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The Constitution of Interests: Institutionalism, Critical Legal Studies and New Approaches to Sociolegal Scholarship

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[1]The Constitution of Interests: Institutionalism, CLS and New Approaches to Sociolegal Studies

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OUTLINE

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Introduction

The next few paragraphs, by way of introduction, will provide some working definitions for a constitutive approach to law and situate the project of developing this approach in the business of constituting an academic orientation. The article will demonstrate the tensions between politics and epistemology in establishing an academic foundation for the public interest in law. Here are glimpses of the constitutive in early Critical Legal Studies; foundational considerations that comprise the roots of professional projects in and around the legal academy. They are nurtured in the ideological orientation of the Amherst Seminar and generously referenced in the attempt to build a conception of legal research under the heading "after the law." Finally, we note an antagonism between constitutivism and relativism and propose the need to "uncouple" constitutivism from 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 form derived from the Latin *constituere*,[2] is a part of our legal vocabulary. The law constitutes when it composes, constructs or forms something. For instance, the law of marriage constitutes the relation between 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 known in terms of the legal relation. Law here puts gay discourse on the defensive, as with the reference to "partner" or some other effort 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 the cultural and the social in phenomena, we should not presume its relativism or post-structuralism. Sometimes the constitutive enterprise appears to shy away from its Marxist roots either in an effort to become more acceptable or simply to broaden its appeal, but the roots of the practice are in the material and social as roots of the ideological sphere. Constitutive also refers to a level of legal relations which necessarily entails culture as well as law. This is evident in recent treatments by cultural studies scholars of the execution of Ethel and Julius Rosenberg in the 1950s. Viewing the execution in the context of 50s America, the Cold War and anti-semitism, law becomes one force among many that are responsible.[3] Recognizing the importance of the

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2. Indeed there seems to be an issue as to whether "constitutive" is even part of an oral tradition. It appears to be rather hard for people to say.

3. Garber, Marjorie and Rebecca L. Walkowitz, *Secret Agents: The Rosenberg Case, McCarthyism and Fifties America* (New York: Routledge, 1995). The proposition, for Garber and Walkowitz, is that the place of Jews in 50s America -- and the meaning of the execution -- could be symbolized in disputes over whether Jello was kosher. We would not want to say Jello, in all respects, is linked to this or any other execution, but rather that our legal relations

way terms are used we find examples of constitutive theory in international relations[4] and administrative law, [5] but I am ultimately drawn to the critical tradition and some versions of interpretivism as sources.

Socio-legal 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 Law School have been thinking, even before they came, in the case of Bob Gordon, or after they left, in the case of Catharine MacKinnon.[6] 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.[7] If the struggles didn't begin at Yale, they often flourished in these halls. One of my favorites is reproduced as the 1982 article "Fiss v. Fish," a comment on Owen Fiss's article "Objectivity and Interpretation," by the Milton scholar and now Duke literature professor Stanley Fish. After debating the nature of authority in law with Fiss, Fish concludes his essay with the following passage:

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and our cultural relations overlap.

4. 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.... recognition functions as the constitutive act, determining as a matter of law the entity's claim to the rights and obligations of statehood.The emphasis here is on the practical side of diplomacy. On the other hand, 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." See Accountability in Chechnya - Addressing Internal Matters with Legal and Political International Norms, 36 Boston College Law Rev. 793 (1995), p. 814-815. 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." Constitutivism in international law places a premium on the nominative authority of established states while declarative law allows for independent action. Makau Wa Mutua, "Why Redraw the Map of Africa: A Moral and Legal Inquiry," 16 *Michigan Journal of International Law* (1995), p. 1124-1126.

5. In administrative law, Richard B. Stewart gives us a notion of constitutive law as consisting ...of rules that make legally recognized practices possible. On this basis he advocated a "reconstitutive law" as an approach to regulation that deregulated or reconfigured the relationship between the federal government, business, the states and other interests.
"Beyond Delegation Doctrine," 36 *American University Law Review* 323 (1987); See also "Reconstitutive Law," 46 *Md. L. Rev.* 86 (1989), p. 86.

6. In MacKinnons case there has been no explicit attention to the constitutive as an approach, yet she has led the way in positing a strong link between law and life. See also Dianne L. Brooks, " A comment on the Essence of Anti-Essentialism in Feminist Legal Theory," *Fenimist Legal Studies 2:*115-132 (1994).

7. It is also close to me since my partner is in NYC which makes New Haven a mid point in my family life. Christine Harrington, Director of the Institute for Law and Society at NYU, and I work together in this field and our collaboration is part of its story.

> "...it 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 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."[8]

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. We 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. The challenge is one sense in which these approaches are critical. Politics and epistemology clashed in the period spawned by student activism, Civil Rights, and Vietnam in the 1960s. On reflection, some of the tension was produced by the liberal conjunction of substantive political outcomes and what we know to be true. 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 receiving widespread attention in political science began as an effort to ground public interest law in the academy. Stuart Scheingold, in *The Politics of Rights*,[9] gave symbolic meaning to instrumental uses of law like those by public interest lawyers. He went about as far as liberal theory could go to transcend its sensitivity to identifying 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 promises of rights and in their political mobilization realize what the courts were unable to provide. This was the politics of rights of the title.

The impact of symbols in Scheingold's work was on how we saw rights. We came to understand that they "condition perceptions, establish role expectations, provide standards of

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8. Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, N.C.: Duke University Press, 1989).

9. Stuart Scheingold, *The Politics of Rights* (New Haven: Yale University Press, 1974).

legitimacy, and account for the institutional patterns of American politics."[10] Rights strategies adapted in 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, Inc. Fund 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.[11] These efforts were worked out 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. In America, law is accountable for a native culture being wiped out in European settlement.[12] 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 of 1978, at the first Critical Legal Studies conference, Karl Klare drew on the work of E. P. Thompson and Douglas Hay whose legal history sought to establish a place between the ideal and the real in law. Along with neo-Marxist theories of *praxis*, Klare addressed "the crisis in liberal legal theory" in an article titled "Law-making as Praxis."[13] 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....[14] Klare also drew attention to the ways law entered into

10. Scheingold, 1974: xi.

11. 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' *Dialectics of Legal Repression* elaborated the relationship of law and material life as a reflection of commodities in markets and linked American scholarship to work which had existed for some time in Europe. Isaac Balbus, *The Dialectics of Legal Repression* (New York: Russell Sage, 1973). See also, "Commodity Form and Legal Form: An Essay on the `Relative Autonomy' of the Law," 112 *Law and Society Review* 571 (1977); Zenon Bankowski and Geoff Mungham, *Images of Law* (London: Routledge and Kegan Paul, 1976); Bernard Edelman, *Ownership of the Image: Elements for a Marxist Theory of Law* (London: Routledge and Kegan Paul, 1979).

12. The earliest national legislation laid the groundwork for continental expansion with provision for the sale of fee simple titles at public auction after surveys which would provide for parcels of land that were uniform and highly marketable.

13. 40 *Telos* 123-135 (Summer 1979).

14. Id. at 124-125.

"labor-management disputes, the character of education, the distribution of income, the allocation of social entitlements to the poor, the nature of family life...."[15]

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." As examples he gave the Black Acts, described by Douglas Hay, and his own work on the labor movement.[16] 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...." Klare continues with 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 law-making as a form of praxis."[17] This was merely a glimpse 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 laid in peripheral questions that emerged along with the turn to Realism and the turn inward toward law school practice.
society.[18]

This interest in law's social foundations also had roots in literary criticism, language philosophy and hermeneutics. The practices of these disciplines were introduced into the legal community from a number of quarters, including by Owen Fiss in an article entitled "Objectivity and Interpretation"[19] that portrayed the interpretive work of the appellate judge as "neither a wholly discretionary nor a wholly mechanical activity,"[20] but as an interactive process that takes place within an "interpretive community."[21] The notion of such communities brings in the reality of a professional life. These are 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

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15. Id. at 126.

16. "Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, " 62 *Minnesota Law Review* 265 (1978).

17. Klare, "Law Making as Praxis."

18. Edmond Husserl, *Phenomenology and the Crisis of Philosophy* (New York: Harper and Row, 1965): 189.

19. Owen Fiss, "Objective and Interpretation," 34 *Standford Law Review* 739-763 (1982).

20. Id. at 739.

21. Id. at 74. This idea comes from Stanley Fish (1980).

its participants are 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 meanings in a different fashion than the social scientist. Robert Cover exhorted his colleagues to tell tales, spin yarns, and create a legal order grounded in new practices. The best law teachers send their students out to break through the paradigms or, to appropriate an epistemological issue, to intentionally confuse "is" and "ought."[22] Cover's call was "to stop circumscribing the nomos ... to invite new worlds." 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. 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 affects from the work of high court judges and their law school clerks. According to Lucy Salyer, Gordon has "elaborated the constitutive aspect of law most fully and explicitly."[23] Writing about legal history, in an article for *Legal Studies Forum*, Salyer discusses "the constitutive nature of law,"[24] quoting Gordon extensively.

> [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.[25]

Some of this comes from the work of J. Willard Hurst, who pioneered attention to the constitutive dimension of law and who also provides a link between law and society and critical legal studies in Gordon's work.[26]

The key is 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

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22. This idea was put very nicely in a comment by Martin Shapiro (1967: 209) on equal protection for indigent defendants.

23. Lucy Salyer "The Constitutive Nature of Law in American History," 15 *Legal Studies Forum* 61-65 (1991).

24. Id. at p. 61.

25. Robert W. Gordon, "Critical Legal Histories," 36 *Stanford Law Review* 102-103 (January 1984):103.

26. J. Willard Hurst, *Law and the Conditions of Freedom in the Nineteenth-Century United States* (Madison: University of Wisconsin Press, 1956).

litigation and legal scholarship as "an exceptionally refined and concentrated version of legal consciousness."[27] The mandarin materials of elite legal thinking are said to illuminate the more ordinary forms of legal discourse. He pointed to research which 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. According to Gordon, "field-level studies would reveal a lot of trickle-down effects -- a lot of mandarin ideology reproduced in somewhat vulgarized forms."[28] Legal scholars have long been confident that the structures familiar to lawyers stand behind many of the ways ordinary people think about the world.[29]

Salyer speaks of law as shaping society and in that sense as constitutive. And she speaks of law as being shaped by and hence being reflexive of the society. Here the constitutive is linked with the idea of relative autonomy, often associated with E.P. Thompson and with the idea of law as an independent rather than a dependent variable, which is a more prosaic formulation in the terms of some political science. To the extent that CLS scholars provide a foundation for a constructive constitutivism it may be in the maturity of a movement ready to build bridges to new colleagues in the law schools and to some on the outside. A great deal of legal history may be read in terms of the constitutive project yet my focus is not there. The interest 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 also becomes a way of understanding law, historians, like Hurst are central to the project.

Scholars of this nature include the legal historians William Forbath and Hedrick Hartog. Both Forbath and Hartog 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 post-war labor. Hartog's book, *The City as a Legal Concept,* contributes a vivid example of the constitutive role of law in the formation of the modern city. According to Frank Michelman, another legal academic who has contributed to the development of this approach, the constitutive refers to "normative givens that underwrite a political process."[30] Some

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27. Robert Gordon, "Critical Legal Histories," *Stanford Law Review* 36: 127 (1984).

28. Id. at 121.

29. These were the grounds upon which later work saw movements as constituted in traditional legal terms where participants see the world through concepts derived from state institutions and where the participants organize themselves according to such concepts. The concept of free expression in America 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 over the phone, their language contains consistent ways of understanding or acting, ie, practices of, about or in opposition to the legal system.

30."Family Quarrel," 17 *Cardozo L. Rev.* 1163 (1996).

time ago he suggested that one might look to the distinction between constitutionalism and pluralism where "pluralist politics...seem the negation of jurisgenerative politics."[31] 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, not all, 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 less familiar. Organized interests, the bar, the law schools and the judges constitute themselves around ways of understanding law. The following section of this article looks at several professional projects that operate on the boundaries of law and social research and concludes with attention to 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 impact of death sentences by race, or the relative pay of women and men doing the same jobs. The section reveals a number of different activities that count as professional projects in the sociolegal realm. They don't cover everyone who works in the area of constitutive studies[32] but rather I try here to reveal the mechanisms and mishaps that comprise shifting paradigms.

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 in places like police departments or schools and they sought to illuminate the activities in the halls of the court houses through studies of plea bargaining and alternative dispute resolution.[33] The scholarship invariably revealed social truths set against legal forms. Fifteen years ago that began to seem inadequate as a new generation entered the academy and as the struggles of the 60s were transformed into professional activities. One of the critiques was offered with reference to the limits of "gap" studies and the constraints of a pervasive positivism. Another was with reference to the "interpretive turn" and an effort to incorporate cultural materials into law. Any successful academic movement or tradition needs to be institutionalized. In the following section of the paper I will describe two important projects advancing the constitutive perspective between 1980 and 1995.

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31. Michelman, "Law's Republic," 97 *Yale L. J.* 1493 (1988).

32. There is a long tradition in criminology some of which is represented by Stuart Henry and Dragan Milovanovic.

33. Felice Levine, "Goosebumps and the Search for Intelligent Life," *Law and Society Review*.

The first was The Amherst Seminar in Legal Process and Legal Ideology. The Seminar operated for 15 years at the intersection of politics and epistemology that had such a significant influence on the nature of sociolegal research. It met in Amherst from 1980 to 1995 and attempted to join the high aspirations of theory in political science with more practical orientations to what goes on in courts. The seminar began by pursuing ideology as subject for socio-legal research. In the early 80s we believed ideology to be capable of sociological investigation. That is, we held that it wasn't just false consciousness but a structure of social relations. The pursuit of an ideological subject was challenging even around the edges of mainstream law and social science. Our 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 counter intuitive theoretical frame. Still, the project might have continued, and perhaps reached some sort of constitutive theorizing, if it were not for the influence of academic agendas on the Seminar.

One important influence of this sort 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." Our work was described as critical empiricism.[34] Trubek saw us as left positivists. This might have been sociologically true in that we came from both empirical and theoretical backgrounds, but the formulation was a little short of our aspiration to transcend the polarities that designation entailed. 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 which they called "Interpretive Sociolegal Research," Harrington and Yngvesson demurred from the labels in the effort to avoid "domestication" and a double institutionalization where conventional order is imposed on something that is emerging.[35] They called attention to an ongoing instrumentalism in which politics continued to exist as an agent for social research but that research did not do much more than what good left wing scholarship had always done, reveal political oppression rather than get to the level at which the relations of power are constituted.

At the same time the Seminar was being undercut by the increasing stature of its members and the consequent implications for continued effort on the ideological project. Many competing projects were flourishing. Prof. 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 post-war framework which conceptualized law outside of society only to discover its political character...." We wanted to "...go beyond the truism that law is political and begin to examine the ways in which law constitutes social relations." We wanted to "challenge the conventional idea that law simply referees contests of interest." We listed three

34. David M. Trubek and John Esser, "Critical Empiricism" in American Legal Studies: Paradox, Program, or Pandora's Box?" 14 *Law and Social Inquiry* 3-53 (1989).

35. Christine B. Harrington and Barbara Yngvesson, "Interpretive Sociolegal Research," 15 *Law and Social Inquiry* 135-148 (1990).

likely areas of work: social movements, institutions and institutional change, and professional communites. 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 at the heart of the constitutive enterprise. Institutions had, at the time, become a battle ground for post-positive scholarship and we anticipated that fascination with cultural phenomenon would expand the sociological attention institutions would receive. And, in the last of these likely sources, we saw professional communities as the sort of places that inevitably combine ideas and social practice. Because these communities police the activities of public intellectuals at the same time that they provide material support we anticipated that they would be important battle grounds.

The Series was nurtured by critical intervention into the marketplace of ideas. With success early on publishing critical theory and culture studies Routledge was ready to hear that law was such a place or at least a fit subject. But there have been challenges. Manuscripts come to us more often as instrumental descriptions than constitutive and the organization of academic books is unsure about what to do with academic publishing in law. While successful in the instrumental sense of selling books and making reputations, the consequence for a constitutive framework is harder to assess.[36]

2. Social Research on Institutions

While the seminar and the Series had their ups and downs, work in political science made institutions a new focus of research. Rogers Smith's APSR article, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law,"[37] 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* I had attempted to do something similar.[38] Following social science work by Walter Murphy and Alan Westin, the Court had become a fit subject for study by the late 1970s.[39] I see the New Institutionalism as a form of constitutive law.[40] Where the

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36. Some of our titles are: *Gigs* (1991), by Paul Chevigny; *Inside the State* (1992), by Kitty Calavita; *Producing Legality* (1994), by Majorie Zatz; *Politics by Other Means* (1995), by Richard Abel; *Toward a New Common Sense* (1995), by Boaventura de Sousa Santos; and *Explorations in Law and Society* (1993), by Alan Hunt.

37. 82 *American Political Science Review* 89-108 (1988).

38. John Brigham, *The Cult of the Court* (Philadelphia: Temple University Press, 1987). The following discussion of the Supreme Court and the Constitution is drawn from this effort

37. 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, and apparently little more. By the time the American Republic was founded, the word referred to "an established organization for the promotion of some object." We now speak of a university as an institution, sometimes a bank or corporation, and certainly the Supreme Court. 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 Fortesque used the word to denote an activity. Machiavelli looked to institutional arrangements much as Montesquieu would some years later. by 1551, the concept was used by Thomas More in his *Utopia* as "an

professions had circumvented institutions with alternative frameworks, institutions like the Supreme Court and parts of it like the majority opinion, remained to be investigated.[41]

We associate institutions with their physical manifestations. In law, the bench, the robes, and the marbled walls signal that the 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 only fifty years ago, after Chief Justice William Howard Taft acquired a new building for the Supreme Court in the 1930s, we lost track of the past in favor of the "Beetles in the Temple of Karnak."[42] 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.[43] 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."[44] In this sense, an institution is identifiable across time in ways that rivers are. The Supreme Court is said to have decided *Brown* v. *The Board of Education* (1954), *Board of Regents* v. *Bakke* (1978), and *Adarand Constructors v. Peña* (1995). 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."[45] The Warren

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established law, custom, usage, practice, organization or other element in the political or social life of a people."

40. This brilliant intervention appears to have been appropriated by scholars for whom institution is simply coded as a variable, as opposed to the work of Lee Epstein, where institution is considerably richer.

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

42. The new building was more than many justices believed to be appropriate for the Court.

43. David M. O'Brien, *Storm Center* (New York: W.W. Norton, 1996): 56-129; Joseph Vining, *The Authoritative and the Authoritarian* (Chicago: University of Chicago Press, 1986): 110-132.

44. This characteristic of institutions suggested to Aristotle the analogy of rivers and fountains that have a "constant identity" even as the flow changes the composition of the thing. Ernest Barker, *The Politics of Aristotle* (New York: Oxford University Press, 1962): 99.

45. Charles P. Curtis, *Lions Under the Throne* (Boston: Little, Brown and Co., 1947).

Court was a trumpet or at least responded to the calls of convicts like Clarence Earl Gideon. Such characterizations are not simply rhetorical flourish; they reflect public perception. Students of the Supreme Court and the Constitution have generally been 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. While the frame has been political, teaching about Court and Constitution has been largely doctrinal. Institutional materials remain important for Court scholars to a degree unimaginable to students of voting behavior. Official discourses also remain in the picture even while their significance is undercut. This makes it difficult for public law to produce a model of their subject susceptible to rigorous investigation.

While most traditional political research has viewed institutions as if they were inevitable, other work has been stimulated by interest in change and transformation.[46] Philip Selznick drew from the American 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."[47] Stability, for Selznick, rested on "a secure source of support, an easy channel of communication."[48] More recently Michael McCann has developed this perspective with reference to the movement for comparable worth.[49] An institution, in formulations like these that consider stability, is a social construction that has become "infused with value" and prized "beyond its technical role." 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[50] leads 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.[51] In the main, social scientists leave the given quality of the institution unexplored.

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46. Philip Selznick, *Leadership in Administration: A Sociological Interpretation* (Evanston: Peterson and Company, 1957).

47. Id. at p. 6.

48. Id. at p. 7.

49. McCann, 1994.

50. E.E. Schattschneider, *The Semi-Sovereign People* (New York: Holt Rinehart and Winston, 1960).

51. Felix Frankfurter and James Landis, *The Business of the Supreme Court* (New York: Macmillan, 1928).

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.[52] The consequence is a pronouncement that "judicial review has become fully established."[53] Lawrence Baum on judicial review indicated that John Marshall *asserted* the power in 1803, that it survived the contest over slavery fifty years later, and that it has been employed on the average once every two years.[54] We see historical moments in the institutional life of judicial review, but not enough about how the institution has changed with that monumental development. We are not given a basis in social research for understanding the grounds on which institutional power rests, and neither Baum nor Wasby provides a framework for putting together the idea, and normative considerations, or the politics in an institutional frame.

The idea of practice captures cultural representations and brings in social relations. Practices give meaning to the steps that lead to the Supreme Court. They make particular steps in Washington the significant ones and not the ones to any old (state) Supreme Court. They give meaning to a signature or a name when it's appended an "opinion." Institutions are not simply robes and marble, nor are they contained 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."[55] 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.[56] 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. Powell's contribution, which opened the doors to Alan Bakke and allowed race to be taken 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.

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

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52. Stephen Wasby, *The Supreme Court in the Federal Judicial System* 2nd ed. (New York: Holt, Rinehart and Winston, 1984): 59-64.

53. Id. at 6.

54. Lawrence Baum, *The Supreme Court* (Washington, D.C.: CQ Press, 1995): 22.

55. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971): 11.

56. Charles Taylor, "Interpretation and the Sciences of Man," 25 *Review of Metaphysics* 1971: 8.

institution. *Strategies* are adopted by those who use an institution and suggest how to "take advantage of the institution for particular purposes."[57] A strategy would not be essential to the very 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.[58] 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 simply ways to get something done because they have status connected to the life of the institution.. The majority opinion has become an expectation that gives meaning to individual opinions. Practices of this sort are a political terrain. With dissents common again, the institution may be returning to the practice of seriatim opinions. But, with a long tradition of one opinion for the majority, individual holdings are usually seen in terms of the majority. Conventions, however, do not determine what an institution is.

Practices that become "constitutive" of the institution I call *institutional practices*. Politics has become associated with the Court 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* 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 "Farewell to the Old Order: The Right Goes Activist and the Center is a Void" by Linda Greenhouse.[59] These stories take their spirit from politics -- at the end of the term in 1995 it was the decisions of Rehnquist, Scalia and Thomas -- and they present the Court in terms of political messages, such as the relative weakness of the traditional swing votes in cases decided during that term. Without the practice of seeing politics in the institution, it would certainly still exist but it would not be the body 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.

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 will be a matter of interpretation. For instance, the assertion of judicial review by John Marshall in *Marbury* v. *Madison* (1803) reiterated a possibility that had been mentioned by others, most notably Hamilton in *Federalist 78* and *81*, but it was certainly not conventional, much less constitutive of the institution at that time.[60] Marshall

57. Rawls, *Justice*, p. 56.

58. Walter Murphy, *Elements of Judicial Strategy* (Chicago: University of Chicago Press, 1964); *The New Yorker* September 1996.

59. *The New York Times*, July 2, 1995.

60. There are a number of scholarly treatments of this point although it has dropped from general view (Ellis, 1971; Corwin, 1938).

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.[61] By the late 19th 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* 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 is the view of the Supreme Court that treats even the failure of Roosevelt's plan to pack the Court as due to the "switch in time that saved nine."[62] 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.

Institutions as bodies of practices means that there are communities who 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 text, in law, or a court, as an office, 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, but its social foundations have been ignored while courts have been so completely understood in terms of action that their ideological qualities have been missed. The special sociological contribution of an investigation into the practices making up an institution comes from identifying the ways of operating and the social relations behind them that give the elements of law and office their significance. The social base makes practices a foundation for a legitimate science of

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. *Chada* (1983), in which the Supreme Court declared the "legislative veto" unconstitutional, was that the Court's decision on the Constitution had relatively little effect on congressional practice as Congress, operating from its own institutional setting, continued to rely on veto provisions in its legislation.[63] Neither the text nor constitutional logic ultimately

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61. Edward S. Corwin, *The "Higher Law" Backgrounds of American Constitutional Law* (Ithaca: Cornell University Press, 1928).

62. O'Brien, 1996: 82.

63. Louis Fisher, "Constitutional Interpretation by Members of Congress," 63 *North Carolina Law Review* 707-747 (1985).

determines the social meaning of the fundamental law; it is the practices of those who matter.[64]

3. Constitutive Sociolegal Studies

Realism distorts the relationship between law and politics. Looking at the 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. If law and political institutions are seen only instrumentally, either as benefits to be acquired or as processes to use, political activity will only be superficially affected by the law. Yet the Rule of Law, specific laws, and legal institutions are major influences on politics.[65] We challenged those who would place law in the background of politics and fail to note its consequences. Derrick Bell,[66] William E. Forbath,[67] and Catharine MacKinnon 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."[68] I discussed three forms of law. The first, the classic assertion of a legal right is described as constituting 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 Mediation or Alternative Dispute Resolution movements, on the other hand, articulates a critique of legal forms but it 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 the respect 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 anti-pornography movement.

That law has a life beyond courts and lawyers is a message of some of the most recent constitutive work. Prof. 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*[69] helps to explain the constitutive approach to law. Silverstein gives us a valuable account of what it means to see law as constituting the animal rights movement. She

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64. Peter Goodrich, *Reading the Law* (Oxford: Basil Blackwell, 1986): 19.

65. John Brigham, *Property and the Politics of Entitlement* (Philadelphia: Temple University Press, 1990): 183; Rogers Smith, "Political Jurisprudence, the "New Institutionalism" and the Future of Public Law," 82 *American Political Science Review*.

66. Derrick Bell, *And We Are Not Saved* (New York: Basic Books, 1987).

67. William E. Forbath, "Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law," 16 *Law and Social Inquiry* 1 (1991).

68. *Studies in American Political Development* (1987).

69. University of Michigan Press, 1996.

links her approach to law in society. Her framework takes seriously the notion that law is not just influenced by society, as in the power of movements to change the law. Nor is society 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 law in society is the rights strategies undertaken in the interest of recognizing animals as an oppressed group. The strategies emerge out of concern for animal welfare, or as Silverstein puts it, "from the discourse of compassion."[70] She sees intellectuals like Peter Singer as influential in the shift from compassion to rights. Calls for "animal liberation" in the 1970s evolve into the "animal rights movement" in the 1980s.[71] In chapters on "The Political Deployment of Rights" and "Rights 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. As applied to this struggle her findings run counter to conventional academic wisdom where 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."[72] 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.

Other work I would identify with this framework is Kristin Bumiller's *The Civil Rights Society,*[73] Efren Rivera-Ramos, in a dissertation looking at the constitution of identity in Puerto Rico, Alan Hunt[74] who taught many of us about the sociological study of ideology in the first place and has given a great deal to the constitutive enterprise, Rosemary Coombe[75] in a considerable corpus of law review articles and Dragan Milovanovic and Stuart Henry[76] who have remained focused on the enterprise for a long time.

B. The Not-so-puzzling Persistence of Positivism

Traditional forces push against the constitutive project in defense of traditional space and

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70. Id. at 28.

71. Id. at 33. Silverstein establishes the movement's links to other struggles against oppression and explains the strategic parallels between "speciesism" and racism.

72. Id at 55.

73. Baltimore: Johns Hopkins University Press, 1988.

74. *Explorations in Law and Society*. New York: Routledge, 1993.

75. See for instance "The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy," *Canadian Journal of Law and Jurisprudence* 6 (1993): 249-85.

76. See *Constitutive Criminology at Work* (Albany: State University of New York Press, Forthcoming).

social relations. From both directions, empirical and normative,[77] 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* and Jeff Segal and Harold Spaeth's, *The Supreme Court and the Attitude Model.*[78] This work has been widely discussed and its reception indicates continued enthusiasm for the positive 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[79] helped to establish the proposition that judges' decisions reflect political considerations. From this perspective, law as precedent was manipulated by judicial interests. Politics was evident in the expression of opinion and it could be measured by dissents. In the social sciences, this work is associated with the "behavioral" revolution which 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 legal text as naive formality. The tradition of seeing politics as an influence on law continues to appear in upper court scholarship. One influential book on the Supreme Court, *Storm Center*, by David O'Brien,[80] is indicative. 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. Instrumentalism is even more prominent in "the attitude model" associated with Segal and Spaeth[81] and others.[82] 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 the political movement on the scale. Placing the judge at the center of the law, gives appellate courts great power while narrowing the conception of law.[83]

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77. See Roberto Alejandro□s critique of William E. Connolly.

78. Jeffrey A. Segal and Harold J. Spaeth, *The Supreme Court and the Attitudinal Model* (New York: Cambridge, 1993).

79. Martin Shapiro, *Law and Politics in the Supreme Court* (New York: Free Press, 1964).

80. David M. O'Brien, *Storm Center* (New York: W.W. Norton, 1986).

81. Segal and Spaeth, *Attitude Model*.

82. Paul Brace and Melinda Gann Hall, "Studying Courts Comparatively: The View from the American States," 48 *Political Research Quarterly* 5 (1995).

83. John Brigham and Christine B. Harrington "Realism and Its Consequences: An Inquiry into Contemporary Sociolegal Research," 17 *International Journal of the Sociology of Law* 41 (1989).

Realism in Law School has become the dominant paradigm in spite of the alleged clout of formalism in jurisprudential debates and its manifestations at local law schools. It claims to be new; and it has failed to provide a full account of institutional power. Robert Ellickson's work on property has always demonstrated the importance of sociolegal or social science approaches in law. His book *Order Without Law* reaches out to both of the law and movements, economics and society.[84] I was fascinated by this project both for its ambitions and because I grew up on a ranchette in the next county over from the ones Ellickson studied. I would like to take this opportunity to pose a question to Prof. Ellickson, which I raised in a review of his book. Ellickson's *Order Without Law*[85] examines disputes between the traditional cattlemen of Shasta County who revere the open range and the newcomers who fence in their small "ranchettes". The general demeanor in the community is "neighborliness" and Ellickson finds that, "The longtime ranchers of Shasta County pride themselves on being able to resolve their problems on their own." While "ranchette owners...unlike the cattlemen, sometimes respond to a trespass incident by contacting a county official who they think will remedy the problem."[86] Ellickson views the law which lawyers know as uncommon in cattle country and even though he studies the tension between the "pro-cattleman fencing-out rule" (which provides that a victim of animal trespass can recover damages only when he has "protected his lands with a lawful fence") and California's Estray Act, passed in 1915 in light of increased settlement. In spite of this distinctly legal focus, he minimizes the terrain of law by separating law from society. This perspective revives the formalism which earlier confined law to codes and commentaries. It seems as if we are being asked to take a socially thin slice of law as the whole thing. The research equates law with the formal rules and says, in effect, that law is not present in ordinary life.[87] 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 really isn't very prominent any more. 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

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84. Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge: Harvard University Press, 1991).

85. Ellickson *Order Without Law*.

86. Id. at 59.

87. 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. He found that the residents he interviewed were unfamiliar with terms like "estray" and "lawful fence" and knew little about subtleties in the law. Thus, he observes that disputing takes place "...largely independent of formal law." *Order*, 49-51.

law. Cover referred to the work of Clifford Geertz and the interpretive tradition in social science just getting attention in those days. The constitutive project gained support from this commentary. Part of the excitement of speaking at Yale is that the errant examples of formalism called up to justify the claim of insurgent realism are not too prominent. This is a place that makes the work Christine and I have been doing seem useful and true.[88]

88. Brigham and Harrington, op. cit.

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, and Gerry Rosenburg, a political scientist at Chicago. The other pole is constitutive or social constructivist and evident in work by Michael McCann, Helena Silverstein, and Christine Harrington. Here, rights are viewed as symbols around which politics transpires. The constitutive project operates in space opened by social constructionist scholarship.

A. Constitutivism v. Relativism

Law exists in texts, languages, buildings and in the ideological formations that organize social life. Such formations include the expectation of free expression, the equality of labor after slavery, 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[89] and the political over traditional legal forms. Interpretation in this formulation becomes a matter of individual choice. As with the interpretivists in law school, the work plays down the sociological dimensions of community and misses the communities that 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 the 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 anti-pornography 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. We offer a constitutive perspective drawn from language and theories of practice.[90] from which some of the following material was drawn. The language

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89. Lief Carter, in his book *Contemporary Constitutional Lawmaking,* 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, or as Carter puts it, "*stare decisis*, consistency with canons of legal reasoning, discovery of the intent of those who adopt legal rules, judicial self-restraint, and so forth." (New York: Pergamon Press, 1985.

90. The model of language was the basis for my book *The Constitution of Interests: Beyond the Politics of Rights*,

model responds to the issue of relativism because it provides a fluid basis from which to understand constraint. While there is a tendency in liberal democracies to emphasize the possibilities in 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 we examine the feminist anti-pornography movement with regard to this framework.

"The new politics of pornography"[91] spawned by the feminist critique, has changed the implications of supporting the First Amendment. There is a divide in progressive legal politics,[92] that separates radical feminists from "sexual liberals."[93] This politics challenges an instrumental view of law and reveals the relation of law to liberalism in America. Since at least 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 anti-pornographers 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 FACT.

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."[94] While offering very radical conceptions of practice 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 Supreme Court decision on flag burning in 1989, *Texas v. Johnson*, became "the law" on this form of expression until Congress passed a new law, and then the Court heard an appeal on that law and things proceeded apace. In this tradition, people outside the "legal system" receive rather than generate law. They may 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 where 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

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from which some of the following material was drawn (New York: New York University Press, 1996).

91. Donald Downs, *The New Politics of Pornography* (Chicago: University of Chicago Press, 1989).

92. Feminism's Skokie, according to Susan G. Cole in *Pornography and the Sex Crisis* (Toronto: Amanita Pubs, 1989).

93. Dorchen Leidholdt and Janice G. Raymond, eds. *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press, 1990).

94. Downs, *New Politics of Porn,* p. 155.

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.[95]

1. Rage As A Form of Law

Radical movements like the American Revolution, the early labor movement, or 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, through disruption to vandalism and disobedience, these movements challenged the formulations put forth by the government. Law is despised and decried. Law is not the sort of thing it is for reformers or the middle class and its meaning takes on a different status. 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 anti-pornography 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, see constitutional doctrine announced by the Supreme Court as on the side of the pornographers. This movement views the doctrine as in a complicitous relation with local "law enforcement," and responsible for the range of pornographic material available.[96]

Rage, as an ideological form, calls attention to the roots of a system, thus, rage is counter-hegemonic.[97] 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 continue to operate in the 1990s. Consciousness of the law on "free expression" as rage, is captured in a statement by Andrea Dworkin in 1978:

> "The oppressor ... is the master inventor of justification. He is the magician who, out of thin air, fabricates wondrous, imposing, seemingly irrefutable intellectual reasons which explain why one group must be degraded at the hands of another."[98]

For feminists whose radicalism is found in the level of their opposition to pornography, the texts, the doctrines, the institutions of government are defined in a manner different from the majority. Certainly neither conventional law nor conventional life is viewed with the liberal's acquiescence

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95. See in particular the work of the Amherst Seminar in Legal Process and Legal Ideology in *The Legal Studies Forum* 9 (1985).

96. The doctrine on pornography was more liberal in the 70s and 80s 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 material have been strictly proscribed.

97. See Alan Hunt, "Rights and Social Movements: Counter-Hegemonic Strategies, Presented to "Marxism Now," Amherst, Massachusetts, 1989.

98. Andrea Dworkin, "Pornography: The New Terrorism," 8 *New York University Review of Law and Social Change* 215-219 (1978-1979).

and presumptions. Stated in a button at the Lesbian and Gay Pride Rally in Northampton, Massachusetts, "Pornography is the Theory, Rape is the Practice."[99] 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. In 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.[100] The movement in the early stages identified the traditional instruments associated with state law as terrorism.

Dworkin's first speech on pornography, given in the winter of 1977 at the University of Massachusetts, Amherst,[101] and repeated often on college campuses, was the basis for her remarks at New York University Law School's forum on the subject.[102] 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."[103] 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."[104] The effect, to which the movement struggle is addressed, is that women "... have burned out of them the militant dignity on which all self-respect is based."[105] 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."[106] The result, as a characterization of a people

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99. May 5, 1990.

100. See also J. Vega "Coercion and Consent - Classical Liberal Concepts in Texts on Sexual Violence," 16 *International Journal of the Sociology of Law* 75-89 (1988).

101. "Pornography: The New Terrorism," *Letters from a War Zone*. (London: Secker and Warburg, 1988).

102. An explanation of how the conference came to be is given by Dean Norman Redlich in his opening remarks that the year before, a feminist in his class, Teresa Hommel, had prepared a discussion of "violent pornography," a new perspective. The discussion that follows is taken from the report of that conference.

103. "Colloquium, Violent Pornography: Degradation of Women Versus Right of Free Speech," 8 *New York University Review of Law and Social Change* (1978-1979): 198.

104. Id.

105. Id.

106. Id. at 199.

under law, is the form of domination with which she began.[107] Dworkin linked rape to terror 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'."[108] The feminist case against pornography was stated in terms of domination and inequality. The law was spoken by "The oppressor" and he was identified in terms of his perpetuation of "...wrongs for his own pleasure or profit." 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" which explain oppression. Yet, the practices themselves and 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 and drawn on by contemporary legal scholars like Robert Gordon and Owen Fiss to show the relevance of High Court materials in the culture.

Here, the role, the responsibility, even the nature of the law for radical feminists can be compared to law in other movements. The formation evident in the anti-pornography movement shares a belief 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 have much in common with the views of Owen Fiss, quoting Harry Kalven, "Over the years the Supreme Court has produced a rich and generous body of decisions on free speech."[109] This body of material is the ideology held responsible for the availability of pornography. In the anti-pornography movement, however, there is much less sense of entitlement then there was at least in the gay community before we had to deal with AIDS.[110] 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

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107. "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 p. 200.

108. Id at p. 218.

109. Owen Fiss, "Free Speech and Social Structure," 1986, Manuscript on file with the author.

110. Didi Herman

feminists find tradition, structure, and law where others deny law this kind of significance.[111]

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 would be less focused on demographics and more on the ideological, social and material construction of communities. This has been in the work of scholar activists as diverse as Charles Reich, Angela Davis, and Catharine MacKinnon. In her essay "Liberalism and the Death of Feminism,"[112] MacKinnon argued that reaction to the anti-pornography movement has 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.[113] In her introduction to *Feminism Unmodified*, "The Art of the Impossible," she says "women get their class status through their sexual relations."[114] She proposes that gender is "a distinct inequality" that operates in the same way that "money as a form of power takes nothing from its function as capital...."[115] 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." 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." 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.[116] According to Fish, her essays brilliantly exemplify what he calls "the strategy of change" because she employs a vocabulary "that departs from ordinary (or as she might say "ideologically frozen") usage in ways that cannot be ignored."[117] For example, the phrase "rape in

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111. The Crits, for instance, see only power.

112. Reprinted in Dorchen Leidholdt and Janice G. Raymond, eds. *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press, 1990).

113. Catharine Mackinnon, *Feminism Unmodified* (Cambridge: Harvard University Press, 1988).

114. Id. at p. 3.

115. Id. at p. 2.

116. Stanley Fish, "Going Down the Anti-Formalist Road," Presented to the Amherst Seminar on Legal Ideology, 2/24/1989; published as the Introduction to *Doing What Comes Naturally* (Durham: Duke University Press, 1989).

117. Id. at p. 27.

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."[118] Rape becomes "a constitutive ingredient of everyday heterosexual intercourse, including intercourse in marriage."[119] 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 brought on by the antipornography movement.[120]

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."[121] Daly describes women who practice suttee as coerced, "drugged, pushed, browbeaten, or otherwise coerced by the dismal and frightening prospect of widowhood in Indian society."[122] 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'."[123] 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."[124] 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." Fish claims that "What is wrong with Indian women from the feminist point of view is not that they are willing (in a precisely non-voluntarist 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."[125] Here Fish cloaks his radical

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118. Id. at p. 28.

119. Id.

120. To Fish, "aperspectivity" is "a name for the condition of believing that what you believe is in fact true...." 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." 28, 30.

121. Id. at p. 30.

122. Id.

123. *Signs*

124. *Signs*

125. Fish, op cit., at p. 32.

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 class and historical character of belief. The anti-pornography movement is rooted in left liberal feminism, the feminism that emerged in the early 1970s and led to such legal transformations as *Roe v. Wade* 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* which went well beyond the comfortable aspirations for equality associated with the Equal Rights Amendment. Growing as the activism conventionally associated with the 1960s began to wane, the 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 counter--ideological critique that was posed in the late 1960s by movement women -- we won't make the coffee, we won't take the minutes -- and which 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 UMass or NYU Law School. As a key element of feminism, the anti-pornography movement has links with other expressions of outrage at the treatment women get in the home, on 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 has subsequently 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 anti-pornography movement. With stories of what Jan Raymond calls GYN/affection[126] set against the "phallic lust" described by Mary Daly,[127] 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 [128] is constitutive law. The struggle is over

126. Janice Raymond, *A Passion for Friends* (Boston: Beacon Press, 1986).

127. 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 Archimagical Powers of Women," in Dorchen Leidholdt and Janice Raymond, eds *The Sexual Liberals and the Attack on Feminism* (New York: Pergamon Press, 1990): 212.

128. "When a system of power is thoroughly in command, it has scarcely need to speak itself aloud; when its

what women and sexuality are to be.[129] Those who would remain within its existing social relations allow law its conventional innocence. Those who would radically change those relations 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 resistance is self defense not disobedience, it is a movement constituted in its challenge to law.

B. Uncoupling from decenteredness

As an essential element of the constitutive perspective, some colleagues, like McCann and Silverstein, have advocated a "decentered view" of law. For McCann, the effort is in response to Gerald Rosenberg's important book, *Hollow Hope*, and 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."[130] Law, in the decentered view, "is manifest in the wider spheres of society" and in "cultural conventions that shape and facilitate practical social interaction."[131] However, the decentered view 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, this 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.[132] 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,[133] 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 businessman 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.[134] A problem with legal pluralism is an implicit reification.

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workings are exposed and questioned, it becomes not only subject to discussion, but even to change."Kate Millet, *Sexual Politics*, p. 58.

129. See Kristin Luker *Abortion and the Politics of Motherhood* (Berkeley: University of California Press, 1984).

130. Silverstein, *Unleashing Rights.*

131. Id. at 4.

132. 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." John Griffiths as quoted in Mark Galanter, "Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law," 19 *Journal of Legal Pluralism (and Unofficial Law)* (1981): 48.

133. Boaventura deSousa Santos, "The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada," 12 *Law and Society Review* (1977): 5.

134. Sally Merry, *Law and Society Review* 5 (1988).

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.

1. The Marble Temple

In America, the "Marble Temple" behind the Capitol Building symbolizes finality in the law.[135] 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 in a conception of American government. Like Justice Potter Stewart's response in another context, we have trouble when we try to define an institution, but we know one when we see it, or hear about it.[136] 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. It is very 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 words of 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.[137]

Insiders, and lawyers 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 for the authority of the Supreme Court. The

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135. The following analysis is drawn from *The Cult of the Court* (Philadelphia: Temple University Press, 1987) and was adapted for the North East Political Science Association Convention, Boston, November 1996.

136. See Howard Gillman, The New Institutionalism, Part I," *Law and Courts Newsletter* Vol. 7, No. 1 Winter 1996-97:6-11; Lee Epstein and Jack Knight, "The New Institutionalism, Part II," *Law and Courts Newsletter* Vol. 7, No. 2 Spring 1997: 4-10.

137. 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.

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.

The challenge is 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*, to fawning iconography, like Fred Friendly's *The Constitution: That Delicate Balance*.[138] The authors of *The Brethren*, Bob Woodward and Scott Armstrong had money and investigative experience that produced a vivid picture that upset many. Yet, they merely intensified a view of judges as political actors that has been around for some time while affirming the special, highly secret nature of the activity. This glimpse inside not only sold millions of copies of their book, but it eventually left the inside even more guarded as 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 that is represented in Gerald Rosenberg's *Hollow Hope* and Michael McCann's *Rights at Work*.[139]

A lack of serious attention to the legal terrain and the diversion of interest from the traditional subjects - law and legal thought - has been a problem for realist social research. This inquiry proposes leaving the preoccupation with disagreement and struggle to move toward a study of social practices, especially as they 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," a highly formal belief in law and the scholarship of judges that was the basis for legal authority fifty years ago, no longer functions as it once did. A realism in law that includes a critique of formalism as part of its narrative, keeps the cult of the robe alive. This realism, as it applies to the authority of courts, particularly the Supreme Court, I have called the "cult of the judge." 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

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138. Friendly, a self-described "salesman for the Constitution" developed his book from material produced for television. It settled some nerves jarred by *The Brethren* 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 contribute to the cult surrounding the institution of the Supreme Court and both depend on it.

139. Gerald Rosenberg, *Hollow Hope* (Chicago: University of Chicago Press, 1993); Michael McCann, *Rights at Work: Pay Equity and the Politics of Legal Mobilization* (Chicago: University of Chicago Press, 1994).

institution are keys to institutional politics.

The meaning of an institution exists in "possible forms of conduct" or, more economically, "practices."[140] 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* (1803), 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 a function of the modern Court's location in the governing apparatus. Practices represent shared paths. We have seen initiatives in the area of doctrine[141] and in the institutional studies where attention to symbolic phenomena has traditionally been rarer.[142] Over a decade ago, political scientists began turning away from the politics of interests and behavior to shared practices in legislatures, in international political economy, and public opinion.[143] Some even described a "new Institutionalism" which became contested terrain itself and in many of its manifestations has lost much of the cultural perspective at the forefront of academic debate over the last decade.[144] The turn from more traditional political inquiry, and necessarily from dissents and disputes, is a natural one for public law scholarship that 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 perception 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*

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140. John Rawls, *A Theory of Justice* (Cambridge: Harvard University Press, 1971); Richard Flathman, *The Practice of Rights* (New York: Cambridge University Press, 1976); Pierre Bourdieu, *Outline of a Theory of Practice* (London: Cambridge University Press, 1977).

141. Richard Brisbin, "Antonin Scalia, William Brennan, and the Politics of Expression : A Study of Legal Violence and Repression," 87 *American Political Science Review* 912-927 (1993); William Harris, "Binding Word and Polity," 76 *American Political Science Review* 34 (1982); Timothy O'Neill, "The Language Equality," 75 *American Political Science Review* 62 (1981).

142. Howard Gillman, *The Constitution Besieged* (Durham: Duke University Press, 1993); Christine Harrington, *Shadow Justice: The Ideology and Institutionalization of Alternatives to Court* (Westport, Conn.: Greenwood Press, 1985).

143. Marcus E. Ethridge, "A Political-Institutional Interpretation of Legislative Oversight Mechanisms and Behaviors," 17 *Polity* 340-360 (1985); Judith Goldstein, "The Political Economy of Trade: Institutions of Protection," 80 *American Political Science Review* 161-184 (1986); W. Lance Bennett, "The Paradox of Public Discourse: A Framework for the Analysis of Political Accounts," 42 *Journal of Politics* 792 (1980).

144. Roger M. Smith, "Political Jurisprudence, the 'New Institutionalism,' and the Future of Public Law," 82 *American Political Science Review* 89-108 (1987); James G. March and Johan P. Olsen, "The New Institutionalism: Organization Factors in Political Life," 78 *American Political Science Review* 734-749 (1984).

Brethren, with its portrayal of scheming and self interest, received so much attention. There is politics on the Court and there is a 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 holding that we should repeal the doctrine of incorporation applying the Bill of Rights to the states. He also argued that the Supreme Court was not the last word on the Constitution. The legal community promptly condemned this position, leaving some to wonder how the understandings Meese challenged became so ingrained. In this approach, I have been less interested in what very few people know and more in what most people take for granted. Expectations that we learn, as we learn what something like a Supreme Court is, 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."[145] Journalists have also described the Court as "shrouded in clouds of mystery...publicly glimpsed only on those occasions when, with little warning, the justices cast their constitutional thunderbolts to consternate us mere mortals below."[146] 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 in common use 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 "We 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." One example of the "cheap realism" widely noted in reviews is the portrayal of Justice Douglas' physical breakdown, including "his incontinence" and how he smelled. This picture was justified by Bob Woodward and Scott Armstrong, author's of the controversial book, as a way of showing the challenges faced by the justices as they work 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 he sees the focus as part of a realist culture that diminishes the status of the Constitution. He was not alone. One of my students, in reviewing reactions to *The Brethren*, wrote that, "Attempts to lift the decorous robes of the nation's highest tribunal to deconstruct the myth of the justices as 'rarified creatures whose priestly vocation allows them to shed the animosities and crudities of ordinary people' are received harshly."[147] She may be right. For example, John P. Frank's review described one of the

145. Gina Russo, "The Brethren Backlash and A High-Tech Lynching: Overexposure of the Marble Temple," Student Paper, UMass, Amherst, 1992.

146. Stephen L. Carter, "The Candidate," *The New Republic*, February 22, 1993: 35.

147. Gina Russo, "The Brethren Backlash and A High-Tech Lynching: Overexposure of the Marble Temple,"

sources used by Woodward and Armstrong as "swine" for recounting one of the justices trying to sign Court papers on his death bed and signing the sheet instead of the paper. Anthony Lewis' review in *The New York Review of Books* was equally harsh.

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." This place has become central to the Court's authority giving new meaning to Justice Robert Jackson's aphorism that the 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. My students have had many interesting experiences while interning in the Chief Justice's Office at the Supreme Court, but the ones that fascinated me most were a sort of denial that seemed to characterize reactions to their appointment. When Joyce O'Connor was at the Court in the Fall of 1989 she was constantly faced with blank stares when she indicated where she was working and on a number of occasions I witnessed what initially seemed to be strange behavior. We began to suspect, however, that people had trouble processing the fact that Joyce was at the Court and we thought this was because the institution seems so distant.

An early citation to the Supreme Court's distance was in "Bachelor Mother," a 1939 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." 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 Benning in *The American President* when she enters the White House for the first time. She calls it "Capraesque," a reference to the self-conscious iconography in the movies of Frank Capra, particularly *Mr. Smith Goes to Washington* where Jimmy Stewart as Jefferson Smith has trouble getting to his office because he is so star struck upon arriving in the city where so many of the monuments to American government reside.

Intimacy and distance provide an aura around the institution which 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' 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."[148] 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 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*

Student Paper, UMass, Amherst, 1992.; quoting Graham Hughes, "The Brethren," *The New Republic* February 23, 1980: 31.

148. Ira Berkow, *The New York Times* December 1991.

Yorker article on the Tailhook Scandal put it, Hill seems to have won the culture war.[149] 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,[150] examining the distinction between institutional and intellectual authority on the Supreme Court, proposes that the Supreme Court's intellectual authority has dwindled. It may no longer be correct to say that the Court has, as Hamilton said, "...neither Force not 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. In support of Marshall an article in *The Stanford Magazine* describe 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?"[151] Collier takes the occasion of Marshall stepping down from the Court to asses the two important ways one might be an authority on the Constitution. The first is as a student of the text and subsequent commentary on it. In this sense it would not be essential to hold a job as Supreme Court justice and indeed it is a kind of authority others might indeed possess. In fact, it is a kind of authority shared by Supreme Court justices and some of the rest of us. The second 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 which would surround a former Supreme Court justice and distinguish him from other non-institutional authorities. Obviously, for Justice Marshall, or any other justice, both senses were operating while they are on the bench. But the distinction still matters. Marshall's status as an authority was obviously diminished when he stepped down and his successor would take up some of what was lost.[152]

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149. *The New Yorker* 1996.

150. "The Use and Abuse of Humanistic Theory in Law: Reexamining the Assumptions of Interdisciplinary Legal Scholarship," 41 *Duke Law Journal* 191 (1991). The author is Assoc. Professor of Law, University of Florida.

151. *The Stanford Magazine*, Spring 1988, at 20, 21; Fall 1987, at 24, 74; see also, Collier, 1991, 222.

152. 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 Kim Crenshaw. Crenshaw is a leading critical race theorists who teaches at UCLA law school. Her image is of "misplaced pairings" that strangely juxtapose ideology, race and class. The result is the failure to see the African-American woman. Painter, a professor of History at Princeton, wrote "...and the use of Racial Stereotype," and sorted out the issues of sex and race that came to the fore

Conclusion: From Interests to Sites

In *The Constitution of Interests* I noted that it may initially seem strange to find movements on the margins of the law, such as gay rights, and the feminist anti-porn 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. This strangeness derives from a failure to place the context for law in the forefront of descriptions of law's power. The constitutive perspective holds that law is dependent on social relations, hence we need to see that law takes different forms for different actors and the forms and the actors are mutually constitutive. In conclusion we 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. Where ownership and movement history leads 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 are really held to the critical standard. The economic insecurity of bathhouse owners compared to the relative security of Harvard Law professors simply highlights the fertility of certain social space for certain forms of law. To paraphrase the book from which much of this comes, "Transcending the subjectivity that maintains the silences on institutional power is a step toward understanding the legal constitution of social life."[153] 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 it seem as if the authority of law is upside down, placing the arrangements between political actors ahead of the law. My position is simply that the role of law 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 draw out more explicitly law's role in shaping the terrain of social life.

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in the Thomas-Hill confrontation. Her puzzle is that of thinking of gender and race "simultaneously." Williams is a law professor at Columbia Law School. Her essay, "A Rare Case Study of Muleheadedness and Men," among the most literary in the volume, is powerful, poetic and hysterical.

153. See *Constitution of Interests*, p. 139, for a version of this quote.