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Indiana Journal of Law and Social
Equality

Volume 8 | Issue 1


Article 2

Spring 1-2020

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Publication Citation

8 Ind. J.L. & Soc. Equality 19 (2020).

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Reevaluating Politicized Identity & Notions of an American Political Community in the Legal & Political Process

Marvin L. Astrada *

*Political identity can be viewed as a “historically and culturally specific discursive formation.”*¹

*“[I]t is in the nature of political identities, camps, teams, and the corresponding bundled ideological commitments to threaten ossification and stasis This suggests a challenge and an enormous opportunity; it suggests the possibility of politics as more than a set of struggles and commitments (read: obligations); it suggests politics as an exploration, a creative enterprise, and an adventure.”*²

INTRODUCTION

The twentieth and twenty-first centuries have seen the rise and development of what is commonly referred to as “identity politics.” This development has profoundly impacted longstanding, traditional notions of a single “American” political community and national identity through the disruption of legal process and public policy spaces. Identity politics and its production of formal, politicized identities as a lodestar for modern representational politics has assumed a significant role in the conduct of American politics and, more specifically, notions of what constitutes an American political community. Politicized identity, as well as competing notions of what should constitute a “proper” national political community, has found expression and exerted influence on the political and judicial system’s law and policy-making capacities.³

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¹ ROSI BRAIDOTTI, *THE POST-HUMAN* (2013) (ebook), *reprinted in* THE NORTON ANTHOLOGY OF THEORY AND CRITICISM 2327, 2335 (Vincent B. Leitch et al. eds., 3d ed. 2018) [hereinafter NORTON ANTHOLOGY].

² Richard T. Ford, *Political Identity as Identity Politics*, 1 UNBOUND: HARV. J. LEGAL LEFT, 53, 57 (2005).

³ For a description of what constitutes a judicial system, see generally Sheldon Goldman & Thomas P. Jahnige, *Eastonian Systems Analysis and Legal Research*, 2 RUTGERS-CAM L.J. 285 (1970). “A judicial system can be conceptualized as encompassing all interactions in a society involved in the authoritative allocation of values by the judicial authorities of specified courts. Values are allocated by court decisions, procedural rules and court orders.” *Id.* at 288. Many cases speak to the impact of politicized identity on the political and legal process and broader political community. See *Obergefell v Hodges*, 135 S. Ct. 2584, 2607–08 (2015) (holding that under the Fourteenth Amendment’s Equal Protection Clause and substantive due process the states must provide

Presently, identity politics in the United States encapsulates a broad range of theories, norms, and practices, ostensibly located in objective, universal “shared” group experiences of marginalization and oppression based on actual or perceived membership in an identity-based group. In the present political and legal context, rather than organizing on explicitly sociopolitical or economic belief systems, ideological platforms, or political party affiliations, many modern political movements and organizations are explicitly embracing formal politicized identity as a basis both for participation in and, by virtue of participation, for attempts to define the broader national political community.⁴ The foregoing movements typically aim to declare, clarify, reclaim, and secure sundry rights and freedoms through the political and legal process. Empowerment and enhancement of a specific identity-based constituency that has been historically marginalized within the American political community is part of the modus operandi of identity-based movements.

The primacy of the identity group is stressed, prioritized, and utilized as the basis for the exercise of power at various levels of the political, legal, and socioeconomic hierarchy by elite representatives of a formal identity group. Power manifests in the articulation and implementation of select identity groups’ goals and interests being represented in political, legal, and policy spaces. Power thus manifests in the public sphere as policy constituted by government pronouncements backed by the financial and coercive power of the State. Such pronouncements are implemented as policy to effectuate, in part, interpretations of the general welfare.⁵ Policy entails a multifaceted process where the general welfare is conceptualized, defined, and acted upon.⁶ Within this process, policy spaces can be viewed as “considerations of what is expedient for the community.”⁷ Policy has “consistently, if not always

marriage licenses to same-sex couples and must recognize marriages that were legally licensed and performed in other states); *United States v. Windsor*, 570 U.S. 744, 745 (2013) (holding that the 1996 Defense of Marriage Act is unconstitutional); *Lawrence v. Texas*, 539 U.S. 558 (2003) (overruling *Bowers v. Hardwick*, 478 U.S. 186 (1986)); *Boy Scouts of America v. Dale*, 530 U.S. 640, 659 (2000) (holding that the constitutional right to freedom of association allowed the Boy Scouts of America (BSA) to exclude a homosexual person from membership in spite of a state law requiring equal treatment of homosexuals in public accommodations); *Romer v. Evans*, 517 U.S. 620, 635 (1996) (striking down Colorado's Amendment 2, which denied gays and lesbians protections against discrimination); *Bowers*, 478 U.S. at 189 (holding that consenting adults do not have a constitutional right to engage in sodomy in private under Due Process Clause); *One, Inc. v. Olesen*, 355 U.S. 371 (1958) (considering the issue of free speech rights with respect to homosexuality).

⁴ See Alex Thompson, *2020 Democrats Are Dramatically Changing the Way They Talk About Race*, POLITICO (Nov. 19, 2018), <https://www.politico.com/story/2018/11/19/democrats-2020-race-identity-politics-strategy-1000249>.

⁵ See Theodore J. Lowi, *Four Systems of Policy, Politics, and Choice*, 32 PUB. ADMIN. REV. 298 (1972).

⁶ See OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 35–36 (Paulo J.S. Pereira & Diego M. Beltran eds., 2011) (1881).

⁷ *Id.* at 35.

explicitly, found authority in peoples' empirical perspectives about social consequences. Its most important contribution has perhaps been . . . that law is most fruitfully conceived as decision in the sense of sanctioned authoritative choice."⁸

Identity is a formidable basis from which to construct a political, legal, and public policy agenda or platform because it gets at the core of what a subject perceives itself to be and what its purpose is in the broader political community. Indeed, political activity is "animated by efforts to define and defend who I am, or we are, or you are, or hope to be, or hope to be seen to be."⁹ Members—or rather, self-designated or appointed representatives—of identity-based constituencies ostensibly assert or reassert ways of explaining and understanding a group's distinctiveness, experiences, history, and inclusion and exclusion criteria. The purpose of asserting and propagating a reimagined or re-appropriated identity is to directly challenge what are deemed mischaracterizations of out-groups' experiences and status within society's public policy spaces.¹⁰ The stated overarching goal of identity-based, socio-political agendas, as put forth by representatives of an identity group, is usually to obtain greater self-determination, autonomy, rights, and recognition of the value and worth of a marginalized group's experience.¹¹ In doing so, politicized identity becomes an exercise of power over subjects, in that individual subjects are, to some degree, compelled to surrender their autonomy, distinctiveness, complexity, and diversity in service of group-based identity factions, politics, and movements for the sake of implementing nationalistic public-policy agendas.¹²

Identity has become not only a basis for political participation and representation, but also a means of obtaining and exercising power among identity-group elites in the realms of law and politics. Identity has become a

⁸ Harold D. Lasswell & Myres S. McDougal, *Criteria for a Theory About Law*, 44 S. CAL. L. REV. 362, 372 (1971).

⁹ Richard D. Parker, *Five Theses on Identity Politics*, 29 HARV. J.L. & PUB. POL'Y 545–53 (2005).

¹⁰ See generally ROGERS BRUBAKER, TRANS: GENDER AND RACE IN AN AGE OF UNSETTLED IDENTITIES (2016); Rogers M. Smith, *Identities, Interests, and the Future of Political Science*, 2 PERSPS. ON POLITICS 301 (2004).

¹¹ See Michael Walzer, *What Does It Mean to Be an "American?"*, 57 SOC. RES. 591 (1990); Nadia Suleman, *Young Americans Are Increasingly 'Uncomfortable' With LGBTQ Community*, GLAAD Study Shows, TIME (June 25, 2019), <https://time.com/5613276/glaad-acceptance-index-lgbtq-survey/>.

¹² From social justice movements anchored by race to artistic expression centering legacies of pain and pleasure that shape our racial, cultural, and geographic senses of self, identity is on the rise as a tool that animates both self-affirmation and liberation. At the same time, identity is prompting severe backlash. From the 'All Lives Matter' slogans developed in response to the fight against police brutality to the ambitious calls for universality in the law, identity politics is characterized as undemocratic, exclusionary, and harmful to minoritized identities.

Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 128 (2017); see also Jessica Knouse, *From Identity Politics to Ideology Politics*, 3 UTAH L. REV. 749, 750 (2009).

pursuit of an ideological-political program that directly impacts public policy. As an expression of power, identity politics has (1) profoundly impacted the fabric of American politics and political culture; (2) affected the political, legal, cultural, and socioeconomic reality of those who reside within and without classificatory schema based on identity; and (3) has had a formative impact on the notion of what comprises an American political community.¹³

In light of the foregoing observations, this work critically examines the complexity of the politics of identity, politicized identity, and notions of an American political community as manifested in the political and legal process. More specifically, this work analyzes some of the problems, tensions, and effects of politicized identity vis-à-vis positing an American political community, as well as the impact that politicized identity has on the character and content of inclusive representational politics—the medium by which the American political community is framed and posited. This work will thus proceed as follows: First, an in-depth analysis of politicized identity is conducted to frame the discussion and highlight the complexity that undergirds the politics of identity in the political and legal process. Second, the enduring problem of identity-based representation and the challenges of positing a national political community is considered. Third, the multifaceted relationship between law, politics, identity, and representation is examined. Fourth, the nuances of politicized identity and the problems that attach to employing politicized identity in representative politics are identified and critically analyzed. Lastly, a summary of findings and some observations pertaining to politicized identity’s role and influence on the political and legal process, representational politics, and what constitutes an American political community going forward are provided.

I. WHY REEVALUATE POLITICIZED IDENTITY?

A. *Politicized Identity & Political Community in Law, Politics & Policy*

A systemic, conceptual analysis reveals the problems that exist in the political and legal process as far as articulating a nationalistic notion of an

¹³ See *Oyama v. California*, 332 U.S. 633, 647 (1948) (holding that States cannot explicitly subject citizens of Asian descent to unequal treatment under law based solely on race/ethnic classification); *Korematsu v. U.S.*, 323 U.S. 214, 216 (1944) (“[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect” and are subject to “the most rigid scrutiny.”); *Plessy v. Ferguson*, 163 U.S. 537, 550–51 (1896) (upholding the constitutionality of racial segregation laws for public facilities as long as the segregated facilities were equal in quality); *The Civil Rights Cases*, 109 U.S. 3 (1883) (holding that the Civil Rights Act of 1875 was unconstitutional because Congress lacked authority to regulate private affairs under the Fourteenth Amendment; also, the Thirteenth Amendment “merely abolishes slavery,” and did not necessarily ban race discrimination regarding access to public services); *United States v. Cruikshank*, 92 U.S. 542, 554 (1876) (declaring that the Due Process and Equal Protection Clauses of the Fourteenth Amendment apply only to state action, not to actions by individual citizens).

American political community via politicized identity groups. Thus, systemic analysis is warranted because of the insight that can be gained concerning the overarching political and judicial systems' ability to confront change and persist in light of the severe challenges that each is presently facing in what some commentators have termed a crisis in the integrity of the American political process and conceptions of a national community.¹⁴ Various strains of politicized identity have manifested, played a substantial role, and persisted in the present political and legal process and in articulations of an American political community.¹⁵ Politicized identity is a structural variable, which persists in the political and judicial systems that contextualize, and which are products and producers of, politicized identity.

[A] principal objective of a political system is to persist—i.e., to maintain the ability to allocate values for a society and to induce most members to accept these allocations as binding. Indeed, the major task of systems analysis is the investigation of how the system persists. Persistence is not to be confused with maintenance of the status quo. Persistence is an empirical concept that recognizes that a static system usually proves to be incapable of handling demands and maintaining support in the face of dynamically changing social, economic and cultural conditions that typify modern societies.¹⁶

Politicized identity has informed the various inputs that place demands on the political and legal process's outputs concerning the character and content of an American political community.¹⁷ What exactly is a political community?¹⁸ Who is included, who is excluded, and why? In the present

¹⁴ See generally Fareed Zakaria, *Can America Be Fixed: The New Crisis of Democracy*, 92 FOREIGN AFF. 22 (2013); Jonathan Rauch, *How American Politics Went Insane*, ATLANTIC (Jun. 21, 2016), <https://www.theatlantic.com/magazine/archive/2016/07/how-american-politics-went-insane/485570/>; Simon Tisdall, *American Democracy Is in Crisis, and Not Just Because of Trump*, GUARDIAN (Aug. 7, 2018), <https://www.theguardian.com/commentisfree/2018/aug/07/american-democracy-crisis-trump-supreme-court>.

¹⁵ See Bharati Mukherjee, *Beyond Multiculturalism*, in MULTI-AMERICA: ESSAYS ON CULTURAL WARS & CULTURAL PEACE 454 (Ishmael Reed ed. 1998); STEPHEN STEINBERG, THE ETHNIC MYTH: RACE, ETHNICITY, AND CLASS IN AMERICA (1981).

¹⁶ Goldman & Jahnige, *supra* note 3, at 289.

¹⁷ A "demand" is defined as "an expression of opinion that an authoritative allocation with regard to a particular subject matter should or should not be made by those responsible for doing so." With some political institutions characterizing American politics, demands can vary broadly in form and content. A riot, no less than a formal petition, may be perceived as a demand. A self-initiated congressional staff study may be used as well as presentations by lobbyists. In a judicial system, on the other hand, litigation is the principal transmitter of demands.

Id. at 290.

¹⁸ [W]hat is it for a group of people to share such an identity? Notoriously there is considerable disagreement on this question. The most basic difference of opinion is between 'subjectivists,' who maintain that sharing a national identity is simply a matter of people believing that they belong together for some special reason (perhaps

milieu of American law and politics, some commentators view the Trump Administration as representing authentic values, virtues, and norms that should inform an American political community,¹⁹ while others find that the Administration does not represent the values, norms, and virtues that should underpin an American political community.²⁰ Inputs in the form of identity-

because they believe that they have a distinctive shared culture, history, language, or way of life), and 'objectivists,' who argue that in order to share a national identity people must really possess distinctive common characteristics, such as a shared culture, history, language, or way of life."

Andrew Mason, *Political Community, Liberal-Nationalism, and the Ethics of Assimilation*, 109 ETHICS 261, 262 (1999); see also Kenneth L. Karst, *Myths of Identity: Individual and Group Portraits of Race and Sexual Orientation*, 43 UCLA L. REV. 263, 266, 282–83 (1995).

¹⁹ Donald Trump is not your regular politician, everyone knows that. But the level of opprobrium heaped upon him is astonishing despite that personal sacrifice. It bounces off him, of course, because he's a street fighter in the purest sense and brings with him a level of ferocity that the political world just can't fathom. Terrorism, rocketing illegal immigration, economic conflict with China and others: these are the existential issues that leave America in a perilous position in a very dangerous world. Globalism is under attack on every continent as a consequence, and it's about time that the United States had a president that put the nation first. This is what these times demand and this man has our back. Few people know how capable he is in these situations . . . He's intense, he's demanding, but it's all driven by his passion to deliver an end product that people love . . . his approach is quite simple, really . . . he reflected upon a question that he was often asked: "How did you achieve your success?" He gave a simple response, but it was one that I still think about often. "I look around, I see what people want and I give it to them." That's the Donald J. Trump mantra: give the people what they want.

George Sorial & Damian Bates, Opinion, *We Know the Real Donald Trump. America Needs Four More Years*, NEWSWEEK (June 14, 2019), <https://www.newsweek.com/trump-sorial-bates-real-deal-four-more-years-1443862>.

²⁰ We can hear the spectacle of cruel laughter throughout the Trump era. There were the border-patrol agents cracking up at the crying immigrant children separated from their families, and the Trump adviser who delighted white supremacists when he mocked a child with Down syndrome who was separated from her mother. There were the police who laughed uproariously when the president encouraged them to abuse suspects, and the Fox News hosts mocking a survivor of the Pulse Nightclub massacre (and in the process inundating him with threats), the survivors of sexual assault protesting to Senator Jeff Flake, the women who said the president had sexually assaulted them, and the teen survivors of the Parkland school shooting. There was the president mocking Puerto Rican accents shortly after thousands were killed and tens of thousands displaced by Hurricane Maria, the black athletes protesting unjustified killings by the police, the women of the #MeToo movement who have come forward with stories of sexual abuse, and the disabled reporter whose crime was reporting on Trump truthfully. It is not just that the perpetrators of this cruelty enjoy it; it is that they enjoy it with one another. Their shared laughter at the suffering of others is an adhesive that binds them to one another, and to Trump. Taking joy in that suffering is more human than most would like to admit. Somewhere on the wide spectrum between adolescent teasing and the smiling white men in the lynching photographs are the Trump supporters whose community is built by rejoicing in the anguish of those they see as unlike them, who have found in their shared cruelty an answer to the loneliness and atomization of modern life. The laughter undergirds the daily spectacle of insincerity, as the president and his aides pledge fealty to bedrock democratic principles they have no intention of respecting.

Adam Serwer, *The Cruelty Is the Point*, ATLANTIC (Oct. 3, 2018), <https://www.theatlantic.com/ideas/archive/2018/10/the-cruelty-is-the-point/572104/>.

based platforms, frameworks, factions, and discourse have had a substantial impact on the political and judicial systems' outputs in the form of legislation and judicial opinions, which directly affect representational politics and policy spaces.²¹ A historical exemplar of the power of politicized identity within the larger political and legal process to deeply shape the notion of an American political community is evident in the Court's notorious *Dred Scott v. Sandford* opinion.²² The opinion is a powerful example of how constitutional expressions of political identity and political community can profoundly affect subjects that reside within the jurisdiction of a political and judicial system that posits a national community grounded in the fundamental law. The Court in *Dred Scott v. Sandford* declared, in part, that:

The words "people of the United States" and "citizens" are synonymous terms, and mean the same thing. They both describe the political body who, according to our republican institutions, form the sovereignty, and who hold the power and conduct the Government through their representatives. They are what we familiarly call the "sovereign people," and every citizen is one of this people, and a constituent member of this sovereignty. The question before us is, whether the class of persons described in the plea in abatement compose a portion of this people, and are constituent members of this sovereignty? We think they are not, and that they are not included, and were not intended to be included, under the word "citizens" in the Constitution, and can therefore claim none of the rights and privileges which that instrument provides for and secures to citizens of the United States. On the contrary, they were at that time considered as a subordinate and inferior class of beings, who had been subjugated by the dominant race, and, whether emancipated or not, yet remained subject to their authority, and had no rights or privileges but such as those who held the power and the Government might choose to grant them.²³

The Court's opinion highlights the influence that politicized identity has on the political and legal process. The remainder of this work, therefore, contextualizes and analyzes politicized identity, delves into the enterprise of critically evaluating it, and assesses some of the effects that it has on notions of an American political community and its expression via representational politics. The aim is to contribute to a discourse that seeks to better bridge the gaps between theory and practice, to appreciate and gauge the conceptual and empirical complexity of politicized identity, to reveal how the conceptual directly informs the practice of identity politics, and to highlight and

²¹ See DAVID EASTON, *THE POLITICAL SYSTEM: AN INQUIRY INTO THE STATE OF POLITICAL SCIENCE* (1953).

²² 60 U.S. 393 (1857).

²³ *Id.* at 404–05.

critically analyze the power-effects of politicized identity in the political and legal process. An analysis encompassing the foregoing sheds light on the importance of a “shared national identity [as] a precondition for the existence of the kind of trust which makes compromise possible in the face of conflicting interests . . . a shared national identity is a necessary condition for a politics of the common good and widespread support for redistribution on grounds of social justice.”²⁴

This work is conceptual in nature as well as comprehensive, in that it seeks to analyze the sundry nuances and complexities of identity vis-à-vis politics, law, and notions of an American political community. It subscribes to Michel Foucault’s characterization of critique:

A critique does not consist in saying that things aren’t good the way they are. It consists in seeing on what types of assumptions, of familiar notions, of established, unexamined ways of thinking the accepted practices are based Thought does exist, both beyond and before systems and edifices of discourse. It is something that is often hidden but always drives everyday behaviors. There is always a little thought occurring in the most [banal] institutions; there is always thought even in silent habits.²⁵

To identify and critically analyze the power effects and impact of politicized identity on law, politics, and policy spaces is the overarching aim of this work.

B. Politicized Identity, Representation & American Political Community

Whether politicized identity is pragmatic or inevitable does not exempt it from critical appraisal. Identity politics continues to have a profound effect on the following: (1) the definition of a national identity—a common will; (2) the political, social, and economic actuality of identity groups, sub-groups, and individual subjects as expressed in the political and legal process; and (3) the notion of a national political community expressed in representational politics and public policy spaces. Facets of this examination include an assessment of whether politicized identity has had a positive effect by providing marginalized groups with increased political power, or instead a negative effect by reducing politics to identity-based meta-ideologies that artificially constrain complex and diverse individuals. In the process of investigating these facets, this article explores the notion that politicized identity may not be an effective basis for an inclusive national political

²⁴ Mason, *supra* note 18, at 263.

²⁵ MICHEL FOUCAULT, *So Is It Important to Think?*, in THE ESSENTIAL FOUCAULT: SELECTIONS FROM ESSENTIAL WORKS OF FOUCAULT, 1954–84 (Paul Rabinow & Nikolas S. Rose eds., 1994).

community, and that it may not be conducive to fostering an American political community based on democratic representation because, as David Easton notes, “[P]olitical community’ implies ‘at the very least that the members of the system show some minimal readiness or ability to continue working together to solve their political problems.”²⁶

Politicized identity, like most human constructs, has both positive and negative effects, depending on the lenses one employs to assess and posit notions of identity and the common will—and weal—of a political community.²⁷ For example, as one critic of the #MeToo movement’s rallying cry “Believe All Women” notes: “There are limits to relying on ‘believe all women’ as an organizing political principle.”²⁸ As noted by a commentator on the state of social science during the US bicentennial, it is possible that subjects can become immured in the very device created to purportedly “free” them.²⁹ Whether or not this is the case, this article contends that identity, in and of itself, is an influential factor in the articulation and practice of power in the political and legal process, the public sphere, and the American political community. Indeed, the successful use of identity in politics has been “fundamentally rooted in a command of public ideas . . . [written into] not

²⁶ Walter F. Murphy & Joseph Tanenhaus, *Public Opinion and the United States Supreme Court: Mapping of Some Prerequisites for Court Legitimation of Regime Changes*, 2 L. & SOC’Y REV. 357, 357 n.1 (1968) (quoting David Easton, *A System Analysis of Political Life* (1965)); see also Roy L. Brooks, *Race as an Under-Inclusive and Over-Inclusive Concept*, 1 AFR. AM. L. & POL’Y REP. 9, 20 (1994) (“[T]he traditional civil rights concept of race . . . ignores significant internal divisions of socioeconomic class, gender, politics, sexual orientation, disability, race-gender intersectionality . . . and other inter-sectionalities.”); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 585 (1990).

²⁷ There is, first, no such thing as a uniquely determined common good that all people could agree on or be made to agree on by the force of rational argument. This is due not primarily to the fact that some people may want things other than the common good but to the much more fundamental fact that to different individuals and groups the common good is bound to mean different things. This fact, hidden from the utilitarian by the narrowness of his outlook on them world of human valuations, will introduce rifts on questions of principle which cannot be reconciled by rational argument because ultimate values—our conceptions of what life and what society should be—are beyond the range of mere logic. They may be bridged by compromise in some cases but not in others. Americans who say, “We want this country to arm to its teeth and then to fight for what we conceive to be right all over the globe” and Americans who say, “We want this country to work out its own problems which is the only way it can serve humanity” are facing irreducible differences of ultimate values which compromise could only maim and degrade.

Joseph Schumpeter, *Capitalism, Socialism, and Democracy*, in *THE DEMOCRACY SOURCEBOOK 6* (Robert Dahl, Ian Shapiro, & Jose Antonio Cheibub eds., 2003) (discussing of the complexities and tensions underpinning notions of a common will in a political community premised on democratic representation).

²⁸ Bari Weiss, Opinion, *The Limits of ‘Believe All Women,’* N.Y. TIMES (Nov. 28, 2017), <https://www.nytimes.com/2017/11/28/opinion/metoo-sexual-harassment-believe-women.html>.

²⁹ See LOUIS SCHNEIDER, *SOCIAL SCIENCE IN AMERICA: THE FIRST TWO HUNDRED YEARS* 210 (Charles M. Bonjean, Louis Schneider, & Robert L. Lineberry eds., 1976).

only public law but into the national consciousness.”³⁰ It is identity’s power to do this in the context of law and representational politics that is the focus of this analysis.

Representation, in the American political context, has found unique and, at times, counter-intuitive expression in politics, law, and public policy.³¹ For instance, although representation is the lodestar of the American constitutional order, the original framework explicitly excluded a plethora of identity-based groups, such as Black slaves, women, and American Indians.³² In the modern context, the American constitutional order continues to suffer from representational deficiency, for example, vis-à-vis the vote based on racial and class status and disparity considerations.³³ From a political process perspective, representation, in conjunction with politicized identity and the notion of a “proper” American political community, may be “the most interesting, the most complex, the most baffling aspect of any democratic political system, namely, the ascertainment of public feeling on innumerable public policy issues through the medium of periodic, partisan selection of district delegates to a multi-membered representative assembly.”³⁴ Ultimately, the present state of American politics necessitates an analysis of the very notion of representation—a seemingly obvious concept that is actually quite complicated and dependent on the interpretations of different identity-based factions. In the present identity politics that undergirds the American political system and political culture, it is important to revisit and reassess the notion of representation in light of the powerful role that politicized identity has played since the 2016 election. What does it signify exactly? The signifier of representation seems to be very different as far as the signifier that identity-based factions seek to

³⁰ CHARLES KRAUTHAMMER, *Ronald Reagan*, in *THE POINT OF IT ALL: A LIFETIME OF GREAT LOVES AND ENDEAVORS* 9, 11 (Daniel Krauthammer ed., 2018).

³¹ Group-based rights means ‘representational’ group-based rights, or group rights that assume a sameness of identity among all persons of a designated group. Such rights, which include social group representation in deliberative political bodies, certain kinds of affirmative action programs, and race-based legislative districting, are distinct from group-based strategies that do not implicate identity, such as affirmative action programs that are justified by, for example, the utilitarian goal of achieving a less race-conscious society.

Anita L. Krug, Note, *The Myth of Context in Politics and Law*, 110 HARV. L. REV. 1292, 1292 n.1 (1997).

³² See Rick Hubbard, *Restoring Citizen Representation in Our Democratic Republic: Congress Is Lagging—Do We Have the Will to Force Change?*, 40 VT. B.J. 20, 20 (2014).

³³ See *Abbott v. Perez*, 138 S. Ct. 2305 (2018) (holding that the District Court disregarded presumption of legislative good faith and improperly reversed burden of proof in a case where the evidence was insufficient to establish that the Texas Legislature acted in bad faith and engaged in intentional discrimination when it adopted interim redistricting plan approved by the district court).

³⁴ Robert G. Dixon, Jr., *Reapportionment Perspectives: What Is Fair Representation?*, 51 A.B.A. J. 319, 319 (1965).

reconfigure or appropriate. The problem with politicized identity and representation may be that it has the potential to easily fall into ideological dogma, which can have an adverse impact on the character and content of representation.³⁵

Although it may provide or seem to provide short or long term satisfaction for what many may feel is a corrupt political system that has oppressed groups based on identity traits and status, identity-based factions may or may not be a less-than-effective basis upon which to engage in representational politics since politicized identities are “historically created and historically variable categories.”³⁶ The “I believe” approach, grounded in an explicitly politicized identity—for instance, wherein belief without any form of “objective” or empirical evidence may be sufficient to sustain an allegation of serious misconduct—demonstrates why it is important to assess how representation and political community manifest in the political and legal process and in policy spaces.

Politicized identity plays a key role in contouring the form and substance of what constitutes a political community. Bertrand Russell’s analysis of the political economy of labor can be applied to politicized identity. Russell opines that “[t]he uniting purpose exists only in owners and managers” of politicized identity signifiers “and may be completely absent in most of those” subjects who are encompassed within a politicized identity signifier.³⁷ It is important to note that this pitfall applies to politicized identity in general; race, ethnicity, sexuality, class, religion, and ideology are exemplars of politicized identity signifiers that all have the potential of negatively impacting the form and substance of representational politics.³⁸ As expressed in a recent editorial:

The huntresses’ war cry—“believe all women”—has felt like a bracing corrective to a historic injustice. It has felt like a justifiable response to a system in which the crimes perpetrated against women—so intimate, so humiliating and so unlike any

³⁵ See Athena D. Mutua, *Shifting Bottoms and Rotating Centers: Reflections on LatCrit III and the Black/White Paradigm*, 53 U. MIAMI L. REV. 1177, 1182–83 (1999). According to some critics, “single issues, fixed ideas, [and] single-minded ideologies are dangerous” for the integrity of representational politics. CHARLES KRAUTHAMMER, *Thank You, Isaiah Berlin*, in *THE POINT OF IT ALL: A LIFETIME OF GREAT LOVES AND ENDEAVORS*, *supra* note 30, at 15.

³⁶ Rogers Brubaker & Frederick Cooper, *Beyond “Identity,”* 29 THEORY & SOC’Y 14, 30 (2000). It has been contended that, because identity politics “are premised on exclusion from a universal ideal,” politicized identity requires “that ideal, as well as their exclusion from it, for their own perpetuity as identities . . . identity structured by this ethos becomes deeply invested in its own impotence, even while it seeks to assuage the pain of its powerlessness through its vengeful moralizing, through its wide distribution of suffering, through its reproach of power as such.” Wendy Brown, *Wounded Attachments*, 21 POL. THEORY 390, 398, 403 (1993).

³⁷ BERTRAND RUSSELL, *AUTHORITY AND THE INDIVIDUAL* 65–66 (1949).

³⁸ See generally Samara Klar, *The Influence of Competing Identity Primes on Political Preferences*, 75 J. POLS. 1108 (2013).

other—are so very difficult to prove. But I also can't shake the feeling that this mantra creates terrible new problems in addition to solving old ones.³⁹

Rigid ideological dogma, the antithesis of a rational rule-based approach to fostering, enhancing, and sustaining representational democratic politics and public policy, may have long-term adverse effects on the integrity of representation.⁴⁰

II. POLITICIZED IDENTITY: AN INITIAL ANALYSIS

A. *The Political & the Legal: Identity & Political Community*

The importance of analyzing politicized identity vis-à-vis political community is that understanding “the claims of community”—whether in law or moral and political theory—is to recognize that, as the phrase itself suggests, more than one claim is involved.”⁴¹ Accordingly, the notion of community rests on contested terrain. Politicized identity is both product and producer of an unstable conceptual communitarian terrain.⁴² In its *Dred Scott* opinion, for instance, the Court noted that:

³⁹ Weiss, *supra* note 28. In the case of the “believing all women” standard for adjudging allegations of sexual misconduct, generally and specifically, Weiss also suggests that such a posture:

can rapidly be transmogrified into an ideological orthodoxy that will not serve women at all. If the past few weeks have shown us the unique horrors some women have faced, the answer to it can't be a stringent new solidarity that further limits the definition of womanhood and lumps [women's] highly diverse experiences together simply based on our gender. I don't think that helps women. Or men. I believe that the “believe all women” vision of feminism unintentionally fetishizes women. Women are no longer human and flawed. They are Truth personified. They are above reproach. I believe that it's condescending to think that women and their claims can't stand up to interrogation and can't handle skepticism. I believe that facts serve feminists far better than faith. That due process is better than mob rule.

Id.

⁴⁰ See Peter H. Schuck, *Against (And For) Madison: An Essay in Praise of Factions*, 15 YALE L. & POL'Y REV. 553, 568–69 (1996).

⁴¹ Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 688 (1992).

⁴² Perusing innumerable definitions, one discovers that democracy has become an altar on which everyone hangs his or her favorite ex voto. Almost all normatively desirable aspects of political, and sometimes even of social and economic, life are credited as intrinsic to democracy: representation, accountability, equality, participation, justice, dignity, rationality, security, freedom . . . the list goes on. We are repeatedly told that “unless democracy is x or generates x” The ellipsis is rarely spelled out, but it insinuates either that a system in which governments are elected is not worthy of being called “democracy” unless x is fulfilled or that democracy in the minimal sense will not endure unless x is satisfied.

Adam Przeworski, *Minimalist Conception of Democracy: A Defense*, in THE DEMOCRACY SOURCEBOOK 12 (Robert A. Dahl, Ian Shapiro, & Jose Antonio Cheibub eds., 2003).

It is very clear, therefore, that no State can, by any act or law of its own, passed since the adoption of the Constitution, introduce a new member into the political community created by the Constitution of the United States. It cannot make him a member of this community by making him a member of its own. And for the same reason it cannot introduce any person, or description of persons, who were not intended to be embraced in this new political family, which the Constitution brought into existence, but were intended to be excluded from it.⁴³

The Court's notions of political community were reconfigured after the Civil War, yet a perusal of the latest local and national news media indicates the United States continues to struggle with who and what constitutes an American political community.⁴⁴ Political community, though nationalistic in nature at the level of high politics, nonetheless has manifold localistic claims as to what constitutes community rather than there being a singular, authentic political community that all subjects must conform to. Multiple claims made by various subcommunities within the polity, which characterize the politics of politicized identity, may therefore be in line with a fragmented yet functional overarching political community that is defined less by what it has in common and more by the diversity of differences that permeate the multiplicity of communitarian-based claims.

Identity, like claims of community, is dynamic. It provides the context for the political and legal process and involves a continual negotiation between representation and actual policy spaces, such as judicial opinions or legislative acts.⁴⁵ Such policy spaces assume a "real" quality, providing tangible, functional, but malleable concepts and ideational frameworks to ground and structure a sense of authentic identity and community.⁴⁶ Notions of self are defined in policy spaces drawn, in turn, from cultural ordering mechanisms such as religion, nationalism, patriotism, political and economic

⁴³ *Dred Scott v. Sandford*, 60 U.S. 393, 406 (1857).

⁴⁴ See, e.g., Katie Rogers & Nicholas Fandos, *Trump Tells Congresswomen to 'Go Back' to the Countries They Came From*, N.Y. TIMES (July 14, 2019), <https://www.nytimes.com/2019/07/14/us/politics/trump-twitter-squad-congress.html>.

⁴⁵ See PHILIP E. STEINBERG, *THE SOCIAL CONSTRUCTION OF THE OCEAN* 207 (2001).

⁴⁶ Many writers go further and characterize liberal assumptions about value consensus as devious and repressive. The dominant groups in society, on this view, universalize their interests and experience and repress the self-expression of groups (e.g. women and minorities) without power. According to Robert Gordon, one can represent law as a legitimating ideology in the view that "[t]he ruling class induces consent and demobilizes opposition by masking its role in widely shared utopian norms and fair procedures, which it then distorts to its own purposes" . . . Gordon himself seems to proffer an account wherein these preferences are concealed even from the actors themselves because "[t]he discourse of law-its categories, arguments, reasoning modes, rhetorical tropes, and procedural rituals-fits into a complex of discursive practices that together structure how people perceive.

Thomas Morawetz, *Understanding Disagreement—The Root Issue of Jurisprudence: Applying Wittgenstein To Positivism, Critical Theory & Judging*, 141 U. PA. L. REV. 375, n.5 (1992-1993).

systems, norms, morals and values, and most importantly, formal politicized identity.⁴⁷ Policy spaces, such as judicial opinions, situate subjects in the world; they provide contextual parameters that shape the contours of human experience, which provides a fulcrum by which experience is translated into an identarian placeholder for a subject's self-perception. Humans construct identity via their interactions and their external experiences with and in space-places, wherein "authentic" meaning resides.⁴⁸ Policy spaces enable the transposition of internal, subjective, and human psychical processes onto the external world.

Identity—wherein it can be grasped and contemplated, rendered constative, concretized and communicated—assumes a cardinal role in the constitution of human affairs. Multifaceted experiences provide fodder for the transformation of identity into a political medium, effectively creating attachments that, in turn, provide meaning for subjects.⁴⁹ Identity is culturally mediated, as are the socialization processes utilized by politicized identity groups to procure attachment and fidelity to the political, ideological, and normative agendas advanced by the elite within a politicized identity group.⁵⁰ The trappings of politicized identity involve the potential for it to become an exclusive means of comprehending and understanding authentic identity in the political milieu.⁵¹ The act of authoritatively naming creates meaning and subjective attachment. Identity enables subjective attachments to political agenda and ideological interpretations of group interests, goals, and the "proper" means by which to obtain these goals. A pitfall of relying upon formal politicized identity groups in a representative democratic political system may be that the foregoing can have the potential effect of restricting subjects to fit within the parameters of the identity, or that the interpretation of identity by certain elite representatives does not necessarily reflect the actual subjects that are emplaced in the identity signifier.⁵²

⁴⁷ *Id.*

⁴⁸ See generally YI-FU TUAN, *SPACE AND PLACE: THE PERSPECTIVE OF EXPERIENCE* (1977).

⁴⁹ See Peter Berkowitz, *The Court, the Constitution, and the Culture of Freedom*, POL'Y REV., Aug.–Sept. 2005, at 3, 23, <https://www.hoover.org/research/court-constitution-and-culture-freedom>.

⁵⁰ See generally BENEDICT ANDERSON, *IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGINS AND SPREAD OF NATIONALISM* (3d ed. 2006).

⁵¹ See Stephen A. Gardbaum, *Law, Politics, and the Claims of Community*, 90 MICH. L. REV. 685, 688 (1992).

⁵² See *Bradwell v. Illinois*, 83 U.S. 130, 141–42 (1873) ("The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator. And the rules of civil society must be adapted to the general constitution of things, and cannot be based upon exceptional cases."); MONA DOMOSH & JONI SEAGER, *PUTTING WOMEN IN PLACE: FEMINIST GEOGRAPHERS MAKE SENSE OF THE WORLD* (2001); Scott B. Astrada & Marvin L. Astrada, *Being Latino in the 21st Century: Reexamining Politicized Identity & the Problem of Representation*, 20 U. PA. J.L. & SOC. CHANGE 245 (2017).

B. Politicized Identity, Political Community & Representation

The notion of an American political community based on representation, despite distorted beginnings, is at the heart of American democratic politics. Political community and representation are key to American politics because of the role community norms, values, and other ordering principles play in the articulation of public policy.⁵³ Political community is underpinned by politicized identities, plays a formative role because it functions as: (1) a causal factor in the constitution of personal identity; (2) a particular substantive value; and (3) a source of general, metaethical value.⁵⁴ In the American case, it may be more constructive to view an American political community as being composed of various sub-communities that seek to generate and disseminate political identity-based knowledge through formal politicized identity discourse. This is significant because political knowledge answers the following question:

What is the meaning and purpose of *this* association? What is the appropriate structure of our community and government? Even if we assume that there are right answers to these last questions . . . it is nevertheless the case that there will be as many right answers as there are communities.⁵⁵

It is certainly the case that identity is a key aspect of our political and judicial systems. “Identity cannot exist without representation Individuals can often communicate certain kinds of identity, such as race, without conscious action. Other kinds of identity, such as religion, are typically invisible. But even individuals with visible identities can communicate consciously chosen messages of group pride and dissent.”⁵⁶

It is an inescapable fact that the individual functions within the context of groups—factions, as James Madison would have it—in the American political system and legal process. “Representative government is a process of accommodating group interests through democratic institutional

⁵³ See Woodrow Wilson, Address at the Daughters of the American Revolution 25th Anniversary: America First (Oct. 11, 1915), in *AMERICA FIRST: PATRIOTIC READINGS* 75, 76–77 (Jasper L. McBrien ed., 1916), [<https://archive.org/details/americafirst00mcbrich>]; George Washington, Farewell Address (Sept. 19, 1796), in *AMERICA FIRST*, at 94, 96.

⁵⁴ Mason, *supra* note 18, at 269.

⁵⁵ Michael Walzer, *Philosophy and Democracy*, 9 *POL. THEORY* 379, 393 (1981).

⁵⁶ Claims of equality based on identities of difference are intrinsically a kind of protest Identity claims in law arise not merely from a social context in which a particular group shares a certain history, culture, or status. Underlying that kind of identity is a shared viewpoint, not a set of opinions or a viewpoint specific to any particular topic or issue, but ‘view-point’ in a more literal, basic sense: a shared point of view, a shared position from which one’s views emerge.

Nan D. Hunter, *Expressive Identity: Recuperating Dissent for Equality*, 35 *HARV. C.R.-C.L. L. REV.* 1, 5 (2000).

arrangements . . . to insure effective representation . . . by a realistic accommodation of the diverse and often conflicting political forces operating within the State.”⁵⁷ Accommodation has been a fundamental ordering principle in the constitutional system. One major change observed in the notion of representation is the shift from a historical focus on liberty to equality and inclusion in the present.

Just as, in the earlier days of anarchy, the most thoughtful men worshipped law, so during the period of increasing State power there was a tendency to worship liberty . . . the impulse toward liberty, however, seems now to have lost much of its force . . . it has been replaced by the love of equality.⁵⁸

This shift has noteworthy consequences for how identity-based politics and factions manifest in thought and practice. Indeed, equality in the form of inclusion—a driving force of identity-based factions—is in line with and has facilitated the power of formal identity-based groups as opposed to a liberty ethos focused on politics and policy.⁵⁹ The consequential impact that formal identity groups have on the political and legal process renders them, in essence, identity-based factions, which thrive by priming or activating certain identities in the electorate to support or reject specific policy agendas as well as credit or discredit particular politicians or parties.⁶⁰

Representation in both the political realm and legal process is quite complex, especially in a nation of millions of people. It can be viewed in different ways, such as in a universalist or pluralistic community-based framework, which results in very distinctive paradigms for characterizing representation.⁶¹ Representation in the United States is profoundly

⁵⁷ *Lucas v. Colo. Gen. Assembly*, 377 U.S. 713, 749 (1964) (Stewart, J., dissenting).

⁵⁸ BERTRAND RUSSELL, *AUTHORITY & THE INDIVIDUAL* 29 (1949).

⁵⁹ See Fredric Jameson, *Foreword* to JEAN FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE*, at vii, xiv–xvii (Geoff Bennington & Brian Massumi trans., 1984); Paul Patton, *Introduction* to JEAN BAUDRILLARD, *THE GULF WAR DID NOT TAKE PLACE* 1, 5–7 (Paul Patton trans., 1995); Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57, 61–63 (1984); Damen Lenard Hutchinson, *Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory & Political Discourse*, 29 *CONN. L. REV.* 561 (1997).

⁶⁰ See Samara Klar, *The Influence of Competing Identity Primes on Political Preferences*, 75 *J. POL.* 1108, 1108–24 (2013).

⁶¹ For instance, regarding the relationship between representation, the rule of law, and its application in society:

The liberal focus on the individual presupposes difference among citizens: because individual ends are not homogeneous, they are incompatible with the existence of an overarching common end. But the universalist assumption at the base of liberal thought is that, because humans are identical in their status as moral beings, moral obligation cannot be contingent on individual attributes, merits, or circumstances. The liberal conception of the moral equality of persons requires that law have universal application: it must treat all persons identically and disinterestedly, and its grant of rights and liberties must extend to all persons in the polity.

Krug, *supra* note 31, at 1294.

challenging given the diversity and difference that permeates the national landscape. Difference permeates norms, values, morals, and other ideational ordering mechanisms that enable a group or groups of people to effectively cohere around a stable and universalizable set of ordering concepts and principles, such as the rule of law. When it comes to politics, it is important to keep in mind Bertrand Russell's admonition:

[P]olitics, economics, and social organization generally, belong in the realm of means, not ends. Our political and social thinking is prone to what may be called the "administrator's fallacy," by which I mean the habit of looking upon society as a systematic whole, of a sort that is thought good if it is pleasant to contemplate as a model of order. . . . But a society does not, or at least should not, exist to satisfy an external survey, but to bring a good life to the individuals who compose it. It is in the individuals, not in the whole, that ultimate value is to be sought. A good society is a means to a good life for those who compose it, not something having a separate kind of excellence on its own account.⁶²

Identity-based factions and formal politicized identity may or may not be less than effective at keeping the aforementioned distinctions apart, due in part to the existential trappings of articulating politics through the lens of identity—the basis for one's conception of Self, Other, and World.⁶³ The complex of principles, rules, ethos, and representative elite actors that propagate, enforce, interpret, and apply them is essential to asserting the propriety of an authoritative configuration of a politicized identity. Politicized identity factions seem to bestride the divide between universal and particularistic notions of political community. A universal interpretation of an American political community may "have the effect of enforcing a singular over a pluralist truth, that is, of reiterating the structure of the ideal commonwealth in every previously particularist community . . . [and thereby have the effect of] repressing internal political processes."⁶⁴ A pluralistic sub-community's view may also have the effect of propagating a "singular over a pluralist truth"⁶⁵ as far as the constitution of "authentic" identities and the "correct" legal and political expression of identities in American politics.

⁶² RUSSELL, *supra* note 58, at 87.

⁶³ See Louis Althusser, *Ideology and Ideological State Apparatuses* (Ben Brewster trans.), in NORTON ANTHOLOGY, *supra* note 1, at 1285, 1292; see also MICHEL FOUCAULT, *ARCHAEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE* (A.M. Sheridan Smith trans., 1972); JEAN-FRANÇOIS LYOTARD & JEAN-LOUP THÉBAUD, *JUST GAMING*, (Wlad Godzich trans., 1999); LUDWIG WITTGENSTEIN, *CULTURE & VALUE*, (G.H. von Wright & Heikki Nyman eds., Peter Winch trans., 1980).

⁶⁴ Walzer, *supra* note 55, at 393, 395.

⁶⁵ JOHN RAWLS, *3 PRINCIPLES OF JUSTICE II: CRITICAL ASSESSMENTS OF LEADING POLITICAL PHILOSOPHERS* 328 (Chandran Kukathas ed., 2003).

Representation, in thought and practice, has been subject to critique as an optimal or genuine state of affairs regarding the American political process and system. For instance, it has been argued:

[T]he grounding of normative political theory in universalist premises has been confronted by a recognition that the specific needs of blacks, women, and homosexuals, among others, cannot be addressed by the universalist principles of equal individual rights and ostensibly equal opportunities. This recognition of difference within the political community necessitates consideration of the group. To the extent that many individuals have been discriminated against or subordinated because of their shared differences, individual differences become group differences, which in turn usher in the concept of group rights as a means of tempering liberal universalism.⁶⁶

It has also been contended that “[o]ur political system is unfair to ethnic, political and other minorities. The system cannot provide representative fairness because it is ‘winner take all’ and defective in its foundation. The only solution is proportional representation, which will provide majority rule and fair minority representation.”⁶⁷ Representation is, or rather should be, much more substantive than mere procedural processes or guarantees of “an electoral system characterized by at-large elections in which the seats are divided among parties and/or individuals in proportion to the number of votes received by each.”⁶⁸ Whether one subscribes to a procedural or a more substantive view of representational politics, it seems to be the case that

no theory of representation is universally valid. Interests are important and like-minded groups should be allowed to speak as a unified voice. At the same time, we do not dare let those interests govern completely The compromise [embedded in the core value/norm of accommodation] recognizes the difference in theories of representation, and it also recognizes the presence of diverse interests . . . our need to accommodate intensifies. Which interests shall be represented? . . . And which theory of representation do we then embrace? One that guarantees absolute equality of votes as measured by population? One that proportions votes by ethnicity? By geography? By occupation? Whatever the answer, it will . . .

⁶⁶ Krug, *supra* note 31, at 1295.

⁶⁷ Henry Sanders & Rose M. Sanders, *Should the U.S. Constitution Be Amended to Require Proportional Representation: Arguments For and Against*, 5 N.Y. L. SCH. J. HUM. RTS. 345, 345 (1988).

⁶⁸ John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 164 n.4 (1984) (characterizing proportional representation systems).

depend on someone, somehow accommodating diverse interests.⁶⁹

Representation is part of an overarching system of law and politics, institutional and ideational. Politicized identity and identity-based factions influence representation systemically in that each functions as and in a “system of knowledge” that establishes “an accepted grid for filtering”⁷⁰ political thought and mobilization of subjects under the banner of an identity-based faction’s interpretation of what constitutes an identity and its interests in policy spaces.⁷¹ Politicized identity and the positing of an American political community are subject to the ebb and flow of the different goals underpinning notions, or rather interpretations of political community—that is, “between respecting and fostering the particular and diverse values of different individual communities (whatever those values happen to be) on the one hand, and fostering the (single) value of substantive community, on the other.”⁷²

Authority in the form of identarian-based elites plays a significant role in manufacturing formal identity-based factions and helps create policy spaces for subjects to dwell in as far as providing perceptive and cognitive apparatuses to explain and understand the relationship between Self, Other, and World.⁷³ Authority and the discourse it promulgates are the result of carefully selected, de-emphasized, marginalized, and included or excluded facets of a politicized identity put forth by an identity-based faction—one

⁶⁹ John Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONST. COMMENT. 203, 205 (1994). Note that the Court, in articulating its equal protection jurisprudence, has explicitly privileged an overarching American political value that is embedded in the socio-cultural superstructure of the American political community, i.e., individualism. The “rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights.” *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948); *see also Oyama v. California*, 332 U.S. 633, 663 (1948); *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938); *McCabe v. Atchison, Topeka & Santa Fe R. Co.*, 235 U.S. 151, 161–62 (1914).

⁷⁰ EDWARD SAID, *ORIENTALISM* 14 (1978).

⁷¹ [G]roup rights fail to be anti-essentialist because they implicitly affirm the essentialist presumption that all persons of a particular race or gender share a common identity outside the context of discrimination; the substantive approach to adjudication that group rights imply likewise fails to be anti-essentialist because it too relies on a conception of unified group identity. This implies that substantive jurisprudence fails to be anti-universalist as well: like universal individual rights and rule-bound formal jurisprudence, substantive jurisprudence screens out important aspects of substance, context, and identity.

Krug, *supra* note 31, at 1292–93.

⁷² Mason, *supra* note 18, at 699.

⁷³ There is nothing mysterious or natural about authority. It is formed, irradiated, disseminated; it is instrumental, it is persuasive; it has status, it establishes canons of taste and value; it is virtually indistinguishable from certain ideas it dignifies [and signifies] as true, and from traditions, perceptions, and judgements it forms, transmits, and reproduces . . . All these attributes of authority apply to [politicized identity].

SAID, *supra* note 70, at 19–20.

which is promulgated by elite gatekeepers.⁷⁴ “Every political judgment helps to modify the facts on which it is passed. Political thought is itself a form of political action.”⁷⁵ Purpose is the condition of thought that gives rise to any system of knowledge—it becomes fused with analysis to form a “single process”⁷⁶ of inquiry and understanding. Politicized identity-based factions, therefore, create knowledge systems that, in turn, inform the political and legal process underpinning policy spaces.

Representation, at a rudimentary level of analysis, in the U.S. political system is based on accommodation.

This has been true in the United States at least since Madison persuaded his fellow participants at the Constitutional Convention that a large republic would be preferable to a small one. Besides the ‘various and unequal distribution of property,’ individuals differ in their wants and needs, in their fortunes, and in their opinions about religion and government. These differences lead people to form groups—Madison calls them factions—that seek their own gain at the expense of others. Whether or not increasing the size of the republic solves the problem, it does increase the number of groups and competing interests, as well as the need for some kind of accommodation.⁷⁷

A problem that emerges between representation and politicized identity is that politics becomes susceptible to a high degree of ideological agitation that, in turn, has the potential to negatively affect the public sphere within which democratic discourse takes place.⁷⁸ This state of affairs, however, may be mitigated if politicized identity is viewed as a limited, functional, and expedient means by which to communicate the pluralistic needs, interests, and goals of a political sub-community that is integral to the nationalist notion of an American political community. From a universalist perspective,

⁷⁴ Social movements founded on identity politics generate claims based on shared identity characteristics in order to gain access to public and private domains. In our political life, identity politics is interwoven with dissent—is understood as dissent. Virtually all of the American civil rights movements since World War II have embodied the harmony between identity and dissent that exists in social practice, if not in law.

Hunter, *supra* note 56, at 1–2 (2000).

⁷⁵ E.H. CARR, *THE TWENTY YEARS CRISIS* 5 (1964).

⁷⁶ *Id.* at 4.

⁷⁷ John Moeller, *The Supreme Court's Quest for Fair Politics*, 1 CONST. COMMENT. 203, 205 (1994); *see also* THE FEDERALIST No. 10 (James Madison) (defining a faction as: “[A] number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community”).

⁷⁸ *See* FRANCIS FUKUYAMA, *IDENTITY: THE DEMAND FOR DIGNITY AND THE POLITICS OF RESENTMENT* 116 (2018) (“[T]he preoccupation with identity has clashed with the need for deliberative discourse. The focus on lived experience by identity groups valorizes inner selves experienced emotionally rather than examined rationally.”).

however, it may be the case that the public sphere does not effectively accommodate debate in the true sense of the term when employing politicized identity because politicized identity, at least on one extreme of the spectrum, as the basis of politics, may have the effect of “stopping debate altogether.”⁷⁹

From a universalist view of an American political community, the potential of politicized identity to shut down and constrain public discourse on policy can lead to the establishment of *this/that* binaries as far as correct and incorrect modalities of expressing a group’s legal and political perceptions of policy discourse and spaces. In the legal realm, the Court has struggled with the dichotomy of singular versus multifarious views of political community, seeming to borrow from one then the other or fusing the two together in a confused effort to provide comprehensive and universal legal definitions of an American political community.⁸⁰ Take, for instance, the Court’s reasoning regarding representation in the political process:

[R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State’s legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them. Full and effective participation by all citizens

⁷⁹ KRAUTHAMMER, *supra* note 30, at 142. “Universal approaches to equality are informed by a movement away from identity groups as forming the baseline for anti-discrimination and equality law. As such, all individuals, without reference to their identity, are guaranteed a set of rights, benefits, or protections.” Osamudia R. James, *Valuing Identity*, 102 MINN. L. REV. 127, 164 (2017); see also Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL’Y & L. 1 (2015).

⁸⁰ The difficulties with singular versus multifarious views of political community, individualism, and the group is exemplified by the Court’s judgment and reasoning in *Evans v. Abney*, 396 U.S. 435, 447 (1970) (holding that because a public park could not be operated on racially discriminatory basis, the intention of testator who left property in trust for creating a public park for exclusive use of white people could not be fulfilled and that the trust property therefore reverted to heirs of testator, the Georgia court’s refusal to apply *cy pres* doctrine to override the testator’s will did not violate Black citizens’ Fourteenth Amendment rights to equal protection and due process). The Court noted:

Petitioners also advance a number of considerations of public policy in opposition to the conclusion which we have reached. In particular, they regret, as we do, the loss of the Baconsfield trust to the City of Macon, and they are concerned lest we set a precedent under which other charitable trusts will be terminated. It bears repeating that our holding today reaffirms the traditional role of the States in determining whether or not to apply their *cy pres* doctrines to particular trusts. Nothing we have said here prevents a state court from applying its *cy pres* rule in a case where the Georgia court, for example, might not apply its rule. More fundamentally, however, the loss of charitable trusts such as Baconsfield is part of the price we pay for permitting deceased persons to exercise a continuing control over assets owned by them at death. This aspect of freedom of testation, like most things, has its advantages and disadvantages. *The responsibility of this Court, however, is to construe and enforce the Constitution and laws of the land as they are and not to legislate social policy on the basis of our own personal inclinations.* (emphasis added).

in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature. Modern and viable state government needs, and the Constitution demands, no less. . . . And the concept of equal protection has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged.⁸¹

Despite attempts to provide inclusive and far-ranging legal and constitutional criteria, American law and society continue to struggle with implementing universalist-type pronouncements concerning the character and content of the polity.⁸²

⁸¹ Reynolds v. Sims 377 U.S. 533, 565–66 (1964). Yet, representation suffers from a severe deficit in our historical and present politics. Justice Sotomayor’s dissent in *Utah v. Strieff* discusses this deficit in light of the criminal law:

[The] white defendant in this case shows that anyone’s dignity can be violated [by the police]. But it is no secret that people of color are disproportionate victims of [heightened police] scrutiny. For generations, black and brown parents have given their children “he talk”—instructing them never to run down the street; always keep your hands where they can be seen; do not even think of talking back to a stranger—all out of fear of how an officer with a gun will react to them. By legitimizing the conduct that produces this double consciousness, this case tells everyone, white and black, guilty and innocent, that an officer can verify your legal status at any time. It says that your body is subject to invasion while courts excuse the violation of your rights. It implies that you are not a citizen of a democracy but the subject of a carceral state, just waiting to be cataloged. We must not pretend that the countless people who are routinely targeted by police are “isolated.” They are the canaries in the coal mine whose deaths, civil and literal, warn us that no one can breathe in this atmosphere. They are the ones who recognize that unlawful police stops corrode all our civil liberties and threaten all our lives. Until their voices matter too, our justice system will continue to be anything but.

136 S. Ct. 2056, 2070–71 (2016) (Sotomayor, J., dissenting).

⁸² The Court has declared that it “is confronted with the task of reconciling conflicting rights of the diverse communities within our society and of individuals.” *Jacobellis v. State of Ohio*, 378 U.S. 184, 200–01 (1964). In *Boddie v. Connecticut*, the Court reasoned:

Perhaps no characteristic of an organized and cohesive society is more fundamental than its erection and enforcement of a system of rules defining the various rights and duties of its members, enabling them to govern their affairs and definitively settle their differences in an orderly, predictable manner. Without such a “legal system,” social organization and cohesion are virtually impossible; with the ability to seek regularized resolution of conflicts individuals are capable of interdependent action that enables them to strive for achievements without the anxieties that would beset them in a disorganized society. Put more succinctly, it is this injection of the rule of law that allows society to reap the benefits of rejecting what political theorists call the “state of nature.” American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is to courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State’s monopoly over techniques for binding conflict resolution could hardly be said to be acceptable

Language can be rendered strictly binary depending on how one interprets and defines an overarching political community. Identity is subject to being restricted in political and legal discourse, while also retaining an expansive character or potential in the realm of socio-cultural discourse, depending on one's characterization of what constitutes an American political community in representative policy spaces.⁸³ A rigid binary framework of inclusion and exclusion based on universal criteria posited by elites at the helm of identity-based factions can generate rigid opposition to policy postures. Differing iterations of identity thereby proliferate in the public sphere of discourse and representational politics.

III. PAST & PRESENT: THE ENDURING PROBLEM OF IDENTITY-BASED REPRESENTATION

A politicized identity-framework informed the framing and subsequent interpretation of the Constitution from the founding onward. As noted by the Court in *Plessy v. Ferguson*, for instance, African Blacks were signaled out for less-than-legal personhood in the establishment of an American political community embodied in the founding Constitutional order:

under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just.

401 U.S. 371, 374–75 (1971).

⁸³ John Stuart Mill prefigured this issue:

A portion of mankind may be said to constitute a Nationality if they are united among themselves by common sympathies which do not exist between them and any others—which make them co-operate with each other more willingly than with other people, desire to be under the same government, and desire that it should be government by themselves or a portion of themselves exclusively. This feeling of nationality may have been generated by various causes. Sometimes it is the effect of identity of race and descent. Community of language, and community of religion, greatly contribute to it. Geographical limits are one of its causes. But the strongest of all is identity of political antecedents; the possession of a national history, and consequent community of recollections; collective pride and humiliation, pleasure and regret, connected with the same incidents in the past. None of these circumstances, however, are either indispensable, or necessarily sufficient by themselves.

JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 308 (Henry Holt 1873) (1861).

To render a federation advisable, several conditions are necessary. The first is, that there should be a sufficient amount of mutual sympathy among the populations. The federation binds them always to fight on the same side; and if they have such feelings towards one another, or such diversity of feeling towards their neighbours [sic], that they would generally prefer to fight on opposite sides, the federal tie is neither likely to be of long duration, nor to be well observed while it subsists. The sympathies available for the purpose are those of race, language, religion, and, above all, of political institutions, as conducing most to a feeling of identity of political interest.

Id. at 320; see also Lyle Denniston, *The Past and Future of America's Political Community*, NAT'L CONST. CTR.: CONST. DAILY (July 25, 2019), <https://constitutioncenter.org/blog/the-past-and-future-of-americas-political-community>.

The object of the [Fourteenth] amendment was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either.⁸⁴

Critics of the Constitution at the founding, such as Patrick Henry and George Mason, contended that a truly representative republic could not function properly on the scale envisioned by the Constitution. Indeed, the multi-hued diversity of people, interests, and values of the population were simply too complex to capture in the identarian representational schema proffered by the Constitution.⁸⁵

Although renowned twentieth-century “sociologists such as Robert Park and Talcott Parsons predicted evolutionary progress in ethnic relations toward assimilation or inclusion of various groups within American society, nothing [in the present] indicates that such developments are at hand.”⁸⁶ The issue of scale, which has burgeoned in a manner that could not have been envisioned by the founding generation, in conjunction with the notion that the sundry interests attached to identities “don’t stand still[,] . . . [t]hey evolve,”⁸⁷ arguably remains a salient problem for the operation of a genuine representational democratic political system. At the time of the founding, George Mason thought that in the “House of Representatives sixty-five men would presume to reflect the interests of all the diverse states Mason reasoned, ‘there is not the Substance, but the Shadow of Representation.’”⁸⁸ Mason’s critique of the Constitution suffering from representational deficiency in the fundamental law has been transpiring for over two centuries as far as clarifying how political identities are expressed and perpetuated in the fundamental law and ordering of the polity.⁸⁹ This deficiency, in part, can

⁸⁴ 163 U.S. 537, 544 (1896).

⁸⁵ See, e.g., LORRI GLOVER, *THE FATE OF THE REVOLUTION: VIRGINIANS DEBATE THE CONSTITUTION* 16–17 (2016).

⁸⁶ Christopher E. Smith, *The Supreme Court and Ethnicity*, 69 OR. L. REV. 797, 812 (1990).

⁸⁷ KRAUTHAMMER, *supra* note 30, at 170.

⁸⁸ GLOVER, *supra* note 85, at 25.

⁸⁹ See generally CHARLES BEARD, *AN ECONOMIC INTERPRETATION OF THE CONSTITUTION* (1918) (contending that the structure of the U.S. Constitution was motivated primarily by the personal financial interests of the Founders, a cohesive economic elite sector that sought to protect the elite minority from the mass majority regarding private property and wealth); see also *Obergefell v. Hodges*, 135 S.Ct. 2584 (2015) (holding that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution); *Batson v. Kentucky*, 476 U.S. 79 (1986) (finding that a state denies black defendants equal protection when members of his/her race have been purposefully excluded from a jury); *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978) (holding that a public university may take race into account as a factor in admissions decisions); *Lau v. Nichols*, 414 U.S. 563 (1974) (finding that a city school system’s failure to provide English language instruction to students of Chinese ancestry was unlawful discrimination); *Jones v. Alfred*

be traced to an underlying tensions and emergent contradictions that undergird the articulation and expression of the relationship between the individual and the group vis-à-vis politicized identarian classifications.⁹⁰

Race,⁹¹ ethnicity,⁹² voting,⁹³ political and ideological affiliation,⁹⁴ and sexuality⁹⁵ constitute some of the legal and political fronts on which contestation over formal political identities and the proper ordering of society and community has been waged. At the founding, for instance, although not formally expressed as such, the political identity that was instrumental in “Constitution making was under the exclusive purview of property-owning white men because suffrage was strictly limited.”⁹⁶ Madison, along with others during the founding, viewed the Constitutional order as an “enlightened natural aristocracy” that would effectively check and balance the People to avoid what was deemed “bad politics,” such as equal division of property.⁹⁷ The People, the American political community, would thus be subject to multiple layers of controls that would effectively divest the energy that mobilized people to support “improper” policy initiatives, rendering the People passive recipients of enlightened rule. In Madison’s initial view of democracy, representation was to be considerably tempered in order to divest of force the People’s passions, desires, and interests so as to make the

H. Mayer Co. 392 U.S. 409 (1968) (holding that federal law bars all racial discrimination (private or public) in the sale or rental of property); *Loving v. Virginia*, 388 U.S. 1 (1967) (holding that state laws prohibiting inter-racial marriage are unconstitutional); *Bailey v. Patterson*, 369 U.S. 31 (1962) (prohibiting racial segregation of interstate and intrastate transportation facilities); *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954) (prohibiting racial segregation of public schools).

⁹⁰ See, e.g., MARTHA MINOW, *NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW*, 40–1 (1997) (“[C]onflicts among self-identification, internal group membership practices, and external, oppressive assignments have given rise to . . . inconsistent meanings of group membership.”).

⁹¹ See *Strauder v. West Virginia*, 100 U.S. 303 (1880) (finding that the categorical exclusion of blacks from juries for no other reason than their race violated the Equal Protection Clause).

⁹² See *Hernandez v. Texas*, 347 U.S. 475 (1954) (finding that exclusion of otherwise eligible persons from jury service solely because of their ancestry or national origin is violates the Fourteenth Amendment).

⁹³ See *Reynolds v. Sims*, 377 U.S. 533 (1964) (finding that the Equal Protection Clause requires substantially equal legislative representation for all citizens in a State regardless of where they reside).

⁹⁴ See *United States v. Robel*, 389 U.S. 258 (1967) (finding that the State cannot deprive people of the right of free association, even in the interests of national security).

⁹⁵ See *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding a state law criminalizing sodomy), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003) (striking down a state sodomy law, rendering same-sex sexual activity constitutionally protected).

⁹⁶ GLOVER, *supra* note 85, at 27.

⁹⁷ *Id.* at 25–30; see also THE FEDERALIST NO. 62 (Alexander Hamilton or James Madison); Adam M. Carrington, ‘Natural Aristocracy’ and the U.S. Constitution, *NAT’L REV.* (Oct. 27, 2017), <https://www.nationalreview.com/2017/10/united-states-constiuttion-declaration-independence-founders-framers-natural-aristocracy-democracy-republicanism/>.

populace amenable to a stable and orderly politics.⁹⁸ Politicized identity proved a viable and significant means by which to enforce the “enlightened natural aristocracy.”

A complicating factor in articulating representation and its evolution through space and time is that of politicized identity. The Founders shared and perpetuated their distinctive identities—political, ideological, and socio-economic identity-based factions—by embedding said identities into the fundamental law, the Constitutional text and ethos that undergird any permutations or iterations of an American political community. The racial and class-based nature of the Founders’ overall identities and experience informed the politicized identity which found, and continues to find, expression in the Constitutional framework. The Constitutional order, as initially conceived and into the present, is one that was and that continues to be interpreted from a politicized identity perspective. During the founding, it was between federalists and confederationist factions, for instance, and in the present, we find that representation, broadly conceived, remains the province of an elite (which the confederationists feared) that define the contours and parameters of what constitutes representation in the legal and political process governed by the fundamental law embodied in the Constitution. Elites in the political and legal process continue to deploy identity to perpetuate particular, suitable interpretations of identity in public discourse.⁹⁹

In the case of law, we can view the foregoing in the Court’s jurisprudence when it comes to gerrymandering, voting, civil rights, housing, and other realms of ordering society that are affected by how the Court interprets representation. This is especially the case when seeking to locate the source and scope of State power under the Constitution. Early in its history, the Court privileged a nationalist interpretation of the Constitution over a local/regional state-based approach to representation. In *McCulloch v. Maryland*,¹⁰⁰ the Court declared that “government proceeds directly from the people; is ‘ordained and established,’ in the name of the people; and is declared to be ordained, ‘in order to form a more perfect union, establish justice, insure domestic tranquility, and secure the blessings of liberty to themselves and to their posterity.’” The Court embedded its political, normative, ideological, and socio-economic worldview—based on the politicized identity of Chief Justice Marshall—who viewed federal power as

⁹⁸ See THE FEDERALIST NO. 10 (James Madison); Jeffrey Rosen, *America Is Living James Madison’s Nightmare*, ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/james-madison-mob-rule/568351/>.

⁹⁹ See, e.g., Sanjana Karanth & Nick Visser, *Joe Biden Refuses to Apologize for Comments on Segregationists*, HUFFINGTON POST (June 19, 2019, 9:29 PM), https://www.huffpost.com/entry/joe-biden-refuse-apologize-segregationist_n_5d0adccfe4b09f5a54b5e266.

¹⁰⁰ 17 U.S. 316, 403–04 (1819).

emanating from “We the People” not “We the States.”¹⁰¹ In *Chisholm v. Georgia*, the Court asserted:

To the Constitution of the United States the term Sovereign, is totally unknown. There is but one place where it could have been used with propriety. But, even in that place it would not have comported with the delicacy of those, who ordained and established that Constitution. They might have announced themselves ‘Sovereign people’ of the United States: But serenely conscious of that fact, they avoided the ostentatious declaration.¹⁰²

A fundamental problem considered immanent in the Constitutional order set forth at the founding was that “as vast a territory as the United States could never be governed as a single republic.”¹⁰³ Identity-based factions are in the sociocultural and political DNA of American politics, law, and society. Indeed, identity-based factions—Federalist/Anti-federalist, Property Holder/Non-Property Holder, Federal/State, and North/South—were key players in defining, implementing, and interpreting the Constitution. Formal political identity, expressed in the guise of regional interests and identities, would be a weighty factor in the dissolution of the Union.¹⁰⁴ During ratification, Judge Harry Innes asserted: “Our interests [as Southern States] and the interests of the Eastern States are so diametrically opposite to each other that there cannot be ray of hope left to the Western Country to suppose that when once that interest clashes we shall have justice done us.”¹⁰⁵

¹⁰¹ Louise Weinberg, *Of Sovereignty and the Union: The Legends of Alden*, 76 NOTRE DAME L. REV. 1113, 1150 (2001); see also Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 66 (1995) (“Marshall treated the American people as a single entity incapable of making a binding agreement with itself.”).

¹⁰² 2 U.S. 419, 454 (1793); see also *Martin v. Hunter's Lessee*, 14 U.S. 304, 324 (1816) (“The constitution of the United States was ordained and established, not by the states in their sovereign capacities, but emphatically, as the preamble of the constitution declares, by ‘the people of the United States.’”).

¹⁰³ GLOVER, *supra* note 85, at 28.

¹⁰⁴ See Lori Robinson, *Region and Race: National Identity and the Southern Past*, in *A COMPANION TO THE REGIONAL LITERATURES OF AMERICA* 57 (Charles L. Crow ed., 2003); Anthony Daniel Perez & Charles Hirschman, *The Changing Racial and Ethnic Composition of the US Population: Emerging American Identities*, 35 POPULATION & DEV. REV. 1 (2009).

¹⁰⁵ Harry Innes to John Brown (Feb. 20, 1788), in 16 THE DOCUMENTARY HISTORY OF THE RATIFICATION OF THE CONSTITUTION: COMMENTARIES ON THE CONSTITUTION, PUBLIC AND PRIVATE, VOLUME 4, 1 FEBRUARY TO 31 MARCH 1788, at 152, 152–53 (John P. Kaminski & Gaspare J. Saladino eds., 1986). Innes himself was a fascinating figure for the purposes of considering politicized identity. A staunch supporter of Kentucky's independence from Virginia and an Anti-Federalist opponent of ratification, he was also a close ally of George Washington and served as a federal judge from the founding until his death in 1816. – Ed. See generally MARY K. BONSTEEL TACHAU, *FEDERAL COURTS IN THE EARLY REPUBLIC: KENTUCKY, 1789–1816*, at 31–53 (1978).

The complexity and problems of identity being interspersed in the formative period of the Constitutional order is also reflected in the power binary between state and national governments. For instance, in opposition to the federalists during the Virginia Constitutional debates, Patrick Henry declared: “What right had they to say, We, the People[,] . . . States are the Characteristics, and the soul of a confederation.’ The framers, Henry believed, had destroyed the sovereign states and created ‘one great consolidated National Government.’”¹⁰⁶ Furthermore, George Mason “insisted that sixty-five representatives ‘cannot possibly know the situation and circumstances of all the inhabitants of this immense continent. It would . . . be impossible to have a full and adequate representation in the General Government; it would be too . . . unwieldy.’”¹⁰⁷ For Mason, locally-based representation, group, and ideological identity should have controlled, not a unitary and politicized notion of “We the People.” During the Virginia constitutional debates, he reflected on “traditional, localistic ideas about representation. Representatives . . . ought to mix with the People, think as they think, feel as they feel, ought to be perfectly amenable to them, and thoroughly acquainted with their interest and condition.”¹⁰⁸

In light of the foregoing contextualization of the impact that politicized identity has had since the founding, it is important, when attempting to map out the contemporary terrain of politics, to grasp the relationship between representation and identity-based factions. This enables a critical awareness of the effects political identity has on politics when it is the principal form of organizing political platforms and articulating public policy. Representation remains a key ordering concept that continues to transect the political and legal process, constitutional order, and the legal actuality that emanates from the Court’s interpretation of representation and notions of an American political community. In the context of legislative apportionment, for instance, which directly impacts the form and substance of representation, the Court has noted that “fair and effective representation for all citizens” is a basic component of—and helps ensure the operation of—a genuinely representational political system.¹⁰⁹ In light of recent social-scientific research on group psychology, some commentators contend that, in light of representational politics, “heterogeneous groups make better collective judgments than homogenous groups.”¹¹⁰

Politicized identity, as expressed in policy, politics, and law, is a discursive construct that is endowed with plasticity due to its cultural,

¹⁰⁶ GLOVER, *supra* note 85, at 105.

¹⁰⁷ *Id.* at 107.

¹⁰⁸ *Id.*

¹⁰⁹ *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

¹¹⁰ Carla D. Pratt, *Judging Identity*, 2016 REVISTA FORUMUL JUDECĂTORILOR 84, 86 (2016) (citing Katherine W. Phillips, Katie A. Liljenquist & Margaret A. Neale, *Is the Pain Worth the Gain? The Advantages and Liabilities of Agreeing with Socially Distinct Newcomers*, 35 PERSONALITY & SOC. PSYCHOL. BULL. 336, 345–47 (2009)).

ideological, and political nature. Identity discourse provides, or rather attempts to provide, some form of bright-line boundaries for advocacy and inclusion/exclusion. This dynamic directly impacts the limits of “correct” thought and conduct and the proper conception and articulation of interests and goals in the realm of public policy. In the case of those politicians seeking the Democratic nomination to run against President Trump in 2020, politicized identity is at the forefront of who is encouraged, predicted, allowed, or favored to secure the nomination.¹¹¹ The foregoing is an example of how, within a discourse of politicized identity, one is subject to a “relationship of power, of domination, of varying degrees of complex hegemony.”¹¹²

Identity-based factions produce a discourse that helps constitute the parameters and contours of politics. This produces a base of critique and knowledge that centers around select limited concepts, and systemically and systematically perpetuates the discourse of “correctness” that emanates from the exercise of power to posit a politicized identity. This is important to note because concepts can be analogized to analytic nets placed over the cognitive and perceptive frameworks employed by a subject to navigate politics and society. That is,

different nets correspond to different systems for describing the world. Mechanics determines one form of description of the world by saying that all propositions used in the description of the world must be obtained in a given way from a given set of propositions—the axioms of mechanics. It thus supplies the bricks for building the edifice of [knowledge], and it says, “Any building that you want to erect, whatever it may be, must somehow be constructed with these bricks, and these alone.”¹¹³

IV. LAW, POLITICS, IDENTITY & REPRESENTATION

Law is the means by which policy is effectuated. The law is part of a biopolitics in which power is exercised in a manner that can be characterized as the “power of regulation” to regularize life, which “consists in making live .

¹¹¹ See Rich Barlow, *Democrats Shouldn't Rule Out Candidates Because of Race or Gender — That Includes White Men*, WBUR COGNOSCENTI (Jan. 10, 2019), <https://www.wbur.org/cognoscenti/2019/01/10/democratic-presidential-nominee-2020-rich-barlow> (“[O]bsessing over identity rather than the content of character both ignores Martin Luther King, Jr.’s counsel and flirts with political fire.”); see also Jamelle Bouie, *Democrats Have Made One Thing Very Clear About 2020: They’re Over White Men: Or, Why Kamala Harris Looks Like a Likely Nominee*, SLATE (Nov. 15, 2018), <https://slate.com/news-and-politics/2018/11/democratic-presidential-candidates-2020-diversity-white-men.html>.

¹¹² SAID, *supra* note 70, at 1787.

¹¹³ LUDWIG WITGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 68 (D. F. Pears & B.F. McGuinness trans., Routledge 1975).

. . . the right to intervene to make live . . . [and] eliminating . . . deficiencies.”¹¹⁴ The “regularization of life,” as Michel Foucault terms it, in the context of biopower and politics, is one that excludes, reduces, and emplaces thought and being in binary oppositions within which complexity, diversity, and the morass of human beings are simplified in the name of a pragmatic politics, which in turn, serves a narrowly defined identity for the purposes of wielding power in politics and policy.¹¹⁵ Complex notions of representation are attenuated.¹¹⁶ Politicized identity is thus part of the “biosocial or biological processes characteristic of human masses.”¹¹⁷

When considering the law’s rule-based mandate to procure order, it is interesting to note how law seeks to regularize life and administer identity as articulated by elites in the service of effectuating policy agendas, which are notions of an American political community. Fixing identity in space and time for the explicit purpose of political mobilization, organization, and as the conceptual basis for applied representation and public policy, may suffer from what Chief Justice Roger Traynor observed in *Pacific Gas & Electric v. G.W. Thomas Drayage & Rigging Co.*,¹¹⁸ where he addressed the difficulty in assigning a singular meaning to a particular word; an observation readily applied to the inherent problem in attempting to fix identity designations:

If words had absolute and constant references, it might be possible to discover . . . intention in the words themselves and in the manner in which they were arranged. Words, however,

¹¹⁴ Michel Foucault, *Society Must Be Defended*, in NORTON ANTHOLOGY, *supra* note 1, at 1445. In terms of identity and the law, the Court has found that identity is key in various areas of societal affairs and requires special attention in some form or other. For example, in *United States v. Brignoni-Ponce*, a unanimous Court found that it was a violation of the Fourth Amendment for a roving patrol car to stop a vehicle solely on the basis of the driver appearing to be of Mexican descent. 422 U.S. 873 (1975).

¹¹⁵ See MICHEL FOUCAULT, “SOCIETY MUST BE DEFENDED”: LECTURES AT THE COLLÈGE DE FRANCE, 1975–1976, at 247–49 (Mauro Bertani & Alessandro Fontana eds., David Macey trans., 2003).

¹¹⁶ In the instant case, the impact of the Massachusetts statute on women is undisputed. Any veteran with a passing grade on the civil service exam must be placed ahead of a nonveteran, regardless of their respective scores. The District Court found that, as a practical matter, this preference supplants test results as the determinant of upper level civil service appointments. Because less than 2% of the women in Massachusetts are veterans, the absolute-preference formula has rendered desirable state civil service employment an almost exclusively male prerogative. As the District Court recognized, this consequence follows foreseeably, indeed inexorably, from the long history of policies severely limiting women’s participation in the military. Although neutral in form, the statute is anything but neutral in application. It inescapably reserves a major sector of public employment to “an already established class which, as a matter of historical fact, is 98% male.” Where the foreseeable impact of a facially neutral policy is so disproportionate, the burden should rest on the State to establish that sex-based considerations played no part in the choice of the particular legislative scheme.

See, e.g., *Pers. Adm’r of Mass. v. Feeney*, 442 U.S. 256, 283–84 (1979).

¹¹⁷ Foucault, *supra* note 114, at 1447.

¹¹⁸ 442 P.2d 641 (Cal. 1968).

do not have absolute and constant referents. . . . The meaning of particular words or groups of words varies with the . . . verbal context and surrounding circumstances and purposes in view of the linguistic education and experience of their users and their hearers or readers (not excluding judges). . . . A word has no meaning apart from these factors; much less does it have an objective meaning, one true meaning.¹¹⁹

Judge O. Rogeriee Thompson’s dissent in *Kosilek v. Spencer*¹²⁰ illuminates Justice Traynor’s observation of the problem in capturing and perpetuating identity. Judge Thompson notes that the majority opinion reifies the gender binary of male/female to deny benefits to a transgender inmate, and that it “aggrieves an already marginalized community, and enables correctional systems to further postpone their adjustment to the crumbling gender binary.”¹²¹ This identity-based binary is the basis of law, which informs and organizes

our daily interactions, our values, our social institutions . . . our very understanding of reality, around these assumptions. One is not fully cognizable as human without a designation as male or female. The categories of sex and gender and the differences we ascribe to them are legitimized through naturalizing them, insisting that they are based on real, inevitable differences and thus go unquestioned . . . this binary system[, however,] is not natural, but socially and politically constructed.¹²²

It is important to note that, irrespective of where one is situated on the formal ideological spectrum, attempting to suspend identity-based classifications in space and time seems to have the effect of emplacing subjects in essentialized identity templates that ossify, perpetuate stasis, and are not able to transcend the historical moment in which said identity-based classifications were articulated and implemented in the legal and political process and policy spaces.

Politicized identity, while imbricated in policy, generally speaking, has distinct impacts on policy when it is employed to mobilize, organize, define, and posit distinctive identity groups’ interests on the political stage. Politicized identity leaves an imprimatur on policy because:

Policy making functions on several different planes as it reflects values, goals, interests, politics, history, and culture. At the

¹¹⁹ *Id.* at 644–45 (quoting Arthur L. Corbin, *The Interpretation of Words and the Parol Evidence Rule*, 50 CORNELL L.Q. 161, 187 (1965)).

¹²⁰ *Kosilek v. Spencer*, 774 F.3d 63, 96 (1st Cir. 2014) (Rogeriee Thompson, J., dissenting).

¹²¹ *Id.* at 113 (Rogeriee Thompson, J., dissenting).

¹²² Tara Dunnivant, Note, *Bye-Bye Binary: Transgender Prisoners and the Regulation of Gender in the Law*, 9 FED. CTS. L. REV. 15, 20 (2016).

same time . . . policy reflects the purpose and meaning of being a member of a political unit and forming a political identity. As such, public policy is not “the rules of governance for our society” but [rather it is] the ambience within which those rules are to be made.¹²³

Politicized identity thus has a very broad impact on law, politics, and policy beyond the sociopolitical and ideological agendas of identity-based factions and the individual subjects that perpetuate and reside within formal identarian classifications.

Law is a producer and product of knowledge. Legal process and discourse inform the administration of justice and ostensibly safeguard American norms and values, such as the rule of law, separation of powers, checks and balances, and due process—each of which has weighty implications for the actuality of subjects that reside within the law’s jurisdiction. “Policymaking embodies identity formation while it preserves, enhances, or augments the power to classify and define legal and political actuality. As the structural ambience that anchors the constitutional order, policy making also dismantles identity as it re-configures social functions and redefines social welfare.”¹²⁴

Law is fraught with complexity and contradictions. Attempts to integrate formal politicized identity into law can create additional problems for representative politics because of politicized identity’s capacity to cabin the scope or circumference of representation.¹²⁵ From a universalist lens, the reductivist nature of politicized identity, which has the effect of seriously simplifying the diverse and complex intersectionality of competing identities to a singular, palpable identity for public and political consumption, shrinks

¹²³ Marvin L. Astrada, *The Nature of the Judicial Process: A Complex Systems Analysis of Checks & Balances & Separation of Powers in the Present Political Context*, 21 RICH. PUB. INT. L. REV. 263, 278 (2017), <https://scholarship.richmond.edu/pilr/vol21/iss3/4>. For a discussion on how politics affects and effects law and policy, see Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC L. REV. 347, 348 (2008), <http://digitalcommons.law.scu.edu/facpubs/35> (“[P]olitics is generally understood as the fight over whose views and values should prevail in the allocation of scarce societal resources, the struggle over who receives various social benefits and who bears the costs.”).

¹²⁴ Astrada, *supra* note 123, at 279; *see also* *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010) (holding political campaign contributions by corporations and labor unions constitute speech protected by the Constitution); *Roe v. Wade*, 410 U.S. 113 (1973) (holding unconstitutional laws that restrict a woman’s right to an abortion prior to fetal viability); *Miranda v. Arizona*, 384 U.S. 436 (1966) (holding police must advise criminal suspects of their rights under the Constitution to remain silent, consult an attorney, and have legal representation appointed if indigent); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding segregating schools by race violates the Equal Protection Clause of the Fourteenth Amendment); *Hernandez v. Texas*, 347 U.S. 475 (1954) (holding that trying a defendant particular race or ethnicity in front of a jury where all persons of his race or ethnicity have been excluded by the state violates of the Equal Protection Clause of the Fourteenth Amendment); *Shelley v. Kraemer*, 334 U.S. 1 (1948) (holding courts may not enforce restrictive racial covenants for real estate).

¹²⁵ *See* MARK LILLA, *THE ONCE AND FUTURE LIBERAL: AFTER IDENTITY POLITICS* 71–72 (2017).

the space of representation vis-à-vis the public sphere in which policy is articulated and implemented. As Madison notes:

[L]aws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications. Besides the obscurity arising from the complexity of objects, and the imperfection of the human faculties, the medium through which the conceptions of men are conveyed to each other adds a fresh embarrassment. The use of words is to express ideas. Perspicuity, therefore, requires not only that the ideas should be distinctly formed, but that they should be expressed by words distinctly and exclusively appropriate to them. But no language is so copious as to supply words and phrases for every complex idea, or so correct as not to include many equivocally denoting different ideas. Hence it must happen that however accurately objects may be discriminated in themselves, and however accurately the discrimination may be considered, the definition of them may be rendered inaccurate by the inaccuracy of the terms in which it is delivered.¹²⁶

A pluralistic sub-community view of an American political community finds strength in heterogeneity and expansive notions of national community. A more restrictive universalist perspective, on the other hand, views law's relationship to fair and effective representation as being complicated by politicized identity when it is the primary mechanism for effectuating policy. This is the case because the latter comprehends society as constituted by "so many separate descriptions of citizens as will render an unjust combination of a majority of the whole very improbable, if not impracticable . . . society itself will be broken into so many parts, interests, and classes of citizens."¹²⁷ The "political thicket"¹²⁸ of politicized identity has the potential to exacerbate the erosion of the overarching political system's representative capacity. As a form of knowledge and practice, law is subject to the same limitations as social-scientific knowledge: "knowledge falls into a complex, conflict-filled social environment, inhabited by agents with different interests and motivations . . . 'sheer knowledge alone, or "disinterested search for truth,"

¹²⁶ THE FEDERALIST NO. 37 (James Madison).

¹²⁷ THE FEDERALIST NO. 51 (Alexander Hamilton or James Madison).

¹²⁸ OXFORD UNIV. PRESS, THE OXFORD COMPANION TO THE SUPREME COURT OF THE UNITED STATES 317 (Kermit L. Hall et al. eds., 2d ed. 2005). *See also* Baker v. Carr, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (The Court should abstain "from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements.").

will never be determinative.”¹²⁹ Due to the “open-textured nature of law,”¹³⁰ identity politics and politicized identity—when viewed as either constituting a homogenous American political community or one constituted by sub-sets of identity-based communities—can have a substantial impact on contouring the representative space of groups or subjects.¹³¹

The Court has expressed various opinions about the relationship between politicized identity and representation and has articulated sundry legal tests and principles in developing its interpretation of representation, and by default, the character and content of the American political community.¹³² This is significant for any analysis of politicized identity because of the implications Court decisions have for defining the character and content of an American political community.¹³³ In *Shaw v. Reno*, for instance, the Court noted, regarding challenges to a redistricting plan:

[B]y perpetuating stereotypical notions about members of the same racial group—that they think alike, share the same political interests, and prefer the same candidates—a racial gerrymander may exacerbate the very patterns of racial bloc voting that majority-minority districting is sometimes said to counteract. It also sends to elected representatives the message that their primary obligation is to represent only that group’s members rather than their constituency as a whole.¹³⁴

¹²⁹ SCHNEIDER, *supra* note 29, at 211.

¹³⁰ Joondeph, *supra* note 123, at 358.

¹³¹ See, e.g., *Parents Involved v. Seattle School Dist. No. 1*, 551 U.S. 701, 748 (2007) (“[T]he way ‘to achieve a system of determining admission to the public schools on a nonracial basis’ is to stop assigning students on a racial basis. The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.”).

¹³² Consider that the “Supreme Court has (especially when invoking the fourteenth amendment) advanced such causes as a constitutionalized right to abortion on demand, a constitutionalized leniency toward pornography, constitutionalized racial quotas, constitutionalized judicial supervision of state school curricula, and a constitutionalized proscription of voluntary, nondenominational public school prayer.” George Steven Swan, *The Political Economy of Supreme Court Social Policymaking 1987*, 8 ST. LOUIS U. PUB. L. REV. 87, 88 (1989).

¹³³ [Judicial] decisions throughout American history have generally reflected the nation’s prevailing social and political mores. The Supreme Court held that racial segregation comported with the Fourteenth Amendment in 1896, but that it was unconstitutional in 1954. It held that states could criminalize sodomy between consenting adults in 1986, but that such laws were impermissible in 2003. See *Plessy v. Ferguson*, 163 U.S. 537 (1896); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *Bowers v. Hardwick*, 478 U.S. 186 (1986). On neither issue had the relevant sources of legal authority changed. But on both issues, societal attitudes had evolved significantly, growing less tolerant of racial segregation and more tolerant of homosexuality.

Joondeph, *supra* note 123, at 365–66.

¹³⁴ *Shaw v. Reno*, 509 U.S. 630, 631 (1993).

The Court has found that politicized identity is most viable when an identity-based group is found to be “politically cohesive.”¹³⁵ From a universalist lens of political community, identity-based factional elites and entrepreneurs may thus be incentivized to “find” or manufacture consent, so to speak, as to what constitutes a discrete and insular cohesive identity that will, in turn, find expression and protection under the law that may be at odds with the actualities that undergird a political community. Cohesiveness, however, must appear organic or at the very least not “forced.” When probing the relationship between politicized identity and law, the Court, in *Bush v. Vera*, for example, stated that legislative decisions that focus primarily on race in redistricting “cause constitutional harm insofar as they convey the message that political identity is, or should be, predominantly racial.”¹³⁶ Yet, from a pluralistic sub-communities perspective, an identity-based faction is part and parcel constitutive of an American community, as sub-communities are facets, components of a mosaic rather than a universal template underpinning an American political community.

Due to the potential for putting forth a politicized identity that may be artificially cohesive, politicized identity may further complicate an already knotty state of affairs in the realm of law and representation. Within the context of law and public policy, politics has been described as constituting the following characteristics: “(1) politics accommodates competing interests; (2) politics is empirical; (3) politics is inspired by an underlying moral foundation; and (4) politics is an ongoing conversation.”¹³⁷ Each of these components or dimensions of politics can be employed to describe representational politics. “The accommodation of interests and principles emerges from an ongoing conversation. Accommodations never are final or complete. They may receive all of the attention and study, but it is the accommodating—the ongoing conversation—that does all of the work.”¹³⁸ Based on one’s perspective of what is or what should constitute American political community and representative political spaces, politicized identity may *prima facie* negatively impact characteristics one and four and may do little to buttress or enhance three.

In the case of representational politics, accommodation seems to be a core norm-ordering principle: “The business of politics is not with theory and ideology but with accommodation.”¹³⁹ Identity-based factions can be viewed as espousing, in essence, a monopoly over the definition, goals, interests, and articulation of identity, politicizing it in order to promulgate a particular interpretation of a group’s goals and interests in policy spaces. This dynamic, to some degree, cuts against the foundational value and norm of

¹³⁵ See *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

¹³⁶ 517 U.S. 952, 980 (1996).

¹³⁷ Moeller, *supra* note 77, at 204.

¹³⁸ *Id.* at 207.

¹³⁹ ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 19 (1975).

accommodation. For those that espouse a “correct” or singular interpretation of an identity’s form and substance, the problem becomes that claims to positing an identity in policy spaces can render an identity rigid or static:

[N]o group or interest can legitimately claim an absolute right to any position. Not only are absolute claims fraught with dangerous consequences . . . but absolute rights do not exist. Rights are real only when and because society grants them. Thus, one can argue persuasively that society should grant the right to vote or the right to decent health care, but they become rights only when the society’s accommodation affirms them as rights.¹⁴⁰

Whether one subscribes to or employs a universalist or the more nuanced pluralistic sub-communities framework in the political and legal process, a political faction—homogenous in nature or comprised of heterogenous components and subcomponents—was originally acknowledged as attenuating the representative capacity of a democratic political system in *The Federalist*.¹⁴¹ In the case of identity-based factions employing politicized identity in policy spaces, a modern interpretation of faction—one that is united, actuated by a common impulse, passion or interest—can have a potentially negative impact on representational politics. This is the case because: (1) the elite that articulate the identity may not in actuality represent the interests of group members and sub groups in the community; or (2) the interest being proffered by elites that “speak” for the group may reflect the priorities of the elite rather than that of the groups and individuals that are being spoken for in policy spaces. A formal identity faction may thus be less representative of a group’s actualities and interests, occluding alternative interpretations of what constitutes an identity and its representation in policy.

Policy is the expression of correct modalities that order and represent a political community. “Every community has an ethical environment, and that environment makes a difference to the lives its members can lead.”¹⁴² The essence of a political community’s identity, distinct from the individuals or groups and subgroups that constitute and reside within a polity, is embodied in national policy spaces, for example, judicial opinions, which are products and producers of the legal and political process that underpin a polity.¹⁴³ The Court has faced some of the problems that emerge from this state of affairs:

At the heart of the Constitution's guarantee of equal protection lies the simple command that the Government must treat

¹⁴⁰ Moeller, *supra* note 77, at 204–05.

¹⁴¹ See THE FEDERALIST NO. 10 (James Madison).

¹⁴² Ronald Dworkin, *Liberal Community*, 77 CALIF. L. REV. 479, 480 (1989).

¹⁴³ See Stephen M. Feldman, *The Supreme Court in a Postmodern World: A Flying Elephant*, 84 MINN. L. REV. 673 (2000).

citizens “as individuals, not ‘as simply components of a racial, religious, sexual or national class.’” Social scientists may debate how people’s thoughts and behavior reflect their background, but the Constitution provides that the Government may not allocate benefits and burdens among individuals based on the assumption that race or ethnicity determines how they act or think.¹⁴⁴

How individuals “act or think” in policy spaces can be linked to particular identity-based factions.¹⁴⁵ Constitutional law and theory as articulated by the Court reflects some of the effects that politicized identity has on politics, law, representation, and community. In the case of voting and race, the Court has stated that:

When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, “think alike, share the same political interests, and will prefer the same candidates at the polls.” Race-based assignments “embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.” They also cause society serious harm. . . . Racial classifications with respect to voting carry particular dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.¹⁴⁶

In *Holder v. Hall*,¹⁴⁷ the Court found that when “there is no objective and workable standard for choosing a reasonable benchmark to evaluate a challenged voting practice, it cannot be challenged as dilutive under Section

¹⁴⁴ *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (1990) (O’Connor, J., dissenting) (quoting *Ariz. Governing Comm’n v. Norris*, 463 U.S. 1073, 1083 (1983)), *overruled by* *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995); *see also* *Powers v. Ohio*, 499 U.S. 400, 410 (1991) (“Race cannot be a proxy for determining juror bias or competence.”); *Palmore v. Sidoti*, 466 U.S. 429, 432 (1984) (“Classifying persons according to their race is more likely to reflect racial prejudice than legitimate public concerns; the race, not the person, dictates the category.”).

¹⁴⁵ Ortiz M. Walton, *Toward a Non-Racial, Non-Ethnic Society, in* MULTI-AMERICA, *supra* note 15, at 452. (“[R]acial and ethnic classifications are more ideological than scientific and frequently utilized by politicians and demagogues for the purpose of divisiveness . . . are we yet at the point of just becoming human beings sans ethnicity and race?”).

¹⁴⁶ *Miller v. Johnson*, 515 U.S. 900, 911–12 (1995) (citations omitted).

¹⁴⁷ 512 U.S. 874 (1994).

II” of the Voting Rights Act.¹⁴⁸ Justice Thomas, joined by Justice Scalia, criticized vote dilution theory for redistricting, characterizing it as “a slightly less precise mechanism than the racial register for allocating representation on the basis of race.”¹⁴⁹ Justice Thomas found that vote dilution claims based on racial identity are underpinned by an assumption of actual or objective cohesiveness of a politicized identity group and that “political cohesiveness, as practically applied, has proved little different from a working assumption that racial groups can be conceived of largely as [distinct] political interest groups.”¹⁵⁰ In *Miller v. Johnson*, however, Justice Ginsburg in her dissent noted that, “ethnicity itself can tie people together . . . even people with divergent economic interests. For this reason, ethnicity is a significant force in political life.”¹⁵¹

V. NUANCES & PROBLEMS ASSOCIATED WITH POLITICIZED IDENTITY

The employment of politicized identity by identity-based factions in accruing power to shape public policy creates discursive conceptual loci that, for better or worse—depending on one’s political and ideological orientation vis-à-vis political community—directly impact the character and content of representation.¹⁵² Identity politics generally speaking—and identity-based factions specifically—have had the effect, to some degree, of reifying a fragmented, as opposed to collective, sense of public policy and general welfare.¹⁵³ While it is indisputably important and necessary to capture the diversity of the populace in policy spaces, formal politicized identity as the

¹⁴⁸ *Id.* at 881.

¹⁴⁹ *Id.* at 908 (Thomas, J., dissenting).

¹⁵⁰ *Id.* at 905.

¹⁵¹ *Miller*, 515 U.S. at 944 (Ginsburg, J., dissenting).

¹⁵² In analyzing arguments pertaining to the role of ethics in communitarian contexts, Ronald Dworkin notes the different iterations of community have serious consequences for how a political community is articulated in the political and legal process and in policy spaces:

Each of these arguments uses the concept of community in an increasingly more substantial and less reductive way. The first argument, that a democratic majority has a right to define ethical standards for all, uses community only as a shorthand symbol for a particular, numerically defined, political grouping. The second argument, which encourages paternalism, gives the concept more substance: It defines community not as just a political group, but as the dimensions of a shared and distinct responsibility. The third argument, that people need community, recognizes community as an entity in its own right, as a source of a wide variety of influences and benefits not reducible to the contributions of particular people one by one. The fourth argument, about identification, further personifies community and describes a sense in which a political community is not only independent of, but prior to, individual citizens.

Dworkin, *supra* note 142 at 480.

¹⁵³ Mukherjee, *supra* note 15, at 455–57. (“Language, race, religion, blood, myth, history, national codes, and manners have all been used . . . in the US . . . to enforce terror, to ‘otherize’ . . . [Q]uestions such as who is an American and what is American culture are being posed with belligerence and being answered with violence.”).

singular means to do so in the overarching policy space may have the consequence of balkanizing politics and exacerbating existing fissures. Identity-based factions may have an adverse effect on the systemic national community in order to highlight and protect the interests of the system's sub-communities, the constitutive parts of the American polity. Alternatives to politicized identity can perhaps be found in a shared and "explicitly expressed [American] system of general ideas,"¹⁵⁴ such as the Declaration of Independence, U.S. Constitution, legal categories such as citizenship, and procedural and substantive due process.

Politicized identity has high degrees of efficiency when it comes to shaping the political and legal process and resultant public policy spaces that, in turn, reflect an American political community. This is the case, in part, because identity-based political factions are able to articulate interests based on objectively ascertainable criteria that purport to capture the essence of individual and group-based identity affiliation that goes to the core of what members may feel is the touchstone of their being.¹⁵⁵ Meaning and purpose of a subject are conditioned by perceived membership in a group because it functions as a repository of one's sense of self. A problematic aspect of politicized identity that lurks in the penumbras of representational politics is that identity-based factional elites and entrepreneurs may be "confounding conveniently abstracted features of human beings with [the] concrete totality of these beings."¹⁵⁶ The politicized subject of an identity-based faction is required to remain within the confines of a general panoramic context that adheres to pre-established rules of constitution. In light of the foregoing, it may be the case that:

[C]laims made on behalf of canonical identities or members of canonical identity groups are just political claims, like claims made on behalf of labor unions or gun owners or oil companies: Gay marriage isn't necessarily weightier than the Family Medical Leave Act; Title VII is just another regulation of the market for labor, like the NLRA or ERISA.¹⁵⁷

This type of contention is, of course, subject to critique and debate. The perceptive lens one employs will directly affect how one assesses politicized identity.

¹⁵⁴ BRUCE BAWER, *THE VICTIM'S REVOLUTION: THE RISE OF IDENTITY STUDIES & THE CLOSING OF THE LIBERAL MIND* xiii (2012).

¹⁵⁵ Politicized identity, and the identity-based factions that promulgate it, are reductivist in nature. Each does not reflect the complex actuality of an individual subject. This "reduction of human relations to ultra-tidy notions of group oppression results in an outrageously crude picture of the world . . . plenty of people are oppressed—or ignored, mocked, or looked down upon—for reasons other than race, class, gender, or sexual orientation." *Id.* at 38.

¹⁵⁶ SCHNEIDER, *supra* note 29, at 212.

¹⁵⁷ Ford, *supra* note 2, at 53.

Politicized identity, as the basis for political organization and representation, has the potential of blurring the demarcation between identity as a personal experiential state of affairs and identity as an objective category that is deployed to create political- ideological platforms for the purpose of organizing and affecting public policy in the name of identarian policy claims. It “remains the case that neither language, nor religion, nor nationality, nor shared moral or political views, is a likely candidate for the communitarian symbol [of an American political community] that seems to be a part of all true communities.”¹⁵⁸ A virtue of formal politicized identity, on the other hand, is that it helps create bonds of commonality among distinct subgroups in the polity that allow for a degree of representation at the macroscopic or national level. Marriage equality, for instance, can be viewed as an attempt to enable pluralistic sub-communities to participate in a universal institution.¹⁵⁹ Yet, a pitfall seems to be that politicized identity is also reductivist in that it de-diversifies individual subjects and sub-groups within the larger umbrella group signifier. The power to name, to establish authoritative and “true” signifiers to indicate objective signifiers, is immanent in the power to identify, classify, and provide singular criteria for inclusion or exclusion.¹⁶⁰ What are the consequences for representational politics as far as the larger political context that frames public policy? Politicized identity is an act of imagination: a self and group affiliation “are not primordial but historically produced[; in the case of race,] whiteness and blackness were historically created and [are] historically variable categories.”¹⁶¹

The contradiction inherent in identity politics as the basis for representation is that politics and policy reflect a conception of the “world as a multi-chrome mosaic of monochrome identity groups.”¹⁶² A “social group should not be understood as an essence . . . with a specific set of common attributes. Instead, group identity should be understood in relational terms. . . . There is no common nature that members of a group have.”¹⁶³ As a form of legal, political, and cultural discourse, politicized identity communicates and is packaged for public consumption based on its ability to perpetuate a

¹⁵⁸ Frederick Schauer, *Community, Citizenship, and the Search for National Identity*, 84 MICH. L. REV. 1504, 1515 (1986).

¹⁵⁹ See Gwendolyn M. Leachman, *Institutionalizing Essentialism: Mechanisms of Intersectional Subordination Within the LGBT Movement*, 2016 WIS. L. REV. 655 (2016).

¹⁶⁰ See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS & OTHER WRITINGS 1972-1977*, at 131–32 (Colin Gordon ed., 1980).

¹⁶¹ Brubaker & Cooper, *supra* note 36 at 29.

¹⁶² *Id.* at 31.

¹⁶³ Iris Marion Young, *Polity and Group Difference: A Critique of the Ideal of Universal Citizenship*, 99 ETHICS 250, 260 (1989).

political and ideological discourse that is rooted in sameness, which provides a means to exercise power via a hegemonic discourse.¹⁶⁴

[Politicized identity provides] a systematized standard of recognizability—of sameness—by which all others can be assessed, regulated and allotted to a designated social location . . . power formations not only function at the material level but are also expressed in systems of theoretical and cultural representation, political and normative narratives and social modes of identification. There are neither coherent, nor rational and their makeshift nature is instrumental to their hegemonic force.¹⁶⁵

Identity-based factions are thus products and producers of power—the power to name, classify, designate, the gatekeepers who authoritatively define and represent a politicized identity in policy spaces.¹⁶⁶

Some critics have claimed that identity politics and the politics of identification have created a “pseudo-politics of self-regard and increasingly narrow and exclusionary self-definition.”¹⁶⁷ An identity-based faction does exert a unique influence on representative politics and policy spaces in that politicized identity employs a “presumption of sameness, whether in the form of universal moral equality or shared identity, [which] obscures biases, nuances, and alternative visions.”¹⁶⁸ Politicized “*identity*—in the contemporary sense of an inner thing, a homunculus that needs tending to—did not enter American political discourse until the late 1960s. It is more exact to say that the founding problem of the United States was that of political identification.”¹⁶⁹ There is a difference between employing personal identities for power and policy gains—for example, obtaining specific rights

¹⁶⁴ Hunter, *supra* note 56, at 5–6.

Nathan Glazer and Daniel Patrick Moynihan first described ethnic groups as also being interest groups. In *Beyond the Melting Pot*, they argued that ethnicity operated on two tracks: cultural and political. Ethnic communities were in a continuing process of regeneration, regardless of intermarriage or cultural assimilation, because central political concerns endured. An individual was connected to a community not only by ties of blood, marriage, or personal history, but also “by ties of *interest*. The ethnic groups in New York are also *interest groups*.” Glazer and Moynihan sought to incorporate ethnicity into a model of interest-driven pluralism. In effect, they merged ethnicity, along with political and economic demands, into the interest group framework.

Id. (citing NATHAN GLAZER & DANIEL PATRICK MOYNIHAN, *BEYOND THE MELTING POT* 17 (1963)).

¹⁶⁵ BRAIDOTTI, *supra* note 1, at 2337.

¹⁶⁶ See MICHEL FOUCAULT, THE SUBJECT & POWER, in THE ESSENTIAL FOUCAULT 126–44 (Paul Rainbow & Nikolas Rose eds., 1994); MICHEL FOUCAULT, OMNES ET SINGULATIM: TOWARD A CRITIQUE OF POLITICAL REASON, in THE ESSENTIAL FOUCAULT 182.

¹⁶⁷ LILLA, *supra* note 125, at 10.

¹⁶⁸ Krug, *supra* note 31, at 1295; see generally Molly S. Mcusic & Michael Selmi, *Postmodern Unions: Identity Politics in the Workplace*, 82 IOWA L. REV. 1339 (1997).

¹⁶⁹ LILLA, *supra* note 125, at 62.

via the policy making process under the auspices of an entire class of people that are grouped under an identity rubric as posited by elite stakeholders—and the notion of identification with a restrictive formal identity-based ideology.¹⁷⁰ A negative effect of basing representation on identity-based factions is that the subjects' complexity is reduced to simplified politicized traits that emphasize what identity elites feel are the most salient facets and aspects of an identity in order to harness power.¹⁷¹ The politicized identity-based subject, emplaced within the confines of formal politicized identity, is encouraged to engage “with the world and politics for the limited aim of understanding and affirming what one already is”¹⁷² as defined by identity elites and entrepreneurs that control public discourse vis-à-vis what members actually want or need, the criteria of inclusion, and exclusion for membership and “proper” conduct in the public and policy realms.

The problem of representation appears when the question is asked: who exactly articulates, sets, defines, and pursues an agenda in the name of the identity group? What are the power dynamics involved—how are membership, experience, interests, and rights conceptualized, and for whom and why? Is it really the case that identity groups are able to facilitate authentic representation of the diversity of members that fall under the classification of a formal politicized identity?

The notion of a group right requires the existence of an identifiable group having an identifiable commonality of pursuits or objectives, which may be regarded as the bearer, or subject, of the right. Thus, a group right implicitly ascribes to group members some type of unified identity—which creates an inconsistency, or tension, between a denial of essentialist premises and an affirmation of group-based rights.¹⁷³

The issues posited as being of importance to the group—the defining of interests, policies, goals, and rights—are all tied into identity and into the

¹⁷⁰ See Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581, 586 (1990). In the case of the Black Panther Party playing a role in defining modern and Black identity, David Hilliard notes that:

Significantly, Huey [Newton] and Eldridge [Clever] parted over ideological differences. “When Eldridge joined the Party it was after the police confrontation, which left him with the *either/or* attitude. This was that either the community picked up the gun with the Party or else they were cowards and there was no place for them.” Eldridge ultimately dismissed the Party’s broad self-defense package, defining the black liberation battle exclusively in terms of armed struggle.

David Hilliard, *Introduction to THE HUEY P. NEWTON READER 3* (David Hilliard and Donald Weise, eds., 2002).

¹⁷¹ See Devon W. Carbado, *Black Rights, Gay Rights, Civil Rights*, 47 UCLA L. REV. 1467 (2000).

¹⁷² LILLA, *supra* note 125, at 84; see also Clarissa Rile Hayward & Ron Watson, *Identity and Political Theory*, 33 WASH. U. J. L. & POL’Y 9 (2010); Nancy Leong, *Identity Entrepreneurs*, 104 CAL. L. REV. 1333 (2016).

¹⁷³ Krug, *supra* note 31, at 1296–97.

subject's sense of self.¹⁷⁴ This has the potential of creating polarizing and non-negotiable spaces wherein it becomes difficult to accommodate the differences that exist among diverse individuals and groups without an umbrella identity to build on, such as national political identity or formal citizenship or macroscopic ordering principles that can transcend niche identity policy spaces.¹⁷⁵ Interest, like identity, is not a static state of affairs; interests are culled from select fragments of “current information, consumption patterns, legal rules, and general social pressures.”¹⁷⁶

Identity-based factions provide a fountainhead for political and legal language that may have the effect of circumscribing broader engagement in the public sphere. “Who is authorized to speak and about whom? Identity, in other words, [has become] a sort of credential of authenticity authorizing some to speak. It also authorized others to use identity to silence.”¹⁷⁷ Underpinning authorization is the fact that politicized identity is a normative, ethical postulation.¹⁷⁸ As Cornel West notes, in the case of African American identity, “any claim to black authenticity—beyond that of being a potential object of racist abuse and an heir to a grand tradition of black struggle—[relies] on one's political definition of black interest and one's ethical understanding of [identity] to individuals and communities in and outside black America.”¹⁷⁹ Politicized identity, as proffered by an identity-based factional elite, is a normative and ethical construct. Trump supporters, for instance, have felt free to revel in their politicized identity (“the silent majority”) during the 2016 presidential campaign and post-election context, deploying it against opponents.¹⁸⁰ The same dynamic happens on the

¹⁷⁴ See STEINBERG, *supra* note 15; Linda Nicholson, *Identity after Identity Politics*, 33 WASH. U. J. L. & Pol'y 44 (2010).

¹⁷⁵ See S.I. Benn, *Interests in Politics*, 60 PROC. ARISTOTELIAN SOC'Y 123 (1960).

¹⁷⁶ Cass R. Sunstein, *Preferences and Politics*, 20 PHILO. & PUB. AFF. 3, 10 (1991).

¹⁷⁷ Cyra Akila Choudhury, *In the Shadow of Gaslight: Reflections on Identity, Diversity, and the Distribution of Power in the Academy*, 20 CUNY L. REV. 467, 474 (2017).

Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth. For that reason the laws and the Constitution can, and in some instances must, protect them in the exercise of their civil rights. The exercise of their freedom on terms equal to others must be given great weight and respect by the courts. At the same time, the religious and philosophical objections to gay marriage are protected views and in some instances protected forms of expression. As this Court observed in *Obergefell v. Hodges*, “[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.”

Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n, 138 S. Ct. 1719, 1727 (2018).

¹⁷⁸ SCHNEIDER, *supra* note 29, at 213; see also Nicholson, *supra* note 174, at 46 (2010) (“[R]ace and gender depict relatively stable bodily and behavioral characteristics whose effects (either minimal or maximal) are stable across social contexts.”).

¹⁷⁹ CORNEL WEST, RACE MATTERS 25–26 (1993).

¹⁸⁰ [During the 2016 campaign, in] North Carolina, a 78-year-old man recently punched a black protester in the face and said he wanted to kill him; a rally in Chicago was canceled outright because of scuffles between Trump supporters and protesters; a man was punched and kicked

ideological left as well. Irrespective of ideological and normative predispositions, “[i]dentity politics can dampen or smother democratic political freedom.”¹⁸¹

Essentialism, that is, the notion that there are objective elements, components that comprise identarian experience, is another facet of formal politicized identity that has repercussions for representational politics.

[Essentialism] is embedded in the practice of elites who seek to establish and maintain a position as “spokesmen” or “advocates for” one or another “affinity group.” And it is embedded in the practice of some rank and file “members” of such groups who, by means of group opinion, seek to keep other “members” in line.¹⁸²

Essentialism is reductivist and tends to “one-dimensionalize” individual subjects and sub-groups within a larger umbrella identity group.¹⁸³ Humans are complex; individually and collectively, they possess multidimensional facets that comprise a singular being. An individual has layers of identity-based influences and meanings. Humans are “multi-identificational.”¹⁸⁴ Layer in the power-based and interest-based motives that undergird formulations of politicized identity in the political realm and these complex dimensions become attenuated. Identity becomes an organizing device and mechanism, by which to classify, name, and place subjects in hierarchical and clearly defined trait- and experience-based modalities that are constitutive of an objective identity-based state of affairs.

In our modern identity politics, it seems that trait-based criteria and experience are deemed to reflect the presence of a deep-seated identity that persists in space and time. This may be problematic in light of the shifting, malleable, and plastic nature of social context and the sociality of facts, epistemology, and the truth regimes that emerge from them. Thought, conduct, and discourse thus seem to reflect a persistence of memory when it comes to identity and not the fact that signifiers are arbitrary and subject to

repeatedly during an Arizona rally Trump leverages the power of this violence—he . . . said that if he isn’t nominated at the Republican Convention in July, “I think you’d have riots.” Along with the fighting, though, something inspirational seems to be happening among the assembled—a sense of collective identity being discovered. In this millionaire cosmopolitan who has married two immigrants, the threatened silent American majority has found its champion.

Clare Malone, *Why Donald Trump? A Quest to Figure Out What’s Happening in America*, FIVE THIRTY EIGHT (Mar. 23, 2016), <https://fivethirtyeight.com/features/why-donald-trump/>.

¹⁸¹ Richard D. Parker, *Five Theses on Identity Politics*, 29 HARV. J.L. & PUB. POL’Y 54, 54 (2006).

¹⁸² *Id.* at 56.

¹⁸³ See Daniel R. Ortiz, *Creating Controversy: Essentialism and Constructivism and the Politics of Gay Identity*, 79 VA. L. REV. 1833 (1993).

¹⁸⁴ DAVID R. JARROWAY, WALLACE STEVENS AMONG OTHERS: DIVA-DAMES, DELEUZE, AND AMERICAN CULTURE 165 (2015).

modification, disbandment, or reconfiguration. “Modern power requires increasingly narrow categories through which it analyzes, differentiates, identifies, and administers individuals.”¹⁸⁵ Enter politicized identity. It is a powerful mechanism that stems from “politics of language and speech” by which to order, classify, name, place, and police discourse, proper expression of interests, policy, goals, quality of life, and group criteria and conduct.¹⁸⁶ Identity discourse thus interjects realness into classification, a persistent trace of objective identity that resides deep in the recesses of the subject. This is part of the process wherein an organic identity emerges, where the sociality, the relative subjective of constructs, is discarded—irrespective of the intent of the elite that articulate it.¹⁸⁷

Politicized identity has the effect of coding the content of thought, speech, and conduct, and qualifying who speaks, when, why, and how about the interests, goals, issues, challenges, etc., which are vital to an identity-based group’s political wellbeing and public policy goals and aspirations.¹⁸⁸ Identity-based politics is a composite of a multiplicity of discourses rather than a singular one, and in a particular interpretation of identity, many competing voices, iterations, and permutations are shut out from the political process.¹⁸⁹ Politicized identity discourse, which transforms identity into a politicized mechanism and construct, provides “an analytical, visible, and permanent reality; a principle of classification and intelligibility. . . . The strategy behind this dissemination [is] to strew reality with [such principles] and incorporate them into the individual.”¹⁹⁰

Politicized identity is a construct that is propagated from within the political realm. Facts are politicized, and thus facts can be appropriated in the service of a politico-ideological program. The reality posited by politicized facts that tell a specific narrative gleaned from a set of interpreted facts leads to a conflation between objective and subjective facts. As a protestor in Greenville, South Carolina stated in remonstrating drag queens reading stories to children in the local public library: “I don’t see why their rights should trump ours. It always seems in society today that’s what happens. They want to be considered the victim; they want to have special rights.”¹⁹¹ The facts change based on the identarian lens applied: story time with drag queens can also be factually seen as an inclusive affair that embraces

¹⁸⁵ *Michel Foucault*, in NORTON ANTHOLOGY, *supra* note 1, at 1392 (biographical and analytical introduction).

¹⁸⁶ Foucault, *The History of Sexuality*, in NORTON ANTHOLOGY, *supra* note 1, at 1421.

¹⁸⁷ *Id.* at 1423.

¹⁸⁸ *Id.* at 1429.

¹⁸⁹ One critic has claimed that identity politics and the politics of identification have created a “pseudo-politics of self-regard and increasingly narrow and exclusionary self-definition.” LILLA, *supra* note 125, at 10.

¹⁹⁰ Foucault, *supra* note 186, at 1437.

¹⁹¹ George Pierpoint, *Drag Queen Story Hour in America’s Bible Belt*, BBC NEWS (Feb. 20, 2019), <https://www.bbc.com/news/world-us-canada-47203976>.

diversity rather than as an assault on the particular values and norms of the community. Politicized identity thus provides a singular account of facts and seeks to disqualify competing discourses.

[I]dentity is contingent, neither the exclusive product of individual choice nor the natural result of ascriptive racial or gender characteristics or cultural heritage. Instead . . . identities are conferred historically: “subjects are produced through multiple identifications, . . . [and] the project of history is not to reify identity but to understand its production as an ongoing process of differentiation, . . . subject to redefinition, resistance and change.” The point is that identity is not a given: it is produced. Individuals’ identities are the product of both the social forces that surround them and the identity labels that are imposed on them and, to some degree, internalized by them. Therefore, groups cannot be conceived of as categorically distinct, because group boundaries themselves must vary as persons shape their identities through interactions with other groups and persons.¹⁹²

Overall, politicized identity may have a negative impact on representation and the positing of an American political community because it blurs the distinction between truth and meaning, subjectivity, and objectivity. There is a crucial distinction between meaning and truth:

Meaning attends to the significance we as humans attach to our actions and existence, whereas truth refers to basic conditions of existence within which our actions and our efforts to attain meaning take place. . . . [T]ruth is irrelevant, even dangerous, in the political sphere. In that sphere, citizens argue about things, often about the best course of action for the collective to undertake. . . . [T]he things we argue about have no right or wrong answer.¹⁹³

When politicized identity becomes the singular or primary basis of performance, then the political becomes contestation for truth(s), not meaning, and groups are locked into internal and external contests for positing the correct identity interpretation to undergird and structure law and policy. Truth compels, “and that is why it has no place in the political, which deals with uncertain matters open to debate.”¹⁹⁴ Identity as an ideological program puts forth truth in place of meaning and creates narrowly defined conduits in which to articulate policy spaces.

¹⁹² Krug, *supra* note 31, at 1292, 1296.

¹⁹³ *Hannah Arendt*, in NORTON ANTHOLOGY, *supra* note 1, at 1168 (biographical and analytical introduction).

¹⁹⁴ *Id.* at 1169.

The conflation of the personal with the public sphere of identity creates issues for representational politics on a macroscopic level of analysis. Identity, when explicitly politicized, does not become a means to an end but rather an end itself. Politicized identity has the potential to emphasize contestation and make it the centerpiece of policy, and the for-or-against posture toward other groups can have an adverse effect on representation.¹⁹⁵ It is important to keep in mind the levels on which politicized identity operates: the micro and the macro, the individual and the collective, the universal and the multifaceted view of identity and a national community. Identity can become a medium of productivity, that is, obtaining specific policy results, and in doing so can adversely affect the subgroups and individuals that fall within the group as classified by elites that put forth and operationalize an identity for policy purposes. “[A] common set of interests . . . may or may not be racially based, and those who support them may or may not be racially similar. Race, in this sense, becomes a political, not a biological cue. It is chosen, not inherited.”¹⁹⁶

VI. SELECT CONCLUSIONS

Politicized identity has played a profound role in the development of the American political and legal process since the inception of the United States as a political unit. Politicized identity and identity-based factions have been with us since the beginning. In *The Federalist*, for instance, John Jay (erroneously) posited the homogeneity and shared communitarian political values of the nascent republic:

Providence has been pleased to give this one connected country to one united people—a people descended from the same ancestors, speaking the same language, professing the same religion, attached to the same principles of government, very similar in their manners and customs, and who, by their joint counsels, arms, and efforts, fighting side by side throughout a long and bloody war, have nobly established general liberty and independence. This country and this people seem to have been made for each other . . . the design of Providence . . . for a band of brethren, united to each other by the strongest ties . . . To all general purposes we have uniformly been one people each individual citizen everywhere enjoying the same national rights, privileges, and protection.”¹⁹⁷

Identity is an abstraction and a signifier that when politicized is presented as capturing or approximating an objective reality in which subjects can be

¹⁹⁵ Hannah Arendt, *The Human Condition*, in NORTON ANTHOLOGY, *supra* note 1, at 1171.

¹⁹⁶ Lani Guinier, *Embracing Democracy: The Voting Rights Cases*, 108 HARV. L. REV. 134 (1994).

¹⁹⁷ THE FEDERALIST NO. 2 (John Jay).

emplaced and ordered in the service of a specific ideological program, thereby making a particular ideological program a nationally comprehensive one. Elites that promulgate politicized identity are the ones who are forming a political-ideological program based on its interpretation of what counts and what actually matters in prioritizing the policy posture and interests and goals of an identity group. The political program is part of a narrative that “was made by somebody else [not the subject; the subject] does not belong to the character of the story itself but only the mode in which it came into existence.”¹⁹⁸

Pluralistic identarian sub-communities are a very real and active part of the American political and legal process and have been successful in obtaining degrees of representative equity in modern policy spaces. Nonetheless, it is important to keep in mind that the presentation of an essentialist or organic identity as a logical and inevitable basis for politics and policy rests on questionable grounds, irrespective of the motives for doing so. There is a tension that exists between a universalist and a more nuanced and complex pluralist sub-communities view of what constitutes an American political community. Language is more than just a naming process, in that naming is an act of power that bestows reality, concreteness, and tactility to an abstraction in the realm of law, society, and politics.

Some people regard language, when reduced to its elements, as a naming-process only—a list of words, each corresponding to the thing it names . . . [This] assumes that ready-made ideas exist before words . . . it lets us assume that the linking of a name and a thing is a very simple operation—an assumption that is anything but true . . . the [sign] unites, not a thing and a name, but a concept and a sound-image.¹⁹⁹

Herein is the power-basis of politicized identity, that is, the power to circumscribe, cabin, and restrict the ebb and flow of fluid signifiers employing an identarian lens. If the law can reflect a policy interest and goal of identity-based factions’ political and ideological agenda, then the law makes it concrete and real, embedding identarian norms, values, morality, and interpretations of the public weal into the legal and political process and policy spaces.

An identity signifier is sociocultural in nature. This does not render identarian groups or identity-based factions necessarily undesirable or improper in the legal and political process that undergirds the U.S. representative political system. But it is important to recognize some of the problems, limitations, and tensions that emerge when attempting to posit the why and how of the political process through identity-based factions: who are the People, what exactly constitutes the political community reflected in the

¹⁹⁸ Arendt, *supra* note 195, at 1174.

¹⁹⁹ Ferdinand Saussure, *Course in General Linguistics*, in NORTON ANTHOLOGY, *supra* note 1, at 826.

U.S. Constitution in the present time, and how is representation impacted by the practice of identity politics and politicized identity as a mainstay in our modern political and legal process? The significance of politicized identity discourse, language, is that “only the associations [between a signifier and a signified] sanctioned by that language appear to us to conform to reality, and we disregard whatever others might be imagined. . . . The bond between the signifier and the signified is arbitrary,”²⁰⁰ that is, there is no organic linkage between the two.

Expression is the crucible in which identity is formed. Identity cannot exist subjectively without the constitutive impact of complex discursive systems, one of which is expression. Discourses shape individual experiences of self-identification, in part by a process of normalization that makes particular differences matter. Ideas shape identity, and culture creates the self, at least as much as the reverse. Identity is not a pre-discursive, biological given.²⁰¹

Indeed, “[b]ecause the members of almost any self-conscious social group share some practices, norms, mannerisms, and narratives, all of the canonical social groups of contemporary identity politics can be said to have a distinctive culture.”²⁰²

Thus, identity discourse does not reflect an organic or objective state of affairs. It is a means by which thought is given shape, contours, definition, and this is an act of power.²⁰³ Meaning, purpose—identity politics seeks to concomitantly fix these concepts in space-time. Politicized identity is more form and less substance as far as providing a stable basis for representational politics. What Saussure says about signs, that they function not through any intrinsic value but through their relative position in the social context,²⁰⁴ applies to politicized identity because its use-value will vary according to its use inside or outside political, sociocultural, and economic boundaries.²⁰⁵

Identity is laden with value. It is able to be marketed in a manner that makes it palpable for mass consumption but also as a tool, an object that produces and is a product of power in the sense that it procures conformity to the mandates of the elites that embed their interests into the identity construct.²⁰⁶ “It is on the basis of meaning that one will be master of language, master of communication (even if the speech act and its modalities

²⁰⁰ *Id.* at 827–28.

²⁰¹ Hunter, *supra* note 56, at 9.

²⁰² Richard Thompson Ford, *Political Identity as Identity Politics*, 1 *Unbound: HARV. J. LEGAL LEFT*, 53, 53, 55 (2005).

²⁰³ See Kenji Yoshino, *Covering*, 111 *YALE L.J.* 769, 933 (2002).

²⁰⁴ Saussure, *supra* note 199, at 835.

²⁰⁵ *Id.*; see also JEAN BAUDRILLARD, *PASSWORDS* xiii (2003).

²⁰⁶ See Leong, *supra* note 172.

come into play in this mastery of discourse); it is on the basis of market value that one will have mastery of the market.”²⁰⁷

Representation may be more robust when it is less beholden to reductivist notions of *this/that* binary thinking, broadly conceived, avoiding the “reproduction of the self from the reflections of the other.”²⁰⁸ A politics of identity that is “not afraid of permanently partial identities and contradictory standpoints”²⁰⁹ may be a counter to the reductivist binary basis of the present politics of identity as it has played out on the political and legal stages. Politicized identity can become a method of formalization and normalization that can then become “instruments for enforcing meanings.”²¹⁰ Political identity codes subjects and seeks to provide a common, organic language in which subjects are able to participate in a system of symbolic exchange, wherein their empirical history, narratives, and experiences become unified and homogenized to create force, energy, and support for politico-ideological public policy programs as defined by the elite within the group/sub group.

Politicized identity builds on the notion that identity provides subjects with a sense of self, meaning, purpose, and legibility within the discursive matrix that constitutes order, society, and the normative, value, moral, and principles that are constitutive of a subject’s perception and conduct in its relations with other(s) and world(s). “But claims to these identities also have legal import, as demands for public recognition or redistribution of resources, cutting across domains such as employment, immigration, public benefits, and tax law.”²¹¹ In a 2007 case dealing with racial classification in public schools to allocate students in a large school district,²¹² the Court highlighted an enduring issue regarding the deterministic capacity of politicized identity, asserting that the Constitution forbids not simply race-conscious measures, but rather “a classification that tells each student he or she is to be defined by race.”²¹³

Politicized identity is an expression ideology, one that seeks to procure homogenization of individual subjects under an identity rubric, thereby conflating the unity of form and content, and that seeks to authoritatively establish the inner from the outer, absorb the individual subject into a collective identity. A collective identity is held out as weighing more in political calculi for influence, power, and control over public policy. Subjects

²⁰⁷ BAUDRILLARD, *supra* note 205, at 10.

²⁰⁸ Donna Haraway, *A Manifesto for Cyborgs*, in NORTON ANTHOLOGY, *supra* note 1, at 2044.

²⁰⁹ *Id.* at 2049.

²¹⁰ *Id.* at 2055.

²¹¹ Jessica A. Clarke, *Identity and Form*, 103 CALIF. L. REV. 754–55 (2015).

²¹² *Parents Involved v. Seattle Sch. Dist.*, 551 U.S. 701, 789 (2007) (Kennedy, J., concurring).

²¹³ See Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 547–48 (1994) (“Essentialism assumes at minimum that a pure and perfect definition of a particular thing can be found Attribution of a natural essence, then, is but one kind of essentialism.”).

experience themselves through the well-wrought category, classification embedded in a politicized identity placeholder in the space of politics via the politicized identity signifier. Representational politics has the potential to ossify under the weight of politicized identity. Politicized identity, as a form of ideology, “functions as an instrument of control. . . . [I]t becomes the emphatic and systematic proclamation of what is.”²¹⁴ We should not lose sight of the effect that politicized identity has on the political and legal process, how it affects and effects notions of political community, and how conduct and perception are processed and expressed on the national political stage, the political and legal process, and in policy spaces.

²¹⁴ Theodor Adorno & Max Horkheimer, *The Culture Industry in* NORTON ANTHOLOGY, *supra* note 1, at 1044.