

II. Narrativized, Constituted, Imagined

II.1 The Constitution's Equal Protection Clause, Suspect Classification, and Cultural Narratives

As a sub-discipline of the larger project of Law and the Humanities, Law and Culture constitutes a both underrepresented and contested research area. While legal scholars such as Peter Häberle have had a significant influence on the field, their work is rarely picked up by cultural scholars, leaving Law and Culture dominated, and admittedly more appreciated, by jurists. Their research acknowledges a connection between legal and cultural developments and phenomena cultural scholars are yet to admit.¹ Häberle's work on constitutional culture(s) highlights how collective legal identities are formed through cultural heritage ("Verfassungskultur" 3) and stresses the need for a culture-specific constitutional interpretation (4). Such analyses remain incomplete without acknowledging the force of cultural narratives fundamental to constitutional story-telling.

At a time that is marked by an increasing importance of interdisciplinary research and a simultaneous need for scholars to demarcate their distinct research fields, Law and Culture appears to threaten those who feel intimidated by the quasi-imperialistic implications of law's masculinist force.² This academic neglect of Law and Culture's influence and significance for both Legal and Cultural Studies thus seems to implicitly respond to the gendering of this

1 With a few important exceptions as indicated by the work of, for instance, Clifford Geertz, Rosemary Coombe, Werner Gephart, or Robert Weisberg as laid out in Chapter I.

2 Note in this context also how legal scholar Susannah W. Pollvogt addresses equal protection jurisprudence as an "aging patriarch, exerting a level of control that far exceeds its actual efficacy" (739).

interdiscipline's parties. Law, being perceived as the more rational, clear, instrumental, objective and thus masculine part, leads the field's direction while culture, being perceived as the more emotional, fluid, erratic, subjective and thus female part, is the one that is dominated. This gendering of academic disciplines has been widely commented on (MacKinnon "Feminism;" Siegrist and Sugarman; MacKinnon *Women's Lives*; Olson "Turgid;" Olson "Futures").³

Analogous to false and essentializing assumptions about inherent gender differences, this framing does not do justice to lived reality's diversity in which law is also an emotional, affective endeavor far from being always rational and clear (Olson "Futures;" Gephart *Recht*; Olson *Legality*). As legal philosopher Leslie Green puts it, "[l]aw pretends to an objectivity it does not have" (Hart xv). Interestingly, this perception of law's masculine force is also mirrored in Marxist critiques which assign law the role of a repressive device in conservatives' toolbox, too unfeeling and violent to treat culture right (MacKinnon "Feminism"). These tensions result in Law and Culture's need to address the following questions: How can an academic field which consists of such seemingly antagonistic systems work? Why is the connection, if there is any at all, between legal and cultural phenomena relevant?

This highly problematic understanding of a presumed antagonism, based on an implicit gendering of academic fields, picks up on oversimplifying and sexist notions of inherent and binary (gender) characteristics while leaving cultural analyses of law in a position which needs legitimation and explanation. The following chapter offers alternatives to this view by illustrating how the U.S. Constitution and culture have been transforming and evolving in connection with each other. The following subchapters comment on and incorporate these two realms by seeing them as equally constitutive of each other, and thus serve to deconstruct the static matrix of opposing academic fields – again in a queer theoretical tradition of challenging binaries.

This chapter's starting point is that the Constitution is not only a legal document but also, maybe even more so, a cultural artefact. Reading the Constitution as such, it is possible to grasp the contemporary dividedness of the United States. At the time of this writing, political parties and their supporters are said

3 One may argue that this hierarchical imbalance in power is also unconsciously mirrored by the academic world's choice to refer to this field and related ones predominantly as Law and Culture, Law and Literature, Law and X, instead of Culture and Law, Literature and Law, X and Law.

to be more divided than ever over domestic issues, identity politics, and matters of racism, sexism and other forms of discrimination based on social group membership. The entanglements of law, culture, and legal affect are particularly salient when it comes to the Constitution and the rights it confers (or fails to confer) to its citizens. It is therefore necessary to unmask exactly those cultural mechanisms and imaginaries at work in twenty-first century U.S. American society which add meaning to Supreme Court decisions. Only by reading these legal texts next to culture, culture as text in this sense, are those who are affected by legal decisions fully able to grasp these cases' implications for an individual's everyday life, their fundamental rights, and their ability to speak back to the document which grants those rights – the Constitution –, and to those in charge of interpreting it – the Supreme Court's justices.

Culture and law, here in the form of spoken, or judiciary, law, are thus mutually constitutive and intertextually connected.⁴ They reflect on each other and initiate changes via the individual who is willing and able to test their cultural realities against legal imaginaries, and their legal realities against cultural imaginaries.

The Fundamentality of Rights

Turning to the Constitution and the rights it provides can be observed regardless of one's party affiliation. This pervasive demand of rights, which are inscribed in the Constitution as a legal document, meets an understanding of a cultural-specific taken-for-granted-ness of access to these, which mirrors the cultural dimension of the Constitution. The idea of 'unalienable' rights can be traced back to the early constitutional beginnings of the United States and is

4 The concept of intertextuality in this context refers to idea that culture and law cannot exist without each other, i.e., that each legal decision is informed by, and reflects on, cultural transformations and vice versa. Intertextuality in law also includes referring back to precedents for decision-making and for adding legitimacy to decisions; see Steel 88; Holzleithner and Mayer-Schönberger. However, legal practices of commenting on, quoting, and using both literary and academic texts to clothe or legitimize arguments mirrors another aspect of intertextuality in legal discourse; see Gadbin-George; see also WWU Münster's Collaborative Research Centre 1385's work, and particularly the project by Petersen, Korten, Steigler, Wittmann, on why courts quote. See also any given Supreme Court opinion for further instances of overlaps of the literary and the legal, for example *US v. Virginia* 556, in which Justice Ginsburg quotes from *The Dialogues of Plato*.

found in the works by James Madison,⁵ John Locke,⁶ George Bancroft,⁷ and the Constitution itself. Regarding “these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness” (preamble), the Constitution codifies the notion that there are rights which are so fundamental to being human, independent of the society one lives in, that they cannot justly be taken away from someone. Just as much as equality is part of the U.S. American cultural narrative, the notion of access to justice is also mirrored in this concept of ‘unalienability,’ dominant founding myths and constitutional history.

By conceiving of this document as something that protects individuals regardless of their race, class, gender, sex, or other social markers of identity, the Constitution becomes larger than politics or the law; it evolves into a representation of a collective identity based solely on an affectively experienced belonging to U.S. America and thus a manifestation of the cultural narratives, which are most dominantly established in the Constitution’s preamble.

These cultural narratives and the imaginaries surrounding the U.S. legal system, as this chapter argues, are attempts at establishing a collective self-understanding. They act as a cultural glue, which aims to unite the states over political and federal borders, rendering the U.S. Constitution as an important part of U.S. American culture instead of a merely singled out instance of self-expression found *within* this culture. This understanding of the realms of law and culture is vital for any further investigation as it undermines the idea that both spheres are in competition or opposition to each other. If, for instance, one perceives of law as a corrective of culture, or of culture as giving directions to law, one cannot but fail to grasp the multidirectional entanglements between these two as stated by Lawrence Rosen:

When we hear a court speak “the conscience of the community,” “the reasonable man,” or “the clear meaning of the statute,” when we watch judges grapple with parenthood as a natural or functional phenomenon, or listen

5 See on this James Madison’s 1835 *Essay on Sovereignty*, in which he reiterates John Locke’s argument that there are ‘unalienable’ rights.

6 See John Locke’s *Two Treatises*.

7 See George Bancroft’s 1834 *History of the United States*. Interestingly, Bancroft’s 10-volume set can also itself be seen as an instance of Law and Literature as Bancroft, a historian and poet, traces back his rather subjective account of the United States’ history by comparison with literary tradition of Goethe and Schiller, among others.

to counsel debate whether surrogate motherhood or a frozen embryo should be thought of in terms of “ownership,” we know that the meaning of these concepts will come not just from the experience of legal officials or some inner propulsion of the law but from those broader assumptions, reinforced across numerous domains, that characterize the culture of which law is a part. And when we seek law outside of specialized institutions – when a kinsman mediates a dispute or members of a settlement use gossip or an informal gathering to articulate their vision of society – the terms by which they grasp their relationships and order them will necessarily be suffused by their implications in many interconnected domains. (6–7)

To understand law as linked to other cultural domains, and culture as informed by a variety of domains of which law is one means also to question whether it is useful to approach each domain's impact on the other in a monodirectional manner. For instance, asking “How did the Supreme Court decision X influence people's perception of Y?” presupposes a constitutive power of an institution which appears to stand above sociocultural forces, with the ability to change sociocultural perceptions. In other words, the Court cannot decide something its justices cannot think as the perspectives of each legal cultures' members, including judges and justices, on equal legal treatments are informed by what their surrounding cultural contexts deem worthy of protection or punishment. This view acknowledges the sociocultural situatedness of members of the judicial branch and their necessarily limited positionality.

The justices who make up ‘the Court’ are socialized in the culture in which they decide legal cases that are feeding back into this culture. Consequently, to think of law as a-cultural would ignore the human role in establishing it, and contributing to a reification of ‘the Law,’ thus rendering it more powerful and morally superior than other human-made cultural achievements or domains. One therefore needs to acknowledge that Supreme Court decisions are influenced by other, non-legal demands for social and cultural change such as civil rights movements, popular cultural depictions, and (dominant) sociocultural discourses in general as well as justices' (affective) relationship to them in particular.

Only by cracking open these invisibilized connections between law and culture are we able to see that the “inevitable dialectic” (Wodak et al. 3) of equal protection and discrimination/punishment is intertwined with negotiations

of normative and non-normative behaviors on a sociocultural level.⁸ To approach these aims and to conduct a queer, cultural analysis of law, Supreme Court decisions and justices' stance on constitutional interpretation need to be analyzed with regard to their ability to impact cultural narratives and by extension collective legal-cultural identities ("How does Supreme Court decision X challenge or substantiate cultural narratives of X? How does decision X influence current collective legal-cultural identities?").

Narrated Identities

Work on constitutions and their cultural impact has evolved around the idea that national identities are constructed and transmitted through narrative elements which stress the unique position of a people at a given historical moment.⁹ By referring to Paul Ricoeur's work on 'narrative identity,' Wodak et al. describe how "the narrative configuration [of a nation's and individual's identity; lb] has to mediate between concordance and discordance in such a way that the story can be understood as a whole by its recipients" (14). Being in search of meaning, this process of mediation makes it "possible to arrange and interpret, to rearrange and to reinterpret past events" (14).

National identities are therefore constructed discursively (Wodak et al. 7–10), i.e., via a reciprocal relationship between social practice and the discourse(s) about national identity – what people do and implement with regard to their national identity/ies is interacting with what people discuss and express about their national identity/ies. Narrative elements in the form of stories and myths assist in the process of constructing meaning about nationalities and cultures because these narratives act as cultural glue which sticks historic events, people, and the latter's affective responses to the former together over time. In many post-Enlightenment, Western nations, constitutions pick up or establish these most fundamental cultural narratives, often

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- 8 This understanding of culture's influence on (non-)normativity corresponds to Wodak et al.'s view which "understand[s] 'culture' as a system of rules and principles for 'proper' behaviour, analogous to the grammar of a language, which sets the standards for 'proper' speaking" (20–21). Following this understanding, culture is not approached as an overarching authority which defines what is normative, non-normative or deviant behavior but rather as a system which maintains the "plans, recipes, rules, instructions (what computer engineers call 'programs') for the governing of behaviour" (Geertz qtd. Wodak et al. 21).
- 9 See on this particularly Peter Häberle, Hans Vorländer and Gert Melville, Benedict Anderson, and Ruth Wodak.

in the form of proclaimed ideals or moral maxims, and combine them with a nation's most fundamental legal principles.

Apart from constitutions' original aim, i.e., to organize and regulate the state they are settled in, the narrative elements, or narremes, found in these documents add an identity-establishing function for the collectives they belong to. Such foundational legal texts thus constitute a common national identity, feelings of belonging in the form of nationalism, and basic legal ground rules for organizing the state. Benedict Anderson traces back nationalism's cultural roots partly to religious communities:

All the great classical communities conceived of themselves as cosmically central, through the medium of a sacred language linked to a superterrestrial order of power. Accordingly, the stretch of written Latin, Pali, Arabic, or Chinese was, in theory, unlimited. (In fact, the deader the written language – the farther it was from speech – the better: in principle everyone has access to a pure world of signs.) (Anderson 13)

Strongly evocative of American Exceptionalism in the idea of cosmical centrality, Anderson's analysis can be applied analogously to today's U.S. The community of U.S. Americans may today not be imagined qua a homogenous religion, but adhering to the quasi-divine character of American 'civil religion' (Bellah 1967) certainly establishes what Anderson calls "*unselfconscious coherence*" (16; emphasis in original): an affectively experienced belonging to the U.S. and, by extension, to those who are sharing this feeling of belonging. Similar to what Anderson describes with regard to languages as carriers of affective belonging, the Constitution also constitutes a system of both legal and cultural signs. Thus, associations with and evocations of the Constitution are highly individual, making its impact and reach temporally and spatially limitless as this sign can be added with (affective) meaning by anyone at any time, regardless of 'actual' knowledge of, for instance, the Bill of Rights, or other legal doctrines established in this document.

In this sense, constitutions act as 'carriers' for the discourse on national identity, and combine both the idea of nations as "imagined political communities" (Anderson 6) and "systems of representations" (Hall 17). Scholars such as Richard Posner, James Boyd White, and Hans Vorländer and Gert Melville have predominantly focused on preambles as texts which introduce constitutions and provide an ideological framework for a collective's shared identity. As these textual frames are set apart from the legal-political technicalities they in-

roduce, its authors are more likely to give explanations about why they believe that what follows is in line with a larger ideological and cultural belief system. This way, constitutions do not only establish a legal order but they also construct a cultural authority which affectively and ideologically binds a collective to the established legal norms. This authority adds validity to what constitutions say across time.

Constitutions' *Geltung*

As constitutions need to be negotiated against what has been, the old system, and what is going to be, the new system, Hans Vorländer identifies *Geltung* (validity) as a distinct element which serves as legitimization for the quasi-eternal character of constitutional systems (Melville and Vorländer xv).¹⁰ *Geltung* adds meaning to a people's (supposedly uniform and uncontested version of) history and processes of self-governing, links contradicting belief systems, and is thus able to claim absolute authority over a historical moment of state-formation. *Geltung* is in part being established through narratives which aim at conserving and constituting meaning, yet it is not exclusively bound to preambles as the U.S. American case shows. The Constitution's preamble reads:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.

Although the Constitution's preamble comments on the aim of the document, "to form a more perfect Union" and following, and the speaker, i.e., "we the People of the United States," the legal and cultural significance of the document can only be derived by reading it in connection with the claims made in the Declaration of Independence. The Declaration, which is "in fact not an intellectual

10 See also Benedict Anderson's assessment of the origin of nations: "If nation-states are widely conceded to be 'new' and 'historical,' the nations to which they give political expression always loom out of an immemorial past, and still more important, glide into a limitless future" (11–12). This connection between adding meaning to what has been and generating meaning for what is going to be is a reoccurring theme in discourses about both nationalism and constitutionalism.

but an inspirational text” (White *Words* 239),¹¹ strongly relies on the narrative that there is a ‘natural’ and God-given entitlement to self-government for the U.S. American people,¹² thus legitimizing the need to establish a new constitutional system and “a more perfect Union” as voiced in the Constitution.

In his fascinating analysis of the Declaration of Independence and the U.S. Constitution as agents of establishing collective identities, James Boyd White finds that

It [the Declaration of Independence; lb] creates in its ideal reader a resolve based on a sense of common identity, on the justice of the cause, and on necessity, and it does this enormously well. ... Its effects are repetitive and cumulative; the reader is moved not once and for all but again and again into the state of feeling it defines. (*Words* 239)

White illustrates that the Declaration’s references to ideals such as equality serve to “work a change of feeling in the reader,” (239) namely to strengthen the affective belonging to the newly established nation. This affective framing of an aspired history, one that is based on equal opportunity for everyone, aims to build a common identity. This collective ‘we’ is then constituted through the U.S. Constitution, which “does purport to speak in a single voice for the people as a whole” (240).

White’s analysis shows the importance of affects for the development of legal and cultural entities and stresses how these foundational texts are “lifeless and inert unless ... put to work in the world by the citizens who live under [them]” (247). This invocation of the Constitution and re-assessment of its intentions are the basis for constitutional interpretation. The Supreme Court is

11 Although it may be argued that the Declaration *de ipso* also had a semi-legal character based on declaring political independence and thus establishing a new political and legal order, the *de facto* legal significance of this document is not given. One may regard the Declaration rather as political document which necessitated legal consequences.

12 See the Declaration of Independence: “When in the Course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume among the powers of the earth, the separate and equal station to which the Laws of Nature and of Nature’s God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.”

tasked with evaluating what the Constitution says about legal questions presented to the justices, and it needs to take into account the cultural narratives inherent to this document.

The Declaration of Independence provides the narrative framework for establishing a common identity based on an affectively felt legitimacy to become politically independent. By referring to the “destructive”¹³ and abusive character of the old system, namely being governed under England’s rule, the struggle for political independence is legitimized as a just cause, rendering those fighting for it heroic. Their struggles are informed by a common goal, which unites them in their pursuit of achieving those “truths [found; lb] to be self-evident.” In this sense, the Declaration of Independence defines those ideals the newly formed union seeks to achieve, and establishes the need for setting up the legal instruments to do so.

Geltung is thus not only established through *narratio* but also through *consuetudo*, i.e., actions (praxes) that follow out of these narratives and thus seem to strengthen these narratives’ cultural-legal significance (Melville and Vorländer x-xv). James Boyd White refers to this concept of *consuetudo* by stating that “the [U.S. American; lb] Constitution has no force except to the extent that it is invoked and used by individual Americans pursuing actual goals” (*Words* 244). These “actual goals” refer back to the historical need to set up legal rules and procedures for the newly formed United States and can today be found in any constitutional claims made before the Supreme Court. Essentially, Boyd White states that the Constitution is without force if not added with meaning by those turning to it.

Boyd White’s understanding of the Constitution as “inert” (*Words* 244), i.e., without force on its own but only becoming dynamic and powerful through its discursively established meaning, corresponds to Clifford Geertz’s concept of culture as being “in search of meaning” (*Interpretation* 5), thereby linking legal and cultural spheres. Perceiving of the Constitution as an almost empty sign, which needs to be filled with meaning by the collective it seeks to establish, forces the individual to implicitly, via accepting the narrative framework, and explicitly, via actions, to adhere to the binding force of this cultural-legal document. Over time, constitutional narratives’ use may change; the actions speak for themselves and continue to maintain valid, as stated by Vorländer

13 See the Declaration of Independence: “That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government.”

and Melville: “It then may happen that there is no further need for a narrative, and that the validity story ultimately triumphs when being kind of encapsulated in institutional practice” (xv).¹⁴

The cultural and legal significance of the U.S. American Constitution is therefore established through narrative elements, what Vorländer and Melville termed *narratio*, and also through the praxes of interpreting, invoking, and turning to the Constitution, *consuetudo*. Over time, however, these distinct elements seem to merge together and create a binding force of the document itself. Although not everyone invokes their constitutional rights in a court of law, and although not everyone explicitly knows about the specific narratives anchored in the Constitution, the cultural meaning of this document is discursively established, maintained, and reproduced by representations in popular culture. In this sense, television series, movies, but also newspaper reports and other cultural texts contribute to how one imagines the Constitution and its force – without ever having dealt with it in a legal context. As anthropologist Lawrence Rosen states, “we create our experience, knit together disparate ideas and actions, and in the process fabricate a world of meaning that appears to us as real” (4–5).

Constitutional Narratives

As posited by legal narrative research, constitutions not only operate on a legal level by setting up rules for governing people’s behavior (Rosen; Cotterrell), but they also establish communities and coalesce group identities (Anderson; Wodak et al.; Olson “Narration and Narrative”). The way these functions are achieved is through a specific form, namely by using storytelling elements (Olson “Narration and Narrative”; Olson and Copland).

The cultural narratives which inform constitutional documents cannot only be found in preambles. As each part of a constitution refers back to the idea(l) of a common collective identity, its ideological work cannot be separated from and delegated back to a constitution’s introductory remarks. The U.S. American Constitution’s history of being amended and constantly being (re-)assessed by the Supreme Court illustrates how cultural considerations continue to inform constitutional interpretations and how each Amendment

14 The German original reads: “Dabei kann es vorkommen, dass es gar nicht mehr der Erzählung bedarf und die Geltungsgeschichte ihren ultimativen Triumph erfährt, wenn sie in einer institutionellen Praktik quasi ‘eingekapselt’ ist.” My translation.

discursively comments and picks up on those cultural narratives it grew out of.

The Supreme Court's practice of interpreting the Constitution and mediating between conflicting normative orders of groups corresponds to what Paul Schiff Berman succinctly labels as "jurisgenerative constitutionalism," drawing on Robert Cover's concept of "jurisgenesis" ("Nomos" 11), yet also subverting it. When Berman conceives of law as a negotiator between diverging normative communities, his call for allowing for diverse, even contrasting legal and quasi-legal spheres next to each other (667; 695) adds to Roger Cotterrell's insight that "[l]aw's interpretive communities now reflect the patterned differentiation of the social" (100). Understanding law to be "potentially jurisgenerative and creative" (695), Berman makes a compelling case for legal pluralism, for "seek[ing] dialogue across difference," (695) and for "accept[ing] unassimilated otherness" in order to "have some hope of navigating the hybrid legal spaces that are all around us" (695). However, this view is already a highly privileged one as Berman advocates for enabling "spaces for productive interaction among multiple, overlapping legal systems ... that aim to manage, without eliminating, the legal pluralism we see around us" (669). The legally pluralistic patchwork one observes in the U.S., in which states' regulations of anti-discrimination laws clash harshly with other states' and in some cases also with federal regulations, comes close to Berman's vision of "legal hybridity" (669) but fails to take into account the systemic violence legally pluralistic systems may yield on those social groups which have yet to have their voices and legal claims acknowledged.

In this sense, Berman's jurisgenerative constitutionalism has to be approached from an intersectional perspective, which takes into account the various entanglements of legal, cultural, and social hierarchies and normative orders, mirroring Cover's view that "the creation of legal meaning – 'jurisgenesis' – takes place always through an essentially cultural medium. Although the state is not necessarily the creator of legal meaning, the creative process is collective or social" ("Nomos" 11). Cover, who introduced the idea of jurisgenesis in his seminal "Nomos and Narrative," recognizes the dependence of legal systems and actors on their cultural framework when he states that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning" (4).¹⁵ Referring to "narratives," Cover supplies

15 This stance becomes even clearer in Cover's equally seminal "Violence and the Word," in which he clarifies this connection: "In 'Nomos and Narrative,' I also emphasized the

his readers only with a rudimentary definition, namely that narratives are prescriptively moral (“Nomos” 5), established through imposing “normative force upon a state of affairs” (“Nomos” 10), and they can be historic, fictional, tragic, or comedic (“Nomos” 10). It is especially Cover’s view on the creation of new texts that is important here:

Prescriptive texts change their meaning with each new epic we choose to make relevant to them. Every version of the framing of the Constitution creates “new” text in this sense. When the text proves unable to assimilate the meanings of new narratives that are nonetheless of constitutive significance, people do create new texts – they amend the Constitution. Thus, the adoption of the 13th, 14th and 15th amendments may be seen as the creation of new texts to fit new constitutive epics. (“Nomos” 4–5, fn. 4).

I pick up on Cover’s understanding of narratives and argue for what he calls “new texts” by advocating for suspect classification instead of an amended Constitution, new laws, or other solutions law offers. This call is reinforced by the Constitution’s, and particularly the Fourteenth Amendment’s, failed promise of equality (see Chapter II.4). New texts of minority protections are all the more important at a time in which “new constitutive epics” in the U.S. are met with a growingly politicized judicial and adversial political landscape, making the creation of new texts through the political process increasingly difficult. The legal affects and cultural imaginaries surrounding the Constitution supplement and at times substitute “new constitutive epics.”

The Fourteenth Amendment’s Equal Protection Clause and its embedded suspect classification are thus being approached as sites where this ideological work continues. Although the Amendment’s voice differs from the preamble’s, the cultural narratives which inform the preamble influence the impact of the Amendment up to this day. Even more, as William N. Eskridge Jr. argues, the Fourteenth Amendment’s Equal Protection is based on a similar cultural narrative as the Constitution itself:

The idea that minorities need protection from tyrannical majorities has been part of America’s constitutional tradition from the beginning. Among the general goals of the Constitution of 1789, as immediately amended

world-building character of interpretive commitments in law. However, the thrust of ‘Nomos’ was that the creation of legal meaning is an essentially cultural activity which takes place (or best takes place) among smallish groups” (1602, fn. 205).

by the Bill of Rights, was protection of property-owning and religious minorities against oppressive measures sponsored by temporary “factions.” (“Political” 2)

Eskridge places the concept of protection from stronger, unjust forces within the set of traditionally U.S. American values. Referencing James Madison, who advertised “break[ing] and control[ing] the violence of faction” (“The Federalist No. 10” 50) as early as 1787,¹⁶ Eskridge’s contextualization insinuates that while equality and liberty are probably the American values most readily associated with the Founding Fathers, protection of minority groups has been part of the founding processes as well.¹⁷ Following this argumentation, the question whether to include more minority groups within the list of suspect classifications exceeds the legal realm and continues to be a pivotal consideration with both constitutional and cultural weight.

The aim of this second chapter is to introduce the readership to the constitutional tool of suspect classification, – what it is, how it works, and why any of that matters, – to the intersections of law and culture within this part of the Constitution, – what is at stake here and for whom, – and to the relationship between the Constitution and U.S. American culture, – how these two respond to each other and (have) develop(ed) in relation to each other. In other words, this chapter provides its readers with the necessary legal and cultural terminology and concepts to understand how suspect classification, equal protection, cultural narratives, and constitutional imaginaries interlock.

Suspect Classification as a “New Text”

With the Equal Protection Clause’s suspect classification, the Supreme Court has the power to address all of the discriminatory regulations concerning sexual minorities with a single decision based on constitutional law. As Chuck Stewart succinctly points out, “[i]f sexual orientation ever achieves suspect class status with the U.S. Supreme Court, a host of discriminatory laws against lesbians and gay men should fall” (186). Suspect classification is a principle

16 Madison understands a faction to be “a number of citizens, whether amounting to a majority or minority of the whole, who are united and actuated by some common impulse of passion, or interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community” (“The Federalist No. 10” 51).

17 From today’s standpoint, we also need to acknowledge that the propertied, able-bodied White men responsible for drafting the Constitution were the ones who perceived themselves to be the minorities they wanted to protect from English rule.

derived from the Equal Protection Clause of the Fourteenth Amendment and conferred to those groups which share a trait against which governmental discrimination is perceived as being inherently suspect. This status is determined by looking at generally four criteria (see Chapter II.3). These criteria have been developed through judicial decision-making, which means that they are not codified principles written down in a code of law or to be found in the Constitution itself. Only by looking at a variety of Supreme Court decisions from 1868, the year the Fourteenth Amendment and the Equal Protection Clause were established, until today, can one trace how suspect classification developed and has been interpreted by different courts at different times. What is codified, however, is the Fourteenth Amendment's first section, which is where the Equal Protection Clause is to be found:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; *nor deny to any person within its jurisdiction the equal protection of the laws.* (U.S. Const. XIV Amendment, sec. 1; emphasis added)

This very last sentence, “nor deny to any person within its jurisdiction the equal protection of the laws,” is what is called the Equal Protection Clause, the clause which lays down the constitutional principle that everyone in the U.S. shall, in principle, be equally protected by the law – this applies to both citizens and non-citizens. However, the Constitution, with its exclusionary understanding of the concept of equality, failed from the beginning to fulfill this promise – both culturally and legally. As social recognition of the discrepancies and gaps of the Constitution grew, another differentiation for a higher form of protection was needed for minorities, which was at first the Fourteenth Amendment and, as this was also not sufficient to protect certain social groups, suspect classification.¹⁸ In this sense, suspect classification has always been a “new text” in Robert Cover’s sense in that the Fourteenth Amendment proved unable to respond to the new notions of equality after the abolition of slavery. I argue that

18 This development is indicative of the evolution of the U.S. Constitution in general. After having ratified it in 1788, it soon became clear that there were issues not thought of at the time of ratification, leading to amending it in 1791.

it could also be used to fit the new constitutive epic of sexual minority protection.

This principle's wide and forceful impact has been compared to the "constitutional equivalent of the atomic bomb" (Gerstmann *Same-Sex* 75–76) as it leads to the most searching, and thus most severe, judicial review for cases involving these suspect classes and is therefore "strict in theory and fatal in fact" (Gunther 8). In effect, suspect classification hands the burden of proof of discriminatory legislation to the states, which must prove that the discrimination serves a compelling state interest, the law is narrowly tailored to serve this interest, and that the law is the least restrictive means for achieving this interest. This means that "the Court presumes the law to be unconstitutional, and the law must be 'legitimated' by the State" (Culverhouse and Lewis 240). Because of these strict requirements, which are elaborated on in more detail in the following subchapters, cases involving suspect classes are most likely to be ruled unconstitutional. Further, once the Supreme Court has established a category's suspect classification, this category's formal protection covers a wide range of areas and its factual protection may be enforced by the president.¹⁹

Although the Equal Protection Clause's suspect classification primarily applies to federal legislation and not to private businesses, its impact and scope of legal norms in general, and the Equal Protection Clause's suspect classification in particular, reaches beyond the statutory or even legal level, influencing sociocultural developments – with statutory law and sociocultural imaginaries being mutually constitutive of the clause. By establishing sexual orientation's suspect classification, the Court would signal its willingness to support the LGBTQ+ community, and to prevent sexual orientation-related stereotypes, prejudice, and discrimination from further manifesting in society and culture. Thus, suspect classification is not only approached as a constitutional tool but also as a potential catalyst for shifting sociocultural value systems, which then again may manifest in how private businesses treat LGBTQ+ individuals.

19 Probably the most famous instance of enforcement of an equal protection decision has been President Dwight Eisenhower's order to have the U.S. Army oversee the process of desegregation at Little Rock Central High School in 1957 following the Supreme Court's landmark decision *Brown v. Board of Education*.

II.2. The Inequalities of Equal Protection

The first section of the Fourteenth Amendment to the U.S. Constitution was the result of unequal times. Following the American Civil War (1861–1865), which was fought over the moral, economic and political question of slavery,²⁰ the Thirteenth Amendment, ratified in 1865, abolished slavery on a federal level. However, many Southern states were dissatisfied with this Amendment and began to enact specific legal regulations, so-called Black codes, a development which *Harper's Weekly* editor George William Curtis described back then as proof that “the *spirit* of slavery does [still] exist” (355; emphasis in original). In 1865, Mississippi and South Carolina were the first states which effectively re-introduced slavery and slavery-like conditions for Black people and formerly enslaved persons through such codes. Equality, or at least notions of it, was undermined by state-level backlash to cultural-legal developments.

By ratifying the Fourteenth Amendment as a consequence of these developments, and by putting political pressure on the South via limiting representation in Congress as well as adding military pressure by having the Union Army being deployed in these states, formerly enslaved persons were now granted the same civil and legal rights as free persons. The Amendment guarantees that any person, domestic or foreign, shall enjoy the same legal protections as others in that same jurisdiction. Adopted during the Reconstruction era in 1868, this part of the Constitution, the so-called Equal Protection Clause, was meant to prevent freedmen from being discriminated against and to protect their rights, making race the first category in U.S. American legal history to have warranted special protection.²¹ Given the legal and sociocultural history of race in the U.S., the constitutional treatment of this category is vital for the legal discourse about sexual orientation's equal protection and the ambiguity of anti-discrimination politics.

Over the years, the Supreme Court of the United States has interpreted the clause, originally referring to the protection of the formerly enslaved, accord-

20 This view, however, is contested and today there only seems to be agreement among scholars “that slavery was ‘somehow’ the cause of the war, [but] they argue over just how slavery did so, why the Confederacy lost and slavery ended, and what kind of freedom arose from the ruins” (Rothman 76).

21 See *Slaughter-House Cases* at 38 (1872): “The clause ... was clearly intended to prevent the hostile discrimination against the ... [Black] race so familiar in the States where he had been a slave, and, for this purpose, the clause confers ample power in Congress to secure his rights and his equality before the law.”

ing to its wording, namely that “any person” shall be treated equally under the law, which resulted in making equality before the law a fundamental right.²²

Despite this idealistic constitutional premise, historic instances of discrimination and racial segregation, most notably the so-called ‘Jim Crow’ laws, complicate today’s assessment of what equal protection means and what it wants to achieve both on a legal and a sociocultural level. As the introduction of the Fourteenth Amendment has been followed by laws enforcing racial segregation from the 1870s up until approximately the 1960s, claims about the ‘equal’ protection of ‘any’ person apparently do not operate beyond historical, cultural, social, and/or political contexts. Contemporary prejudice factors into any interpretation of the Constitution as does the public, individual and state-level backlash towards such interpretations.

It thus becomes clear that even universalizing human rights claims and generalizing statements such as the Fourteenth Amendment’s guarantee of equal protection under the law for any person operate from a specific image of being human and from a specific image of those who appear worthy of rights. The Constitution, but even more so its interpretation by the Supreme Court, both imagine a specific, default rights-holding subject while also actively constituting such a subject by forcing one to submit to the regulations the law prescribes.²³ Historically, this “rights-ability” has excluded, for instance, Black people, people of color, women, indigenous people, people without citizenship, and trans people (Evans; Fredrickson; Fitzgerald; Richardson; Olson and Borchert).

Whenever the Supreme Court deals with a case in which an individual claims a violation of their civil rights by a state or federal government, the main question is: Is the legal text in violation of the Equal Protection Clause (“Equal”)? Or, in other words, does the legal text deny to any person within its jurisdiction the enjoyment of a right others are free to exercise? This also means that in order to equally protect someone, the person needs to have a

22 The understanding that equal protection applies to “any person” dates back to the Supreme Court decision *Yick Wo v. Hopkins* in 1886, in which Justice Stanley Matthews stated that “these provisions are universal in their application to all persons within the territorial jurisdiction, without regard to any differences of race, of color, or of nationality, and the equal protection of the laws is a pledge of the protection of equal laws” (369, majority opinion).

23 This claim becomes clearer in Chapter III and IV and their analyses of legal sexual orientationism and the ways the Supreme Court constitutes queer subjects along a heterosexual default.

comparable group which enjoys the rights this person is denied. Otherwise, there would be no unequal treatment because nobody enjoys the right.

For deciding on this, it is important which group of people is affected because different groups enjoy different levels of constitutional protection. So firstly, the Court needs to determine the classification this group shares, e.g., their race, gender, sex or similar (“Equal;” “Equal Protection Violation”). Secondly, depending on the classification, the Court applies different levels of scrutiny, which is the fierceness of reviewing a case. Thirdly, the Court proves whether the legal text passes this review and is thus in line with the constitutional requirements of equal protection (“Equal Protection Violation”).

1896: *Plessy v. Ferguson*

The idea behind this differentiation and complex process is that the concept of equality has been applied unequally throughout the U.S.’s cultural-legal history. Among the most unequal Supreme Court decisions by today’s standards, and paradoxically the starting point for suspect classification, is undoubtedly *Plessy v. Ferguson*, which dealt with the constitutionality of racial segregation in public facilities: In 1896, the Supreme Court had to decide on a Louisiana statute of 1890 which required “railway companies carrying passengers in their coaches in that State, to provide equal, but separate, accommodations for the white and colored races” (163 U.S. 537). The Court found the statute to be constitutional since it treated all races identically and consequently discriminated neither. While the Declaration of Independence states that “all men are created equal,” such discriminatory Jim Crow laws were based on an unequal understanding of equality, in this case that separated public facilities for Whites and non-Whites are constitutional as long as they were equal.

Decisions like *Plessy* have historically been used to undermine the very idea of equality by establishing equal conditions only on the surface while simultaneously enabling covert forms of discrimination. This perspective on what ‘equality’ means in the U.S. context stands in stark contrast to what cultural narratives about the U.S. want one to readily associate, namely a free, democratic, and equal society protective of all its members (and those wanting to become ones). The U.S. cultural narrative of exceptionalism, not only in terms of a God-given nation but also in terms of the equality of the laws, thus meanders into constructions of (superior) morality, enabling pluralism and fostering minority participation.

1944: *Korematsu v. United States*

Soon, this view on equality proved to be socioculturally untenable. In the early 1940s, the Court began discussing the implications of equal protection for minorities in its 1944 *Korematsu v. United States*. Again, *Korematsu* was a case dealing with racial prejudice, namely the constitutionality of forcefully deporting people of Japanese ancestry into camps (“Facts and Case Summary”). So, while texts such as the Fourteenth Amendment, the Equal Protection doctrine, and *Plessy* had already tackled racial discrimination, it was far from extinct by 1944. The *Korematsu* decision, which upheld the constitutionality of these internments, was the first one which laid out the idea of what was later perceived as ‘suspect classification.’

It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can. (Justice Hugo Black, *Korematsu* at 216)

Although *Korematsu* acknowledged the racial motivation for discriminating against Japanese Americans, it took the Supreme Court another 10 years before race was officially treated as a classification against which unequal treatment is suspect. This was also possible by looking back and retrospectively considering *Korematsu* as treating race with a higher level of judicial review. With the 1960s civil rights movement and the landmark decision *Brown v. Board of Education* in 1954, understandings of equality which favored a White, male majority became publicly more and more contested. Calls for (legal) emancipation by people of color, Blacks, and women then warranted the need to establish even higher forms of protection, post-equal, in the want of a ‘more’ equal protection of the laws. The constitutional tool of suspect classification was born.

Soon, other suspect classifications would follow suit or were retrospectively regarded as such. In *Graham v. Richardson* (1971), the Court treated alienage as suspect classification; *McLaughlin v. Florida* (1964) declared race suspect by referring to *Bolling v. Sharpe* (1954) and to *Korematsu*’s suggestion for a “most rigid scrutiny” in cases involving racial minorities. Nationality was considered a suspect classification in 1973 (*San Antonio Independent School Dist. v. Rodriguez* 61) and religion’s special status derives from its important anchoring in the Constitution; both the First and Fourteenth Amendment

make sure religious groups are not treated differently than others in similar conditions (Legrand “Suspect”).

The legal practice of grouping people into classifications before applying the Equal Protection Clause illustrates that the Constitution’s ‘equality’ has a certain meaning, which differs from what common use of the concept would typically entail. Equality, in the clause’s understanding and in its legal application, also does not refer to the Declaration of Independence’s ideal that “all men are created equal.” It is rather the notion that only those shall be treated equally who are indeed equally situated based on characteristics such as social group membership, socioeconomic background, and parameters like age, which are constructed using medical-biologicistic categories. The Declaration of Independence’s sociocultural concept of equality has thus to be separated from the Constitution’s legal concept of equality. While the ur-U.S. American ideal of (universal) equality has served as foundation for the new Union, as stated in the Declaration of Independence, it is also one of the main pillars upon which the cultural narrative of American Exceptionalism is based. The Constitution’s equality, on the other hand, is conceptualized as equity, which aims to accommodate the specific needs of a specific social group at a specific time.

Legal and Cultural Notions of Equality

While the legal tools equal protection offers seem promising for those trying to achieve formal equity, the ways the Equal Protection Clause has been interpreted shed light on the discriminatory and exclusionary politics of this part of the Constitution. Formal equality gains are rendered unable to translate into lived equality because sociocultural realities prevent them from doing so. The Supreme Court’s landmark decisions in *Plessy v. Ferguson* and *Obergefell v. Hodges* serve as prominent examples.

Plessy is better known as the landmark decision which established the “separate but equal” doctrine. Here, the Court ruled that racial segregation in public facilities is constitutional as long as the facilities are equal to those of the White population, paving the way for States to uphold a variety of discriminatory segregation laws known as the Jim Crow system. The Court’s reasoning shows how the legal idea of equal protection can be interpreted in a way that reifies sociocultural hierarchies and thus becomes complicit in upholding institutional discrimination. This way, equal protection can serve as a legal tool of minority oppression on a sociocultural level while continuing to appear exceptional just on its legal face.

These dynamics can still be observed in the twenty-first century. In 2015, *Obergefell* legalized marriages between two individuals of the same sex. While the Supreme Court ruling forces all federal courts in all states to adhere to this decision, the sociocultural reality does not always reflect this as Leonore F. Carpenter states:

Given the spate of court clerks refusing to issue same-sex marriage licenses, or even resigning rather than having to comply with the requirements of *Obergefell*, the issue of rogue court administrators refusing to allow LGBT people to access their rights is, if anything, more pressing than ever. (273)

The discrimination manifested here is different from the one described above regarding *Plessy*. Carpenter's assessment of *Obergefell* evolves around how individuals intentionally or unintentionally fail to act according to the laws. In *Plessy*, the Court failed to acknowledge the inherent racism and inequality its decision enabled to continue. Despite their differences, both cases shed light on the intersections of law and culture. *Obergefell* and *Plessy* illustrate how sociocultural realities surround and (co-)determine legal decisions, even by the highest court in the U.S., and how these realities may foster discriminatory applications of formally equal protection issues. In *Obergefell*, the sociocultural realities of administrators and bureaucrats Carpenter mentions accompany legal decisions and codetermine their factual effectiveness regardless of their formal premises. In *Plessy*, prevalent racial prejudice following the Reconstruction era fed into the Court's reasoning, making an unbiased decision solely based on law impossible.²⁴

The way legal decisions feed back into sociocultural realities, how they are regarded, affectively felt, and implemented, is therefore both grounded in and constitutive of cultural narratives and sociocultural imaginaries. Consequently, the legal significance of the Equal Protection Clause cannot be separated from its cultural impact since the decisions it is based on inform people's lives and the overarching cultural narratives these lives are embedded in.

24 This reading is not meant to take away the justices' responsibility for *Plessy* but rather stress their embeddedness in a cultural framework, which influences their opinion.

Understanding Equal Protection from a Legal Point of View

In order to assess the equal protection doctrine's cultural impact, it is necessary to understand how the doctrine works on a legal level. As pointed out in the previous section, the concept of equality is vital to this part of the Constitution, yet the legal understanding of it differs from a purely moralistic one. Equality is not meant to be translated into an equal treatment of all individuals but conceptualized as an equal assessment of each individual's living conditions for the sake of governing different social group's needs. The way the Equal Protection Clause works is thus by focusing on equity, i.e., "proportional fairness" ("Usage") instead of equality, "sameness of treatment."²⁵ But what does this mean in practice?

Equal protection claims may be brought forward when a governmental action interferes with a fundamental right, and when a certain (suspect) classification is addressed (e.g., 1976's *Massachusetts Board of Retirement v. Murgia* at 312). This means the Equal Protection Clause is invoked when someone claims to have been treated unequally compared to others which share their respective characteristic. For instance, a famous equal protection decision focused on whether sex differences are constitutional in tax deductions for care work of a family member (*Charles E. Moritz v. Commissioner of Internal Revenue*). In *Moritz*, caregiver deductions were explicitly provided for "a woman or widower, or ... a husband whose wife is incapacitated or is institutionalized" (26 U.S.C.A. Sec. 214a), which did not apply to the plaintiff Charles Moritz, who cared for his mother but had never been married. Here, the deciding characteristic was (biological) sex – a woman could have deducted her taxes while a man could not, only if he had been married and his wife was unable to provide care. This decision contributed to the Supreme Court landmark decision *Reed v. Reed* (1971), which enshrined the unconstitutionality of sex-based classifications into law. After *Reed*, sex could no longer be explicitly used as distinguishing factor in legal regulations – at least not without a compelling governmental interest.

The idea to use classifications within the law to protect everyone equally goes back to 1896. Justice John Marshall Harlan's famous dissent from *Plessy* constitutes a turning point of the equal protection doctrine. *Plessy* established that the basis of equal protection lies in the principles of antisubordination and anticlassification. By arguing that "[t]he white race deems itself to be the

25 Also note that while both words share their linguistic origin in the Latin root *aequus*, equity is mostly used in legal contexts with its French derivative *équité* translating into justice or rightness ("Usage").

dominant race in this country ... [b]ut in view of the Constitution, in the eye of the law, there is in this country no superior, dominant, ruling class of citizens” (559), Harlan asserts that the Constitution is “color-blind, and neither knows nor tolerates classes among citizens” (559).

Following Harlan, the equal protection doctrine has to follow the principle of antisubordination, meaning particularly vulnerable groups of individuals are not allowed to be treated subordinately by the law, and the principle of anticlassification, meaning that law is not allowed to differentiate between groups of people, so that “irrational classifications are purged from the law and individuals are no longer treated differently across irrelevant criteria” (Copeland 283). Anticlassification, however, does not mean that there is no classification. Quite the contrary, as law evolves around classifications, equal protection merely aims at preventing ‘irrational,’ ‘arbitrary’ ones.

This legal constellation strikes as a paradox. On the one hand, equal protection claims to be anticlassificatory in nature, aiming to disregard and to resolve ‘irrational’ or ‘irrelevant’ classifications. On the other hand, it establishes classifications in order to arrive at more just, or more equal, legal decisions. This is because the very idea behind the Equal Protection Clause is that law *has* to classify in order to be able to protect its citizens equally.²⁶ To do so, “the measure of the reasonableness of a classification is the degree of its success in treating similarly those similarly situated” (Tussman and tenBroek 344). In other words, the rationale behind legally distinguishing between social groups is constitutional if those are treated equally who are indeed equal before the law according to their common category, e.g., age with regard to drinking alcohol or income with regard to paying taxes.

While these exemplary categorizations seem rational and relevant from a Western hemispheric standpoint, – the protection of minors²⁷ and the social (re-)distribution of financial means are arguably important cultural pillars of

26 This seemingly paradox has been commented on in Supreme Court cases involving sexual orientation; see *Romer v. Evans* at 631: “The Fourteenth Amendment’s promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons;” see *Perry v. Schwarzenegger* at 995: “The guarantee of equal protection coexists, of course, with the reality that most legislation must classify for some purpose or another.”

27 For a critical assessment of how this aspect is weaponized in current queer rights discourses, see Chapters III and IV.

a Western democracy – , they are nonetheless arbitrary, socioculturally constructed distinctions between individuals. As these examples show, legislation always has to “impose special burdens upon or grant special benefits to special groups or classes of individuals” (Tussman and tenBroek 343) if it is to apply its principle of anticlassification. The Equal Protection Clause’s concept of equality is therefore better understood as equity, aiming at protecting individuals not in the same way but in a way which fits their respective social group’s needs – according to a state’s assessment of what these needs are. This practice of categorizing people already foreshadows some of the problematic tendencies of the law and of those interpreting it. Having the decisive power over which categories are meaningful and who falls into which category lies with those who are already privileged members of society, e.g., politicians, judges, justices, and lobbyists.

Equal Protection’s Cultural-Legal Entanglements

The Fourteenth Amendment’s first section dictates that “the laws of a state must treat an individual in the same manner as others in similar conditions and circumstances” (“Equal Protection”). Legal equality is thus negotiated against already existing social categories, which are considered as a seemingly ‘natural’ given for the legal discourse. The (ir-)relevance of criteria for grouping individuals in the first place is not addressed. Consequently, the Equal Protection Clause does not guarantee that everybody is treated the same but that treatment under the law is reasonable and not arbitrary. This is why certain groups of people enjoy rights others do not, e.g., it is not allowed to consume or purchase alcohol under the legal drinking age of twenty-one. Consequently, in cases in which the laws of a state serve a justified objective, e.g., protecting minors from drinking alcohol, the legal distinction between groups of individuals is constitutional.

Deconstructing the implicit sociocultural notions attached to law, in this case that people are (better) equipped to make informed choices about their behavior at a certain age, is only rarely part of legal considerations. When it is, this openness is likely to indicate an already changing sociocultural climate, which visibilizes these concerns that formerly were unthinkable or possible to ignore for the people deciding on them. For instance, while the Court retrospectively claimed that “we think *Plessy* was wrong the day it was decided” (*Planned Parenthood of Southeastern Pa. v. Casey* at 863), and legal scholars agree in that it was “one of the two most egregious decisions in Supreme Court his-

tory (along with *Dred Scott*)” (Klarman 25),²⁸ the decision was not as harmfully or controversially perceived by a majority of people back then (Klarman 25–8; Siegel 1112–15).

Supporting the view that legal assessments, similar to cultural ones, are dependent on the specific time, place, and context they are situated in, one has to be cautious not to justify them on these grounds or to shy away from critically questioning them. Relegating responsibility to correct mistakes to a future society or judging the actions of a past court results in legitimizing present inequalities as follies of the time without acknowledging their severity or one’s duty to address them. Another instance is Justice Antonio Scalia’s dissent in the Court’s 1996 *U.S. v. Virginia*:

Much of the Court’s opinion is devoted to deprecating the closed-mindedness of our forebears with regard to women’s education, and even with regard to the treatment of women in areas that have nothing to do with education. Closed-minded they were—as every age is, including our own, with regard to matters it cannot guess, because it simply does not consider them debatable. The virtue of a democratic system with a First Amendment is that it readily enables the people, over time, to be persuaded that what they took for granted is not so, and to change their laws accordingly. That system is destroyed if the smug assurances of each age are removed from the democratic process and written into the Constitution. (at 566)

Scalia dissented in *U.S. v. Virginia* to the 7–1 majority opinion that the Virginia Military Institute’s policy of only admitting (cis) men violated the Equal Protection Clause and is thus unconstitutional. To Scalia, this gender-biased policy is equal because it acknowledges the biological “facts” of “developmental differences” (at 566) between men and women. As another argument, he stresses that the institute’s admission policy is “essential to that institution’s character” (at 566). Scalia’s view supports the idea that tradition should take precedence over changing sociocultural sentiments, scientific developments, and evolving legal norms – a conviction which will be important again when discussing justices’ modes of constitutional interpretation in Chapter III. Framing women’s access to education as a matter the people of the time did not conceive of as an issue ignores and explicitly rejects the realities of millions who were part of

28 Klarman further states that legal scholar Michael Perry, Judith Baer, Paul Oberst, Robert Harris, and Ronald Dworkin have been equally appalled by this landmark decision (25–6).

and witnessed women's struggle for their equal rights prior and after the Virginia Military Institute was founded in 1839, most notably 1848's Seneca Falls Convention.²⁹

While Scalia acknowledges that legal systems are malleable and subject to sociocultural changes over time, he perceives this to be a task needing to be accomplished by the political process and not by the Supreme Court. Interestingly, Scalia seems to base his reasoning on the assumption that the drafting of the Constitution as well as the political process in the 1990s, when he issued his dissent, mirror an inherently democratic process which represents all of the people the legal system governs. If not for the apparent disregard of the historic context of slavery, this argument is perplexing for its use in a case that deals with equal access to education. If the democratic process were as equal (and in fact democratic) as Scalia assumes, it would not bear and maintain those mechanisms of educational hierarchization and gatekeeping *U.S. v. Virginia* deals with. Scalia's view thus both relieves past and present courts from their responsibility to ensure the equal protection of the laws.

Additionally, the underlying biologicistic logic of Scalia's argument, one that is found in similar reiterations in current anti-trans and anti-non-binary state level legislation, is void of any engagement with the usefulness of negotiating legal categories based on one's genitalia. Biological sex is taken as a hard fact for establishing legal norms around those who are read as male or female, or around those having to comply with this binary system. The practice of categorizing people according to either one or the other sex in educational contexts seems reminiscent of *Plessy's* separate-but-equal logic. Regardless whether one agrees or disagrees with Scalia on the democratic process and the Court's role in it, it becomes obvious how equal protection decisions are socioculturally embedded and part of ongoing transformations.

Levels of Review and The Three-Tiered Approach to Equal Protection Analysis

In order to better access equal protection claims, the Court uses a three-tiered approach for its analysis. Deciding on the criteria for distinguishing between social groups, i.e., their similarity, is the trickiest part of equal protection

29 This convention was the U.S.'s first women's rights convention and resulted in the *Declaration of Sentiments and Resolutions*, which mirrored the Declaration of Independence in speech, yet explicitly addressed women's needs and those equal rights they have been neglected. The document explicitly mentions unequal access to education (2; 4).

and arguably the onset for imposing sociocultural notions onto the law. The legal practice of distinguishing between people based on characteristics such as their skin color, class status, gender, able-bodiedness, age, or place of residence underwent certain changes over time and is tied to sociocultural negotiations of social group membership (and what counts as such) as already outlined.

Whenever such a differentiation between social groups within a legal statute is perceived as irrational or arbitrary, the U.S. Supreme Court employs a three-tiered approach to test the statute in question (e.g., differentiating between men and women in *Moritz*). This approach is used to prove whether a statute indeed violates a plaintiff's constitutionally protected interests by employing different levels of scrutiny depending on the respective group of people affected: the basic, the intermediate, and the heightened level of judicial review. As seen in the Supreme Court's *Plessy* decision, a class's degree of perceived irrationality and arbitrariness can change over time as it is embedded in and subject to sociocultural transformations. Race had not been considered an irrational and arbitrary criterion for differentiation in 1896 and only been tested using the basic level of judicial review. This perception changed over the years, and the Supreme Court responded to this development by ruling it indeed irrational and arbitrary in its *Brown* decision in 1954, using the heightened level of judicial review. As the category of race is since then considered a suspect classification, i.e., a category against which discrimination is inherently suspect and thus prone to a more searching judicial review, legal texts which draw distinctions between, e.g., white and Black people, are very likely to be ruled unconstitutional after being reviewed by the Supreme Court.

The basic level of judicial review is the so-called Lindsley test or rational basis review, which every classification must pass in order to be legitimated. This test tries to determine whether the classification drawn by the law is not "without reasonable basis"³⁰ and not "purely arbitrary",³¹ plus it has to be "fairly related to the object of regulation."³² Consequently, the Supreme Court may consider discriminatory federal laws constitutional as long as they are "reasonable, not arbitrary, and ... rest upon some ground of difference having a fair and

30 *Lindsley v. Natural Carbonic Gas Co.* at 78 (1911).

31 *Lindsley* at 78.

32 *Railway Express Agency, Inc. v. New York.* at 112 (1949).

substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.”³³

States’ enactments of laws that classify individuals are constitutional as long as these laws are “based upon some reasonable ground – - something which bears a just and proper relation to the attempted classification, and is not a mere arbitrary selection.”³⁴ For cases involving the Lindsley test, the burden of proof lies in the sphere of the assailant, which means that the party who perceives a law’s classification to be unreasonable and arbitrary must hand in evidence for their claim. The difficulty of proving this results in most of these cases failing to prove a lack of legitimate governmental interest.

Equal Protection’s Suspect Classifications

In cases which involve certain groups of individuals, the Court has to apply either intermediate or heightened review, depending on whether the Court is dealing with ‘quasi-suspect’ or ‘suspect’ classes. While social groups are referred to as quasi-suspect or suspect *classes*, e.g., African-American, immigrants, Catholics, the legal category under which they are subsumed is referred to as quasi-suspect or suspect *classification*, e.g., race, national origin, religion. In its legal meaning, the term ‘suspect’ does not refer to the suspiciousness of the classes or classifications themselves but to the unlawfulness of any discrimination against them. These classifications then appear suspect to the legal reader when appearing in legal norms while the suspectness of these classifications’ existence, e.g., why people are categorized according to a socially constructed category such as race, is not part of the discourse.

33 Royster Guano Co. v. Virginia at 415 (1920).

34 *Gulf, Colorado & Santa Fe Ry. Co. v. Ellis* at 151 (1891).

Up to this point, suspect classifications include race,³⁵ national origin,³⁶ religious affiliation, illegitimacy of birth,³⁷ and alienage.³⁸ The Court argues that governmental discrimination against these classifications is inherently suspect and thus the statutes in question have to be reviewed with strict scrutiny, also known as heightened review. In this process, the Supreme Court has to analyze if a) the discrimination serves a compelling governmental interest, b) the law is narrowly tailored to serve this interest, and c) the law is the least restrictive means for achieving this interest. This means that “the Court presumes the law to be unconstitutional, and the law must be ‘legitimated’ by the State” (Culverhouse and Lewis 240), i.e., the burden of proof lies in the sphere of the state. Consequently, statutes which discriminate against an individual’s race, national origin, religious affiliation, illegitimacy of birth, or alienage are less likely to become enacted than those discriminating against non-suspect classifications such as sexual orientation, gender, or age.

Since cases of heightened review are most likely to result in ruling that the statute in question is unconstitutional, the Supreme Court has been reluctant to consider too many classifications as suspect. This privilege to decide (or not to decide) which classifications are ‘worthy’ of more protections illustrates how much power the Court has in protecting minorities, and how much these decisions comment on sociocultural hierarchies. Considering distinction based on religious affiliation suspect but denying this stricter scrutiny to, for instance,

35 See *Loving v. Virginia* at 11 (1967), quoting *Hirabayashi v. U.S.* at 100 (1943), and *Korematsu v. U.S.* at 216 (1944).

36 See *Korematsu v. U.S.* at 216 (1944): “It should be noted, to begin with, that all legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny. Pressing public necessity may sometimes justify the existence of such restrictions; racial antagonism never can” (majority opinion by Blackmun).

37 According to Marcy Strauss, “illegitimacy is entitled to heightened—though not strict—scrutiny” because the Court did not find that “strict scrutiny was justified in this case because the history of discrimination of illegitimate children was not as severe as discrimination based on race” (140, fn. 24). See also *Mathews v. Lucas* at 518 (1976).

38 See *Graham v. Richardson* at 371–2 (1971): “It has long been settled, and it is not disputed here, that the term ‘person’ in this context encompasses lawfully admitted resident aliens, as well as citizens of the United States, and entitles both citizens and aliens to the equal protection of the laws of the State in which they reside” (majority opinion by Blackmun).

distinction based on dis/ability mirrors an ableist understanding of what constitutes a legal subject worthy of support.

Instead of granting more, and also more vulnerable, groups such a privilege, and thereby not commenting on these groups' position in the constitutional and sociocultural hierarchy, the Court constructed a middle-way: the intermediate approach, which applies to quasi-suspect classifications. As of today, gender,³⁹ status as minor children of illegal aliens,⁴⁰ and status as aliens are considered quasi-suspect classifications. The Supreme Court has not established a consistent handling of these 'in-between' classifications, which makes them more relevant politically than legally. Cases involving these classifications can be reviewed with heightened scrutiny, but the Court is likely to use an intermediate approach, i.e., "a heightened level of scrutiny falling between strict scrutiny and rational basis testing" (Widin 414). Since sexual orientation is neither regarded as a suspect or quasi-suspect classification, cases involving discrimination based on sexual orientation are likely to be reviewed with the most lenient judicial review, the Lindsley test. Political scientist Evan Gerstmann explains this hierarchy of equal protection, and sexual minorities's place in it as follows:

Since the 1970s the United States Supreme Court has held that the equal protection clause protects different groups differently – an approach that has denied many citizens the equal protection of the laws. Some groups are "suspect classes" that receive strong judicial protection against discriminatory laws. Other groups are "quasi-suspect classes" that receive an intermediate level of protection. Courts rarely tolerate laws that discriminate against these classes. Still other groups, such as gays, lesbians, the elderly, and the poor, constitute neither suspect nor quasi-suspect classes and therefore receive very little protection under the equal protection clause; laws that discriminate against them will be tolerated so long as there is any "rational basis" for those measures. (*Underclass* 3)

39 See *Mississippi Univ. for Women v. Hogan* at 718 (1982); see also *Craig v. Boren* at 190 (1976): Responding to the growing number of cases in which sex classifications were perceived as unconstitutional, but yet unwilling to apply the same level of judicial review as for race, the Supreme Court decided to use a heightened, intermediate level of scrutiny when criteria of gender are involved.

40 See *Plyler v. Doe* at 224–5 (1982).

Gerstmann picks up on the Equal Protection Clause's idea of having to classify between social groups in order to treat them equally, and goes on to criticize that "the Supreme Court cannot adequately explain why [certain; lb] groups are frozen in this hierarchy" (3). However, while this logic may be convincing when thinking about social groups' distinctive needs, the reasoning behind protecting some vulnerable social groups more thoroughly while denying this degree of protection to others is not. Examples of these logical inconsistencies may be the different treatment of women and the elderly, or "illegitimate children and their parents [who are] protected more than gays and lesbians" (Gerstmann *Underclass* 3).⁴¹ Ill-picking his examples, Gerstmann may have traced back the reasons for protecting the groups mentioned to the exploitation and utilization logic inherent in neoliberal capitalist societies: (Cis) Women's ability and expectation to reproduce offspring to guarantee national survival make them more worthy of legal protection, and children have an *a priori* higher need as they are socioculturally and legally troped and narrativized as innocent and vulnerable victims.⁴² Static constellations within the Court's suspect classification decisions speak for an equally static understanding of sociocultural orders. Having arrived at a fixed set of groups which receive greater protection, paired with an uneasiness or unwillingness about adding more groups to this selected circle, the Court insinuates that the current legal order mirrors socio-cultural and naturalized realities which need no altering.

II.3. The Cultural and Legal Significance of Suspect Classification

According to legal scholar Kenji Yoshino, the Court's decision to establish the in-between form of intermediate scrutiny for quasi-suspect classifications, and its reluctance to include more 'real' suspect classifications is connected to what he calls "pluralism anxiety" (747), which "flows from at least two sources – 'new' kinds of people and 'newly visible' kinds of people" (747). Yoshino considers this anxiety as the reason for the Court's changed approach to civil

41 Perceiving of the elderly, queers, and the poor as more vulnerable social groups in this legal context is not meant to essentialize or victimize these groups but refers to the lack and contestations of protections for them.

42 For more on the child and women as preferred victimized figures in human rights discourses, see Olson *Legalij*; Hesford; Baxi.

rights legislation and its unwillingness to include sexual orientation in its canon of suspect classifications:

For instance, the percentage of the population that has experienced same-sex desire has presumably not changed dramatically over time. However, the political visibility of gays, lesbians, and bisexuals has grown dramatically over recent decades. Even if a group is not comprised of “new” kinds of individuals, it can still trigger pluralism anxiety if it becomes newly visible. Because of “new” and “newly visible” groups, the nation has developed an increasing sense of its own pluralism. That sense has engendered significant anxiety across the political spectrum. For some time now, conservative commentators have expressed impatience with the seemingly endless proliferation of identities and identity politics. But the concern transcends political creed. Even liberal lion Professor Arthur Schlesinger Jr. cautioned as early as 1991 against the “disuniting of America,” calling for a recommitment to the ideals of assimilation and integration. (751–52)

Yoshino constructs law and culture as spheres which monodirectionally influence each other in the sense that law responds to politico-cultural developments and not the other way around. To him, the political visibility of queers has increased, which resulted in an anxiety and impatience by conservatives, who oppose granting sexual minorities more rights. The reasons for this increased visibility, which has been a gradual process on a political, but also cultural, social, and legal level, are left undiscussed.

According to this understanding, the constructive element of law becomes a reactive one, and the idea of law being merely a device to correct or respond to current issues reinforces the notion of law and culture as juxtaposed realms. Although Yoshino explicitly mentions cultural factors by referring to Schlesinger, his focus on talking about either law or culture prevents him from seeing the politico-cultural ways of social stratification as legal orders in themselves. Those who assess this particular constitutional situation (legal scholars such as Yoshino himself) as well as those who sit on the bench of the Supreme Court are able to do so because of their respective opportunities – a very good educational background, which equals high socio-economic standing in most U.S. American cases, and no or only little institutional obstacles based on sex, race, national origin, gender, gender identity, sexual orientation, or ability. Referring to “new” or “newly visible” groups of people thus only appears plausible for those who are unquestioningly sustaining the very structures which invisibilize these groups.

Being granted or denied access to societal institutions, being able to integrate oneself, is oftentimes inhibited by sociocultural factors and contemporary forms of prejudice. In fact, the very requirements of what is perceived a 'successful' integration may themselves be part of a dominant cultural order.⁴³ These factors may be addressed through legal means as well as by strengthening sensibilities for cultural-legal entanglements.

Further, this rudimental characterization of how identity and social group membership work leaves out any intersectional entanglements. Someone might be legally protected for their status as a White woman, yet not for their sexual identity as lesbian. People have more than one social group they belong (or feel belonging) to, but some classifications seem generally more desirable than others and therefore appear more socioculturally acceptable than the others. For instance, Yoshino's privilege of being an Ivy-League educated professor of law seems more prominent here than his identity as a gay man which leaves the notion of agreement with such pluralism anxiety mentioned.

One's assessment of the constitutional situation in the U.S. is consequently influenced by one's worldview, which is influenced by one's socialization, which is likely to be (predominantly) influenced by one's privileged position. Deciding on who constitutes a "new" or "newly visible" class, and which of these classes need or deserve more protection is therefore already marred by one's own social positioning. This positioning implicitly presupposes that at least one position in society's hierarchy is taken – one's own.

Taking a human rights stance, Yoshino argues that moving from a group-based civil rights approach to protecting fundamental rights of all humans will not only be easier to achieve politically but will also help reducing distinctions between social groups (792–94). This argument reminds of calls to treat discrimination based on sexual orientation akin to discrimination based on sex.⁴⁴ Such approaches attempt to establish an effective anti-discrimination protection for LGBTQ+ individuals by finding a common, seemingly unproblematic category worthy of protection. Such ideas may seem promising with regard to

43 One may for instance think of Friedrich Merz' instrumentalization of the term *Leitkultur* to exclude ethnic Others in German integration discourses, see also Olson *Legality* 134.

44 The logic here is that if, for example, a lesbian (cis) woman is fired because she is in a relationship with another (cis) woman, she would not have been fired if she were a (cis) man who was in a relationship with a (cis) woman. Thus, discrimination based on sexual orientation is in effect discrimination based on sex according to this argument.

its outcome, yet they are far more dangerous than they seem.⁴⁵ For instance, the decision to consider marriage a fundamental right in *Obergefell* was benefitting same-sex couples the most, yet it was not a right directly granted to queers. *Obergefell* was a concession to the institution of marriage as such, and a decision for granting broader access to such a culturally, religiously, and legally important right. The right to get married served as seemingly common category many groups of people now had access to. However, a specific queer right would have signaled the Court's acknowledgement of queer realities and elevated sexual minorities in existing cultural-legal orders.

Moreover, Yoshino ignores the cultural implications of what he calls “new” and “newly visible” groups. Visibilities, or the lack thereof, are not *a priori* biological occurrences but socioculturally constructed phenomena based on threats to one's life, socioeconomic position, or political silencing. The “newness” of a social group is consequently only linked to how visible its members are in the public discourse – in other words, a “new” group is also a “newly visible” group because it has existed before but only now becomes visible, and a “newly visible” group is better conceived of as a “more visible” group than it was in the past.

The decision to become or make visible is closely linked to how law and culture develop in connection with each other. Claiming formal equity (or lived equality) for one's sexual orientation, race, or other social identity marker would be a too dangerous, or at least desperate, demand when there are no laws protecting an individual's Otherness. This is even more the case when there is no cultural openness for non-normativity and unassimilation. Similarly, fighting for one's visibility and recognition of one's rights, for instance in the form of activism, is ultimately only as effective as (lived) cultural responses to its (formal) legal results: County clerks' refusal to issue marriage licenses to same-sex couples post-*Obergefell* renders the (formal) right to marry ineffective for those facing (lived) discrimination and backlash. Post-*Brown*, president Eisenhower's deployment of 1,200 U.S. Army soldiers at Little Rock Central High School enforced the (formal) legal decision to desegregate public education facilities despite (lived) hostile resistance by a white mob. Whenever cultural and legal orders clash, the need to approach both simultaneously becomes evident.

45 Chapter III picks up on the implications of anti-discrimination laws and analyzes why the ‘sex discrimination argument’ to sexual orientation's legal protection has a narcotizing effect and is not the one LGBTQ+ persons should be arguing for.

Pluralism anxiety does not transcend political beliefs, as argued by Yoshino: When there are too many ‘new’ groups claiming their rights, even liberal commentators fear a disruption of the legal order. This view reifies the political notion that there is a unified majority – (presumably) White, cis, male, able-bodied, heterosexual –, which demands primacy. The angst of including more groups beside this unmentioned majority marks the Supreme Court’s reluctance to consider more social groups as suspect classes a political decision with the establishment of quasi-suspect classifications as concessions to those calling for group-based protections.

Beyond these cultural-political considerations, the normative power of constitutional precedents lays the, arguably also not a-political, foundation for legal assessments of suspect classifications. In order for a classification to become suspect, it has to pass certain criteria which have been developed over time by Supreme Court justices. Although the American case law system does not adhere to codified laws, and different legal scholars identify different criteria,⁴⁶ the majority of legal commentaries considers four factors as crucial in determining a classification’s need for heightened judicial review.

Criteria to Determine the Need for Heightened Judicial Review

In 1938’s Supreme Court decision *U.S. v. Carolene Products Co.*, Justice Harlan Fiske Stone stated in his now famous Footnote Four⁴⁷ that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more

46 Scholars are divided upon the number of criteria determining suspect classification, with some identifying up to seven criteria (Wintemute 61–4). The four criteria mentioned here are generally considered the most important and controversial ones.

47 *U.S. v. Carolene Products Co.* at 144, footnote 4 (1938) reads: “There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments. ... It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment. ... Nor need we enquire ... whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

searching judicial inquiry” (footnote 4). This footnote laid the foundation for the Supreme Court’s differentiation of standards of judicial review by introducing the notion of strict scrutiny for cases which involve underrepresented, thus particularly vulnerable, social groups. The core idea of this definition is that a social group’s status as politically powerless minority who is subjected to discrimination based on stereotypes is the most crucial factor which warrants an intervention by the Supreme Court in the form of declaring a category a suspect classification or a group a suspect class. Gerstmann explains what he refers to as ‘political process theory’ as follows: “In Stone’s view, majority prejudice against unpopular and powerless minorities poisons the political process, and the Court must intervene to protect these groups” (*Underclass* 4).

Constitutional law scholar Bruce Ackerman attests to the impact of “the *Carolene* idea” (716, footnote 5), which is the “concern with the political powerlessness of ‘discrete and insular’ minorities” (716), by stating that “even when it is not cited explicitly, ... [it] plays a role in standard judicial justifications for strict judicial scrutiny of legislation burdening ‘suspect’ classes” (716). According to Ackerman, this is why in numerous cases social groups use the criteria laid out in *Carolene Products* to justify extraordinary protection. Based on the decision’s Footnote Four, the Supreme Court generally identifies four criteria⁴⁸ of a suspect classification:

- (1) whether the classification is based on immutable traits or characteristics over which the individual has no control; (2) whether the classification reflects historic and incorrect stereotypes with no basis in fact; (3) whether the classification represents a politically powerless minority; and (4) whether there is a history of discrimination of unequal treatment towards the class. (Culverhouse and Lewis 240)

The first criterion refers to characteristics which are determined “solely by the accident of birth,”⁴⁹ making them innate rather than consciously chosen traits. Although it is not quite clear if these characteristics are biological or genetic conditions or if they are merely impossible to escape (as has been argued with regard to religious affiliations), the individual cannot be held responsible for the trait in question; it is part of their essence.

48 Please note that the number of requirements changes among legal scholar and courts, see also *Sail’er Inn, Inc. v. Kirby*, which recognizes three criteria. However, immutability is always cited and problematized.

49 *Frontiero v. Richardson* at 686 (1973).

The second criterion deals with historic and incorrect stereotypes, i.e., prejudices which contribute to a social group's discrimination. An example for such incorrect stereotypes would be the enduring prejudice of gay men molesting children. According to Culverhouse and Lewis, "such misconceptions and stereotypes have been used to justify sodomy statutes, employment discrimination and housing discrimination" (243). Stereotypes can be used to justify institutional discrimination, especially when they come with a notion of immoral or downright despicable behavior. This is why the second criterion also operates under the label 'moral neutrality.' This means that the trait in question has to be in accordance with religious and sociocultural principles which constitute a society's value system. Proving that a characteristic is not immoral and warrants extraordinary legal protection is a difficult endeavor: It involves convincing the highest court of the society that discriminates exactly against this trait that existing biases have to be reversed. The difficulty of this task is reinforced by the political powerlessness of the minorities involved, which makes up the third criterion.⁵⁰

The legal understanding of a politically powerless minority refers to "a group's inability to rely on the legislative process to protect its interests" (Strauss 153): If a social group is left out of the majoritarian political process, it cannot represent its own interests by, for example, proposing statutes. In return, this requires that this otherwise powerless minority is extraordinarily protected. Measuring political powerlessness includes analyzing a group's ability to vote, looking at the amount of people belonging to this group, checking if there are statutes which might add political power to the group and examining if any members of the group hold positions of political power (see also Strauss 154).

The last criterion deals with a group's history of discrimination. Ackerman defines this criterion as follows:

[A]lthough each of us cannot always expect to convince our legislators, we can at least insist that they treat our claims with respect. At the very least, they should thoughtfully consider our moral and empirical arguments, rejecting them only after conscientiously deciding that they are inconsistent

50 In *San Antonio Independent School District v. Rodriguez* at 28 (1973), the Court in the form of Justice Powell first used the term "political powerlessness" to consider whether a classification qualifies as suspect which was then picked up and quoted in *Massachusetts Board of Retirement v. Murgia* at 313 (1976).

with the public interest. If a group fails to receive this treatment, it suffers a special wrong, one quite distinct from its substantive treatment on the merits. (738)

Ackerman considers the political silencing, or non-consideration, of a group's concerns as important for measuring the degree of discrimination. If over a long period of time in a democratic society a social group has been denied the same treatment as other groups, one can speak of a history of discrimination, which "is connected to the group's political power and indicates whether the legislative process has failed to protect it, warranting judicial intervention" (Strauss 150). Consequently, the aspect of unequal treatment is always connected to the lack of a group's representation in the majoritarian political process, requiring legislation to intervene.

It is unclear whether these four criteria, influenced by the Court's *Frontiero v. Richardson* decision in 1973, must all be fulfilled in order for a classification to be regarded as suspect. The Supreme Court has not supplied a coherent approach to its rulings on suspect classification, leaving "each writer seeking to apply [the criteria; lb] to a new classification ... to supply his or her own framework" (Wintemute 63).

The Significance of the Four Criteria

Proving that a group of individuals has been politically disadvantaged and treated unequally over a long period of time may be relatively easy with regard to existing statutes and lack of representatives in positions of power. The criteria of immutability and incorrect stereotypes are, however, more difficult to overcome for a minority seeking suspect class status. This is due to the lack of coherent definitions for these criteria and the difficulties in finding biological and ethical evidence for what is immutable and moral.

Another question is whether a politically disadvantaged group will be regarded as such: Although the perception of a social group may have changed over time, the group in question has to appeal to the courts of the society which established its status in the first place. This means a group seeking suspect class status has to prove its case before a court which is, consciously or unconsciously, governed by the political, sociocultural and religious processes making up a society's value system. Constitutional law scholar Paul A. Freund famously explained this thin line as "the Court should never be affected by the weather of the day but inevitably they will be influenced by the climate of the era" (qtd. in Coyle), a quote often used by Justice Ruth Bader Ginsburg.

In addition to the problems attached to the burden of proof for these criteria, the vague definition of factors that determine a suspect class make them difficult to apply. Although *Frontiero* and *Carolene Products* serve as foundation for the Court's decision-making, "the test for distinguishing between the three types of classes has [not; lb] been carefully crafted and precisely defined" (138) according to Marcy Strauss. By referring to Harvie Wilkinson, she states that "beyond the basic truism" (138) that a suspect classification should involve "politically powerless minorities that have historically been discriminated against" (138), the Court's determination of a suspect class status lacks consistency and clarity. This is shown in the fact that "different courts emphasize different factors without any real explanation why some are more important than others" (Strauss 138–9). While being a typical feature of the U.S. American juridical case law system, the lack of any coherently codified definition for the factors determining a suspect classification enables courts to interpret these criteria rather freely. This does not only lead to different interpretations of class categorizations, but it also complicates the case for social groups who are trying to achieve suspect class status.

The Court's incoherent line of argumentation becomes clear when looking at religion's status as suspect classification. Although there are groups that have been persecuted, politically disadvantaged and discriminated against,⁵¹ characterizing religion as an immutable trait seems at least problematic from a secular perspective. If religious affiliations were innate, converting to another religion or being an atheist would certainly not be possible since it contradicts one's essential character. Despite these apparent inconsistencies regarding the practice of constitutional interpretation and the flaws in reviewing cases involving religion with strict scrutiny while cases involving sexual orientation, dis/ability, or gender are not, sexual minorities are still imagined as wanting too much and the Constitution is imagined to be an impeccable tool of establishing equality. These affectively felt truths about legal-cultural connections make arguing for a transformation of constitutional protections even more difficult. The next subchapter sheds light on such legal-cultural imaginaries and their relevance for queer legal discourses.

51 An example for such a group would be the Puritans who immigrated to New England in the seventeenth century because they had been persecuted in England, see Davis "America's".

II.4. What Constitutes a Culture? – Constitutional Transformations and Changing Cultural Imaginaries

The previous subchapters have commented on the Constitution and the cultural narratives inscribed in it, on the Fourteenth Amendment with its Equal Protection Clause and suspect classification, and on the relationship between law and culture. As has been argued throughout this chapter, the Constitution codifies the cultural narrative of equality as well as the notion that there is a guaranteed access to justice for U.S. citizens. The concept of equality has been an important ingredient of cultural narratives surrounding and establishing what is now the United States of America. The faultiness in assuming that there is or ever has been something close to equal rights or a general sociocultural equality between U.S. Americans has already been laid out. What remains is to look more closely at cultural-constitutional imaginaries and the functions they serve.

The following observations illustrate that a) cultural-constitutional imaginaries in the U.S. are not static but rather constantly changing, b) they have been powerfully weaponized in current anti-queer laws, and c) they are not new phenomena but rather reemerging as indicated by former Court decisions about racial segregation. What is central here is the insight that law and rights discourses are not negotiated from neutral and objective positions but rather that subjective and affective positions are constitutive of law-making, judicial decisions, and individual responses to law. Thus, power and affect play an important role in how legal cultures imagine themselves and their subjects.

The first part of this subchapter introduces the concept of cultural *imaginaries* as contrasted to cultural *narratives* before defining it in more detail by drawing on Kathleen Lennon's work on imaginaries, Jacques Lacan's imaginary order, and Clifford Geertz's, Baruch Spinoza's, and Benedict Anderson's seminal works on law and culture, affect, and collective identity. After doing so, I go on to discuss what I identify as the most prominent, contemporary cultural-constitutional imaginaries in the U.S. This chapter explicitly focusses on cultural *imaginaries* concerning constitutional rights, and shows how the narrative of access to justice has been perverted in recent political developments to the extent of curtailing other envisaged cultural-constitutional pillars such as equality and liberty.

Following Kathleen Lennon's understanding of the imaginary, cultural-constitutional imaginaries are understood here as specific kinds of legal affects that function as "encounters with alternative imagined configurations

which can be recognized as making both cognitive *and* affective sense” (107; emphasis in original). While *imagination*, in the sense of a cognitive faculty, tends to be more interested in a distinction between the ‘real’ and the imagined object (Lennon 107; Iser 136), *imaginary* is closer to what psychoanalysts would consider “unconscious phantasy” (Whitford 53 qtd. in Lennon 109):

Freud believes that phantasy provided us with a mode of representation of ourselves, our biological processes, our relationship to the world and others which was not governed by truth and falsity, but by the demands of affect and emotion. What is important to recognize here is that the content of such phantasmatic representations, the images and patterns that make them up, are the *vehicles* whereby these emotions become constituted. The relation between the affect and the phantasy is not simply one of causality but one of constitution. ... For Freud these phantasmatic representations of the world remain unconscious. They do, however, have effects in our life, underpinning and often disrupting the judgments of the conscious and apparently rational ego: “[T]hese unconscious (mis)representations can coexist in the mind with the knowledge acquired at a later stage, providing an affective substratum which determines a person’s feelings (often unconscious) towards that later knowledge” (Whitford, 64). (Lennon 109; emphasis in original)

The ‘real’ in this understanding is not an objectively true, neutral condition but an affectively experienced and cognitively accepted one in the sense of “there being a real for us” (Lennon 111).⁵² Following Wolfgang Iser’s conceptualization, the imaginary is to be separated from processes which are more precise or aim to add precision. The imaginary is marked by its in-grasp-ability, its fluidity, and affectiveness:

In our ordinary experience, the imaginary tends to manifest itself in a somewhat diffuse manner, in fleeting impressions that defy our attempts to pin it down in a concrete stabilized form. The imaginary may suddenly flash before our mind’s eye, almost as an arbitrary apparition, only to disappear

52 The ‘real’ has different meanings in the various conceptualizations of what is imagined, real, and social. For instance, Lacan would consider the ‘real’ as connected to a pre-language state of need (see Lacan 93–100 for a thorough introduction of ‘The Mirror Stage;’ see also Lennon 110–11) while Iser labels the connection between the ‘real,’ the fictive, and the imaginary as a “triadic relationship” (3).

again or to dissolve into quite another form. “The peculiar quality of fantasy,” says Husserl, “is its self-will. And so ideally it distinguishes itself by its absolute arbitrariness.” (3)

The imaginary functions to guide the affective responses to the sociocultural conditions one encounters via an unconscious process of meaning-making and knowledge production. Lennon builds on the work by Jacques Lacan and Luce Irigaray to critique the former’s concept of imaginary as tied to “phantasy and illusion” (111) and to point out the latter’s understanding of imaginary as “structured by the symbolic as well as constituting its affective dimension” (113). For Lennon, Lacan, and Irigaray, the social world, or symbolic order, informs the imaginary and is influenced by it.

Making these perspectives fruitful for the concept of cultural-legal imaginaries, I take imaginaries to be responses to external circumstances which happen on an affective level before they cognitively evolve. This process happens in a pre-narrativized stage (mirroring Lacan’s pre-language stage of the imaginary order), which is only put into form by drawing on already available sociocultural scripts, tropes, and templates. I argue that before one cognitively accepts these imaginaries, – with cognitive acceptance being one of the important characteristics of Lennon’s imaginaries, – they have to go through a process of being checked against and compared with available cultural (and legal) narratives. Agreeing with Lacan’s conceptualization of the imaginary and the social order (54–57), what distinguishes the concept of cultural-legal imaginaries I outline from cultural narratives is the former’s lacking intersubjectivity. In this understanding, imaginaries possess a high degree of narrativity, i.e., “qualities that elicit thinking structures that help to explain [them] as ... narrative[s]” (Olson “Futures” 44), yet they have not been explained cognitively, have not been thoroughly narrativized, thus are not (yet) narratives. Imaginaries’ unconscious functioning is undoubtably influenced by the cultural narratives and norms individuals encounter in their sociocultural environment as well as the normativized structures and the constructions of reality which are formed by dominant views. Yet, narratives and imaginaries are not identical.

Imaginaries are less structured and narrativized since they are something the individual affectively experiences instead of cognitively tells oneself. The process of putting these affectively felt imaginaries into a tell-able and shareable form then happens via comparing them to already available cultural narratives and narrative structures. Only then, through this process of sociocultural and linguistic legitimation, can imaginaries become cogni-

tively accepted. Thus, cultural-legal imaginaries and cultural narratives are entwined and draw on each other. Yet imaginaries are more intuitively taken for granted as ‘objectively right’ without engaging with their origins, implications, and concrete meanings. I argue that the identified imaginaries in this subchapter work even more effectively on a political level because they are already unconsciously accepted before being cognitively processed.

The imaginaries analyzed here are ones that are affectively experienced and, in Lennon’s sense, establish something which is ‘real for us’ without needing to be based on observable realities. These ‘imagined configurations’ of the status quo may involve alternatives to established norms but also stereotypical, categorizable notions of ‘the’ legal subject. They differ from cultural narratives in that the former create something that does not (yet) exist in reality but is conceptualized or configured, – a template, – while the latter add meaning to something that may or may not have happened. Imaginaries have a more affective component and power than do narratives while their storytelling elements are missing. As Mazukatow and Binder observe with reference to Marcel Stoetzler and Nira Yuval-Davis, “the process of imagining does not only contribute to the stabilization of knowledge about society but it also belongs to the repertoire of critical practices aiming for change” (460).⁵³ Imaginaries then pick up and (re-)figure existing notions about sociocultural conditions. They function as modes of critique of established orders or to perpetuate fossilized notions of how something (or someone) should be. Imaginaries or the act of imagining can be seen as a specific form of knowledge production; they are not synonymous or related to legal fictions as used here.⁵⁴ Both cultural imaginaries and cultural narratives are culture-specific as Greta Olson points out with regard to cultural narratives of law (“Futures” 57).

Cultural narratives involve an aspect of intention and retrospect, of actively setting up a story to make sense of what has happened. Cultural imaginaries, on the other hand, are experienced more subconsciously and less rational as

53 The German original reads: “Somit trägt das Imaginieren nicht nur zur Stabilisierung eines Wissens um Gesellschaft bei, sondern gehört auch zum Repertoire kritischer, auf Veränderung zielender Praktiken.” My translation. See also Stoetzler and Yuval-Davis, “Standpoint Theory” 316: “on the one hand, imagination constructs its meanings while, on the other hand, it stretches and transcends them,” quoted in Mazukatow and Binder 460.

54 For more on legal fictions, see Hans Vaihinger, *Philosophie*. For a different understanding of the relation between legal imaginaries and legal fictions which draws on Wolfgang Iser’s theory of the real, the fictional, and the imaginary, see Künzel.

they allow for more *Leerstellen*, i.e., blank spaces which can be filled by the recipient's own associations, fears, hopes, and actions. Cultural narratives, in this sense, are semi-fictional accounts of how an event took place, and are meant to add causality and legitimacy to this event. Cultural imaginaries, likewise imagined facts about a culture and working as efficient cultural glue, are yet more fluid, less obvious. Both, however, are successfully used for political purposes, most prominently by right conservative politicians as this subchapter shows.⁵⁵

Drawing on Clifford Geertz's understanding of legal complexes, the cultural-constitutional imaginaries discussed here rather adhere to "the Western notion of 'right' (*Recht, droit*) than they [do] to that of 'law' (*Gesetz, loi*)" (*Knowledge* 187):

They center, that is, less around some sort of conception of "rule," "regulation," "injunction," or "decree" than around one, cloudier yet, of an inner connection, primal and unbreakable, between the "proper," "fitting," "appropriate," or "suitable" and the "real," "true," "genuine," or "veritable": between the "correct" of "correct behavior" and that of "correct understanding." (Geertz *Knowledge* 187)

'Right' and 'law' in Geertz' understanding differ in their affectively experienced intensity and their relation to norms. The notion of a 'primal and unbreakable' inner connection between what is perceived as right and what is real resembles Baruch Spinoza's affect as laid out in his seminal 1677 *The Ethics*. Spinoza rejects the dualism of affect and rationality, of body and mind and instead argues for an understanding which sees these spheres as interconnected. Aiming to understand affects, Spinoza's theory considers affect as a specific form of knowledge production, similar to the imaginaries discussed here.

Benedict Anderson's understanding of imaginaries takes into account how they function as identity-building devices among collectives, adding yet another affective layer. Referring to medieval sacred communities, Anderson states in his *Imagined Communities* that "[w]e are faced with a world in which the figuring of imagined reality was overwhelmingly visual and aural" (22–23). In today's U.S., figures of speech and image iconography have arguably replaced church windows and sermons, yet their approach to aim at the masses in a way that is "always personal and particular" (Anderson 23) still holds true

55 The use of imaginaries as emancipatory tool is discussed in more detail in Chapter V, which looks at ways of imagining and creating a queer legal future.

– maybe even more so in times of algorithmic personalization on the internet. Anderson's imaginaries thus function as sociocultural glue and hold political power, thereby almost becoming cultural symbols themselves as indicated by the cultural-constitutional imaginaries surrounding the Supreme Court.

Imaginary 1: The Congruence of the U.S. Supreme Court and the Constitution

The quasi-sacred notion of cultural symbols, what Robert Bellah described in 1967 as America's civil religion, can also be found with regard to the Supreme Court. While the U.S. Constitution is already considered a semi-sacred text in the American cultural imagination, the Supreme Court's task to guard its implementation becomes a holy endeavor itself, making the Court equally venerable. This close connection between the Court, an increasingly political institution as laid out in Chapter III, and the Constitution translates into a unity in the cultural imagination, which elevates the Court's authority from a legal to a cultural one. The closeness of the Court and the Constitution, and the corresponding imagined superiority of the judiciary has already been identified in the very beginnings of the United States. In 1788, Alexander Hamilton observed "[s]ome perplexity respecting the right of the courts to pronounce legislative acts void, because contrary to the constitution, has arisen from the imagination that the doctrine would imply a superiority of the judiciary to the legislative power" (474). However, refusing a critique of the Court because of this imagined unity is as misleading as it is dangerous for democratic structures:

Because traditional scholarship has tended to confuse the Constitution with judicial decisionmaking, it has imagined resistance to courts as a threat to the Constitution itself. This is a mistake. To criticize a judicial decision as betraying the Constitution is to speak from a normative identification *with* the Constitution. Citizens who invoke the Constitution to criticize courts associate the Constitution with understandings they find normatively compelling and believe to be binding on others. When citizens speak about their most passionately held commitments in the language of a shared constitutional tradition, they invigorate that tradition. In this way, even resistance to judicial interpretation can enhance the Constitution's democratic legitimacy. (Post and Siegel 375; emphasis in original)

Legal scholars Robert Post and Reva Siegel, who refute the imaginary that the Court and the Constitution are a quasi-sacred unity, frame critique of the judi-

ciary as strengthening the Constitution. This founding document and courts' decisions are separate sources of law, and a legal culture which fosters a critical engagement with the Court and its decisions is vital for maintaining its democratic structure.

Imaginary 2: Racialized Minorities Get Special and Unjust Treatment

While the Supreme Court and its relation to the Constitution are imagined as a unity, some imaginaries have only developed with the help of constitutional interpretation. Among the most significant cases which de-established racial segregation and dismissed discrimination based on one's race as unconstitutional, the Supreme Court landmark cases *Brown v. Board of Education* (1954), *Loving v. Virginia* (1967), and *Batson v. Kentucky* (1986) fueled the popular narrative that racial discrimination has been overcome, both culturally and legally. This narrative of a 'post-racial' or 'color-blind' society finds further 'proof' in the election of Barack Obama as the first Black president in 2008 and instances of heightened racialized minoritarian visibility in the media. These misconceptions of constitutional history add legitimacy to the cultural narrative of equality.

As U.S. American legal culture narrates itself as 'post-racist' and as having overcome distinctions based on skin color, race, and ethnicity, legal means to establish racial equality are perceived as unnecessary and unjust. Minority quotas such as in Affirmative Action programs are thus subject to imaginaries which frame historically oppressed minorities as receiving preferential treatment. This perverted understanding of race relations and equality goes on to imagine the White majority as the one that is oppressed and treated unfairly. In this understanding, minorities get, for instance, placements at universities based solely on their racial or ethnic background and not due to their achievements or skills.

The history of systematic racism illustrates the faultiness of this imaginary, as does the very idea behind minority protection. The abolition of slavery after the Civil War led to the amendment of the Constitution, namely to the passing of Amendments XIII, XIV, and XV, which promised the formerly enslaved more civil rights. Abolishing slavery, already contested by many states and not a uniform decision, was met with other forms of structural racism and attempts to uphold racial hierarchies, most notably with the Supreme Court decision *Plessy v. Ferguson* (1896). As discussed earlier, *Plessy* not only established the so-called 'separate-but-equal' doctrine and enforced racial segregation, it also circumvented the legal promise of gaining more

equality by subsequently establishing more laws which curtailed equal rights. Endeavors to tackle the constant backlash against minority rights are means to level out existing inequalities, which are far from being close to extinct. Using past Supreme Court decisions as light buoys in a sea of racial inequality overshadows the mass of contemporary discriminatory state bills, lower court decisions, and *de facto* practices of unfair treatment.

Imaginary 3: The Supreme Court Is Beyond Prejudice, as Is Contemporary Law

The decisions *Brown*, *Loving*, and *Batson* are considered all the more progressive and just because former legal and judicial attempts to establish racial equality have so obviously failed. While these decisions have undoubtedly been important in ending *de jure* segregation, conceiving of them as the cases which solved *de facto* racial tensions in the U.S. or even establishing a race blind society would be window dressing. Still, they serve as credentials for imagining the contemporary Supreme Court as beyond prejudice and impartially objective. This imaginary serves to narrate the U.S. as ‘post-racial,’ morally enlightened and an exceptional nation. Siegel describes this invisibilization of contemporary prejudice as follows:

We have demonized subordinating practices of the past to such a degree that condemning such practices may instead function to exonerate practices contested in the present, none of which looks so unremittingly “evil” by contrast. That which we retrospectively judge evil was once justified as reasonable. If we reconstruct the ground on which our predecessors justified subordinating practices of the past, we may be in a better position to evaluate contested practices in the present. (1113)

Siegel’s view that focusing on past decisions instead of addressing current inequalities supports the claim that legal considerations should incorporate deconstructing cultural concepts. Taking as an example bills which regulate trans youth access to school sports, which are increasingly popping up in states throughout the U.S., legal and activist responses to these attacks on LGBTQ+ youth should focus on questioning the cultural emphasis on gender identity in and outside the law. Following Siegel, reconstructing the grounds on which past courts have justified their anti-LGBTQ+ decisions may initiate processes of deconstructing and rethinking legal (over)regulation of sexuality, sexual orientation, and gender identity. This may be done by, for instance, question-

ing why the state has an interest in assigning its citizens gender identities, and by extension examining whether this practice is a legitimate intrusion in one's private sphere. Engaging in this analysis and critique of legal decisions also necessitates scrutinizing the cultural framework which attributes meaning to sexual categories in the first place. Without this cultural-legal work, anti-trans and anti-queer narratives will feed into cultural imaginaries about LGBTQ+ and reify stereotypical misconceptualizations.

In the context of sex and gender equality, one observes similar dynamics of taking constitutional rights gains as equivalent to accomplished emancipatory efforts. *Frontiero v. Richardson* (1973) resulted in considering sex a quasi-suspect classification although the Court could have also opted to consider it a suspect classification and thus could have made discrimination based on sex unconstitutional in all areas of life. *Craig v. Boren* (1976) resulted in considering gender a quasi-suspect classification, making discrimination based on gender less likely to be considered constitutional, and *Roe v. Wade* (1973) de-criminalized abortion.

These decisions serve as moral credentials used to assert an exceptional sexual order and to imagine an already emancipated and equal society in terms of sex and gender, a 'post-sexist' society in no need for heightened legal or constitutional protections for sexual minorities and women. *Frontiero*, *Craig* and *Roe* thus fuel the constitutional-legal imaginary that sex and gender equality has been accomplished while truly progressive and more emancipatory constitutional solutions have not been considered. Declaring sex a suspect classification in *Frontiero*, gender a suspect classification in *Craig*, and emphasizing women's rights as grounds on which to base de-criminalizing abortion⁵⁶ would have also been emancipatory for a cultural order which still evolves around sexual hierarchies.

In her essay "Sexueller Exzeptionalismus" (sexual exceptionalism), Gabriele Dietze convincingly characterizes progressive legal decisions as important tools in immigration discourses and in maintaining sexual hierarchies by claiming to have overcome supposedly outdated and backwards

56 Although *Roe* was concerned with the fundamental right to privacy (at 152), including women's right to bodily autonomy with regard to abortions (at 153), feminist scholars including Supreme Court Justice Ruth Bader Ginsburg have criticized the opinion as using paternalistic language and being focused on "the doctor's freedom to practice" (Ginsburg qtd. in Heagney), claiming "it wasn't woman-centered, it was physician-centered" (Ginsburg qtd. in Heagney).

conceptualizations of sex and gender binary systems. “Sexually exceptional” refers to the societies’ self-understanding with regard to sexual norms. To Dietze, sexually exceptional societies, typically within the global Northern hemisphere, understand their sexual order as outstandingly “progressive, privileged, and the best of all possible orders.”⁵⁷ This imagined superiority necessitates an imagined sexist, patriarchal, queerphobic, and thus inferior counterpart, mostly found in immigrant communities, Muslim, non-Western or ethnically Otherized countries.

In immigration discourses, ethno-sexist narratives serve to shield one’s borders against supposedly less ‘civilized’ groups of people, who would bring with them their misogynistic, anti-LGBTQ+, and un-enlightened ideologies.⁵⁸ Examples of using images of Otherized bodies bringing with them something undesired in anti-migration discourses can be observed throughout history,⁵⁹ from framing immigrants as carriers of disease (Allman 6; Latour 123) to recent instances of Donald Trump’s racist remarks about people who are immigrating to the U.S.⁶⁰ Relocating potential sexual and gendered violence to other countries serves to stress that one’s own sexual orders and hierarchies are better, in the sense of more civilized, mirroring a colonial logic of alleged superiority.

The imaginary of a system without prejudice also involves the notion of an exceptionally fair and anti-hierarchical legal system. In this context, the U.S.’s cultural narrative of equality serves as proof of a superior legal system which guarantees everyone the equal protection of the laws. One could argue that the constitutional principle of suspect classification undermines this narrative as

57 Dietze speaks of “die am meisten ‘fortgeschrittene’, ‘privilegierte’ und ‘beste’ aller denkbaren Sexualordnungen” (27). My translation.

58 For a more detailed examination of images and imaginaries of migration, see Dietze 41–45.

59 See in this context also the concept of homonationalism in the work of Jasbir Puar, most notably *Terrorist Assemblages*.

60 See Reilly quoting Trump: “When Mexico sends its people, they’re not sending their best. ... They’re not sending you. They’re sending people that have lots of problems, and they’re bringing those problems with us [sic]. They’re bringing drugs. They’re bringing crime. They’re rapists. And some, I assume, are good people.” By labeling people from Mexico as rapists, Trump works to construct an image of immigrants not as merely foreign and thus *potentially* dangerous but as hostile and thus *definitely* dangerous. Interestingly, Trump chose to use several images of crime climaxing in the worst imaginable one, *sexual* violence.

well as the idea of an apolitical and neutral Supreme Court by offering minorities a more thorough protection. In this reading, the discrepancy between an assumed equal treatment for everyone and systemic inequalities for many becomes visible.

Claims for legal reforms, constitutional interventions in the form of reviewing laws that are perceived to be sexist, and the acceptance of social movements fighting for these issues are therefore doubly burdened. For one, they have to legitimize themselves in a sociocultural environment which *narrates* itself as post-sexist, equally protecting, and superiorly civilized. Further, these efforts meet an environment which wants to *imagine* itself this way because such an imaginary functions as a political, ideological, and economic tool to justify isolationist and unequal(izing) politics. In this constellation, different cultural-constitutional imaginaries reinforce and beget one another. An imagined exceptional legal system, which guarantees equal protection of the law for everyone in society, and an imagined exceptional cultural order, which accepts and tolerates sexual minorities, render granting more rights, deconstructing sociocultural norms, and cultural-legal education superfluous for the legal system already protects everyone in the best possible way.

Imaginary 4: A Sense of Justice Is a Value Inherent to True Americans

Increasingly, the U.S. American legal system is becoming increasingly defined via its justices and judges. Taking former U.S. president Donald Trump as reference point, his rhetoric not only influenced cultural narratives by stabilizing sexual orders, it is also directly connected to cultural-constitutional imaginaries. Using the trope of Mexicans as dangerous and criminal during his election campaign in 2015, Trump's questioned the impartiality of federal judge Gonzalo P. Curiel, who presided over two lawsuits against Trump University (*Tarla Makaeff v. Trump University*; *Cohen v. Trump*). He insinuated that Curiel would not judge cases involving Trump fairly because as a Mexican, Curiel disapproves of Trump's plans to build a boarder to Mexico. By combining xenophobic assumptions and name discrimination (Curiel is not Mexican) with anger over being prosecuted, Trump used the prominent right-wing narrative of an imminent loss of entitlement to draw on the cultural narrative of inalienable rights, which has constantly been (re-)formed and applied.

This evolving Trumpian sense of law and justice, which affects not only the judiciary but the legal system in general, has also spread into other cultural realms. It takes its starting points in neoliberal notions of freedom and heteropatriarchal power structures and merges them with cultural anxieties

about imminent deprivation of economic, social, and power resources. The neoliberal notion of freedom as unchecked, unalienable fundamental right violently refuses any interference by the law (and those making or applying it), especially when minorities are granted more rights. In this logic, if the judiciary finds someone guilty, it is the judges' lack of partiality or knowledge, but never in line with existing law. One's legal affect, the *feeling* of being right, leads to the imaginary that the law is on one's side, and outweighs any actual legal provisions.

How this imaginary manifests becomes obvious by looking at Trump's speeches. In a December 2020 post-election rally, he talked about alleged voting fraud and called out to the courts by stating that "our legislatures [sic] and the United States Supreme Court will step forward and save our country" (Trump). The emphasis on the U.S. legal system mirrors notions of American Exceptionalism: Trump believes in its justice-yielding ability and its exceptional fairness based on his own feeling. Dragging legislators and the Court's justices into the political spotlight, Trump puts pressure on the democratic process. He supposes the *a priori* culpability of the enemy, i.e., the Democratic Party, without adhering to other legal principles such as due process, and he frames (in)justice as a matter of individual opinion (of the legislators and justices).

By calling on the legislative and the judiciary whenever a societal transformation is unwanted and expecting these branches to step in to correct this transformation, Trump transforms the narrative of unalienable rights into an imagined guaranteed legal protection for anyone who is American. Ironically, this understanding of 'anyone' is again as fragile as the Fourteenth Amendment's original meaning of 'any person.' It only addresses those who correspond to the Trumpian in-group and their preferred normative standards of being American, i.e., White, cis, able-bodied, heterosexual, non-immigrants. Despite these apparent exclusionary implications, the cultural-constitutional imaginary of guaranteed legal protection stresses the moral superiority of the Republican Party and the political far-right – and thereby forces others to respond to this affectively felt injustice done to others' voices and bodies.

What follows is an imagined entitlement of having one's own position represented in law. While cultural discourses become more politicized, which is apparent in contemporary notions of 'culture wars,' more emphasis is placed on courts, judicial decision-making processes, and legislators. Individualism, as an important American cultural value, and the emphasis of freedom of speech and personal liberty merge to bear a new fundamental belief: being

entitled to have one's feelings about justice legally represented. This neoliberal understanding of demarcating one's space is not implemented in the form of private property but in the form of legal feelings or feelings of justice. Using the concept of German legal scholar Rudolf von Jhering, one's own and valid *Rechtsgefühle* (28) pose a threat to legal and cultural pluralisms whenever these are situated in illiberal democracies or are not able to endure diversity and discrepancies.

Highly controversial events such as Justice Brett Kavanaugh's confirmation hearing, the unsuccessfulness of both the impeachment process of Trump and investigations about Russia's involvement in the 2016 elections have constantly shifted the confines of what is possible without being charged or prosecuted. Yet these events have not only diluted democratic structures, they have also inflated cultural understandings of justice and law.

The implicit promise for those in power, namely that there is someone, from 2016–2020 in the person of Donald Trump, who will protect one's interests and help one to get away with ever more violent demands for 'freedom' has shaped the imaginary that the U.S. American citizen's (as imagined by Republicans and right conservative actors) inherent legal affect of justice is more in line with the Constitution and fundamental values than are democratic institutions. Thus, these larger-than-law Americans are entitled to favor their *Rechtsgefühle* over existing, supposedly unjust legal orders. In order to survive and remain powerful, this entitlement proves insatiable. It has to be fed by continuous territorial gains, be it in the form of surprisingly audacious public statements or by pushing back on those who challenge this view. This development culminated in the pro-Trump mob attacking and vandalizing the U.S. Capitol in January 2021 after more formal attempts⁶¹ to secure this by now internalized entitlement had failed.

When challenged, now internalized demands to have one's *Rechtsgefühle* represented and accounted for step in and legitimize means, even violent ones, of self-empowerment and vigilantism. An important observation in this context of violent protests and attacks is that the governing law is not perceived as void, i.e., that one is indifferent to which laws are possibly broken, but that

61 Arguably, only the multiple law suits trying to demand a recount of the voting ballots after the 2020 election were formal. Other attempts were rather informal and illegal such as Trump's call to Georgia's Secretary of State, Brad Raffensperger, urging him to "find" votes in favor of the Republican Party.

breaking governing law is affective fuel which motivates those with hurt entitlements. Only by overstepping these boundaries, one has the feeling of redemption and making their conceptions of justice seen or heard.

Another instance is Florida Governor Ron DeSantis' reaction to Disney's critique of HB 1557, informally known as 'Don't Say Gay' bill. After initial refusal to comment on DeSantis' anti-LGBTQ+ bill, Disney, following protests by its workers, issued a statement on 28 March 2022 in which the company called "for this law to be repealed by the legislature or struck down in the courts" (@WaltDisneyCo). DeSantis condemned such an intervention and retaliated against Disney by revoking their special status in Florida.⁶² The bill, which DeSantis signed into law in April 2022, took away Disney's ability to self-govern its theme park, which Disney had held for 55 years. DeSantis' decision to tackle a company like Disney, one of the biggest employers in the state and arguably a proponent of traditional gender roles and heteronormative structures, illustrates how contested and affectively charged any kind of critique is.

Imaginary 5: American Life, Born and Unborn, Is in Severe Need of Being Saved

This imagined right to entitlement and vigilantism has by now found its way into codified law. State bills such as Texas' Senate Bill 8/House Bill 1515 ("Texas Heartbeat Act") as well as Texas Governor Gregg Abbott's February 2022 order which charges trans children's supportive parents with child abuse explicitly call on citizens to report those not abiding to existing law. Arguably the most vigilante U.S. state in the cultural imaginary, Texas is currently constructing these laws to target both the culturally undesired Other and those supporting them. The Texas Heartbeat Act states that "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child" (sec. 171.204), which typically develops six weeks into pregnancy. This regulation "does not apply if a physician believes a medical emergency exists" (sec. 171.205 a) or if the pregnancy resulted from rape or incest. However, Texas' law goes even further than this. The Heartbeat

62 DeSantis already warned against such an involvement by 'woke' companies in June 2021: "If you are in one of these corporations, if you're a woke CEO, you want to get involved in our legislative business, look, it's a free country ... But understand, if you do that, I'm fighting back against you. And I'm going to make sure that people understand your business practices, and anything I don't like about what you're doing" (qtd. in Contorno).

Act awards “any person, other than an officer or employee of a state or local governmental entity in this state” (sec. 171.208 a) who spies and reports those breaking the law with \$10,000. This incentive to enforce legal norms caters to the cultural imaginary of having the right to yield legislative and executive power and to the constitutional imaginary that one’s own legal affects need to be mirrored in law. As legal scholar Josh Blackman puts it, “[e]very citizen is now a private attorney general” (qtd. in Goodkind):

Politically, this move is particularly divisive because it undermines the democratic workings of the three governmental branches and strengthens the position of those in opposition to abortion. By enabling citizens to sue abortion clinics through reporting, governmental agencies are no longer the ones which initiate judicial persecution, which makes abortion providers unable to defend the constitutionality of their actions in court (Goodkind).

In a similar vein, Texas Governor Gregg Abbott issued an order in February 2022 which “imposes a duty on DFPS [Department of Family and Protective Services] to investigate the parents of a child who is subjected to [...] abusive gender-transitioning procedures, and other state agencies to investigate licensed facilities where such procedures may occur” (“February”). While the re-definition of what constitutes child abuse is part of the anti-LGBTQ+ agenda, Abbott’s order adds yet another layer of violence to the struggle for cultural and constitutional hegemonies. Quoting the “fundamental right to procreation” (“February” 6), the Attorney General of Texas, Ken Paxton, issued an opinion which fills the gap legislative attempts such as Texas SB 1646 have failed at: Paxton adds gender-reassignment surgeries as well as “administering, prescribing or dispensing” puberty blockers and hormones to children to chapter 261 of the Texas Family Code (2), which defines child abuse.

Issuing an order and an opinion, Abbott and Paxton bypass the democratic process of the legislative to avoid that their measures do not find a majority⁶³, and to invoke a constitutional foundation for their arguments. Again, the cultural imaginary of having a rxfight to entitlement factors into the constitutional imaginary of bending the Constitution to match one’s legal affects. Abbott’s order to have state agencies investigate those not complying with the law, which, as of April 2022, is being challenged in court and temporarily

63 For instance, SB 1646 has died in the senate.

blocked, resembles the Heartbeat Act's deputizing of Texans for policing abortion providers and receivers. In both instances, one witnesses a coupling of social control with institutional violence, entitled by the imaginary of having the right to have one's legal affects represented and enforced.

From a historical perspective, stressing the ideals of liberty, individualism, and self-determination amplifies when confronted with cultural anxieties about heteronomy. Fearing a return to an oppressing, centralized form of government, Reconstruction Era constitutional cases negotiated the role of former slaves within U.S. American society and the relationship between federal and state governments. Legal scholars and politicians utilized anxieties about lack of representation by merging them with anxieties about Otherness.⁶⁴ Pending deprivation of formerly enjoyed rights or feeling deprived of rights one feels entitled to has thus a history of being connected to anti-minority bias and politico-legal endeavors to challenge emancipatory reforms.⁶⁵

This cultural imaginary about justice and its connected idea about what law should do for whom also affects those on other sides of the political spectrum. Violently dismissing others' demands for justice while defending one's own entitlement to absoluteism leads to a disenchantment with politics and bears the risk of establishing violence as *modus operandi* and suspends democratic institutions from their authority.

Consequently, the imaginary of the omnipresence of enemies within, and entitlement to individual absoluteism stretch into legislative and judicial terrains and create a network of distrust and new entitlements. However, there seems to exist an overarching belief in an American Exceptionalism of justice, which makes one rely on and trust in the system's self-regulating forces. The Supreme Court functions as a main ingredient in this imaginary.

Trump worked to form the image of the Supreme Court as most important instance of authority. First, especially for younger generations, associations with the Court will evolve around Kavanaugh and Barrett, whom Trump both nominated. Even after his presidential term, these justices are thought of

64 See Millhiser "Troubled:" Former Supreme Court Justice and then lawyer John Archibald Campbell asked the Court whether "there [can] be any centralization more complete or any despotism less responsible than that of a State legislature concerning itself with dominating the avocations, pursuits and modes of labor of the population." While Campbell legally challenged the *Slaughterhouse Act*, his personal motivation to do so has been traced back to anger about "black participation in government."

65 Support for this analysis can be found in social psychology's deprivation theory, see Kite and Whitley 312–4.

as place holders for Trumpian politics and representatives of the Republican party's political impact. Should these justices fail to adhere to Trump's political beliefs, they will nonetheless be remembered as 'Trump justices' and thus may even be considered as proof of his political skill.

Additionally, both Kavanaugh's and Barrett's nominations show how the Supreme Court is being used as a site for negotiating the ability to exercise political power, an aspect which will be dealt with in more detail in Chapter III, and of shaping cultural imaginaries. Having a majority of justices on the bench who were nominated by Republicans makes a conservative Court very likely. This way, overturning liberal decisions (and fears of having those decisions overturned) become powerful and dangerous tools in shaping sociocultural realities and deepening bipartisan distrust. The constant antagonization of Republicans vs. Democrats has a real foundation because Court decisions have real-life consequences for U.S. Americans. Hence the over-politization of justices as either conservative or liberal denies them the opportunity to act as mediators between party politics in the U.S. American people's imaginary. Justices are depicted and imagined as static political actors and actresses, thereby reinforcing binary thinking about politics and imagining an identity politics which disregards ambiguity and decision-based judicial impartiality.

Thus, the Court is transformed into a gatekeeper for cultural identity and into a political arena. The subsequent pressure to satisfy every political demand of every side poses the danger of creating distrust in the judiciary and the entire legal system when demands are not met. As a consequence, cultural imaginaries about the Court pose the danger of working to de-legitimize the Court.

As seen by looking at cultural imaginaries in the context of racial politics, changing cultural imaginaries factor into constitutional transformations only when there are equally important political, ideological, and economic goals to achieve. On the other hand, constitutional transformations factor into changing cultural imaginaries quite differently. Landmark decisions that have shaped and altered existing notions of equality illustrate that constitutional transformations have a direct impact on American society's and culture's set-up and on how one perceives them. The power to form these imaginaries, and thereby potentially shed light on or mask sociocultural issues results in a morally, socially, and also politically heightened responsibility. In this understanding, one cannot but perceive of those holding this power as political actors. The next chapter sheds light on the polarization and politization of the Supreme Court as an institution and on the role the individual justices take on.

