctions, thus failing the color-blindness test.¹¹⁷ Yet the statutes prohibited all people of different races from marrying, satisfying formal equality. The Court, however, recognized that the state's actual purpose was to preserve the integrity of only the white race—a formal *inequality*.¹¹⁸ In effect, the Court's own analysis demonstrates not only the lack of necessity, but perhaps the logical impossibility of choosing between the antinomies: the goals of assimilation and antisubordination might be understood as mutually constitutive rather than internally contradictory.

Similarly, a co-constitutive understanding illuminates how the second antinomy between sameness and difference is a false dichotomy. In his research regarding the education of disabled children, David Engel has shown the paradox created by the choice between sameness and difference.¹¹⁹ On the one hand, the law requires that

¹¹² BUMILLER, *supra* note 4, at 61 (construing EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 68 (1933)).

¹¹³ For a description of the role of Stewart Macaulay and other law and society scholars in disrupting and transcending the public/private distinction, see Munger, *supra* note 98, at 45-46.

¹¹⁴ 347 U.S. 483 (1954).

¹¹⁵ 388 U.S. 1 (1967).

¹¹⁶ For an analysis of *Brown* on similar terms, see BUMILLER, *supra* note 4, at 67-68.

¹¹⁷ See *Loving*, 388 U.S. at 11 ("There can be no question but that Virginia's miscegenation statutes rest solely upon distinctions drawn according to race. The statutes proscribe generally accepted conduct if engaged in by members of different races.").

¹¹⁸ See *id.* ("The fact that Virginia prohibits only interracial marriages involving white persons demonstrates that the racial classifications must stand on their own justification, as measures designed to maintain White Supremacy.").

¹¹⁹ See David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166.

children with disabilities receive the same right to education as nondisabled children.¹²⁰ On the other hand, a child must first prove that she is disabled, in effect proving her difference, in order to qualify for the right to the same education. In fact, the accommodating education is itself deemed "special."¹²¹ Engel concluded that this rights analysis simultaneously liberates disabled children "from isolated and inadequate educational programs" yet reproduces "the very distinctions it sets out to obliterate."¹²² Engel's analysis thus provides an example of how sameness and difference play roles in mutually constituting one another: a recognition of difference creates a right to sameness, while the very process of obtaining the right reinforces difference.

By focusing our attention on the ways that law and society mutually construct and constrain one another, a co-constitutive approach disrupts a formal equal protection analysis. A co-constitutive approach denies the belief that law is autonomous.¹²³ Instead, it requires that scholars explore how law is internal to the constitution of social practices¹²⁴ and how social practices are internal to the constitution of law. Law and society researchers have used co-constitutive insights to accomplish varied goals, for example: to show how law and society mutually reinforce the hierarchy between "haves" and "have-nots";¹²⁵ to explore how sociolegal identities such as persons, victims, citizens, and classes are part of "the core of fictions created by the law";¹²⁶ to reveal how social and legal identities are multiple, complex, and contingent;¹²⁷ and to demonstrate the role of law in producing cultural meaning.¹²⁸ As the next Part shows, other co-constitutive insights abound in both doctrine and theory.

¹²⁰ See *id.* at 204.

¹²¹ *Id.* at 204-05.

¹²² *Id.* at 205.

¹²³ See, e.g., HUNT, *supra* note 2, at 304-05; Munger, *supra* note 2, at 121.

¹²⁴ See Sarat & Kearns, *supra* note 92, at 31.

¹²⁵ See Marc Galanter, *Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change*, 9 L. & SOC'Y REV. 95, 95-97 (1974) (describing how social and economic advantages systemically favor the "haves" and disfavor the "have-nots" throughout the legal system).

¹²⁶ BUMILLER, *supra* note 4, at 60.

¹²⁷ See HUNT, *supra* note 2, at 330 (co-constitutive theory studies "the impact of law on behavior or on the formation of identities and social consciousness"); Sarat et al., *supra* note 3, at 4-6 (collecting and summarizing sources); see also Kathryn Abrams, *The Constitution of Women*, 48 ALA. L. REV. 861, 883-84 (1997) (urging development of "a multi-faceted theory which clarifies that discrimination against women differs in different contexts and which affects distinct subgroups of women in varying ways" and suggesting that the Supreme Court has begun to project "more complex, contingent" depictions of women).

¹²⁸ See MERRY, *supra* note 4, at 17-18 (collecting and summarizing sources); Jane S. Schacter, *Skepticism, Culture and the Gay Civil Rights Debate in a Post-Civil-Rights Era*, 110 HARV. L. REV. 684, 717-30 (1997) (book review) (exploring how law affects culture and how culture affects law in terms of the meaning of sexual orientation).

III

EXAMPLES OF CO-CONSTITUTIVE THEORY AT WORK

The first two Parts of this Article provided an overview of equal protection's antinomic discourse and introduced co-constitutive theory as a new framework for understanding and transcending this discourse. This third Part explores several examples of co-constitutive theory at work. First, it links several outlier equal protection cases to their underlying co-constitutive insights and suggests that these cases imply an emerging co-constitutive third strand in equal protection doctrine. Second, it identifies several co-constitutive aspects of the scholarly contributions to this Symposium.

A. Equal Protection's Co-Constitutive Third Strand

Equal protection doctrine can be succinctly summarized as a two strand analysis: courts apply heightened scrutiny only to government actions that either burden a sufficiently suspect class¹²⁹ (the first strand) or infringe on a sufficiently fundamental right¹³⁰ (the second strand). In order to situate the following examples of co-constitutive theory at work, one must unpack this neat doctrinal summary.

Historically, equal protection doctrine focused on two primary variables, the *class* of people affected and their affected interest or *right*. After it identified these two variables, the Supreme Court faced two choices. First, it could consider the class and right either in relation to one another or independently of one another. The Court chose the latter, and generally considers the class and right independently of one another, resulting in its two-strand approach.¹³¹ The Court then encountered a second choice of how to structure its review. Justices Marshall and Stevens famously urged the Court to adopt a sliding-scale approach that would allow for flexible but careful consideration of the competing interests.¹³² Instead of employing a slid-

¹²⁹ The common phrase "suspect class" is, of course, a misnomer. It is not the class, but the government's targeting of the class, that is suspect. The so-called suspect class analysis evolved from the Supreme Court's recognition that "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." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 n.4 (1938). More recently, the Supreme Court has shifted its concern from presumptively suspect targeting of a class, such as that of African Americans, to government deployment of presumptively irrelevant classifications, such as race. See *supra* Part I.A.5 (discussing the antimony between classifications or classes).

¹³⁰ See CHEMERINSKY, *supra* note 39, at 532-33.

¹³¹ See *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.")

¹³² See, e.g., *Craig v. Boren*, 429 U.S. 190, 212 (1976) (Stevens, J., concurring); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 109-10 (1973) (Marshall, J., dissenting).

ing scale, the Court gradually developed categorical tiers of scrutiny used to identify the strength of the individual and the government interests and to determine the requisite fit between the government's ends and its means.¹³³ I suggest that co-constitutive theory offers a partial critique of the Court's first choice; the Court should have provided a means for consideration of the class and right in relation to one another. I do not address the Court's second methodological choice, whether—once inside a strand—it should employ tiers of scrutiny, a sliding scale, or some other method for evaluating the competing interests and the fit between the government's ends and means.¹³⁴ The following discussion explains how the Court has begun to consider classes and rights in co-constitutive relation to one another.

Within the two-strand analysis of equal protection doctrine, one of the persistent questions is whether the equal protection mandate prohibits governmental discrimination against classes not deemed to be suspect and with regard to rights not deemed to be fundamental. In its apparent desire to avoid the difficult questions associated with

¹³³ The first step identifies the individual interests. The first-step occurs when a court assigns the case to its first or second strand by determining whether the affected individual is a member of a fully suspect or quasi-suspect class (the first strand), and whether the individual's interest invokes a fully fundamental or quasi-fundamental right (the second strand). The second step requires a court to determine the strength of the government's interests. The third step requires a court to evaluate the fit between the government's means and its ends.

Each strand of equal protection doctrine utilizes three familiar tiers of scrutiny. For most classes or rights, the Court applies rational review, upholding governmental discrimination if it is rationally related to achieving legitimate governmental purposes. See *Kimel v. Florida Bd. of Regents*, 120 S. Ct. 631, 645-46 (2000) (applying rational review to laws that classified based on age). For quasi-suspect classes (such as gender-based classes) or quasi-fundamental rights, the Court applies intermediate scrutiny, allowing governmental discrimination only if it is substantially related to achieving important governmental objectives. See, e.g., *United States v. Virginia*, 518 U.S. 515, 533 (1996) (requiring that a state "at least" satisfy intermediate scrutiny to successfully defend its gender discrimination). For fully suspect classes (such as race-based classes) or fully fundamental rights, the Court applies strict scrutiny, permitting governmental discrimination only if it is narrowly tailored to further compelling governmental interests. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995) (requiring that all racial classifications be subjected to strict scrutiny). Conventional wisdom states that courts uphold laws reviewed on a rational basis, strike down laws reviewed with strict scrutiny, and alternate between upholding and invalidating laws reviewed with intermediate scrutiny. See CHEMERINSKY, *supra* note 39, at 527-33. There have been times when the Court has struck down laws reviewed on a rational basis, and some scholars have identified a fourth tier of rationality with "bite" to explain these outlier cases. Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18-22 (1972). Contrary to Gerald Gunther's famous assertion, the Supreme Court has insisted that strict scrutiny is not "fatal in fact." *Id.* at 9; *Adarand*, 515 U.S. at 202.

¹³⁴ It might be helpful to explain how the co-constitutive approach differs from intermediate scrutiny. While intermediate scrutiny considers separately whether the case involves either a quasi-suspect class or a quasi-fundamental right, the co-constitutive approach considers the mutually constituting relations of the right and the class. See Nice, *supra* note 5, at 1213.

applying the doctrine's two strands to new factual situations, the Supreme Court has ignored whether a particular class is suspect or whether a particular right is fundamental, thus generally refusing to recognize additional suspect classes or fundamental rights.¹³⁵ Yet the Court has allowed exceptions to this general pattern by occasionally ignoring the established equal protection doctrine to invalidate government classifications that typically would have survived if the Court strictly adhered to that doctrine.¹³⁶ These exceptions suggest an emerging third strand of equal protection doctrine—one that considers the class and right in co-constitutive relation to one another.¹³⁷

As I have explored in greater detail elsewhere,¹³⁸ the Supreme Court has begun to craft this third doctrinal strand to invalidate government actions that do not burden suspect classes or fundamental rights. In these outlier cases, the Court has refused to separate the first two doctrinal strands, which it normally treats as independent.

¹³⁵ All nonsuspect government actions not burdening any fundamental right receive the lowest judicial scrutiny, namely rational review, which requires the government to prove that its means are rationally related to a legitimate interest and typically results in judicial deference and validation of these allegedly discriminatory government actions. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest.").

¹³⁶ None of the cases involved a class deemed suspect or a right deemed fundamental. The Supreme Court applied rational review and invalidated Colorado's Amendment 2, which prohibited legal protection of gay, lesbian, and bisexual people from discrimination, even though the Court did not declare sexual minorities as a suspect class nor the right to petition any branch of government for protection from discrimination as a fundamental right. See *Romer v. Evans*, 517 U.S. 620 (1996). Similarly, the Court applied intermediate scrutiny and invalidated a Texas statute that effectively denied a free public education to children of undocumented immigrants, even though the Court did not declare immigrant children as a suspect class nor the right to free public education as a fundamental right. See *Plyler v. Doe*, 457 U.S. 202 (1982). Finally, the Court applied strict scrutiny and invalidated a Mississippi rule that denied an appeal to a mother who could not afford the transcript fee required to appeal the termination of her parental rights, even though the Court did not declare indigent parents as a suspect class nor the right to appeal termination of parental rights as a fundamental right. See *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996). Instead, these cases establish a pattern of invalidating laws when those laws infringe upon rights particularly important to relatively vulnerable classes.

¹³⁷ A co-constitutive relation presents only one of many possible ways to understand relations between two variables. Specifically, a co-constitutive framework is not the only way for the Court to consider a class and a right in relation to one another. The Court could, for example, simply aggregate the vulnerability of the class and the importance of the right in a "stacking" approach. It could decide that the combined weight of the vulnerability of the class and the importance of the right triggers some form of heightened scrutiny, i.e., either intermediate or strict scrutiny. While such a stacking approach lies beyond the purview of this Article, it merits future exploration. In the meantime, it is sufficient to note that a stacking approach is different than a co-constitutive approach. In particular, a stacking approach likely would trigger heightened scrutiny more frequently than the co-constitutive approach will. For an analogous use of stacking in the context of the qualified immunity doctrine, see Alan K. Chen, *The Ultimate Standard: Qualified Immunity in the Age of Constitutional Balancing Tests*, 81 IOWA L. REV. 261, 307-13 (1995).

¹³⁸ See Nice, *supra* note 5.

Instead, the Court has considered the class and the right in relation to one another, effectively applying heightened scrutiny when governmental actions target relatively unprotected classes for the denial of rights particularly important to those classes.¹³⁹ I have suggested that this third strand recognizes co-constitutive theory's insight that law and society mutually constitute one another.¹⁴⁰ Specifically, third strand analysis considers rights and classes in relation to one another. It understands rights as partially marked, defined, and constituted by the classes that do or do not hold them, and it also understands those rights as partially marking, defining, and constituting those classes.¹⁴¹

The third strand of equal protection doctrine reveals the Supreme Court's implicit use of co-constitutive insights in its reasoning. For example, the Court relied on co-constitutive understandings of law and society in three prominent cases: *Romer v. Evans*,¹⁴² *Plyler v. Doe*,¹⁴³ and *M.L.B. v. S.L.J.*¹⁴⁴ In each of these cases, the co-constitutive relations between law and society materialized in the connections between the right involved and the class affected. Each law at issue sought to deny a right from a class that had been marked by the lack of that right, thus legally perpetuating one of the specific social characteristics that disadvantaged the class.

In *Evans*, Colorado's Amendment Two¹⁴⁵ targeted gay people, a class marked by discrimination and by exclusion from antidiscrimina-

¹³⁹ This third strand differs from the Supreme Court's use of intermediate scrutiny and strict scrutiny because both intermediate and strict scrutiny separate consideration of the suspectness of the class from the fundamentality of the right, whereas third strand analysis considers the class and the right in relation to one another. See *id.* at 1215.

¹⁴⁰ For excellent overviews of law and society's constitutive theory, see EWICK & SILBEY, *supra* note 4, at 22-23. Ewick and Silbey note how

[b]ecause law is both an embedded and an emergent feature of social life, it collaborates with other social structures . . . to infuse meaning and constrain social action. . . .

. . . . In sum, we conceive of legality as an emergent structure of social life that manifests itself in diverse places, including but not limited to formal institutional settings. Legality operates, then, as both an interpretative framework and a set of resources with which and through which the social world (including that part known as the law) is constituted.

Id.; see also Sarat & Kearns, *supra* note 92, at 29 (describing constitutive scholars as believing "that law permeates social life and that its influence is not adequately grasped when law is treated as an external, normative missile launched at independent, ongoing activities" and believing that "we have internalized law's meanings and its presentations of us, so much so that our own purposes and understandings can no longer be extricated from them").

¹⁴¹ See Nice, *supra* note 5, at 1222-26; see also BUMILLER, *supra* note 4, at 71 (describing how those who enjoy rights do not need them, while those who seek rights are defined as the class of those who do not enjoy them).

¹⁴² 517 U.S. 620 (1996).

¹⁴³ 457 U.S. 202 (1982).

¹⁴⁴ 519 U.S. 102 (1996).

¹⁴⁵ See COLO. CONST. art. II, § 30b, held unconstitutional by *Romer v. Evans*, 517 U.S. 620 (1996).

tion protection,¹⁴⁶ and denied them the right to receive governmental protection from discrimination.¹⁴⁷ In *Plyler*, Texas targeted undocumented immigrant children, a class marked by its presumed under-education,¹⁴⁸ and denied them the right to receive a free public education.¹⁴⁹ Finally, in *M.L.B.*, Mississippi targeted an impoverished mother, one of a class marked by both poverty and allegations of parental unfitness,¹⁵⁰ and denied her the right to a free appeal of a judicial order that found her to be an unfit parent and terminated her parental rights.¹⁵¹

Although formal equal protection doctrine would have required the Court to separate its consideration of whether heightened scrutiny is justified either because the right is fundamental or because the class is suspect,¹⁵² the Court instead considered the right and the class in relation to one another. For example, Colorado defended Amendment Two by arguing that it simply denied gay people special rights. The Court in *Evans*, however, rejected Colorado's special-rights defense by recognizing that "the protections Amendment 2 withholds" cannot be characterized as special precisely because they are "taken for granted by most people either because they already have them or do not need them."¹⁵³ This reasoning was crucial to the Court's analysis and revealed its understanding of rights as influenced by, and influencing, the social classes and the context in which they function.¹⁵⁴ Similarly, the Court in *Plyler* recognized that denying undocumented immigrant children the right to a free public education would directly

¹⁴⁶ See Schacter, *supra* note 8, at 286-90.

¹⁴⁷ See Nice, *supra* note 5, at 1226-29.

¹⁴⁸ For an exploration of one scholar's negotiation around such a presumption, see Margaret E. Montoya, *Mascaras, Trenzas, y Greñas: Un/Masking the Self While Un/Braiding Latina Stories and Legal Discourse*, 17 HARV. WOMEN'S L.J. 185, 186-92 (1994).

¹⁴⁹ See Nice, *supra* note 5, at 1232-36.

¹⁵⁰ For analyses of the assumption that poor women are bad mothers, see, e.g., JULIE A. NICE & LOUISE G. TRUBEK, *POVERTY LAW: THEORY AND PRACTICE* 31-40, 618-620 (1997); *id.* at 31-32, 230-231 (Supp. 1999); Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274; Lucy A. Williams, *Race, Rat Bites, and Unfit Mothers: How Media Discourse Informs Welfare Legislation Debate*, 22 FORDHAM URB. L.J. 1159 (1995). For an example and a critique of the assumption at work in case law, see *Wyman v. James*, 400 U.S. 309, 322-23 (1971) (justifying home visits to welfare recipients as presumptively and reasonably necessary to monitor health and safety of children), and *id.* at 342 (Marshall, J., dissenting) (questioning the assumption that welfare recipients are more likely than the general population to be bad parents).

¹⁵¹ See Nice, *supra* note 5, at 1239-42.

¹⁵² See, e.g., *Romer v. Evans*, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

¹⁵³ *Id.* at 631.

¹⁵⁴ See Nice, *supra* note 5, at 1229-32.

impede their ability to improve their subordinated status in society.¹⁵⁵ Finally, in *M.L.B.*, the Court recognized that denying an appeal to an impoverished mother due to her inability to pay court fees would prohibit a poor parent from resisting the very thing she needed to oppose—the brand of parental unfitness.¹⁵⁶ Thus, in each case, the Court understood how the right and the class influenced the meaning of one another. This co-constitutive insight justified the Court's heightened scrutiny, which resulted in the invalidation of discriminatory laws, something its formal equal protection doctrine otherwise would have precluded.¹⁵⁷

B. Co-Constitutive Contributions in this Symposium

In this Symposium's collection of articles, other legal scholars employ co-constitutive theory, albeit in largely unmarked ways. For example, both Angela Harris and Linda McClain explore our conceptions of equality, freedom, and governance, thus contributing to our understanding of the state and civil society in co-constitutive relation.¹⁵⁸ Devon Carbado and Mitu Gulati call for legal recognition of both the identity of work and the work of identity.¹⁵⁹ Martha Mahoney shows how law continues to perpetuate segregation and uses critical theory to re-imagine segregation as de-naturalized.¹⁶⁰ Darren Hutchinson continues to explore the problems of singular essentialism, here decentering white privilege within gay identity.¹⁶¹ Because each of these authors assumes that law and society are mutually constitutive, their work contributes to the co-constitutive enterprise of conceptualizing law "in relation to the nonlegal."¹⁶²

¹⁵⁵ See *Plyler v. Doe*, 457 U.S. 202, 222 (1982) ("[B]y depriving the children of any disfavored group of an education, we foreclose the means by which that group might raise the level of esteem in which it is held by the majority."); Nice, *supra* note 5, at 1238.

¹⁵⁶ See *M.L.B. v. S.L.J.*, 519 U.S. 102, 125 (1996); Nice, *supra* note 5, at 1247-50.

¹⁵⁷ See Nice, *supra* note 5, at 1211.

¹⁵⁸ See Angela P. Harris, *Foreword: Beyond Equality: Power and the Possibility of Freedom in the Republic of Choice*, 85 CORNELL L. REV. 1181 (2000); Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221 (2000); see also HUNT, *supra* note 2, at 305-13 (exploring conceptions of law and governance).

¹⁵⁹ See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259 (2000).

¹⁶⁰ See Martha R. Mahoney, *Whiteness and Remedy: Under-Ruling Civil Rights in Walker v. Mesquite*, 85 CORNELL L. REV. 1309 (2000).

¹⁶¹ See Darren Lenard Hutchinson, "Gay Rights" for "Gay Whites"?: *Race, Sexual Identity and Equal Protection Discourse*, 85 CORNELL L. REV. 1358 (2000).

¹⁶² HUNT, *supra* note 2, at 329 ("Any attempt at a treatment of law that seeks to do more than undertake a purely internal enquiry that assumes the radical autonomy of law must adopt some view on how law is to be conceptualized in relation to the nonlegal.").

CONCLUSION

Co-constitutive theory offers a framework for both understanding how law and society mutually constitute one another, and also for re-imagining those mutual relations. Doing so offers a way to understand, as well as transcend, the mechanisms behind the ten antinomies of equal protection described in the first part of the essay. Judges and legal scholars have begun to recognize co-constitutive relations. Not surprisingly, as the theory itself might predict, scholars and courts have not explicitly articulated these mutual relations, leaving open the possibility of further understanding through marking, articulating, and exploring the theory's insights. Because applying co-constitutive theory to constitutional law is a new enterprise, I leave open the question whether co-constitutive theory offers a universal approach to understanding law and society.¹⁶³ Nevertheless, co-constitutive theory itself constructs by not merely refuting the dichotomy between law and society and between rights and classes but also by affirmatively identifying and revealing their mutually constitutive relations. Its promise for equal protection jurisprudence lies in its potential to help us understand its development thus far and to allow us to imagine beyond its currently antinomic discourse. Future scholarship undoubtedly will further articulate co-constitutive theory's insights.

¹⁶³ I do note, however, as Lawrence Friedman has explained, that law itself is not universal. See Friedman, *supra* note 91, at 767 ("As everybody knows, the law of one country is not the same as the law of other countries, in an absolutely literal way. Law is the only social process studied in universities that completely lacks any reasonable claim to universality.").