

# New Directions

## **The Constitution of Interests: Institutionalism, CLS, and New Approaches to Sociolegal Studies**

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By way of introduction, I will provide some working definitions for a constitutive approach to law and will situate the project of developing this approach in the business of constituting an academic orientation. This Essay demonstrates the tensions between politics and epistemology in establishing an academic foundation for the public interest in law. First, I point to glimpses of the constitutive in early Critical Legal Studies (CLS), foundational considerations that comprise the roots of professional projects in and around the legal academy. Next, I discuss how these are nurtured in the ideological orientation of the Amherst Seminar and generously referenced in the

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attempt to build a conception of legal research under the heading "after the law." Finally, I note an antagonism between constitutivism and relativism and propose the need to "uncouple" constitutivism from what I term the appeal of a "decentered" legal research. The entire project moves from the constitution of interests to the sites where law engages with the social and material world. These are places where sometimes law is successful and sometimes it fails to constitute.

Whenever we speak of the Constitution, a noun form derived from the Latin *constituere*<sup>1</sup> is a part of our legal vocabulary. The law constitutes when it composes, constructs or forms something; that is, when it acts as a verb. For instance, the law of marriage constitutes the relation between a man and woman when they are husband and wife. The law of property constitutes the relations of landlord and tenant in the same sense that the "separation of powers" in the Constitution is essential to understanding American government. We know the marital relation as a legal one. Heterosexuals speak in the shadow of law when they say, "My husband did this," or "My wife did that." In these forms, one's lover is referred to in terms of a legal relation. Law here puts gay discourse on the defensive, as in the reference to "partner" or in other efforts to describe relations outside of the law. Thus law is linked with the constitutive process as a verb just as law is positively inseparable from the noun. Constitutive work in sociolegal scholarship looks at the way relations among people are formed by or with reference to law.

Although constitutive scholarship is associated with interpretation and discourse, with cultural and social phenomena, we should not presume its relativism or poststructuralism. Sometimes the constitutive enterprise appears to shy away from its Marxist roots either in an effort to become more acceptable to conservatives or simply to broaden its appeal, but the roots of the practice are in the material and social as foundations for the ideological sphere. The constitutive also refers to a level of legal relations that necessarily involves culture as well as law. This focus on culture is evident in recent treatments by cultural studies scholars of the executions of Ethel and Julius Rosenberg in the 1950s. When one views the executions in the context of 1950s America, the Cold War, and anti-semitism, law becomes one force among many that are responsible.<sup>2</sup> Recognition of the impor-

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1. Constitutive law is responsible, at least in part, for some aspects of social life.

2. See, e.g., MARJORIE GARBER & REBECCA L. WALKOWITZ, *SECRET AGENTS: THE ROSENBERG CASE, MCCARTHYISM AND FIFTIES AMERICA* (1995). The proposition, for Garber and Walkowitz, is that the place of Jews in 1950s America—and the meaning of the executions—could be symbolized in disputes over whether Jello was kosher. We would not want to say that Jello, in all respects, is linked to these or any other executions, but rather that our

tance of the way terms are used provides examples of constitutive theory in international relations<sup>3</sup> and administrative law,<sup>4</sup> but I am ultimately drawn to the critical tradition and some versions of interpretivism as sources.

Sociolegal scholars are creating a body of work under the rubric of a constitutive approach. To address this approach is to become familiar with Yale and with what people of the Yale Law School have been thinking, even before they arrived—in the case of Robert Gordon—or after they left, in the case of Catharine MacKinnon.<sup>5</sup> In this approach, Yale becomes not just a special place with bright people, but also a place in the configurations of power that give meaning to law.<sup>6</sup> If the struggles did not begin at Yale, they often flourished in its halls. One of my favorites is reproduced as the 1982 article *Fish v. Fiss*, a comment on Owen Fiss's article *Objectivity and Interpretation*, by the Milton scholar and now Duke literature professor Stanley Fish. After debating with Fiss the nature of authority in law, Fish concludes his essay with the following passage:

[I]t has been my argument that [the possibility of adjudication] is a consequence of being situated in a field of practice, of having passed through a professional initiation or course of training and become what the sociologists term a "competent member." Owen

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legal relations and our cultural relations overlap.

3. A traditional analogue to the constitutive in international law arises in determining the status of new states. "The constitutive theory contends that an entity does not become a state until other states recognize it as such . . . . [R]ecognition functions as the constitutive act, determining as a matter of law the entity's claim to the rights and obligations of statehood." Duncan B. Hollis, Note, *Accountability in Chechnya—Addressing Internal Matters with Legal and Political International Norms*, 36 B.C. L. REV. 793, 814 (1995). The emphasis here is on the practical side of diplomacy. The declarative view is more formal. It holds that entities do not need recognition to become states under international law. Rather, they may achieve this status "by possession of certain objective criteria" such as "a permanent population, a defined territory, a government, and the capacity to enter into relations with other states." *Id.* at 815. Thus, a state could have a claim to legal recognition if it met the standard criteria. In international law, according to Makau Wa Mutua, "the declaratory theory has prevailed over the constitutive theory." Makau Wa Mutua, *Why Redraw the Map of Africa: A Moral and Legal Inquiry*, 16 MICH. J. INT'L L. 1113, 1124-26 (1995). Constitutivism in international law places a premium on the nominative authority of established states while declarative law allows for independent action.

4. In administrative law, Richard B. Stewart gives us a notion of constitutive law as consisting "of rules that make legally recognized practices possible." Richard B. Stewart, *Beyond Delegation Doctrine*, 36 AM. U. L. REV. 323, 335-43 (1987). On this basis, he advocates a "reconstitutive law" as an approach to regulation that deregulated or reconfigured the relationship between the federal government, business, the states, and other interests. *See id.*; *see also* Richard B. Stewart, *Reconstitutive Law*, 46 MD. L. REV. 86 (1989).

5. Though MacKinnon has not paid explicit attention to the constitutive as an approach, she has led the way in positing a strong link between law and life. *See* Diane L. Brooks, *A Commentary on the Essence of Anti-Essentialism in Feminist Legal Theory*, 2 FEMINIST LEGAL STUD. 115 (1994).

6. Since my partner is in New York City, New Haven is a midpoint in my family life. Christine Harrington, Director of the Institute for Law and Society at New York University, and I work together in this field, and our collaboration is part of its story.

Fiss has undergone that training, but I have not; and, therefore, even though I believe that his account of adjudication is wrong and mine is right, anyone who is entering the legal process would be well-advised to consult Fiss rather than Fish.<sup>7</sup>

That story would not make sense in every law school because of the way academic legal authority is constituted.

When you believe, as Fish does and as I do, that power in law resides in fields of practice, it is important to speak of places and people as well as ideas. It is thus exciting to visit Yale, a place that is central to the constitution of legal practice in America. My presentation says something about the constitution of legal practice as well as about the academic project of describing how law is constituted. This is a story of academic projects as well as a story about legal ideas. I turn first to a fruitful tension between the politics of law and the ways we treat legal knowledge.

### I. POLITICS AND EPISTEMOLOGY

Constitutive approaches challenge the idealism of liberal law. Their challenge is one sense in which these approaches are critical. Politics and epistemology clashed in the period characterized by student activism, civil rights, and Vietnam in the 1960s. On reflection, it appears that some of the tension in the period was produced by the liberal conjunction of substantive political outcomes and widely accepted political institutions. Transformative politics required a new approach to legal phenomena that challenged the separation of law from society.

#### A. Academic Grounds for a Public Interest

The first instance of this challenge's receiving significant attention in political science began as an effort to ground public interest law in the academy. Stuart Scheingold, in *The Politics of Rights*,<sup>8</sup> gave symbolic meaning to instrumental uses of law like those by public interest lawyers. He went about as far as liberal theory could go toward transcending its reluctance to identify the sources of law. Scheingold built a politics out of "the myth of rights," the idea, common still, that the invocation of legal rights would lead to social transformation. He taught a generation of sociolegal scholars that, although activists could not depend on a declaration of rights from courts, they might still mobilize around the promise of rights, and in

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7. STANLEY FISH, *Fish v. Fiss*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* 120, 140 (1989) [hereinafter *DOING WHAT COMES NATURALLY*].

8. STUART SCHEINGOLD, *THE POLITICS OF RIGHTS* (1974).

their political mobilization realize what the courts were unable to provide. This was the "politics of rights" of the title.

Scheingold's work on the symbolic aspects of law transformed how we saw rights. We came to understand that they "condition perceptions, establish role expectations, provide standards of legitimacy, and account for the institutional patterns of American politics."<sup>9</sup> Rights strategies adapted into collective action were the symbolic dimension of law, and this dimension was a political resource. Here was a new way of understanding the work of the NAACP and the California Rural Legal Assistance lawyers. It captured the conventional heroics of legal aid lawyering during the period and taught us to see the role of those who mobilized around claims of right. Thus it made law part of the culture.

The genesis of this orientation was political activism and scientific inquiry. Academic social science was a powerful force that was altered in confrontation with the civil rights movement and Vietnam. Scheingold and others shifted the way American social science approached the study of law in order to incorporate its politics.<sup>10</sup> These efforts were incorporated with reference to social scientific issues and represented significant developments whereby engaged scholars were moved by the phenomena they studied to depict how law enters into and determines social relations.<sup>11</sup> The ideas about law held by activists are conventions, articles of faith, views about the world the activists take to be true. These ideas about law are constituted in social relations and they are significant parts of the legal order.

### *B. Glimpses of the Constitutive*

In February 1978, at the first CLS conference, Karl Klare drew on the work of E.P. Thompson and Douglas Hay, whose work in legal history sought to establish a place between the ideal and the real in

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9. *Id.* at xi.

10. As a response to civil unrest in American cities that began in the late 1960s and carried into the 1970s, Isaac Balbus sought to tie the use of law to the threat of violence in the inner cities. Balbus's *Dialectics of Legal Repression* elaborated the relationship between law and material life as a reflection of commodities in markets and linked American scholarship to work that had existed for some time in Europe. See ISAAC BALBUS, *THE DIALECTICS OF LEGAL REPRESSION* (1973); see also ZENON BANKOWSKI & GEOFF MUNGHAM, *IMAGES OF LAW* (1976); BERNARD EDELMAN, *OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW* (1979); Isaac Balbus, *Commodity Form and Legal Form: An Essay on the "Relative Autonomy" of the Law*, 112 L. & SOC'Y REV. 571 (1977).

11. The earliest national legislation laid the groundwork for continental expansion with provision for the sale of fee simple titles at public auction after surveys that created parcels of land that were uniform and highly marketable. In America, for example, law is accountable for wiping out a native culture during European settlement. See JOHN OPIE, *THE LAW OF THE LAND: TWO HUNDRED YEARS OF AMERICAN FARMLAND POLICY* (1989).

law.<sup>12</sup> Along with neo-Marxist theories of *praxis*, Klare addressed “the crisis in liberal legal theory” in an article titled *Law-making as Praxis*.<sup>13</sup> The article advocated “transcending the traditional view of law (and the state generally) as mere instruments, buttresses, or ‘retaining walls’ of class power, and being able to conceive of law and politics more broadly as forms of practice.”<sup>14</sup> Klare also drew attention to the ways law entered into “labor-management disputes, the character of education, the distribution of income, the allocation of social entitlements to the poor, [and] the nature of family life.”<sup>15</sup>

In calling for a “constitutive theory of law,” Klare sought “to free Marxism” from determinism and “the notion that law is a mere instrument of class power.”<sup>16</sup> Klare cited as examples his own work on the labor movement and the Black Acts, described by Douglas Hay.<sup>17</sup> In looking at law as constitutive rather than instrumental, according to Klare, “the initial theoretical operation is to free the Marxist theory of law from its determinist integument—i.e., the notion that law is a mere instrument of class power.”<sup>18</sup> Klare depicted the project as one that tries “to conceive the legal process as, at least in part, a manner in which class relationships are created and articulated, that is, to view lawmaking as a form of praxis.”<sup>19</sup> The project was shortlived because, within a few months, Klare had jettisoned the constitutive in favor of the CLS movement’s strategic return to Realism, and a period of homelessness for this theoretical orientation followed. But the seeds of a post-Realist Critical Legal Studies were sown in the peripheral questions that emerged along with the turn to Realism and the turn inward toward law school practice.

This interest in law’s social foundations also had roots in literary criticism, language philosophy, and hermeneutics. These disciplines were introduced into the legal community from a number of quarters, including by Owen Fiss in *Objectivity and Interpretation*,<sup>20</sup> an article that portrayed the interpretive work of the appellate judge as “neither a wholly discretionary nor a wholly mechanical activity,”<sup>21</sup> but as an interactive process that takes place within an “interpretive com-

12. See DOUGLAS HAY ET AL., *ALBION’S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGINS OF THE BLACK ACT* (1975).

13. Karl Klare, *Lawmaking as Praxis*, 40 *TELOS* 123 (1979).

14. *Id.* at 124-25.

15. *Id.* at 126.

16. *Id.* at 122.

17. See Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness*, 62 *MINN. L. REV.* 265 (1978).

18. Klare, *supra* note 13, at 128.

19. *Id.*

20. Owen Fiss, *Objectivity and Interpretation*, 34 *STAN. L. REV.* 739 (1982).

21. *Id.* at 739.

munity.”<sup>22</sup> The notion of such communities conveys the reality of a professional life. These communities constitute the social relations that underlie and maintain legal activity. The community in law is very well defined in comparison with other communities, such as those of literary criticism, and consequently it acts as a constraint upon individual lawyers and judges. But its participants comprise a large group engaged in a variety of tasks, and their place in the community is less clear than the official theories of law would have us believe. Law professors are participants in the legal community, and they approach its universes of meaning in a different fashion than do social scientists. Robert Cover exhorted his colleagues to tell tales, spin yarns, and create a legal order grounded in new practices.<sup>23</sup> The best law teachers send their students out to break through paradigms or, to appropriate an epistemological issue, intentionally to confuse “is” and “ought.”<sup>24</sup> Cover’s call was “to stop circumscribing the *nomos* . . . to invite new worlds.”<sup>25</sup> This is more difficult for those who operate outside the great law schools or do not have access to the appellate bench. The social life of the law makes some yarns particularly important. Thus, when we say that there are social foundations to law and office, we mean that the *nomos* is not completely up for grabs.

Not long after Klare’s statement, Robert Gordon offered what has become a foundational statement for constitutive work.<sup>26</sup> Gordon was responding, at least in part, to the critique of court-centeredness in CLS work by advocates of a “law and society” approach. He posited some trickle-down effects from the work of high court judges and their law clerks. According to Lucy Salyer, Gordon “elaborated the constitutive aspect of law most fully and explicitly.”<sup>27</sup> Writing about legal history in an article for the *Legal Studies Forum*, Salyer discusses “the constitutive nature of law,”<sup>28</sup> quoting Gordon extensively.

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22. *Id.* at 740. The notion of interpretive communities comes from Stanley Fish. See STANLEY FISH, *IS THERE A TEXT IN THIS CLASS?: THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1980).

23. See Robert M. Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4 (1983).

24. This idea was put very nicely in a comment by Martin Shapiro on equal protection for indigent defendants. See MARTIN SHAPIRO, *THE SUPREME COURT AND CONSTITUTIONAL RIGHTS* 209 (1967).

25. Cover, *supra* note 23, at 68.

26. See Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984).

27. Lucy Salyer, *The Constitutive Nature of Law in American History*, 15 LEGAL STUD. F. 61, 62 (1991).

28. *Id.* at 61.

[I]t is just about impossible to describe any set of basic social practices without describing the legal relations among the people involved—legal relations that don't simply condition how the people relate to each other but to an important extent define the constitutive terms of the relationship, relationships such as lord and peasant, master and slave, employer and employee, ratepayer and utility, and taxpayer and municipality.<sup>29</sup>

Gordon's approach derives in part from the work of J. Willard Hurst, who was the first to devote attention to the constitutive dimension of law and who provides the link between law, society, and Critical Legal Studies in Gordon's work.<sup>30</sup>

The key to Gordon's perspective is the anticipation of a relationship between the conceptual life of the community and the conceptual parameters of case law, statutes, and treatise literature—the “stuff” of the law school curriculum. In his justification for attending to “mandarin materials,” Gordon saw appellate litigation and legal scholarship as “an exceptionally refined and concentrated version of legal consciousness.”<sup>31</sup> The mandarin materials of elite legal thinking are said to illuminate the more ordinary forms of legal discourse. He pointed to research that found the basic elements of formal legal rules of property and contract internalized by laypeople and routinely applied in contexts remote from officials and courts.<sup>32</sup> According to Gordon, “field-level studies would reveal a lot of trickle-down effects—a lot of mandarin ideology reproduced in somewhat vulgarized forms.”<sup>33</sup> Legal scholars have long been confident that the structures familiar to lawyers support many of the ways ordinary people think about the world.<sup>34</sup>

The desire that has motivated this inquiry is for a constitutive perspective, a way of seeing law. To the extent that this perspective is not only shared by legal historians, but is also a way of understanding law, historians like Hurst are central to the project.

29. Gordon, *supra* note 26, at 102-03.

30. See J. WILLARD HURST, *LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH-CENTURY UNITED STATES* (1956).

31. Gordon, *supra* note 26, at 120.

32. See Lawrence Friedman & Stuart Macaulay, *Contract Law and Contract Teaching*, 1967 WIS. L. REV. 805.

33. Gordon, *supra* note 26, at 121.

34. The concept of free expression in America, for example, is often derived from talk about the First Amendment to the United States Constitution. Thus, movements as diverse as Women Against Pornography and the “Right to Life Movement” are constituted, at least in part, by law. Legal forms are evident in the language, purposes, and strategies of movement activity as “practices.” We don’t see code books or legal citations hanging cartoon-like in the air but when activists speak to one another in meetings, on picket lines, or by phone, their language consistently draws on legal ways of understanding or acting; practices of, about, or in opposition to the legal system.



Scholars of this nature include William Forbath, Gerald Frug, and Frank Michelman. Both Forbath and Frug give life to the political and social forces in law without making them the whole story. In the case of labor, Forbath holds law accountable for the bureaucratization and lack of militancy of postwar labor.<sup>35</sup> Frug's article, *The City as a Legal Concept*, contributes a vivid example of the constitutive role of law in the formation of the modern city.<sup>36</sup> According to Michelman, another legal academic who has contributed to the development of this approach, the constitutive refers to "normative givens that . . . underwrite a political process."<sup>37</sup> Some time ago, he suggested that one might look to the distinction between constitutionalism and pluralism where "pluralist politics . . . seem[] the negation of juris-generative politics."<sup>38</sup> It is this "jurisgenerative" quality that appears to motivate the student of constitutive law.

In all of this, the mainstream, Tocquevillian notion that law is so pervasive that political questions become legal ones is turned around to identify some places where legal rules and practices determine what becomes political, cultural, social, and physical.

## II. PROFESSIONAL PROJECTS

That law is affected by professional activity is a given; that it is constituted by professional projects is a less familiar idea. Organized interests, the bar, the law schools, and the judges constitute themselves around ways of understanding law. The following Part of this Essay looks at several professional projects that operate on the boundaries of law and social research and concludes with an examination of the persistence of positivism in social research and in conventional discourse.

### A. Sociolegal Efforts

The efforts we call "sociolegal" are grounded in the aspiration to say something that is true about the world, like the disparate impact of death sentences by race, or the unequal pay of women and men doing the same jobs. This Section discusses a number of different activities that count as professional projects in the sociolegal realm.<sup>39</sup>

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35. See WILLIAM E. FORBATH, *LAW AND THE SHAPING OF THE AMERICAN LABOR MOVEMENT* (1991).

36. See Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1059 (1980).

37. Frank Michelman, *Family Quarrel*, 17 CARDOZO L. REV. 1163, 1173 (1996).

38. Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1508 (1988).

39. These examples do not include all of those working in the area of constitutive studies. For example, there is a long tradition of constitutivism in criminology, some of which is summarized in the work of Dragan Milovanovic and Stuart Henry. See DRAGAN MILOVANOVIC & STUART HENRY, *CONSTITUTIVE CRIMINOLOGY AT WORK* (1998).

### 1. *From Ideology to "After the Law"*

Scholars working within the tradition of Legal Realism built the sociolegal movement in law. They wanted to see the impact of high court decisions on institutions like police departments or schools, and they sought to illuminate the activity in courthouses through studies of plea bargaining and alternative dispute resolution.<sup>40</sup> Their scholarship invariably revealed social truths set against legal forms. Fifteen years ago, their approach began to seem inadequate.<sup>41</sup> A new generation entered the academy, and the struggles of the 1960s were transformed into professional activities. Any successful academic movement or tradition needs to be institutionalized. Two important projects advanced the constitutive perspective between 1980 and 1995.

The first was the Amherst Seminar in Legal Process and Legal Ideology. The Seminar explored the intersection of politics and epistemology that significantly influenced the nature of sociolegal research. From 1980 to 1995, scholars met in Amherst and attempted to join the high aspirations of theory in political science with the more practical focus on courts. The seminar initially pursued ideology as a subject for sociolegal research. In the early 1980s, we believed sociolegal investigation of ideology to be possible. That is, we understood it not as false consciousness but as a structure of social relations. The pursuit of an ideology was challenging even around the edges of mainstream law and social science. Problems arose from the strong influences of a Marxist tradition that was not generally popular and was also very difficult to sell to an American working class due to its counterintuitive theoretical frame. Still, the project might have continued—and perhaps reached some sort of constitutive theorizing—were it not for the influence of academic agendas on the Seminar.

One detrimental influence, for instance, was premature exposure. As we were getting under way, the work of the Seminar became the subject of a study by David Trubek, called *Paradox, Program, or Pandora's Box*.<sup>42</sup> Our work was described as critical empiricism.<sup>43</sup> Trubek saw us as leftist positivists. This might have been sociological-

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40. See Felice Levine, *Goosebumps and the Search for Intelligent Life*, 24 L. & SOC'Y REV. 1, 7-33 (1990).

41. One of the critiques was offered with reference to the "gap" studies and the constraints of a pervasive positivism. See CHRISTINE B. HARRINGTON, *SHADOW JUSTICE: THE IDEOLOGY AND INSTITUTIONALIZATION OF ALTERNATIVES TO COURT* (1985). Another was with reference to the "interpretive turn" and an effort to incorporate cultural materials into law. See PAUL RABINOW, *ESSAYS ON THE ANTHROPOLOGY OF REASON* (1996).

42. David M. Trubek & John Esser, "Critical Empiricism" in *American Legal Studies: Paradox, Program, or Pandora's Box?*, 14 L. & SOC. INQUIRY 3 (1989).

43. See *id.* at 4.

ly true in that we came from both empirical and theoretical backgrounds. But the formulation fell short of our aspiration to transcend the polarities that designation entails. We were featured in the debates over what Law and Society should be before we had a chance to develop a coherent way of approaching law in society. Seminar members Christine Harrington and Barbara Yngvesson wrote a response to Trubek that they called *Interpretive Sociolegal Research*.<sup>44</sup> Harrington and Yngvesson demurred to the labels in the effort to avoid “domestication,” in which conventional order is imposed on something that is emerging.<sup>45</sup> They called attention to an ongoing instrumentalism in which politics continued to exist as an agent for social research. But that research did little more than what good left-wing scholarship had always done—reveal political oppression rather than focus on the level at which power relations are constituted.

At the same time, the Seminar was being undercut by the increasing stature of its members and the consequent reduction in effort on the ideological project. Many competing projects were flourishing. Professor Harrington and I began a book series with the intention of developing a platform for constitutive work. We said we were focusing “on the law IN society, shifting attention away from the postwar framework which conceptualized law outside of society only to discover its political character.”<sup>46</sup> We wanted to “go beyond the truism that law is political and begin to examine the ways in which law constitutes social relations.”<sup>47</sup> We wanted to “challenge the conventional idea that law simply referees contests of interest.”<sup>48</sup> We listed three likely areas of work: social movements, institutions and institutional change, and professional communities.<sup>49</sup> We expected that work on social movements that addressed the dynamism of civil rights, labor, or the women’s movement would necessarily attend to the relationship between ideas and social life that lies at the heart of the constitutive enterprise. Institutions had, at the time, become a battleground for postpositivist scholarship, and we anticipated that fascination with cultural phenomena would expand the sociological attention institutions would receive. In the last of these sources, we saw professional communities as places that inevitably combine ideas and social practice. We anticipated that they would be important

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44. See Christine B. Harrington & Barbara Yngvesson, *Interpretive Sociolegal Research*, 15 L. & SOC. INQUIRY 135 (1990).

45. See *id.* at 135.

46. Flyer, AFTER THE LAW (1990) (flyer describing this book series).

47. *Id.*

48. *Id.*

49. See *id.*

battlegrounds because they police the activities of public intellectuals as well as provide them material support.

## 2. *Social Research on Institutions*

While the success of the Amherst Seminar and the book series fluctuated, work in political science made institutions a new focus of research. Rogers Smith's article, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*,<sup>50</sup> self-consciously posed a new professional project for political science and advocated building the study of law outside the law school. In *The Cult of the Court*,<sup>51</sup> I had attempted to do something similar. Following social science work by Walter Murphy and Alan Westin, the Court had become a fit subject for this type of study by the late 1970s.<sup>52</sup> I see the New Institutionalism as a form of constitutive law.<sup>53</sup> Whereas the professions had circumvented institutions with alternative frameworks, institutions like the Supreme Court and aspects of it, like the majority opinion, remained to be investigated.<sup>54</sup>

We associate institutions with their physical manifestations. In law, the bench, the robes, and the marbled walls signify that judicial activity is important. We know that these "things" are not just physical, but we treat the physical presence as the institution. Although the Court had makeshift quarters until 1935, we lost track of the past in favor of the "Beetles in the Temple of Karnak."<sup>55</sup>

50. Rogers Smith, *Political Jurisprudence, the "New Institutionalism," and the Future of Public Law*, 82 AM. POL. SCI. REV. 89 (1988).

51. JOHN BRIGHAM, *THE CULT OF THE COURT* (1987). The following discussion of the Supreme Court and the Constitution is drawn from this effort.

52. In English, the idea of an "institution" has evolved from the act of "instituting," giving form or order to a thing. To "institute" was once simply something that could be done. By the time the American Republic was founded, the word referred to "an established organization for the promotion of some object." See OXFORD ENGLISH DICTIONARY 1046 (2d ed. 1989). We now speak of a university as an institution. Yet we have lost track of what it means for an institution to give form or order to our politics. Institutions are constituted in possible forms of action. The process of giving form exists even if no one sees it. Around 1400, Sir John Fortescue used the word to denote an activity. See *id.* Machiavelli looked to institutional arrangements as the key to politics much as Montesquieu would some years later. See *id.* By 1551, the concept was used by Thomas More in his *Utopia* as "an established law, custom, usage, practice, organization or other element in the political or social life of a people." *Id.* at 1047.

53. This important intervention appears to have been appropriated by scholars for whom the institution is simply coded as a variable, as opposed to the work of Lee Epstein and Joseph Kolbyka, who give institutions a social life. See LEE EPSTEIN & JOSEPH KOLBYKA, *THE SUPREME COURT AND LEGAL CHANGE: ABORTION AND THE DEATH PENALTY* (1992).

54. Disputes take place concerning such institutions, and politics revolves around them. Ordinary political understanding of institutions presents a challenge simply because the understanding is ordinary. We might debate the actions of a particular Supreme Court or the wit of a particular President, but we accept and find it hard to investigate the fact that there is a president of the United States or the fact that the Justices of the Supreme Court go to a particular building to work. These practices, though they are of course historically contingent, constitute conventional limits on action.

55. The new building was more elaborate than many Justices believed to be appropriate for

Sometimes an institution is quite animated, as when a voice on the other end of the telephone says, "Supreme Court, may I help you?" A Justice may speak for "the Court" or the Chief may lend his name to the institution, as in the Marshall, the Taney, the Warren, or the Burger Court.<sup>56</sup> These names suggest a human quality and reflect a political view of the institution. Institutions are able to transcend changes in membership. In classical philosophy, this quality accords an institution a "naturalness."<sup>57</sup> In this sense an institution is identifiable across time in ways that rivers are across diverse terrain. The Supreme Court is said to have decided *Brown v. Board of Education*,<sup>58</sup> *Regents of the University of California v. Bakke*,<sup>59</sup> and *Adarand Constructors, Inc. v. Peña*.<sup>60</sup> Here, the institution mediates policy shifts in the meaning and relevant context for interpreting another "continuous" institution: the Constitution of the United States.

Portrayal of an institution from a constitutive perspective requires a leap from the common sense concreteness evident in buildings and artifacts like robes and purple curtains to the shared perceptions that tell us what these things mean. New Dealers saw "nine old men." Their efforts to transform the institution were met by "lions under the throne."<sup>61</sup> Some saw the Warren Court as a trumpet that responded to the calls of convicts like Clarence Earl Gideon.<sup>62</sup> Such characterizations are not simply rhetorical flourish; they reflect public perceptions. Students of the Supreme Court and the Constitution have been generally more resistant to the drift away from the formal institutions of social life than most social scientists. Although this often means an insensitivity to the enterprise of social research, resistance to social science has sometimes led to self-consciousness about the objects and methods of study. Judicial behavioralists, in their prime from the early 1950s until the late 1960s, charted judicial attitudes in their research and taught case law in their classrooms.<sup>63</sup> While the framework has been political, teaching about the Court and

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the Court.

56. See DAVID M. O'BRIEN, *STORM CENTER* 56-129 (1996); JOSEPH VINING, *THE AUTHORITATIVE AND THE AUTHORITARIAN* 110-32 (1986).

57. This characteristic of institutions suggested to Aristotle the analogy to rivers and fountains that have a "constant identity" even as the flow changes the composition of the thing. ERNEST BARKER, *THE POLITICS OF ARISTOTLE* 99 (1962).

58. 347 U.S. 483 (1954).

59. 438 U.S. 265 (1978).

60. 515 U.S. 200 (1995).

61. CHARLES P. CURTIS, *LIONS UNDER THE THRONE* (1947).

62. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964).

63. See, e.g., *JUDICIAL CONFLICT AND CONSENSUS: BEHAVIORAL STUDIES OF AMERICAN APPELLATE COURTS* (Sheldon Goldman & Charles M. Lamb eds., 1986).

Constitution has been largely doctrinal. Institutional materials remain important for Court scholars to a degree unimaginable to students of voting behavior. Official reports also remain in the picture even while their significance is undercut. This makes it difficult to produce a scientific model of courts.

While most traditional political research has viewed institutions as inevitable, other work has been stimulated by interest in change and transformation.<sup>64</sup> Philip Selznick drew from the Constitution, which he considered an institution to the extent that "social and cultural conditions (class structure, traditional patterns of loyalty, and the like) affect its viability."<sup>65</sup> Stability, for Selznick, rested on "a secure source of support, an easy channel of communication."<sup>66</sup> More recently, Michael McCann has developed this perspective with reference to the movement for comparable worth.<sup>67</sup> An institution, in formulations like these that consider stability, is a social construction that has become "infused with value"<sup>68</sup> and is prized "beyond its technical role."<sup>69</sup> Thus a seemingly natural quality appears in valuations or expectations.

Some scholarship on the Supreme Court has addressed the relationship between conventional practice and institution. The work of John Schmidhauser<sup>70</sup> harks back to Felix Frankfurter and James Landis, who linked the business of the Court with institutional developments and portrayed jurisdictional shifts as affecting the work and status of the institution.<sup>71</sup> Generally, social scientists leave the quality of the institution unexplored. Traditional treatments do little more than describe conventional practice, reinforcing the perception that the institution is simply there. When Stephen Wasby discusses judicial review, he loses his critical instinct, turning to Justice Cardozo for authority.<sup>72</sup> The consequence is a pronouncement that "judicial review has become fully established."<sup>73</sup> Lawrence Baum, writing on judicial review, indicated that John Marshall *asserted* the power in

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64. See, e.g., PHILIP SELZNICK, *LEADERSHIP IN ADMINISTRATION: A SOCIOLOGICAL INTERPRETATION* (1957).

65. *Id.* at 6.

66. *Id.* at 7.

67. See MICHAEL MCCANN, *RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION* (1994).

68. *Id.* at 7.

69. *Id.* at 300.

70. See JOHN SCHMIDHAUSER, *THE SUPREME COURT: ITS POLITICS, PERSONALITIES, AND PROCEDURES* (1960).

71. See FELIX FRANKFURTER & JAMES LANDIS, *THE BUSINESS OF THE SUPREME COURT* (1928).

72. See STEPHEN WASBY, *THE SUPREME COURT IN THE FEDERAL JUDICIAL SYSTEM* 59-64 (2d ed. 1984).

73. *Id.* at 6.

1803, that it survived the contest over slavery fifty years later, and that it has been employed, on the average, once every two years.<sup>74</sup> We see historical moments in the institutional life of judicial review, but not enough about how the institution has changed with that monumental development. Social research does not provide a basis for understanding the grounds on which institutional power rests, and neither Baum nor Wasby provides a framework for putting the idea, normative considerations, or the politics together in an institutional frame.

The idea of practice captures cultural representations and incorporates social relations. Practices give meaning to the steps that lead to the Supreme Court. They make particular steps in Washington the significant steps, not the ones to any old (state) supreme court. They give meaning to a signature or a name when it is appended to an "opinion." Institutions are not simply robes and marble, nor are they contained solely in codes or documents. Meaningful action makes institutions. John Rawls, the theorist of justice, viewed an institution as "an abstract object" realized "in . . . thought and conduct."<sup>75</sup> For Rawls, practices that belong together comprise institutions. Some actions rely on physical spaces for their meaning, like the steps of the Court that give meaning to a lawyer and client ascending or a newscaster reporting. Other actions, like signing a name, gain special significance from the practices that associate a judicial signature with an opinion. A vote is an intentional action, "the vote" a democratic institution. In the Supreme Court, the meaning of a vote comes from the practices in that setting.<sup>76</sup> In the *Bakke* case, Justice Powell's holding that an aspiring white person should be admitted to medical school is steeped in the traditions of constitutional discourse.<sup>77</sup> The importance of Powell's contribution, which opened the doors to Alan Bakke and suggested that it was appropriate to take race into account in admissions decisions, is a consequence of its institutional status as a holding of the Court. Nobody joined him entirely, but as a matter of institutional practice, his opinion spoke for the Court.<sup>78</sup>

The various kinds of practices in an institution are strategies, conventions, and constitutive or "institutional" practices. These depend on the relationship that a practice has to the institution.

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74. See LAWRENCE BAUM, *THE SUPREME COURT* 22 (1995).

75. JOHN RAWLS, *A THEORY OF JUSTICE* 11 (1971).

76. See Charles Taylor, *Interpretation and the Sciences of Man*, 25 *REV. METAPHYSICS* 8 (1971) (encouraging social scientists to interpret basic institutional practices, such as the vote, in order to place them in the larger social context).

77. See *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

78. The other Justices split, four holding that Bakke had been discriminated against, and four holding that he had not, leaving Powell the swing vote. See *id.*

*Strategies* are adopted by those who use an institution and suggest how to “take advantage of the institution for particular purposes.”<sup>79</sup> A strategy is not essential to the nature of the institution. For example, issuing opinions on various days or circulating drafts of opinions are strategies that are part of the political life in the Supreme Court, but they do not determine the nature of the institution.<sup>80</sup> Over time, an opinion supported by the majority of the Justices came, as a matter of *convention*, to be understood as the Court’s opinion. Conventions are ways of doing things that people associate with the institution. Conventions are not ways to get something done simply because they have status connected to the life of the institution. Conventions like the majority opinion become associated with the institution. Practices of this sort inhabit a political terrain. With dissents common again, the institution may be returning to the practice of seriatim opinions.<sup>81</sup> But, with a long tradition of one opinion for the majority,<sup>82</sup> individual holdings are usually seen in terms of the majority. Conventions, however, do not determine what an institution is.

I call practices that become “constitutive” of the institution *institutional practices*. The Court is now associated with politics as a matter of institutional practice. Ever since C. Herman Pritchett introduced the analysis of dissents and constructed “blocs” of judges in *The Roosevelt Court*,<sup>83</sup> the culture has moved toward an incorporation of politics into its picture of the Court. Every day, a political institution is represented in articles like those by Linda Greenhouse.<sup>84</sup> These stories take their spirit from politics. At the end of the term in 1995, the decisions of Rehnquist, Scalia, and Thomas were noted in terms of their political message and compared with the relative weakness of the traditional swing votes in cases decided during that term. Without the practice of seeing politics in the institution, the Court certainly would still exist, but not as we understand it today. The link between the Court and the legal profession, evident in the practice of appointing lawyers to the bench, also has become constitutive. And among the most important constitutive practices is institutional authority to interpret the Constitution.

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79. RAWLS, *supra* note 75, at 56.

80. See WALTER MURPHY, *ELEMENTS OF JUDICIAL STRATEGY* (1964).

81. See BRIGHAM, *supra* note 51, at 187.

82. See *id.* at 20.

83. See C. HERMAN PRITCHETT, *THE ROOSEVELT COURT: A STUDY IN JUDICIAL POLITICS AND VALUES* (1948).

84. See, e.g., Linda Greenhouse, *Gavel Rousers; Farewell to the Old Order of the Court*, N.Y. TIMES, July 2, 1995, at D1.



Distinguishing among the various kinds of practices is difficult. This is especially true when it comes to distinguishing between conventions and constitutive practices. The extent to which a practice constitutes the Court is a matter of interpretation. For instance, the assertion of judicial review by John Marshall in *Marbury v. Madison*<sup>85</sup> reiterated a possibility that had been mentioned by others, most notably by Hamilton in *Federalist Nos. 78 and 81*,<sup>86</sup> but it certainly was not conventional, much less constitutive of the institution at that time.<sup>87</sup> Marshall articulated the possibility for the Supreme Court, introducing it into the institutional setting. The basis for such a claim was in Blackstone's *Commentaries*, *The Federalist Papers*, and in the fact of a written constitution.<sup>88</sup> By the late nineteenth century, Americans knew judicial review as something the Supreme Court did.

In the struggle over authority to interpret the Constitution precipitated by the split between the Court and the President over the New Deal, the authority of the Court over the Constitution became a matter of debate. The publication in 1938 of Edward Corwin's *Court over Constitution*<sup>89</sup> is a benchmark indicating the shift from the then-"outmoded" doctrine of formal or static constitutionalism to the living constitutionalism of political jurisprudence or legal realism. From this statement, a new myth of judicial power emerges. This view of the Supreme Court even treats the failure of Roosevelt's plan to pack the Court as due to the "switch in time that saved nine."<sup>90</sup> With a judicial review grounded in political jurisprudence as constitutive of the Supreme Court, the consequence is not only a political Court but a political Constitution. Marshall's suggestion that Justices draw authority from the Constitution has been turned on its head. Now it is a common practice to know the Constitution through the Supreme Court.

This view of institutions as bodies of practices implies that there are communities that understand the practices and operate according to them. An institution like the Supreme Court is constituted by the communities familiar with it, groups or even entire societies where the practices are accepted. We say of a legal text, or a court as an

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85. 5 U.S. (1 Cranch) 137 (1803).

86. THE FEDERALIST NOS. 78, 81 (Alexander Hamilton).

87. For scholarly treatments of this point, see, for example, EDWARD S. CORWIN, *COURT OVER CONSTITUTION: A STUDY OF JUDICIAL REVIEW AS AN INSTRUMENT OF POPULAR GOVERNMENT* (1938); and RICHARD E. ELLIS, *THE JEFFERSONIAN CRISIS: COURTS AND POLITICS IN THE YOUNG REPUBLIC* (1971). This proposal has largely dropped from general view.

88. See EDWARD S. CORWIN, *THE "HIGHER LAW" BACKGROUNDS OF AMERICAN CONSTITUTIONAL LAW* 5 (1928) (citing Blackstone).

89. CORWIN, *supra* note 87.

90. O'BRIEN, *supra* note 56, at 82.

institution, that its social foundation is the group or community that can interpret the text or understand the court. Legal doctrine has been seen for some time as an ideological activity,<sup>91</sup> but its social foundations have been ignored while courts have been so pervasively understood in terms of action that their ideological qualities have been missed. An investigation into the practices making up an institution makes a special sociolegal contribution by identifying the ways of operating and the social relations that give the elements of law and office their significance. Their social base makes these practices a foundation for a legitimate science of society.<sup>92</sup>

Social relations and group life enforce the dictates of sensible communication. These social forces are often missed by interpretivists. One of the interesting things about the often discussed case of *INS v. Chadha*,<sup>93</sup> in which the Supreme Court declared the legislative veto unconstitutional, is that the Court's decision on the Constitution had relatively little effect on congressional practice, since Congress, operating from its own institutional setting, continued to rely on veto provisions in its legislation.<sup>94</sup> Neither text nor constitutional logic ultimately determines the social meaning of fundamental law; it is the practices of those who matter.<sup>95</sup> In this case, those who matter are members of Congress.

### 3. *Constitutive Sociolegal Studies*

Realism distorts the relationship between law and politics. Looking at New York City's Lower East Side, Diana Gordon and I tried to develop a perspective on Realism by examining the forms of law in grassroots politics and their interaction with economic and cultural forces that shape the neighborhood.<sup>96</sup> If law and political institutions are seen only instrumentally, either as benefits to be acquired or as processes to be used, political activity will be affected only superficially by the law. Yet we found the rule of law, specific laws, and legal institutions to be major influences on politics.<sup>97</sup> We challenged those who would place law in the background of politics and fail to note its consequences. Derrick Bell,<sup>98</sup> William E. Forbath,<sup>99</sup> and Catharine

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91. See Alan Hunt, *The Ideology of Law*, 19 L. & SOC'Y REV. 11 (1985).

92. See EDMOND HUSSERL, PHENOMENOLOGY AND THE CRISIS OF PHILOSOPHY 189 (1965).

93. 462 U.S. 919 (1983).

94. See Louis Fisher, *Constitutional Interpretation by Members of Congress*, 63 N.C. L. REV. 707 (1985).

95. See PETER GOODRICH, *READING THE LAW* 19 (1986).

96. See John Brigham & Diana Gordon, *Law in Politics: Struggles Over Property and Public Space on New York City's Lower East Side*, 21 L. & SOC. INQUIRY 265 (1996).

97. See JOHN BRIGHAM, *PROPERTY AND THE POLITICS OF ENTITLEMENT* 183 (1990); Smith, *supra* note 50, at 89-108.

98. See DERRICK BELL, *AND WE ARE NOT SAVED* (1987).

99. See William E. Forbath, *Courts, Constitutions, and Labor Politics in England and*

MacKinnon<sup>100</sup> have addressed these consequences in the areas of race, labor, and gender.

In an article, *Rights, Rage and Remedy: Forms of Law in Movement Practice*,<sup>101</sup> I discussed three forms of law. The first, the classic assertion of a legal right, constitutes movement practice by situating the politics of some movements, such as the gay rights or civil rights movements, in a hopeful relation to the State. The remedial form of law, evident in the Alternative Dispute Resolution movements, articulates a critique of legal forms but appears to be advocated by people who are either part of the legal system or find a place close by. Rage is a form of law that stands opposed to Right in that it manifests a lack of faith in the mobilization of law and social relations that stand apart as well. It is law in this form that characterizes the antipornography movement.

That law has a life beyond courts and lawyers is a message of some recent constitutive work. Professor Helena Silverstein, writing about the animal rights movement, documents the shift from compassion to rights, where rights are formed in a new way. Her book *Unleashing Rights* helps to explain the constitutive approach to law.<sup>102</sup> Silverstein gives us a valuable account of what it means to see law as constituting the animal rights movement. She links her approach to law in society. Her framework takes seriously the notions that law is not just influenced by society (as in the power of movements to change the law), and that society is not simply a receiver of law (as in the impact of high court decisions on police practices). The point of this book is that law has a life beyond courts and lawyer's offices. For animal rights activists, the rights strategies undertaken in the interest of recognizing animals as an oppressed group embody the law in society. The strategies emerge out of concern for animal welfare, or as Silverstein puts it, "from the discourse of compassion."<sup>103</sup> She sees intellectuals like Peter Singer as influential in the shift from compassion to rights.<sup>104</sup> Calls for "animal liberation" in the 1970s evolved into the "animal rights movement" in the 1980s.<sup>105</sup> In chapters such as *The Political Deployment of Rights* and *Rights*

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*America: A Study of the Constitutive Power of Law*, 16 L. & SOC. INQUIRY 1 (1991).

100. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter *FEMINISM UNMODIFIED*].

101. John Brigham, *Rights, Rage and Remedy: Forms of Law in Movement Practice*, 2 *STUD. IN AM. POL. DEV.* 303 (1987).

102. See HELENA SILVERSTEIN, *UNLEASHING RIGHTS: LAW, MEANING, AND THE ANIMAL RIGHTS MOVEMENT* (1996).

103. *Id.* at 28.

104. See *id.*

105. See *id.* at 33. Silverstein establishes the movement's links to other struggles against oppression and explains the strategic parallels between "speciesism" and racism.

*Strategically Understood*, Silverstein draws on traditional jurisprudence, Critical Legal Studies, and the sociology of law to show what it has meant for animal advocates to turn to rights. Her findings run counter to conventional academic wisdom, wherein rights are presumed to stem from individualistic rather than communitarian perspectives. Here, Silverstein sees the animal rights movement as communicating “the values of sentience, caring, relationship, responsibility, and community.”<sup>106</sup> She suggests that animal rights activists have shifted the basis of rights from rationality to sentience, and she explains this shift through an examination of movement literature.<sup>107</sup>

### *B. The Not-so-puzzling Persistence of Positivism*

Traditional forces push against the constitutive project in defense of traditional views of space and social relations. From both empirical and normative directions,<sup>108</sup> positivism in scholarship about law and politics persists in spite of the existence of constitutive currents in the professional literature. Contemporary examples are David O’Brien’s *Storm Center*<sup>109</sup> and Jeffrey Segal and Harold Spaeth’s, *The Supreme Court and the Attitudinal Model*.<sup>110</sup> This work has been widely discussed, and its reception indicates continued enthusiasm for the positivist paradigm. The prominence of this kind of work suggests the continuing need to advocate for the constitutive perspective on law.

Three decades ago, political scientist Martin Shapiro helped to establish the proposition that judges’ decisions reflect political considerations.<sup>111</sup> From this perspective, legal precedent is manipulated by judicial interests. Politics are evident in the expression of opinion and can be measured by dissents. In the social sciences, this work is associated with the “behavioral” revolution that evaluated the attitudes of judges against a background of legal form. Insights about the political orientations of the judges became commonplace in journalism, history, and political science and reinforced the picture of

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106. *Id.* at 55.

107. Other work I would identify within this framework includes KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY* (1988); ALAN HUNT, *EXPLORATIONS IN LAW AND SOCIETY* (1993); MILOVANOVIC & HENRY, *supra* note 39; Rosemary Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, 6 CAN. J.L. & JURISPRUDENCE 249 (1993); and Efren Rivera-Ramos, *The Legal Construction of American Colonialism: The Insular Cases (1901-1922)*, 65 REVISTA JURIDICA UNIVERSIDAD DE PUERTO RICO 2 (1996).

108. See Roberto Alejandro, *Reflection on Connolly’s Postmodern Liberalism*, Paper presented at the Northeastern Political Science Association Annual Conference (1996).

109. O’BRIEN, *supra* note 56.

110. JEFFREY A. SEGAL & HAROLD J. SPAETH, *THE SUPREME COURT AND THE ATTITUDINAL MODEL* (1993).

111. See MARTIN SHAPIRO, *LAW AND POLITICS IN THE SUPREME COURT* (1964).

legal text as naive formality. The tradition of seeing politics as an influence on law continues to appear in scholarship. David O'Brien's influential book on the Supreme Court is indicative.<sup>112</sup> O'Brien describes the Supreme Court as the eye of the political storm in America and enlivens the portrayal with stories of political influence like that wielded by Justice Black over President Roosevelt.<sup>113</sup> Instrumentalism is even more prominent in "the attitudinal model" associated with Segal and Spaeth and others.<sup>114</sup> This is a radical empiricist construction in which the case votes of Justices are coded on an attitude scale and the Court is described in terms of political movements on the scale. Placing the judge at the center of the law gives appellate courts great power while narrowing the conception of law.<sup>115</sup>

Realism in law school has become the dominant paradigm in spite of the alleged clout of formalism in jurisprudential debates and its manifestations at law schools serving local communities. It claims to be new, and it has failed to provide a full account of institutional power. Robert Ellickson's work on property has demonstrated the importance of sociolegal or social science approaches in law. His book *Order Without Law* reaches out to "law and" movements, such as the law and economics and the law and society movements.<sup>116</sup> It examines disputes between the traditional cattlemen of Shasta County, California, who revere the open range, and the newcomers who fence in their small "ranchettes"<sup>117</sup> and "sometimes respond to a trespass incident by contacting a county official who they think will remedy the problem."<sup>118</sup> Ellickson views the lawyers' law as uncommon in cattle country, even though he studies the tension between the "pro-cattlemen 'fencing-out' rule"<sup>119</sup> (which provides that a victim of animal trespass can recover damages only when he has "protected his lands with a 'lawful fence'"<sup>120</sup>) and California's Estray Act, passed in 1915 in light of increased settlement.<sup>121</sup> In spite of this distinctly legal focus, he minimizes the terrain of law by separating law from society. This perspective revives the formalism that earlier

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112. See O'BRIEN, *supra* note 56.

113. See *id.* at 71.

114. See SEGAL & SPAETH, *supra* note 110; see also Paul Brace & Melinda Gann Hall, *Studying Courts Comparatively: The View from the American States*, 48 POL. RES. Q. 5 (1995).

115. See John Brigham & Christine B. Harrington, *Realism and Its Consequences: An Inquiry into Contemporary Sociolegal Research*, 17 INT'L J. SOC. L. 41 (1989).

116. See ROBERT ELICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

117. *Id.* at 21.

118. *Id.* at 59.

119. *Id.* at 42.

120. *Id.* at 43.

121. See *id.* at 42-48.

confined law to codes and commentaries. It seems that we are being asked to take a socially thin slice of law as the whole thing. Ellickson's research equates law with formal rules and says, in effect, that law is not present in ordinary life.<sup>122</sup> Of course it is, but sociolegal scholarship is only now showing it.

One reason for the failure of Realism to penetrate more fully is that it is stuck in the invocation of a naive formalism, a mechanical jurisprudence that is no longer prominent. While some forms of retro-Realism are unsettling (as Gordon demonstrated over a decade ago) the basic insight—that law is politics—has been widely accepted for some time. In *Nomos and Narrative*, published in 1983, Robert Cover supported those of us working in the sociolegal field when he responded to the critique of formalism by finding something “there” in law.<sup>123</sup> Cover referred to the work of Clifford Geertz and the interpretive tradition in social science, which was just beginning to receive attention in those days.<sup>124</sup> The constitutive project gained support from this commentary.

### III. CONTESTING THE ACADEMIC TERRAIN

A constitutive approach is coalescing, but there is enough at stake for troubling issues to arise. Examples of this are evident in the clash of two related approaches to law in political science, the critical and the constitutive. I associate the critique of rights with studies of litigation by scholars like Shep Melnick, a political scientist at Brandeis University,<sup>125</sup> and Gerald Rosenberg, a political scientist at the University of Chicago.<sup>126</sup> The other pole is constitutive or social constructivist and evident in work by Michael McCann, Helena Silverstein, and Christine Harrington.<sup>127</sup> Here, rights are viewed as symbols around which politics transpires. The constitutive project operates in space opened by social constructionist scholarship.

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122. Although the landowners in Shasta County *did* know whether their own lands were within the open or closed range designation, Ellickson speculates that the level of knowledge was probably “atypically high” because the range law had been the subject of political controversy. *Id.* at 49. He found that the residents he interviewed were unfamiliar with terms like “estrays” and “lawful fence” and knew little about subtleties in the law. Thus he observes that disputing takes place “largely independent of formal law.” *Id.* at 51.

123. See Cover, *supra* note 23, at 40.

124. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES* 5 (1973).

125. See, e.g., R. SHEP MELNICK, *REGULATION AND THE COURTS: THE CASE OF CLEAN AIR* (1988).

126. See, e.g., GERALD ROSENBERG, *HOLLOW HOPE* (1993).

127. See, e.g., HARRINGTON, *supra* note 41; MCCANN, *supra* note 67; SILVERSTEIN, *supra* note 102.

*A. Constitutivism v. Relativism*

Law exists in texts, languages, buildings, and ideological formations that organize social life. Such formations include the expectation of free expression, the equality of labor after slavery, and the idea that civil rights are national rather than local. A theory of law needs to address the status of these forms and their consequences. Yet much of legal critique is relativistic. It is common to miss the boundaries of interpretive communities surrounding the Supreme Court and the Constitution. It is excessive to say that the Supreme Court has never paid much attention to *stare decisis*. This is the perspective legal realism brought into fashion. In deconstructing the confidence of the uncritical in law, interpretive practitioners, like realists, elevate other standards such as the aesthetic<sup>128</sup> and the political over traditional legal forms. Interpretation in this formulation becomes a matter of individual choice. As do the interpretivists in law schools, this work plays down the sociological dimensions of community and misses the fact that some communities give some people greater access than others. Settings like Yale and others in the “higher circles” have a special place, and their aesthetic assumes a priority status in comparison with contributions from other institutions and locales where people have something to say about the Constitution. The Supreme Court, at the apex of this configuration of American legal authority, is subject to the way that authority is organized. The aesthetic perspective, while it restates an important epistemological caveat, is naive sociology.

The notion that law constitutes important terrain for political activists, like those attempting to keep gay baths open during the early days of the AIDS epidemic or antipornography crusaders, brings one face-to-face with a version of the problem of liberal legalism. Since movements change as they are constituted, it is difficult to stipulate how the constitutive force of law is determinative. Alan Hunt has discussed the limits of a model of rules to account for change in this sort of environment.<sup>129</sup> We offer a constitutive perspective drawn from language and theories of practice.<sup>130</sup> The language model responds to the issue of relativism because it provides

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128. Lief Carter views constitutional interpretation from what he calls an “aesthetic” perspective, by which he means that the way a Justice looks at the Constitution is like the way a gallery visitor views a work of art. This is meant to be a helpful corrective to those who see law as rules. See LIEF CARTER, *CONTEMPORARY CONSTITUTIONAL LAWMAKING* (1985).

129. See HUNT, *supra* note 107.

130. The model of language was the basis for my recent book, from which some of the following material is drawn. See JOHN BRIGHAM, *THE CONSTITUTION OF INTERESTS: BEYOND THE POLITICS OF RIGHTS* (1996).

a fluid basis from which to understand constraint. While there is a tendency in liberal democracies to emphasize the possibilities of ideology, legal forms, as used here, are to politics as grammar is to language. In the speech of movement activists we have evidence of the semiotic structure in the life of social movements. Movements, like ordinary speakers, decide what they want to say within a framework of possibilities. In the material below I examine the feminist antipornography movement with regard to this framework.

"The new politics of pornography"<sup>131</sup> inspired by the feminist critique has changed the implications of supporting the First Amendment. There is a divide in progressive legal politics<sup>132</sup> that separates radical feminists from "sexual liberals."<sup>133</sup> This politics challenges an instrumental view of law and reveals the relation of law to liberalism in America. At least since the New Deal, the authority of progressive reform has depended on an unsettling union of moral outrage and liberal relativism. In order to argue for change, it has seemed essential to posit the contingency of social relations. One problem for the antipornographers is that their allies in other feminist struggles against inequality for women have based their politics in this sort of contingency, as is the case with the Feminist Anti-Censorship Taskforce (FACT).<sup>134</sup>

The radical feminism of MacKinnon and Andrea Dworkin might indeed "undermine the entire edifice of modern First Amendment doctrine and revolutionize the law of equality."<sup>135</sup> While offering very radical conceptions of practices and policies that constrain the freedoms of some, the movement is democratic in that it has turned from courts to local government. As a theory of liberal epistemology, particularly idealism in law, the movement operates at the constitutive level. By convention, the offices and institutions of the State determine what is legal. For example, the 1989 Supreme Court decision on flag burning, *Texas v. Johnson*,<sup>136</sup> became "the law" on this form of expression until Congress passed a new law, and then the Court heard a challenge to that law. In this tradition, people outside the "legal system" receive rather than generate law. They may

131. See DONALD DOWNS, *THE NEW POLITICS OF PORNOGRAPHY* (1989).

132. Susan G. Cole has termed the unpopular anticensorship movement "feminism's Skokie." SUSAN G. COLE, *PORNOGRAPHY AND THE SEX CRISIS* (1989) (analogizing the movement to the American Civil Liberties Union's unpopular decision to support the Nazis' marching in a predominantly Jewish Chicago suburb).

133. See *THE SEXUAL LIBERALS AND THE ATTACK ON FEMINISM* (Dorchen Leidholdt & Janice G. Raymond eds., 1990) [hereinafter *THE SEXUAL LIBERALS*].

134. See Nan D. Hunter & Sylvia A. Law, *Brief of Amici Curiae of Feminist Anti-Censorship Task Force, et al. in American Booksellers v. Hudnut*, 21 U. MICH. J.L. REFORM 69 (1987-1988).

135. DOWNS, *supra* note 131, at 155.

136. 491 U.S. 397 (1989).



advocate change and apply pressure on the lawmakers, but this is not supposed to be *the law*. Their claims are only part of a process of which law is the product. When a priest proposes that “abortion is murder,” for instance, we understand him to be preaching, rather than articulating a valid law. Defining law as what the sovereign orders misses the culture of public authority. When that priest tells his congregation that abortion is not just wrong but illegal—and they believe him—the law *in* society is that belief.<sup>137</sup>

### *1. Rage as a Form of Law*

Radical movements like the American Revolution, the early labor movement, and the Weather Underground all addressed law with particular intensity. Law was in the hands of others, and the legal system offered little hope. From armed struggle to disruption to vandalism and disobedience, these movements challenged the formulations put forth by the government. Law is despised and decried, but it is formidable. The feminist case against pornography and the practices that constitute it are a reflection—an image—of the rights claim. In this case, the arguments and practices respond to the perceived right to free expression. As a response that is being stated by the antipornography movement, the movement operates in terms of a form of law. In commentary since the late 1970s, Women Against Pornography (WAP) and other more or less organized groups in the movement have explained (or expressed) their belief that the constitutional doctrine announced by the Supreme Court is on the side of pornographers.<sup>138</sup> Those within the movement believe that the doctrine is in a complicitous relation with local “law enforcement” and is responsible for the range of pornographic material available.<sup>139</sup>

Rage, as an ideological form, calls attention to the roots of a system; thus rage is counterhegemonic.<sup>140</sup> It counters the claim of sovereign institutions to command obedience, substituting its own form of meaning for others, whether of a conventional sort or imposed with force. “Rage,” as a form of law, is evident in the early movement against violent pornography and some of the variants that

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137. See in particular the work of the Amherst Seminar in Legal Process and Legal Ideology. See, e.g., Symposium, *Legal Process and Legal Ideology*, 9 LEGAL STUD. F. 1 (1985).

138. See, e.g., ANDREA DWORKIN, *Pornography: The New Terrorism*, in LETTERS FROM A WAR ZONE: WRITINGS 1976-1989, at 197, 198 (1989).

139. The doctrine on pornography was more liberal in the 1970s and 1980s than it had been 20 years or more before, and the consequence has been more pornography. Throughout much of American history, of course, obscene and pornographic materials have been strictly proscribed.

140. See Alan Hunt, Rights and Social Movements: Counter-Hegemonic Strategies, Address at Marxism Now (Dec. 2, 1989) (on file with author).

continue to operate in the 1990s. Rage toward the law on "free expression" was evident in the work of Andrea Dworkin as early as 1978 in her association of free expression with the degradation of women.<sup>141</sup>

For feminists whose radicalism is found in the level of their opposition to pornography, the texts, the doctrines, and the institutions of government are defined differently than for the majority. Certainly neither conventional law nor conventional life is viewed with the liberal's acquiescence and presumptions. As stated in a button at the May 5, 1990 Lesbian and Gay Pride Rally in Northampton, Massachusetts, "Pornography is the Theory, Rape is the Practice." Andrea Dworkin's view, one of the earliest statements in the modern attack on violent pornography, emphasized the "outgroup" quality of social relations formed around this law.<sup>142</sup> In its the early years, the movement skirted the practice of seeking state-supported censorship, although it was continually confronted with the challenge of free expression. In the case against pornography, radical feminists argued that, in a male-dominated society, sexuality is oppressive and that dominant/subordinate power relationships in sex as it is normally practiced perpetuate violence against women.<sup>143</sup> The movement in its early stages identified the traditional instruments associated with state law as terrorism.<sup>144</sup>

Dworkin's first speech on pornography, given in the winter of 1977 at the University of Massachusetts, Amherst,<sup>145</sup> was the basis for her remarks at New York University Law School's forum on the subject.<sup>146</sup> Those remarks began by associating pornography with mankind's greatest inhumanities. "Slavery, rape, torture, extermination": To Dworkin, these were "the substance of life for billions of human beings since the beginning of patriarchal time."<sup>147</sup> Male domination depends on "the law" as an instrument. "The oppressed are encapsulated by the culture, laws, and values of the oppressor. Their behaviors are controlled by laws and traditions based on their presumed inferiority."<sup>148</sup> The effect, to which the movement's

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141. See DWORKIN, *supra* note 138, at 198.

142. *Id.* at 199.

143. See Judith Vega, *Coercion and Consent—Classical Liberal Concepts in Texts on Sexual Violence*, 16 INT'L J. SOC. L. 75 (1988).

144. See DWORKIN, *supra* note 138, at 199.

145. See generally *id.*

146. See Colloquium, *Violent Pornography: Degradation of Women Versus Right of Free Speech*, 8 N.Y.U. REV. L. & SOC. CHANGE 1, 198 (1978-1979). In his opening remarks, Dean Norman Redlich explained how the conference came to be: The year before, a feminist in his class, Teresa Hommel, had prepared a presentation from a new perspective, "violent pornography." The discussion that follows is taken from the report of that conference.

147. DWORKIN, *supra* note 138, at 198.

148. *Id.*

struggle is addressed, is that women "have burned out of them the militant dignity on which all self-respect is based."<sup>149</sup> Dworkin exemplifies a social relations constituted outside the mainstream. "This violence," she says, "is always accompanied by cultural assault—propaganda disguised as principle or knowledge."<sup>150</sup> The result, as a characterization of a people under law, is the form of domination with which she began.<sup>151</sup> Dworkin linked rape to terror, which she identified with the constitutional protection for freedom of expression.

Law for her, and for the movement, is the ideological form of patriarchy. Law is a rationalization so that "when pornographers are challenged by women," the legal establishment punishes the women "all the while ritualistically claiming to be the legal guardians of 'free speech.'"<sup>152</sup> The feminist case against pornography was stated in terms of domination and inequality. The law was spoken by "the oppressor," who was identified in terms of his perpetuation of "wrongs for his own pleasure or profit."<sup>153</sup> So as not to miss him in the obfuscation that characterizes the law's smoke and mirrors, "the master inventor of justification . . . the magician" is identified with his creations, "wondrous, imposing, seemingly irrefutable intellectual reasons" that explain oppression.<sup>154</sup> Yet the practices, as well as subsequent developments, suggest that this avoidance may be taken as an influence of doctrine, a tacit recognition of the hegemony of free expression ideology. Much of the substance of the ideology, and its significance in social relations, draws from the sort of popularly constituted ideology addressed by Harry Kalven, Jr.<sup>155</sup> This ideology was tapped by contemporary legal scholars like Robert Gordon and Owen Fiss to show the relevance of High Court materials in the culture.<sup>156</sup>

Here the role and the responsibility, even the nature of the law for radical feminists can be compared to law in other movements. The formation evident in the antipornography movement shares a belief

149. *Id.*

150. *Id.* at 199.

151. Dworkin has written:

Women are an enslaved population—the crop we harvest is children, the fields we work are houses. Women are forced into committing sexual acts with men that violate integrity because the universal religion—contempt for women—has as its first commandment that women exist purely as sexual fodder for men.

*Id.* at 200.

152. *Id.* at 218.

153. *Id.* at 215.

154. *Id.* at 216.

155. See HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988).

156. See OWEN FISS, *THE IRONY OF FREE SPEECH* (1996); Gordon, *supra* note 26.

in the power of appellate doctrine, the compulsion of rights claims grounded in tradition, with the gay rights claims evident in the AIDS crisis. Radical feminists share with libertarians the widely held view that the Supreme Court produced a rich body of opinions on free speech. This body of material is the ideology held responsible for the availability of pornography. In the antipornography movement, however, there is a much lesser sense of entitlement than there was, in the gay community at least, before we had to deal with AIDS.<sup>157</sup> In addition, radical feminists eschew the "sophisticated" cynicism of Critical Legal Studies with its tendency to minimize the power and responsibility of law. This is what makes sense out of a movement's politics constituted with regard to law as "rage." The radical feminist position does not simply accept a positive frame of law coming from distant or professionally constituted institutions, but links the doctrines, actors, and institutions traditionally associated with law to economic and cultural interests. Radical feminists find tradition and structure where others deny law this kind of significance.<sup>158</sup>

## 2. Law's Social Relations

To discover the law in social movements, we must penetrate ordinary practice. By drawing out the constitutive character of practice, the sociology of law may capture the law in social relations. This kind of sociology is less focused on demographics and more focused on the ideological, social, and material construction of communities. Scholar-activists as diverse as Charles Reich,<sup>159</sup> Angela Davis,<sup>160</sup> and Catharine MacKinnon work in this area. In her essay *Liberalism and the Death of Feminism*,<sup>161</sup> MacKinnon argued that reaction to the antipornography movement had split feminism because a hegemonic liberalism is unable to address female inequality. Explicit attention to the reality of women's experience is the force behind MacKinnon's jurisprudence. She has offered an analysis of the material dimensions of law and the failure of liberal legal frameworks.<sup>162</sup> In her introduction to *Feminism Unmodified, The Art of the Impossible*, she says "women get their class status through their sexual relations."<sup>163</sup> She proposes that gender is "a distinct ine-

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157. See, e.g., CINDY PATTON, *SEX AND GERMS: THE POLITICS OF AIDS* (1985).

158. The Critics, for instance, saw power through Realism but included little of their own authority as law professors. See Brigham & Harrington, *supra* note 115.

159. See, e.g., Charles Reich, *The New Property*, 74 YALE L.J. 1245 (1964).

160. See, e.g., ANGELA DAVIS, *WOMEN, RACE AND CLASS* (1983).

161. Catherine A. MacKinnon, *Liberalism and the Death of Feminism*, in *THE SEXUAL LIBERALS*, *supra* note 133, at 3.

162. See FEMINISM UNMODIFIED, *supra* note 100.

163. CATHERINE A. MACKINNON, *Introduction: The Art of the Impossible*, in *id.* at 1, 3.

quality” that operates in the same way that “money as a form of power takes nothing from its function as capital.”<sup>164</sup> MacKinnon’s “themes” reflect a constitutive dimension of law. She presents sex as the key: “The social relation between the sexes is organized so that men may dominate and this relation is sexual—in fact, is sex.”<sup>165</sup> Challenging liberalism, she argues that the “[n]otion that gender is basically a difference rather than a hierarchy—hides the force behind the description” and “that Pornography turns gendered inequality into ‘speech,’ which has made it a right.”<sup>166</sup> While liberal convention imagines a state hostile to sexuality and to speech, for MacKinnon, the state is hostile to women.

The nature of the constitutive relationship was highlighted in a critique of MacKinnon by Stanley Fish.<sup>167</sup> According to Fish, MacKinnon’s essays brilliantly exemplify what he calls “the strategy of change”<sup>168</sup> because she employs a vocabulary “that departs from ordinary (or as she might say ‘ideologically frozen’) usage in ways that cannot be ignored.”<sup>169</sup> For example, the phrase “rape in ordinary circumstances,” which “is provocative because in the way of thinking MacKinnon wishes to dislodge, rape is defined as an exceptional and statistically deviant act against a background of mutually agreed upon sexual transactions.”<sup>170</sup> Rape becomes “a constitutive ingredient of everyday heterosexual intercourse, including intercourse in marriage.”<sup>171</sup> For MacKinnon, sexual relations as the foundation for epistemology and for law suggest that “aperspectivity”—the claiming of universality for a partial point of view—is a central feature of the debate initiated by the antipornography movement.<sup>172</sup>

MacKinnon makes her point in discussing Mary Daly’s analysis of suttee, “a practice in which Indian widows are supposed to throw themselves upon their dead husband’s funeral pyres in grief.”<sup>173</sup> Daly describes women who practice suttee as “drugged, pushed, brow-beaten, or otherwise coerced by the dismal and frightening prospect

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164. *Id.* at 2.

165. *Id.* at 3.

166. *Id.*

167. See STANLEY FISH, *Going Down the Anti-Formalist Road*, in *DOING WHAT COMES NATURALLY*, *supra* note 7, at 1 (1989) (originally given as an address to the Amherst Seminar on Legal Ideology (Feb. 24, 1989)).

168. *Id.* at 17.

169. *Id.* at 27.

170. *Id.* at 28.

171. *Id.*

172. To Fish, “aperspectivity” is “a name for the condition of believing that what you believe is in fact true . . .,” *id.* at 28, and “change will not be from a state of undoubted belief to a state in which the grip of belief has been relaxed, but from one state of not-at-the-moment-seen-around belief to another,” *id.* at 30.

173. *Id.* at 19 (quoting MacKinnon).

of widowhood in Indian society.”<sup>174</sup> MacKinnon points out that “by focusing on the surface coercions, Daly misses an underlying level of coercion that leads some women who are not drugged or pushed to fling themselves on the pyre quite ‘freely.’”<sup>175</sup> These, for MacKinnon, “are suttee’s deepest victims: women who *want* to die when their husband dies, who volunteer for self-immolation because they believe their life is over when his is.”<sup>176</sup> To Fish, the power to create the world “is not a matter of epistemology, of the producing of accounts of how we know what we know,” but rather “a power that attends successful persuasion . . . a power whose effects are always and necessarily objectifying” because being “under its sway (and everyone is at every moment of his or her life) is to see the world from a point of view.”<sup>177</sup> Fish claims that “[w]hat is wrong with Indian women from the feminist point of view is not that they are willing (in a precisely nonvoluntarist sense) to die for the beliefs that have captured them, but that they have not been captured—constituted, formed, made into what they are—by the right beliefs.”<sup>178</sup> Here Fish cloaks his radical subjectivity in surface objectivity. By not addressing the various sources of coercion, Fish does what the liberals do, and at the same time reveals his value to them. He focuses his attention on the project of indeterminacy while operating at a surface level of conventionality. He is the embodiment of detached reason.

The constitutive approach requires attention to the historical character of belief. The antipornography movement is rooted in the left liberal feminism that led to legal transformations such as *Roe v. Wade*<sup>179</sup> and the introduction of the Equal Rights Amendment. By the late 1970s, some of those successes were looking less attractive and a careerism of liberal feminism was beginning to show itself. By this time, a fuller expression of feminist rage was evident in work like Kathleen Barry’s *Female Sexual Slavery*,<sup>180</sup> which went well beyond the comfortable aspirations for equality associated with the Equal Rights Amendment. As the activism conventionally associated with the 1960s began to wane, the feminist movement was free to go beyond many of the social and ideological characteristics of that movement. Women Against Pornography has been influenced by the same counterideological critique that was posed in the late 1960s by

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174. *Id.* (quoting Daly).

175. *Id.* (paraphrasing MacKinnon).

176. Catharine MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 23, 23 (1982).

177. FISH, *supra* note 167, at 19.

178. *Id.* at 32.

179. 410 U.S. 113 (1973).

180. KATHLEEN BARRY, *FEMALE SEXUAL SLAVERY* (1979).

movement women—we won't make the coffee; we won't take the minutes—and that was influential at the onset of the women's movement.

The movement was closely tied to university and professional settings, with many of its major events situated in institutions like the University of Massachusetts or New York University Law School. As a key element of feminism, the antipornography movement has links with other expressions of outrage at the treatment of women in the home, on the campus and in the streets. In the battered women's struggle and in the extension of prosecution for rape, the incidents and the use of law has reached economic and racial parts of the population not represented on college campuses. The feminist case subsequently has been shaped by debates over what is pornographic, over free expression, and over the nature of legislation as a form of politics. In these considerations, the link between state, law, and ideology depends on the issue and the group considered.

In many North American cities, radical feminists created a culture of resistance, one manifestation of which was the antipornography movement. With stories of what Jan Raymond calls GYN/affection<sup>181</sup> set against the "phallic lust" described by Mary Daly,<sup>182</sup> collective households, distinctive entertainment, services, and forms of struggle; the community has the cultural presence to support its vision of the law. The link between rage and relations so embedded in the law that they can't be spoken about<sup>183</sup> is constitutive law. The struggle is over what women and sexuality are to be.<sup>184</sup> Those who would remain within existing social relations allow law its conventional innocence. Those who would change those relations radically are outraged at law's complicity. Because radical feminism teaches that pornography is not speech but violence; that violence against women is a crime, not a "concern"; and that

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181. See JANICE RAYMOND, *A PASSION FOR FRIENDS* 7-9 (1986).

182. Daly writes:

On the one side, lust and pure lust name the deadly dispassion that prevails in patriarchy, the life-hating lechery that rapes and kills the objects of its obsession/aggression. Indeed, the usual meaning of lust within the lecherous state of patriarchy is well-known. It means sexual desire of a violent, self-indulgent character, lechery, lasciviousness. Phallic lust, violent and self-indulgent, levels all life, dismembering spirit/matter, attempting annihilation.

Mary Daly, *Be-Witching: Re-Calling the Archimagic Powers of Women*, in *THE SEXUAL LIBERALS*, *supra* note 133, at 211, 212.

183. Kate Millet writes: "When a system of power is thoroughly in command, it has scarcely need to speak itself aloud; when its workings are exposed and questioned, it becomes not only subject to discussion, but even to change." KATE MILLET, *SEXUAL POLITICS* 58 (1971).

184. See KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* (1984) (drawing on perceptions of both prolife and prochoice activists to show how the politics of abortion responded to the Supreme Court's decision in *Roe v. Wade*, 410 U.S. 113 (1973)).

resistance is self-defense, not disobedience; it is a movement constituted in its challenge to law.

### *B. Uncoupling from Decenteredness*

McCann and Silverstein have advocated a "decentered view" of law as an essential element of the constitutive process. For McCann, the effort is in response to Gerald Rosenberg's important book, *Hollow Hope*,<sup>185</sup> as well as the sense that there is little impact from the decisions of high courts. For Silverstein, law is more than "a system of rules established by the governing institutions of society."<sup>186</sup> Law, in the decentered view, "is manifest in the wider spheres of society" and in "cultural conventions that shape and facilitate practical social interaction."<sup>187</sup> The decentered view, however, limits what we can see through the constitutive lens. While we should include the margins of society to understand the full effects of state law, they should not constrain research into the constitutive dimension of law.

Legal pluralism was an early "decentered" view that sought to break down the domination of state law by positing other forms of law in society.<sup>188</sup> From the early 1970s, this perspective on law, like the Law and Society movement of which it was a part, saw law in the squatter settlements of Brazil,<sup>189</sup> in the deals struck by car dealers, and even perhaps in the agreements we reach with the chairs of our departments. The pluralist message is that one might find evidence of contracting among businesspersons or an accounting of liabilities among the elders in a tribe or the homemakers in a neighborhood. One might find all kinds of things like law in the corridors rather than the courtrooms.<sup>190</sup> A problem with legal pluralism is that it endorses an implicit reification of justice. Though turning away from the state, its "law" is other. This is part of the utopian reification that takes place under a liberal positivist frame. In seeking to draw attention from the state apparatus, pluralism misses the effect of the *state* on forms of life in society: the family, bargaining, health, and wealth. A more direct acknowledgment of the constitutive consequences of state power in social movements allows us to recognize our role in maintaining forms of authority.

185. ROSENBERG, *supra* note 126.

186. SILVERSTEIN, *supra* note 102, at 4.

187. *Id.*

188. According to John Griffiths, "the state has no more empirical claim to being the center of the universe of legal phenomena than any other element of that whole system does." Mark Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1, 48 (1981) (quoting John Griffiths).

189. See Boaventura de Sousa Santos, *The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada*, 12 L. & SOC'Y REV. 5 (1977).

190. See Sally Engle Merry, *Legal Pluralism*, 5 L. & SOC'Y REV. 869, 889 (1988).



### 1. *The Marble Temple*

In America, the “Marble Temple” behind the Capitol Building symbolizes finality in the law.<sup>191</sup> When robed men and women announce opinions from this building, those opinions have authority derived from the institution it represents. Institutions are ways of acting. They give meaning to action, and they require more reflective attention than scholars have given to them. We need to think about how institutional authority works and place institutions like the Supreme Court within a conception of American government. Like Justice Potter Stewart’s response in another context,<sup>192</sup> we have trouble when we try to define an institution, but we know one when we see it, or hear about it.<sup>193</sup> When the Court serves as background for a picture of a robed person, we believe that we know something of the job that person does. We know the Justices when they are in place, behind the bench, or represented in opinions, but very few people know them away from the Court. While many Americans would recognize the Court if they saw a picture of the building in Washington, D.C., few could distinguish the building standing alone. The structure is similar to thousands of other neoclassical temples in the United States (the Court’s facade is almost identical to The New York Stock Exchange). Similarly, although the Court’s opinions are available in most libraries, few know how to make sense of them. This differential knowledge is part of the institution and it is part of the attraction of realism.<sup>194</sup>

Insiders generally present the Supreme Court through the perspective of realism as if this were a new discovery. A political view of judging has become the orthodoxy, and the authoritative foundation of law has shifted. This new orthodoxy—political skepticism—is an institutional reality. On the inside, and to an increasing extent on the outside, political explanations have become a nearly sufficient basis

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191. The following analysis is drawn from BRIGHAM, *supra* note 51, and was adapted for John Brigham, *The Constitution of the Supreme Court*, Address Before the Northeast Political Science Association Convention (Nov. 8, 1996).

192. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964).

193. See Lee Epstein & Jack Knight, *The New Institutionalism, Part II*, 7 L. & CTS. NEWSL. (American Political Science Ass’n, Wash., D.C.), Spring 1997, at 4; Howard Gillman, *The New Institutionalism, Part I*, 7 L. & CTS. NEWSL. (American Political Science Ass’n, Wash., D.C.), Winter 1996-1997, at 6.

194. Today, much Court commentary heralds the value of insider access. I once had occasion to talk with an intern at the Court about the value of access. In a spirited defense of the insider perspective, this young woman claimed that the advantage in getting “behind the scenes” was that one could never teach constitutional law with a “straight face” again. She argued that the reality of the Chief Justice wearing his slippers inside the Court demystified the Constitution. As a political scientist who began the academic study of law and politics in the 1970s, I learned to appreciate the insights of realism and still teach constitutional law with a straight face. I just don’t rely too heavily on the Justices.

for the authority of the Supreme Court. The surprise is not that the Court is political, but that those who work with the institution, like the Congress, and those who observe it closely, like journalists, appear to accept politics as an adequate basis for the Court's authority. The story of this institution is more than a synthesis of personality traits and individual interests. Consequently, my interest in idiosyncratic behavior taking place behind the bronze doors of the Supreme Court has limits that are set by the institution itself as a place of great interest and significant consequence in American politics.

A challenge exists to provide insight into the Supreme Court through a perspective that transcends investigative journalism and resists excessive identification with the institution. Attention to the Court has ranged from muckraking exposé, like *The Brethren*,<sup>195</sup> to fawning iconography, like Fred Friendly's *The Constitution: That Delicate Balance*.<sup>196</sup> The authors of *The Brethren*, Bob Woodward and Scott Armstrong, had the money and investigative experience to produce a vivid picture that upset many. Yet they merely intensified a view of judges as political actors that had been around for some time while affirming the special, highly secret nature of the activity of judging. This "glimpse inside" not only sold millions of copies of their book, but it eventually left insiders even more guarded. Chief Justice Warren Burger reacted against the "intrusion" of journalists. One source for the inquiry into what the Supreme Court has become is the debate about the capacity of the Court to influence American life, a debate represented in Gerald Rosenberg's *Hollow Hope*<sup>197</sup> and Michael McCann's *Rights at Work*.<sup>198</sup>

A lack of serious attention to the legal terrain and the diversion of interest from the traditional subjects—law and legal thought—have created problems for realist social research. This inquiry proposes leaving the preoccupation with disagreement and struggle behind in favor of a move toward a study of social practices that provide insight into the Supreme Court as a terrain of politics and law. In the tradition of constitutive research, the perspective must be altered somewhat. For instance, "the cult of the robe" no longer functions as

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195. BOB WOODWARD & SCOTT ARMSTRONG, *THE BRETHREN: INSIDE THE SUPREME COURT* (1979).

196. FRED FRIENDLY, *THE CONSTITUTION: THAT DELICATE BALANCE* (1984). Friendly, who had once run a news bureau, developed his book from material produced for television. It settled some nerves jarred by Woodward & Armstrong's *The Brethren*, *supra* note 195, in its engaging portrayal of what the Supreme Court does, while its attention to detail did not intrude on the protected inner space behind the Purple Curtain. Both books contribute to the cult surrounding the institution of the Supreme Court, and both depend on it.

197. ROSENBERG, *supra* note 126.

198. MCCANN, *supra* note 67.

it once did.<sup>199</sup> A realism in law that includes a critique of formalism as part of its narrative keeps the cult of the robe alive. I have called this realism as it applies to the authority of courts, particularly the Supreme Court, the “cult of the judge.”<sup>200</sup> And at a more general level, a “cult of the Court” has replaced the formalism of mechanical jurisprudence. The way we view the Court today depends on hierarchies, the image of justice represented by the building, and the special place of the Supreme Court in the law. Pursuing these “cults” can be scary, but viewing the institution at this level promises some resistance to the pull of authorized material or official opinion from the bench. In addition, the effort to portray the cult around the institution provides a framework for interpreting a variety of Court-related materials. Opinions, history, and commentary on the institution are keys to institutional politics.

The meaning of an institution exists in “possible forms of conduct”<sup>201</sup> or, more economically, “practices.”<sup>202</sup> People know an institution such as the Supreme Court through traditions of possible action or practices. Chief Justice John Marshall, for instance, did not give us the practice of judicial review in *Marbury v. Madison*,<sup>203</sup> he presented a possibility. The practice of judicial review is a more recent development linking the Court and the Constitution. The linkage as it manifests itself is presently less dependent on Marshall’s claims to authority and far more reliant on the modern Court’s location in the governing apparatus. Practices represent shared paths. We have seen initiatives in the area of doctrine<sup>204</sup> and in the institutional studies where attention to symbolic phenomena has traditionally been rarer.<sup>205</sup> Over a decade ago, political scientists began turning away from the study of politics of interests and behavior to investigate shared practices in legislatures, in international political economy, and in public opinion.<sup>206</sup> Some even described a “new

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199. See BRIGHAM, *supra* note 51, at 63.

200. *Id.*

201. JOHN RAWLS, *supra* note 75, at 11 (providing the foundation for my treatment of institutions in BRIGHAM, *supra* note 51).

202. See, e.g., PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1977); RICHARD FLATHMAN, *THE PRACTICE OF RIGHTS* (1976).

203. 5 U.S. (1 Cranch) 137 (1803).

204. See Richard Brisbin, *Antonin Scalia, William Brennan, and the Politics of Expression: A Study of Legal Violence and Repression*, 87 AM. POL. SCI. REV. 912 (1993); William Harris, *Binding Word and Polity*, 76 AM. POL. SCI. REV. 34 (1982); Timothy O’Neill, *The Language Equality*, 75 AM. POL. SCI. REV. 62 (1981).

205. See HOWARD GILLMAN, *THE CONSTITUTION BESIEGED* (1993); HARRINGTON, *supra* note 41.

206. See, e.g., W. Lance Bennett, *The Paradox of Public Discourse: A Framework for the Analysis of Political Accounts*, 42 J. POL. 792 (1980); Marcus E. Ethridge, *A Political-Institutional Interpretation of Legislative Oversight Mechanisms and Behaviors*, 17 POLITY 340 (1985); Judith Goldstein, *The Political Economy of Trade: Institutions of Protection*, 80 AM. POL. SCI. REV. 161

Institutionalism," which itself became contested terrain and, in many of its manifestations, lost much of the cultural perspective at the forefront of academic debate over the last decade.<sup>207</sup> The turn from more traditional political inquiry, and necessarily from dissents and disputes, is a natural one for public law scholarship, which never totally lost its connection to the stuff of tradition. Instead of taking a model from some realm of social science, such as organization or systems theory, the analysis offered here draws on public perceptions of the institution. These come from journalists, scholars, lawyers, and citizens. Today the Court's authority draws from a new realism in still-mysterious ways.

The modern Court functions through a dynamic between politics and law, human interest and institutional practice. It stands apart from individual action most of the time. That is why *The Brethren*, with its portrayal of scheming and self-interest, received so much attention. There are politics on the Court and there are politics in the way we know the institution. The second kind is newer. We began to see this kind of politics in the debate over the Supreme Court and the Constitution. Attorney General Edwin Meese stimulated the debate in speeches from 1985 to 1986 arguing that we should repeal the doctrine of incorporation applying the Bill of Rights to the states.<sup>208</sup> He also argued that the Supreme Court's was not the last word on the Constitution. The legal community promptly condemned this position, leaving some to wonder how the understandings that Meese challenged had become so ingrained. In this approach, I have been less interested in what very few people know and more interested in what most people take for granted. Expectations that we learn, as we learn about something like a Supreme Court, set limits on action.

## 2. *All the Way to the Supreme Court*

Two facets of the Court's special place in the American political culture are evident through institutional analysis: its intimacy or mystery and its distance or place at the "end of the line" in jurisprudence. My students have been asked to write about these phenomena for years. According to one, "... deference to the Marble Temple has resulted in its exaggerated depiction, the Supreme Court is touted as a post-modern Olympus."<sup>209</sup> Others have described the Court as "shrouded in clouds of mystery . . . publicly

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(1986).

207. See, e.g., James G. March & Johan P. Olsen, *The New Institutionalism: Organization Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984); Smith, *supra* note 50, at 89-108.

208. See EDWIN MEESE, III, WITH REAGAN: THE INSIDE STORY (1992).

209. Gina Russo, *The Brethren Backlash and A High-Tech Lynching: Overexposure of the Marble Temple* 3 (1992) (unpublished manuscript, on file with author).

glimpsed only on those occasions when, with little warning, the Justices cast their constitutional thunderbolts to consternate us mere mortals below.”<sup>210</sup> I have tried to capture these considerations in the reaction to penetration of the institution by *The Brethren* and in ordinary phrases like “all the way,” which is commonly used as an indication of where the Supreme Court sits and has sexual as well as linear connotations.

George Anastaplo, in his review of *The Brethren*, proposed that “[w]e should take care, in our responses to the opinion-makers of our day, that we do not permit a cheap realism to be substituted for a noble awareness.”<sup>211</sup> One example of the “cheap realism” widely noted in reviews is the portrayal of Justice Douglas’s physical breakdown, including his incontinence and how he smelled.<sup>212</sup> This picture was justified by Bob Woodward and Scott Armstrong, authors of the controversial book, as a way of showing the challenges faced by the Justices as they worked together in a small room. To Anastaplo, not only do we do not need to know about bodily functions to understand the Court and the Constitution, but this focus is part of a realist culture that diminishes the status of the Constitution. Anastaplo was not alone. One of my students, in reviewing reactions to *The Brethren*, wrote that “[a]ttempts to lift the decorous robes of the nation’s highest tribunal to deconstruct the myth of the Justices as ‘rarefied creatures whose priestly vocation allows them to shed the animosities and crudities of ordinary people’ are received harshly.”<sup>213</sup> She may be right. For example, John P. Frank’s review described one of the sources used by Woodward and Armstrong as a “swine” for recounting a Justice trying to sign Court papers on his death bed and signing the sheet instead of the paper.<sup>214</sup> Anthony Lewis’s review in *The New York Review of Books* was equally harsh.<sup>215</sup>

*The Brethren* opens with a statement about the Court’s place in American law: “The United States Supreme Court, the highest court in the land, is the final forum for appeal in the American judiciary.”<sup>216</sup> This place has become central to the Court’s authority, giving new meaning to Justice Robert Jackson’s aphorism that the

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210. Stephen L. Carter, *The Candidate*, NEW REPUBLIC, Feb. 22, 1993, at 29, 35.

211. George Anastaplo, *Legal Realism, the New Journalism and The Brethren*, 1983 DUKE L.J. 1045, 1074.

212. See WOODWARD & ARMSTRONG, *supra* note 195, at 391-92.

213. Russo, *supra* note 209, at 3 (quoting Graham Hughes, *The Brethren*, NEW REPUBLIC, Feb. 23, 1980, at 31).

214. John P. Frank, *Review of The Brethren*, 66 ABA J. 160, 162 (1980).

215. See Anthony Lewis, *Supreme Court Confidential*, N.Y. REV. BOOKS, Feb. 7, 1980, at 3, 3-8.

216. WOODWARD & ARMSTRONG, *supra* note 195, at i.

Justices “are not final because they are infallible but are infallible, because they are final.” The manifestations of distance as an aspect of the Court’s identity appear in various forms.<sup>217</sup>

An early allusion to the Supreme Court’s distance was in *Bachelor Mother*, a 1932 movie with David Niven, Ginger Rogers and Charles Coburn. Niven says, demonstrating his perseverance, “I’ll get him if I have to go to the Supreme Court.”<sup>218</sup> It is a reference familiar in film and television lore. A similar wide-eyed enthusiasm is exploited to convey some of the special qualities of the character played by Annette Bening in *The American President* when she enters the White House for the first time.<sup>219</sup> She calls it “Capraesque,” referring to the self-conscious iconography in the movies of Frank Capra, particularly *Mr. Smith Goes to Washington*,<sup>220</sup> wherein Jimmy Stewart as Jefferson Smith has trouble getting to his office because he is so star-struck.

Intimacy and distance provide an aura around the institution that serves as a surrogate for legal authority in an age of Realism. The relationship is evident in an unusual confrontation involving the Court: the meeting between Washington Redskins star tailback John Riggins and Justice Sandra Day O’Connor in January of 1985. As the hero of the Redskins’s 1983 Super Bowl victory, Riggins was seated across the table from Justice O’Connor at the National Press Club dinner in Washington. Trying to make conversation while drunk, he called out, “C’mon, Sandy, baby. Loosen up. You’re too tight.” Then he got up, collapsed, and fell asleep under a chair where he stayed for an hour. Vice President Bush was the speaker while Riggins slept and he wrote to the football player commiserating that “we all have our bad days.”<sup>221</sup> A more famous case of breakdown in the intimacy and distance usually associated with the Supreme Court is that of Clarence Thomas’s nomination. During the Thomas nomination hearings in the fall of 1991, the nation sat transfixed as a would-be justice came under fire. The result was revelations about the sexual practices of a nominee to the Supreme Court. Thomas won confirmation, but as a recent *New Yorker* article on the Tailhook Scandal put it, “Thomas won confirmation, but Hill and her supporters won the cultural

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217. While interning in the Chief Justice’s Office at the Supreme Court, my students have faced a sort of denial from the public in reaction to their position. When Joyce O’Connor was at the Court in the fall of 1989, she was often met with blank stares when she indicated where she was working. We began to suspect that people had trouble with the fact that O’Connor was at the Court because the institution seemed so distant from everyday life.

218. *BACHELOR MOTHER* (Goldsmith 1932).

219. See *THE AMERICAN PRESIDENT* (Columbia Tristar 1996).

220. *MR. SMITH GOES TO WASHINGTON* (Columbia Pictures 1939).

221. Ira Berkow, *N.Y. TIMES*, Dec. 15, 1991, at H1.

war.”<sup>222</sup> We might think of the Supreme Court’s authority in terms of the combined factors of intimacy/mystery and considerable social distance. *The Brethren*, the Riggins Affair, and Hill-Thomas throw open the black robe at times when the Court has eluded substantial scrutiny, contradict existing information on the Supreme Court, and are criticized as fetishizing detail and manipulating imagery in their portrayals of the institution. Yet, the institution appears to be quite secure as it wields these new forms of authority.

The Supreme Court’s place at the top of a legal hierarchy has come to constitute its authority. Charles W. Collier, examining the distinction between institutional and intellectual authority on the Supreme Court, proposes that the Supreme Court’s intellectual authority has dwindled.<sup>223</sup> It may no longer be correct to say that the Court has, as Hamilton said, “neither Force nor Will, but merely judgment.” This is because, in its exercise of institutional authority, the Court mixes will with judgment. One of Collier’s examples is an issue that arose in 1987 following Justice Thurgood Marshall’s comment that the original Constitution was not something Americans should celebrate.<sup>224</sup> In support of Marshall, an article in the *Stanford Magazine* described him as an authority on the Constitution. This was challenged by letters to the editor. The editorial response was “If a Supreme Court Justice is not an authority on the Constitution, pray tell, who is?”<sup>225</sup> Collier takes the occasion of Marshall stepping down from the Court to assess the two important ways in which one might be an authority on the Constitution. The first is as a student of the text and through subsequent commentary on it. In this sense, it would not be essential to hold a job as Supreme Court Justice, and, indeed, this is a kind of authority that others might possess. It is a kind of authority shared by Supreme Court Justices and some of the rest of us. The second way to be an authority on the Constitution is, *ipso facto*, by virtue of being a Supreme Court Justice. That is, from this office alone, one might be considered an authority on the Constitution. When one stepped down, some of that authority would be lost, but maybe not all of it. Perhaps there would be a residue; a ghost of the institutional authority would surround a former Supreme Court Justice and distinguish him from other noninstitutional authorities. Obviously, for Justice Marshall, or any other Justice, both senses are operating while they are on the bench. But the distinction

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222. Peter J. Boyer, *Admiral Boorda’s War*, NEW YORKER, Sept. 16, 1996, at 68, 71.

223. See Charles W. Collier, *The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship*, 1991 DUKE L.J. 191.

224. See THURGOOD MARSHALL, COMMENTS ON THE CONSTITUTION (1987).

225. Collier, *supra* note 223, at 222 (discussing Editorial, STAN. MAG., Spring 1988, at 20, 21; Editorial, STAN. MAG., Fall 1987, at 24, 74).

still matters. Marshall's status as an authority was obviously diminished when he stepped down, and his successor absorbed some of what was lost.<sup>226</sup>

#### IV. CONCLUSION: FROM INTERESTS TO SITES

In *The Constitution of Interests*, I noted that it may seem strange initially to find movements on the margins of the law, such as gay rights and the feminist antiporn crusade, asserting law's power, while movements more centrally located in the structures of legal power, such as Critical Legal Studies and Alternative Dispute Resolution, deny that law has power.<sup>227</sup> This strangeness derives from a failure to place the context of law in the forefront of descriptions of law's power. The constitutive perspective holds that law is dependent on social relations, and hence that we need to see that law takes different forms for different actors and that the forms and the actors are mutually constitutive. In conclusion, I suggest where constitutive law is going by drawing on this attention to social relations.

In this regard, CLS and gay activists are not debating the same thing. For the former, the power of a right diminishes. For bathhouse owners in San Francisco, the right to which they addressed their claims is constituted in both the relations of political practice and the economic relations that make some people owners of baths. While ownership and movement history lead to support for the rights claim by operators of the baths, neither the claims of tenure nor the institutional hegemony that gives CLS so much of its power is really held to the critical standard. A comparison between the economic insecurity of bathhouse owners and the relative security of Harvard Law professors simply highlights the fertility of certain social spaces for certain forms of law. To paraphrase the book from which this Essay is derived, transcending the subjectivity that maintains the silences on institutional power is a step toward understanding the

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226. Toni Morrison's collection explores this issue with attention to the relationship between feminism and the Supreme Court in chapters by Patricia Williams, Nell Painter, and Kimberlé Crenshaw. See *RACE-ING JUSTICE, EN-GENDERING POWER: ESSAYS ON ANITA HILL, CLARENCE THOMAS, AND THE CONSTRUCTION OF SOCIAL REALITY* (Toni Morrison ed., 1992). Crenshaw is a leading critical race theorist who teaches at UCLA Law School. She presents an image of "misplaced pairings" that strangely juxtapose ideology, race, and class. Kimberlé Crenshaw, *Whose Story Is It, Anyway?: Feminist and Antiracist Appropriations of Anita Hill*, in *id.* at 402, 403. The result is an inability to see the African-American woman. Painter, a professor of history at Princeton, sorted out the issues of sex and race that came to the fore in the Thomas-Hill confrontation. See Nell Irvin Painter, *Hill, Thomas, and the Use of Racial Stereotype*, in *id.* at 200. She puzzles over the difficulty in thinking of gender and race "simultaneously." *Id.* at 204. Williams is a law professor at Columbia Law School. Her essay, among the most literary in the volume, is powerful, poetic, and hilarious. See Patricia J. Williams, *A Rare Case Study of Muleheadedness and Men*, in *id.* at 159.

227. See BRIGHAM, *supra* note 130, at 26.



legal constitution of social life.<sup>228</sup> But, more than that, the constitutive project outlined here with reference to social movements and the Supreme Court is merely the beginning of an effort to depict the power of law over who we are.

Thus attention to social relations should not make the authority of law seem as if it were upside down by placing the arrangements between political actors ahead of the law. My position is simply that the role of law should be included in what we understand to be social relations. Social relations are based in law. The authority of the Harvard or Yale law professor enables distinct legal forms, like realism or remedy, to flourish. Forces basic to social relations in addition to law, like physical attraction, smells, moods, etc., may lead to the adoption of particular legal statuses, like “married” or “divorced.” And those statuses may alter the other basic forces, like physical attraction or moods. As such, the law and social relations are mutually constituted. In my next project, I plan to turn from the constitution of interests to the constitution of material life. This will help to draw out more explicitly law’s role in shaping the terrain of social life.

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228. Cf. BRIGHAM *supra* note 130, at 139.

