

# POWER MATTERS: POWER CONFIGURATION AND THE DEATH OF AMERICAN LAW

*Otis Grant*<sup>†</sup>

## TABLE OF CONTENTS

I.	INTRODUCTION .....	1
II.	RAWLS, LOCKE AND THE TRADITION OF AMERICAN JUSTICE .....	4
III.	INSTITUTIONALISM AND THE SEPERATION OF POWER.....	6
	A. Constitutional Structure .....	7
	B. The Judicial Branch.....	8
	C. Legislative Branch.....	11
IV.	POWER.....	12
V.	AUTHORITY IS NOT THE SAME AS POWER.....	14
VI.	POWER CONFIGURATION.....	19
	A. Power Configuration is Different from Social Exchange Theory .....	20
	B. Power Configuration Analysis .....	23
VII.	DEATH OF LAW.....	23
VIII.	THE FOUR GUIDING SUPPOSITIONS OF POWER CONFIGURATION .....	25
IX.	CONCLUSION .....	26

## I. INTRODUCTION

Power, not law, is the most important element in the interaction between litigating parties. The political, not the judiciary, is the foundation of the American legal system.<sup>1</sup> The link between law and

---

<sup>†</sup> Otis Grant holds a J.D. from the University of Connecticut School of Law and is the CEO of the Center for the Study of Power, Behavior and Strategy.

<sup>1</sup> See, e.g., Louiza Dudin, *Networked Medical Devices: Finding a Legislative Solution to Guide Healthcare into the Future*, 40 SEATTLE U. L. REV. 1085 (2017) (discussing political

2 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

power connects “authoritative rules and precedents to policies and principles.”<sup>2</sup> The notion of sovereignty and authority as the foundation of law directly contradicts the legitimacy of the private/public conception of law, which is the foundation of jurisprudence and American legal theory.<sup>3</sup>

The concept of power is subjective.<sup>4</sup> Theories about power have occupied scholars for centuries.<sup>5</sup> Though psychologically-based, power comes from ideas in political science, social theory, sociology, philosophy, theology and economics. These disciplines have confronted basic issues in the analysis of power and serve to offer a relevant foundational paradigm.<sup>6</sup> Those that espouse the rationalist framework for

assertions and shortcomings of current legal approaches to cybersecurity); Hon. Lisa Foster, *Injustice Under Law: Perpetuating and Criminalizing Poverty Through the Courts*, 33 GA. ST. U. L. REV. 695 (2017) (discussing whether the poor receive the same legal protections as the affluent); Erwin Chemerinsky, *The Assault on the Constitution: Executive Power and the War on Terrorism*, 40 U.C. DAVIS L. REV. 1 (2006) (contending that the Constitution asserts that two branches of government should have to be involved in virtually all major government actions, and that the courts should reject broad claims of Executive authority).

<sup>2</sup> John M. Finnis, *On the Critical Legal Studies Movement*, 30 AM. J. JURIS. 21, 25 (1985).

<sup>3</sup> See e.g., G. Edward White, *The Path of American Jurisprudence*, 124 U. PA. L. REV. 1212, 1212 (1976) (The foundation of American jurisprudence can be set out in three postulations: (1) the belief that “common” law must continually and consistently reflect contemporary social attitudes; (2) the written Constitution is the supreme source of law; and (3) the government always has lawmaking power.). Hanoch Dagan & Roy Kreitner, *The Character of Legal Theory*, 96 CORNELL L. REV. 671, 681 (2011) (suggesting that law may be framed as set of “normative rules,” as legal theory is typically explicitly or implicitly structured around the “central and persistent question of jurisprudence”); Alan V. Johnson, *A Definition of the Concept of Law*, 2(1) MID-AM. REV. SOC. 47, 49 (1977) (identifying two main types of phenomena within the meaning of “law”: (1) a body of statements (written or oral) constituting the rules, norms, and prescriptions (i.e., ‘laws’) which have either been explicitly formulated or which have come to be accepted as authoritative and legitimate and (2) actions which express or implement these statements of the rules, and which are of two kinds: (a) those which formulate, codify, refine, elaborate on, supplement, and explain the rule statements; and (b) those which use the rules as a basis for sanctioning rule violators or as a basis for adjudicating conflicts between actors.”).

<sup>4</sup> Samantha Godwin, *Social Construction of False Necessities and the Material Basis of Socio-Legal Power: A Reply to Irrationalism in Critical Legal Studies Critiques Identifying Latent Social Violence as a Potential New Material Foundation for Systematic Socio-Legal Theory*, 32 PACE L. REV. 362, 365 (2012); see also James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 724-725 (1985).

<sup>5</sup> See, e.g., DENNIS H. WRONG, *POWER: ITS FORMS, BASES, AND USES*, viii-ix (5th ed.) (2009) (contending that “conservatives, liberals, socialists, libertarians, anarchists, nationalists, religious believers, and secularists endlessly dispute over who should have power and how much, how it should be organized and channeled, and a host of other issues pertaining to its distribution and exercise”); Jan Bruins, *Social Power and Influence Tactics: A Theoretical Introduction*, 55(1) J. SOC. ISSUES 7, 8 (1999); NICOLO MACHIAVELLI, *THE PRINCE* (Peter E. Bondanella ed. & trans., Oxford University Press 1984) (1532) (discussing human nature and the concept of power); STEVEN LUKES, *POWER: A RADICAL VIEW 1* (1974) (suggesting that power should be conceptualized broadly, with an emphasis on highlighting aspects of power that are not readily observable); THOMAS HOBBS, *LEVIATHAN* 7, 88-89 (Crawford Brough Macpherson ed., Penguin Books 1968) (1651) (discussing human nature, power and the need for political structure in society).

<sup>6</sup> Bernd Simon & Penelope Oakes, *Beyond Dependence: An Identity Approach to Social Power and Domination*, 59(1) HUM. REL. 105, 106 (2006).

the study of power, reduce the concept of power to “process dynamics” and in so doing, too narrowly define the scope of inquiry.<sup>7</sup> Whereas a rational choice process can generate cooperative conduct, such behavior does not happen in a vacuum.<sup>8</sup> Moreover, because of the fallibility of human decision making and human judgment, it is necessary to impose constraints on individual choice.<sup>9</sup>

Law is an instrument used to keep people from evil or damaging conduct.<sup>10</sup> Law is also a framework in which actors can develop and maintain a “peaceful and profitable existence.”<sup>11</sup> For the purpose of this article, law is construed very broadly and includes legal systems of nations, states, local governments and also smaller systems that operate “law-like” in structure and function.<sup>12</sup> In asserting that power, not law, is the most important element in the American legal system, the article maps a more complex way in which to frame law.

Another important way of looking at law is through its functions.<sup>13</sup> In this context, one may think of law in terms of its role in resolving disputes, managing and directing the actor’s behavior allocating entitlements and obligations, and articulating values.<sup>14</sup> As articulated by James Boyle, it is important that law “translate the struggles, conflicts, and politically contentious values of everyday life into a [supposedly] neutral system of the law.”<sup>15</sup> Legal theory attempts to address these functions and their complex interplay in society.<sup>16</sup>

Power reflects decisions that are made and the sociohistorical conditions in which the decisions are created and implemented. From a

---

<sup>7</sup> Alexander Wendt, *Anarchy is What States Make of It: The Social Construction of Power Politics*, 46(2) INT’L ORG. 391, 392 (1992).

<sup>8</sup> See, e.g., Jeffrey J. Rachlinski, *The Uncertain Psychological Case for Paternalism*, 97 NW. L. REV. 1165, 1165 (2003) (asserting that “human beings are fallible creatures, often making poor choices”); Russell B. Korobkin and Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051 (2000) (questioning the rationality assumption in law); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, 185 SCI. 1124, 1124 (1974) (arguing that “many decisions are based on beliefs concerning the likelihood of uncertain events such as the outcome of an election, the guilt of a defendant, or the future value of the dollar.”).

<sup>9</sup> Rachlinski, *supra* note 8; see also Christine Jolls, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1541-45 (1996).

<sup>10</sup> Lon L. Fuller, *Law as an Instrument of Social Control and Law as a Facilitation of Human Interaction*, 1975 BYU L. REV. 89, 89 (1975).

<sup>11</sup> *Id.*

<sup>12</sup> See, e.g., Lon L. Fuller, *Human Interaction and the Law*, 14 AM. J. JURIS. 1, 1 (1969).

<sup>13</sup> Charles E. Clark, *The Function of Law in a Democratic Society*, 9 U. CHI. L. REV. 393, 393-394 (1940) (pointing out that “though some of the excrescences of [the] higher law doctrine have been pruned away in [modern] jurisprudence, enough remains alive to give us pause, [and] require some thoughtful consideration as to the role of law in a modern democracy.”).

<sup>14</sup> Dagan & Kreitner, *supra* note 3.

<sup>15</sup> Boyle, *supra* note 4, at 687, 696.

<sup>16</sup> Dagan & Kreitner, *supra* note 3.

4 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

political standpoint, any assessment of power seeks to answer two important questions: (1) who benefits, and (2) who controls?<sup>17</sup> Those analyzing power must also be cognizant of the built-in conflict of values and norms that are expressed in everyday interpersonal relations.<sup>18</sup> For instance, in the United States there has been a relationship between public policy and political equality.<sup>19</sup> This is not likely to change given America's current political environment.<sup>20</sup>

In Part I of this article, the author discusses the tradition of American jurisprudence, including institutionalism, separation of powers and the rule of law. In Part II, the author describes the concepts of power and authority, pointing out that the concepts are not one in the same. Part III focuses on Power Configuration and how the theory intersects with concepts of justice. The author concludes that power, not law, is the dominant element in American justice.

## PART I

### II. RAWLS, LOCKE AND THE TRADITION OF AMERICAN JUSTICE

John Rawls<sup>21</sup> provided a theory of justice grounded in a hypothetical

<sup>17</sup> G. William Domhoff, *C. Wright Mills, Power Structure Research, and the Failures of Mainstream Political Science*, 29(1) NEW POL. SCI. 97, 102 (2007).

<sup>18</sup> *Id.* at 101 (contending that “[t]his conflict leads to some unexpected but understandable alliances, with building trades unions often siding with the growth elites in a vain attempt to create more jobs in the overall economy, whereas environmentalists, university students, and left-wing activists usually line up with the neighborhoods even though there is nothing inherently progressive or environmentalist about neighborhood protection (think racial or ethnic exclusion, for example).”).

<sup>19</sup> Jacob S. Hacker, *Inequality, American Democracy, and American Political Science: The Need for Cumulative Research*, 39(1) PS: POL. SCI. & POL. 47, 48 (2006).

<sup>20</sup> See, e.g., Frances Fox Piven, *Response to American Democracy in an Age of Inequality*, 39(1) PS: POL. SCI. & POL. 43, 43 (2006) (contending that “we should pay more attention to the politics of extreme wealth concentration, the culture of greed and arrogance it has encouraged, and the stratagems the wealthy now deploy to control formally democratic institutions.”).

<sup>21</sup> See JOHN RAWLS, *A THEORY OF JUSTICE* 223 (rev. ed. 1999) [hereinafter RAWLS, THEORY] (“[H]owever mistaken the notion of the social contract may be as history, and however far it may overreach itself as a general theory of social and political obligation, it does express, suitably interpreted, an essential part of the concept of Justice.”); JOHN RAWLS, *POLITICAL LIBERALISM* 445, 446, n.16 (1996) (“[I]deally citizens are to think of themselves as if they were legislators and ask themselves what statutes, supported by what reasons satisfying the criterion of reciprocity, they would think it most reasonable to enact.” There is some resemblance between this criterion and Kant’s principle of the original contract.”); JOHN RAWLS, *THE LAW OF PEOPLES, WITH THE IDEA OF PUBLIC REASON REVISITED* 10 (1999) [hereinafter RAWLS, LAW]; JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 3, 16 (Erin Kelly ed., 2001) [hereinafter RAWLS, RESTATEMENT]; JOHN RAWLS, *COLLECTED PAPERS* 62 (Samuel Freeman ed., 1999); and JOHN RAWLS, *LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* 363 (Barbara Herman ed., 2000). See Gary Chartier, *People or Persons? Revising Rawls on Global Justice*, 27 B.C. INT’L & COMP. L. REV. 1, 1 n.1 (2004) (pointing out that

contract between “people.”<sup>22</sup> Rawls’ theory encompasses both ideal and non-ideal elements.<sup>23</sup> The ideal (or “strict compliance”) element of Rawls’ theory concerns societal relationships and presumes that most or all people act in accordance with the dictates of society, including the various laws and social norms and values.<sup>24</sup> Rawls’ idea of compliance is best understood as both a norm for society members and as a standard of justice.<sup>25</sup> However, absent compliance by members of society, governments would still be bound by the compliance element, and “could rightly demand that others conform to it.”<sup>26</sup>

John Locke is considered one of the major figures in American Law.<sup>27</sup> The Declaration of Independence incorporates Locke’s position, stating that each person is endowed with “certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness.”<sup>28</sup> This is not to assert that Locke alone influenced the philosophy of the Founding Fathers.<sup>29</sup> In fact, natural law can readily be traced to the philosophy of Aristotle.<sup>30</sup>

Despite the effectiveness of the American Revolution, the Founding Fathers did not speak in one voice, and in fact, were not in agreement on all issues in the new Republic.<sup>31</sup> The founding of the Republic entailed one of the greatest and most probing public debates in history.<sup>32</sup> In the name of progress, the Founding Fathers sought to transform society, personal life, government and religion.<sup>33</sup>

The relationship between the American people and their government

---

in RAWLS, THEORY, at 332-33, Rawls discusses the rudiments of what he later called ‘the Law of Peoples.’”).

<sup>22</sup> Chartier, *supra* note 21, at 1.

<sup>23</sup> RAWLS, LAW, *supra* note 21, at 10; *see also* Charles Beitz, *Rawls’s Law of Peoples*, 110 ETHICS 669, 675 (2000); Chartier, *supra* note 21, at 2.

<sup>24</sup> RAWLS, RESTATEMENT, *supra* note 21, at 13; *see* RAWLS, THEORY, *supra* note 21, at 216; Chartier, *supra* note 21, at 2.

<sup>25</sup> Chartier, *supra* note 22, at 2.

<sup>26</sup> *Id.*

<sup>27</sup> Jeffrey M. Gaba, *John Locke and the Meaning of the Takings Clause*, 72 MO. L. REV. 525, 526 (2007).

<sup>28</sup> Wilson R. Huhn, *Constantly Approximating Popular Sovereignty: Seven Fundamental Principles of Constitutional Law*, 19 WM. & MARY BILL RTS. J. 291, 317 (2010). THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

<sup>29</sup> Kenneth D. Stern, *John Locke and the Declaration of Independence*, 15 CLEV.-MARSHALL L. REV. 186, 189 (1966).

<sup>30</sup> *Id.*

<sup>31</sup> Paul Lermack, *The Constitution is the Social Contract So it Must Be a Contract Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1405-06 (2007).

<sup>32</sup> PAULINE MAIER, RATIFICATION: THE PEOPLE DEBATE THE CONSTITUTION, 1787-88, ix (2010) (discussing the Founding, American Constitutionalism and American politics).

<sup>33</sup> Geoffrey R. Stone, *The World of the Framers: A Christian Nation?* 56 UCLA L. REV. 1, 4 (2008) (contending that this “transformation was of course shaped in large part by the Enlightenment”); *see also* BERNARD BAILYN, TO BEGIN THE WORLD ANEW: THE GENIUS AND AMBIGUITIES OF THE AMERICAN FOUNDERS 35 (2003); HENRY F. MAY, THE ENLIGHTENMENT IN AMERICA 88 (1976).

6 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

was permanently transformed when the U.S. Constitution was ratified.<sup>34</sup> The Framers deliberately denied sovereignty to the American government, and as such, the United States stood in contrast to England where all sovereignty is invested in Parliament.<sup>35</sup> The United States was “founded on the principle that ‘the people’ retained their sovereignty, with authority over constitutional meaning, while government officials merely served as their agents.”<sup>36</sup> The Framers understood human nature and recognized that government officials, invested with power and authority, could not always be trusted to pursue the public interest.<sup>37</sup>

### III. INSTITUTIONALISM AND THE SEPARATION OF POWER

“Constitutional law has been created by a dialogue between generations.”<sup>38</sup> For instance, at the Founding, “the people” referred to white men who owned property.<sup>39</sup> However, over the course of the next three centuries, Americans fiercely debated and fought over who comprised the body politic; and as a result, the ranks of “the people” continued to expand.<sup>40</sup> Yet, the motive in constitutional adjudication is often oblique.<sup>41</sup>

Democracy defines the American government.<sup>42</sup> Specifically, the United States is a Federal Presidential Constitutional Republic.<sup>43</sup> Similar to most modern constitutional democracies, U.S. Constitutional document covers three areas: (1) “social goals and individual rights;” (2) “sanctioning powers, duties, and interactions of the various branches of

---

<sup>34</sup> Michael Sant’Ambrogio, *Standing in the Shadow of Popular Sovereignty*, 95 B.U. L. REV. 1869, 1873 (2015).

<sup>35</sup> *Id.*

<sup>36</sup> Sant’Ambrogio, *supra* note 34, at 1873.

<sup>37</sup> *Id.*

<sup>38</sup> Bruce Ackerman, *De-Schooling Constitutional Law*, 123 YALE L. J. 3104, 3104 (2014).

<sup>39</sup> Sant’Ambrogio, *supra* note 34, at 1873 n.13. *See also* CHRISTIAN G. FRITZ, *AMERICAN SOVEREIGNS: THE PEOPLE AND AMERICA’S CONSTITUTIONAL TRADITION BEFORE THE CIVIL WAR* 5 (2008).

<sup>40</sup> Sant’Ambrogio, *supra* note 34, at 1873 n.13.

<sup>41</sup> Richard A. Epstein, *Tuskegee Modern, or Group Rights Under the Constitution*, 80 KY. L. REV. 869, 870 (1992).

<sup>42</sup> Simeon E. Baldwin, *The Extent of the Judicial Power of the United States*, 18 YALE L. J. 1, 2 (1908) (contending that “[i]n legal theory, the people of the several States of the United States, by the action of a majority of the people in each State taken within that State, delegated certain powers, which either these States or peoples or the whole people of the United States had theretofore possessed, to the United States of America.”).

<sup>43</sup> The U.S. Constitution provides that “The United States shall guarantee to every State in this Union a Republican form of government.” U.S. CONST. art. IV § 4, cl. 1.; Richard H. Pildes, *Romanticizing Democracy, Political Fragmentation, and the Decline of American Government*, 124 YALE L. J. 804, 806 (2014) (opining that American democracy includes the “organization, structure and exercise of actual political power in elections and in governance.”)

government;” and (3) “the procedures for amending the document itself.”<sup>44</sup>

### A. Constitutional Structure

The American government has three branches: the legislative, the executive, and the judicial. Each of the three branches has defined functions and operates to check the powers of the other branches. In short, the branches are kept distinct in order to prevent abuse of power.<sup>45</sup>

The rationale of the separation of powers is often intertwined with the theory of “dispersal of power” and “checks and balances” usually found in a constitutional system.<sup>46</sup> The separation of powers is conceptual

---

<sup>44</sup> See Gianluigi Galeotti, *Founding Fathers Versus Rotten Kids*, in COMPETITION AND STRUCTURE: THE POLITICAL ECONOMY OF COLLECTIVE DECISIONS 106 (Gianluigi Galeotti et al. eds., 2009).

<sup>45</sup> See W.B. GWYN, THE MEANING OF THE SEPARATION OF POWERS 127-28 (1965); John F. Manning, *Separation of Powers as Ordinary Interpretation* 124 HARV. L. REV. 1939, 1994 (2011), (pointing out that at the time of the founding, there were five main purposes of the Separation of Powers Doctrine):“(1) to create greater governmental efficiency; (2) to assure that statutory law is made in the common interest; (3) to assure that the law is impartially administered and that all administrators are under the law; (4) to allow the people’s representatives to call executive officials to account for the abuse of their power; and (5) to establish a balance of governmental powers”; *Myers v. United States*, 272 U.S. 52, 293 (1926) (Brandeis, J., dissenting) (“[t]he doctrine of the separation of powers was adopted by the Convention of 1787[,] not to promote efficiency but to preclude the exercise of arbitrary power.”); see also James M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 TEX. L. REV. 1427, 1428 (2016) (contending that “constitutional constructions should be consistent with the basic constitutional framework,” which “includes the ‘Constitution’s text and its choice of legal norms, rules, standards, principles and silences’ and further arguing that “there are at least five underlying principles: (1) separation of powers; (2) checks and balances; (3) federalism; (4) the rule of law; and (5) republicanism, or representative democracy”); John W. Dean, *The U.S. Supreme Court and the Imperial Presidency: How President Bush is Testing the Limits of His Presidential Powers*, FINDLAW (Jan. 16, 2004), <http://writ.news.findlaw.com/dean/20040116.html>; ROBERT BYRD, LOSING AMERICA: CONFRONTING A RECKLESS AND ARROGANT PRESIDENCY 13-14 (2005); Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979, 985-86 (1987); Edward H. Levi, *Some Aspects of Separation of Powers*, 76 COLUM. L. REV. 371, 385 (1976) (discussing that at one time or another, each branch has abused the power entrusted to it); M. Elizabeth Magill, *Beyond Powers and Branches in Separation of Powers Law*, 150 U. PA. L. REV. 603, 650 (2001) (discussing that the general theory of abuse is that “having one, or even a few actors controlling all government authority increases the risk that state power will be abused in some unquestionably awful way.”); Ganesh Sitaraman, *Economic Structure and Constitutional Structure: An Intellectual History*, 94 Tex. L. Rev. 1301, 1305 (1994) (pointing out that “Constitutional design is about the structure of government”); Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421, 432-437 (1987); Adrian Vermeule, *Optimal Abuse of Power*, 109 NW. U. L. REV. 673, 675 (2015) (defining abuse as “action that flagrantly transgresses the bounds of constitutional or statutory authorization, or in welfare-economic terms as action that produces welfare losses-either because officials have ill-formed beliefs or because they act with self-interested motivations.”); Keith Werhan, *Toward an Eclectic Approach to Separation of Powers: Morrison v. Olson Examined*, 16 HASTINGS CONST. L. Q. 393, 410 (1989) (asserting that during the Nixon Presidency, Congress created structural checks on executive authority in an effort to prevent abuses of power by the executive branch). . .

<sup>46</sup> Cf. Jeremy Waldron, *Separation of Powers in Thought and Practice*, 54 B.C. L. REV. 433,

8 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

and structural and dictates a “qualitative separation of the different functions [i.e., powers] of government—legislation, adjudication, and executive administration.”<sup>47</sup>

### B. *The Judicial Branch*

The Judicial Branch is one of the three co-equal branches of the U.S. government and is organized under the United States Constitution and laws of the federal government.<sup>48</sup> The U.S. Constitution is the central feature of American law.<sup>49</sup> Article III of the Constitution requires the establishment of a Supreme Court and permits the Congress to create other federal courts, and place limitations on their jurisdiction.<sup>50</sup> Article III federal judges are appointed by the President with the consent of the Senate and serve until they resign, are impeached, retire, or die.<sup>51</sup>

Despite the enormous power of the Presidency, the President is obligated to adhere to the power of the judiciary because the judicial branch interprets the Constitution and determines what the law is.<sup>52</sup>

433 (2013).

<sup>47</sup> *Id.* at 434. See also Torsten Persson et al., *Separation of Powers and Political Accountability: Towards a Formal Approach to Comparative Politics*, at (Inst. for Int’l Econ. Stud., Seminar Paper No. 612, 1996), available at <http://www.diva-portal.org/smash/get/diva2:343133/FULLTEXT01.pdf>.

<sup>48</sup> Albert K. Stebbins, *The “Vested” Powers of the United States Supreme Court*, 10 MARQ. L. REV. 204, 204 (1926); William W. Van Alstyne, *Civil Rights and Civil Liberties: Whose “Rule of Law”?*, 11 WM. & MARY BILL RTS. J. 623, 626 n.18 (2003); U.S. CONST. art. III, §§ 1-2:

The judicial power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The judicial power shall extend to all Cases arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority.

<sup>49</sup> Stephen E. Sachs, *Constitutional Traditions: Akhil Amar’s America’s Unwritten Constitution: The “Unwritten Constitution” and Unwritten Law*, 2013 U. ILL. L. REV. 1797, 1797 (“The written Constitution is the ‘central feature’ of American law; see also William B. Ewald, *What’s So Special About American Law?* 26, 1093 (suggesting that “one distinctive feature of the American legal system is its reliance on a written constitution”).

<sup>50</sup> U.S. CONST. art. III, § 2:

In all cases affecting ambassadors, other public ministers and consuls and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

See also Stebbins, *supra* note 48 at 204.

<sup>51</sup> The United States Constitution stipulates that federal judges shall “hold their Offices during good Behavior,” and “shall receive a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III § 1. “These clauses are known as the Judicial Tenure and Salary Protection Clauses, respectively.” See Peter M. Shane, *Who May Discipline or Remove Federal Judges? A Constitutional Analysis*, 142 U. PA. L. R. 209, 209 n.1 (1993). For a general discussion on the appointment process for federal judges, see Hugh Scott, *The Selection of Federal Judges*, 24 WASH. & LEE L. REV. 205 (1967); Michael J. Yelnosky, *Who Rates Prospective Federal Judges for the American Bar Association?*, 19 ROGER WILLIAMS U. L. REV. 91, Part I (2014) (discussing the influence that the ABA has on the appointment of federal judges).

<sup>52</sup> See U.S. CONST. art. VI, cls. 2-3:



Judicial review includes power to review the actions of the President.<sup>53</sup> To ensure impartiality, the Constitution grants all federal judges tenure and an extraordinary degree of independence.<sup>54</sup> Once appointed by the President and confirmed by the Senate, federal judges serve for life, without fear of retaliatory cuts of pay, and are subject to removal only by a strenuous process of impeachment by the House of Representatives, and trial by the Senate.<sup>55</sup>

The judicial branch stands as the guardian of civil liberties and the protector of the rule of law.<sup>56</sup> Unlike the highest court in most other countries, the U.S. Supreme Court “came into being along with the government itself, and was created by the same hand.”<sup>57</sup> Though created by the Constitution, the Supreme Court also creates and interprets

---

This Constitution, and the laws of the United States which shall be made in Pursuance thereof shall be the supreme Law of the land and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation to support this Constitution.

<sup>53</sup> Tom C. Clark, *The Supreme Court as a Protector of Liberty Under the Rule of Law*, 43 MARQ. L. REV. 11, 12 (1959).

<sup>54</sup> Joseph J. Darby, *Guarantees and Limits of the Independence and Impartiality of the Judge*, 41 SAN DIEGO L. REV. 997, 1000 (2004) (“[t]he Tenure and Salary Clause of the U.S. Constitution guarantees the personal (or decisional) independence of all federal judges.”); Harry T. Edwards, *Regulating Judicial Misconduct and Divining “Good Behavior” for Federal Judges*, 87 MICH. L. REV. 765, 776 (1989) (“Federal judges are guaranteed life tenure to protect their independence.”). Article III provides: “The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.” U.S. CONST. art. III, § 2. Ronald J. Krotoszynski, Jr., *On the Danger of Wearing Two Hats: Mistretta and Morrison Revisited*, 38 WM. & MARY L. REV. 417, 459-461 (1997) (pointing out that “[t]hree Federalist Papers [Federalist Nos. 37, 78, and 79] demonstrate that the Framers intended to safeguard zealously the independence of the federal judiciary.”); Saikrishna Prakash & Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L. J. 72, 87 (2006) (contending that “limiting removal of federal judges to impeachment enhance[s] judicial independence.”).

<sup>55</sup> Article I allocates the “sole Power of Impeachment” to the House of Representatives and designates the Senate with the “sole Power to try all Impeachments.” U.S. CONST. art. I, §§ 2, cl 5; U.S. CONST. art. I, § 3, cl 6. Article I also stipulates that “[j]udgment in Cases of Impeachment shall not extend further than to removal from Office, and disqualification to hold and enjoy any Office of Honor, Trust, or Profit under the United States.” U.S. CONST. art. I, § 3, cl 7. Additionally, it reserves the prospect of further criminal sanctions for misconduct by indictment and trial in the criminal courts “according to Law.” *Id.* Article II identifies the officers subject to impeachment, including the “President, Vice President and all civil Officers of the United States” and denotes impeachable offenses including “Treason, Bribery, or other high Crimes and Misdemeanors.” U.S. CONST. art. II, § 4. *See also e.g.*, Federalist 79 (Hamilton) in *The Federalist* 531, 532-33 (Wesleyan 1961). Saikrishna Prakash and Steven D. Smith, *How to Remove a Federal Judge*, 116 YALE L. J. 72, 74 (2006) (suggesting that “[i]t is a virtually unquestioned assumption among constitutional law cognoscenti that impeachment is the only means of removing a federal judge.”). U.S. CONST., art. III, § I (providing for indefinite tenure wherein “Compensation shall not be diminished.”). *See* U.S. CONST. art. I, §§ 2-3 (delineating the impeachment process for federal judges). *See* Preble Stolz, *Disciplining Federal Judges: Is Impeachment Hopeless?* 57 CAL. L. R. 659, 659, n.3 (1969) (describing the impeachment process).

<sup>56</sup> Van Alstyne, *supra* note 48, at 623. *See generally* Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719 (1975).

<sup>57</sup> Clark, *supra* note 53, at 12.

10 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

common law.<sup>58</sup> As a common law system, American courts give great precedential weight to common law. The courts often draw connections between statutory interpretation and common law.<sup>59</sup> In practice, common law operates as a third branch of law, equal with statutes which are adopted through the legislative process and regulations which are promulgated by the executive branch.<sup>60</sup>

One of the most important cases in American legal history is *Marbury v. Madison*,<sup>61</sup> wherein Chief Justice Marshall declared that the “Court had the power to act as a final interpreter of the Constitution” and “just as importantly, to declare invalid and unenforceable any Act of Congress inconsistent therewith.”<sup>62</sup>

Under *Marbury v. Madison*, the Supreme Court has the final word on the meaning of the Constitution.<sup>63</sup> Notwithstanding, an important premise of the U.S. Constitution is when “Congress passes a law and the President signs it, their actions reflect a shared judgment about the constitutionality of the statute.”<sup>64</sup>

The judicial power of the United States “shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.”<sup>65</sup> The appropriate interpretation of congressional power is not that Congress must vest the judicial power in the federal judiciary, but rather, that the Constitution itself does the vesting.<sup>66</sup> This archetype of reasoning can be traced to *Marbury v. Madison*, which viewed an injury to “the rights of individuals” as a “predicate to judicial action.”<sup>67</sup> Here, judicial power is both idealistic and

---

<sup>58</sup> Common law (also known as case law or precedent) is law created by judges, courts, and tribunals, which is stated in decisions that ostensibly decide individual cases, but in fact, have precedential effect on future cases. *See., generally*, David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. OF CHI. L. REV. 877 (1996).

<sup>59</sup> Jeffrey A. Pojanoski, *Reading Statutes in the Common Law Tradition*, 101 VA. L. REV. 1357, 1364 (2015).

<sup>60</sup> *See generally id.* at 1357 (discussing the connection between statutory law and common law).

<sup>61</sup> *Marbury v. Madison*, 5 U.S.137 (1803).

<sup>62</sup> *See Clark, supra* note 53, at 12; *Marbury v. Madison*, 5 U.S. 137 (1803). *See also* Hon. John N. Hostettler & Thomas W. Washburne, *The Constitution's Final Interpreter: We the People*, 8 REGENT U. L. REV. 13, 14, 30 (1997) (pointing out that the prevailing view in America is that the Supreme Court is the final interpreter of the Constitution); *see generally* J. SCOTT HARR ET AL., CONSTITUTIONAL LAW AND THE CRIMINAL JUSTICE SYSTEM 62 (6th ed. 2015).

<sup>63</sup> *Marbury*, 5 U.S. at 177. Seth P. Waxman, *Defending Congress* 79 N.C. L. Rev. 1073, 1085 (2001).

<sup>64</sup> Waxman, *supra* note 63, at 1078 (contending that “it is fair to presume that the Congress that passed the legislation and the President who signed it were of the view that the law conformed to the Constitution as construed by the Supreme Court.”).

<sup>65</sup> U.S. CONST. art. III, § 1.

<sup>66</sup> Julian Velasco, *Congressional Control over Federal Court Jurisdiction: A Defense of the Traditional View*, 46 CATH. U. L. REV. 671, 699 (1997).

<sup>67</sup> Ernest A. Young, *In Praise of Judge Fletcher-And of General Standing Principles*, 65 ALA. L. REV. 473, 483 (2013).

conceptual and includes the “whole history of the administration of justice in the American courts through the centuries.”<sup>68</sup>

### C. Legislative Branch

The legislative branch is in charge of making laws.<sup>69</sup> It is made up of the Congress, which has two parts: the House of Representatives and the Senate.<sup>70</sup> The House and Senate are equal partners in the legislative process.<sup>71</sup> Legislation cannot be enacted without the consent of both chambers.<sup>72</sup>

In America, all legislative Powers are vested in [the] Congress of the United States.<sup>73</sup> Congress has the power to govern by means that involve no cost to the federal government and no federal government action.<sup>74</sup> Yet, as Professor Kate astutely points out, “Congress holds the power of the purse.”<sup>75</sup> Congress also has discretion to choose any appropriate means of exercising its powers.<sup>76</sup>

According to the U.S. Constitution, a bill becomes law when it receives a majority vote in both houses of Congress and the President signs it.<sup>77</sup> The separation of powers between the President and the legislative branch is clear. For example, Congress is precluded from vesting in itself the authority to appoint commissioners who exercise

<sup>68</sup> Felix Frankfurter & James M. Landis, *Power of Congress over Procedure in Criminal Contempts in “Inferior” Federal Courts—A Study in Separation of Powers*, 37 HARV. L. REV. 1010, 1017 (1924); Joseph J. Anclien, *Broader is Better: The Inherent Powers of Federal Courts*, 64 N.Y.U. ANN. SURV. AM. L. 37, 37 n.2 (2008).

<sup>69</sup> See U.S. CONST. art. I (“All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.”).

<sup>70</sup> DAVID R. MAYHEW, *AMERICA’S CONGRESS: ACTIONS IN THE PUBLIC SPHERE*, JAMES MADISON THROUGH NEWT GINGRICH, at x-xi, 4 (2000); STEVEN S. SMITH, JASON M. ROBERTS & RYAN J. VANDER WIELEN, *THE AMERICAN CONGRESS 1-2* (6th ed. 2006).

<sup>71</sup> See, e.g., Jonathan L. Entin, *Separation of Powers, The Political Branches, and the Limits of Judicial Review*, 51 OHIO ST. L. J. 175, 182 (1990); LEE H. HAMILTON, *HOW CONGRESS WORKS AND WHY YOU SHOULD CARE 6-7* (2004).

<sup>72</sup> See U.S. CONST. art. I, § 7, cl. 2. See, e.g., William N. Eskridge, Jr. & John Ferejohn, *The Article I, Section 7 Game*, 80 GEO. L. J. 523, 523 (1992); see also MARTY PIATT ARCHITECT, *IF I WAS PRESIDENT: MY BLUE PRINT FOR AMERICA 11* (2012).

<sup>73</sup> U.S. CONST. art. I, § 1. See also Baldwin, *supra* note 41, at 1.U.S. CONST. art. I, § 8, cl. 18 provides: “The Congress shall have power to make all laws which be necessary and proper to carry into execution all powers vested by the Constitution in the government of the United States, or in any department or officer thereof.” (emphasis added).

<sup>74</sup> Kate Stith, *Congress’ Power of the Purse*, 97 YALE L. J. 1343, 1348 n.20 (1987).

<sup>75</sup> Andrias Kate, *The President’s Enforcement Power*, 88 N.Y.U. L. Rev. 1031, 1047-48 n.58 (2013); see U.S. CONST. art. I, § 9, cl. 7 (“No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law.”).

<sup>76</sup> See *McCulloch v. Maryland*, 17 U.S. 316, 419-421 (1819). signal? Stith, *supra* note 74, at 1348 n.29.

<sup>77</sup> See U.S. CONST. art. I, § 7, cl. 2. § Robert Cooter, *Do Good Laws Make Good Citizens: An Economic Analysis of Internalized Norms*, 86 VA. L. REV. 1577, 1580 (1986).

12 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

enforcement authority.<sup>78</sup> In sum, “Congress acts by agreement of its houses, following which the President can sign or veto.”<sup>79</sup>

Societal and governmental factors assume greater significance when viewed in the context of that it is necessary to develop some mechanism to ensure that the three branches of government exercise their powers in the contemplated manner and for the public good.<sup>80</sup> In America’s multifaceted, technologically oriented society, government could not function without the use of “nonstatutory, informal accommodations” that have been developed between the executive branch and the legislative branch.<sup>81</sup> These accommodations are often built on power.

## PART II

### IV. POWER

No term is used more broadly and loosely in political discourse than “power.”<sup>82</sup> Yet confusion often derives from the broad scope inherent in the term.<sup>83</sup> For the purpose of this article, power is defined as the ability to move people on a course to produce and effect or achieve some goal.<sup>84</sup> The uses of power suggest that “power is more than just a way to change others’ behaviors (although that function is certainly important). It may also be used to help act more freely (or not) or to prevent others from forcing us to do things we don’t want to do.”<sup>85</sup>

Power has institutional and structural attributes. Power is a resource

---

<sup>78</sup> Kate, *supra* note 75, at 1031, 1048 n.64 (pointing out *Buckley v. Valeo*, 424 U.S. 1, 138-139 (1976) (holding that the Federal Election Commission’s “enforcement power is authority that cannot possibly be regarded as merely in aid of the legislative function of Congress,” and ruling that “[a] lawsuit is the ultimate remedy for a breach of the law, and [that] it is to the President, and not to the Congress, that the Constitution entrusts the responsibility to ‘take Care that the Laws be faithfully executed’” (quoting U.S. CONST. art. II, §3)).

<sup>79</sup> Frank H. Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J. L. & PUB. POL’Y 11, 14 (1998).

<sup>80</sup> See, e.g., Arthur S. Miller & George Knapp, *The Congressional Veto: Preserving the Constitutional Framework*, 52 IND. L. J. 367, 376 (1977).

<sup>81</sup> *Id.* at 374.

<sup>82</sup> WRONG, *supra* note 5, at viii (observing that “power has always been one of those words that everybody uses without necessarily being able to define satisfactorily.”).

<sup>83</sup> Keith Dowding, *Why Should We Care About the Definition of Power?* 5 J. OF POL. POWER 119, 119-20 (2012); Richard M. Emerson, *Power-Dependence Relations*, 27(1) AM. SOC. REV. 31, 31 (1962) (contending that “[j]udging from the frequent occurrence of such words as power, influence, dominance and submission, status and authority, the importance of power is widely recognized, yet considerable confusion exists concerning these concepts.”).

<sup>84</sup> KAREN K. KIRST-ASHMAN, *HUMAN BEHAVIOR: COMMUNITIES, ORGANIZATIONS, AND GROUPS IN THE MACRO SOCIAL ENVIRONMENT* 70 (2008).

<sup>85</sup> *Id.* at 71.

and can be utilized as a commodity. According to Morgan:

“All [institutions] depend for their continued existence on the adequate flow of resources, such as money, materials, technology, personnel and support from customers, suppliers, and the community at large. An ability to exercise control over any of these resources can thus provide an important source of power within an organization.”<sup>86</sup>

The strength of power lies in its source. The source of power can be located in an object or source.<sup>87</sup> Power can be held centrally, and it can also be produced and dispersed through power relations that take place during interactions.<sup>88</sup> As such, power should be seen not as something that pre-existing entities possess but as something produced in relationships.<sup>89</sup> Hence, power has psychological components and is interactive in essence. Merely having power does not mean it must be used. Nor does it mean that some have more legal rights than others.<sup>90</sup>

Despite the visible evidence of power-driven behavior, discovering and describing power relations can be a complex task.<sup>91</sup> Behavior is the result of a person’s past relationships, inherent impulses (which may be conscious or unconscious), passion and desire. Human beings are self-interested and opportunistic, but they are willing to commit to cooperative agreements in order to realize goal attainment.<sup>92</sup> To overcome their collective action problems and cooperate for mutual gain, human beings create institutions.<sup>93</sup>

Law is a hierarchically structured institution wherein people occupying a position of authority (i.e., judge, attorney, police officer, jury member, clerk, etc.) control significant aspects of the life and fate of others, and thereby possess great influence over the activities of others. This influence is power.<sup>94</sup> But the person(s) who have power may

<sup>86</sup> GARETH MORGAN, *IMAGES OF ORGANIZATION* 169 (2006).

<sup>87</sup> WILLIAM M. CZANDER, *THE PSYCHODYNAMICS OF WORK AND ORGANIZATION: THEORY AND APPLICATION* 267 (1993) (arguing that “[i]f power is a perceptual phenomenon, then in psychological terms the person projects power onto another as a function of meaningful attributes”).

<sup>88</sup> MARTIN GRIFFITHS, *ENCYCLOPEDIA OF INTERNATIONAL RELATIONS AND GLOBAL POLITICS* 91 (2005).

<sup>89</sup> Power, influence and dominance are fundamental aspects of human interaction. For discussions about the significance of power, *see, e.g.*, JOHN BRENKMAN, *CULTURE AND DOMINATION* 4 (1987); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* (Alan Sheridan trans., 1977); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY* (Robert Hurley trans., 1978); NANCY FRASER, *UNRULY PRACTICES: POWER, DISCOURSE, AND GENDER IN CONTEMPORARY SOCIAL THEORY* (1989); THOMAS E. WARTENBERG, *THE FORMS OF POWER* (1990); *RETHINKING POWER* (Thomas E. Wartenberg ed., 1992).

<sup>90</sup> Czander, *supra* note 87, at 269.

<sup>91</sup> *Id.*

<sup>92</sup> Terry M. Moe, *Power and Political Institutions*, 3(2) *PERSP. ON POL.* 215, 215 (2005).

<sup>93</sup> *Id.*

<sup>94</sup> This is the classic *Power-Over Dynamic* (POD), which is usually described as: “(1) A has the power to achieve A’s objective means, A has capabilities and resources such that if A utilizes these abilities and resources, A will achieve A’s objective, and (2) A has capabilities and resources,

14 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

dispense it stealthily, surreptitiously, or covertly, ensuring that others will do whatever is necessary to achieve the powerholder's goals.

Within the field of law, power is a poorly understood concept.<sup>95</sup> In legal documents and in everyday usage, authority and power are not usually differentiated and many scholars and practitioners utilize the concepts of "power" and "authority" interchangeability. This leads to the presumption that "authority and power are one and the same."<sup>96</sup>

## V. AUTHORITY IS NOT THE SAME AS POWER

For the purpose of this article, authority can be defined as "a right given as a result of rank or office occupancy."<sup>97</sup> Operationally, authority manifests as "a right to issue commands and to punish violations."<sup>98</sup> While the person occupying a position of authority may have power, psychologically it must be differentiated from authority. Power is a perceptual phenomenon.<sup>99</sup> Perception is a function of a person's personality.<sup>100</sup> As such, power is reflected in the characteristics that one believes to be associated with power. For instance, a person can create the environment and social conditions that other people must function in.<sup>101</sup> Accordingly, power is also a social construction.

---

and B has capabilities and resources, such that if A mobilizes A's capabilities and resources in pursuit of A's objectives, and B mobilizes B's capabilities and resources in pursuit of B's objectives, then A still achieves A's objective." Jeffrey Isaac, *On Benton's Objective Interests and the Sociology of Power: A Critique*, 16(3) SOC. 440, 440 (1982). See also Ted Benton, *Objective Interests and the Sociology of Power*, 15(2) SOC. 161, 175-176 (1981).

<sup>95</sup> Colin Hay, *Divided by a Common Language: Political Theory and the Concept of Power*, 17(1) POL. 45, 45 (1997) (discussing that as a concept, power is probably the most universal and fundamental issue in political-legal analysis, but it also the most contested).

<sup>96</sup> CZANDER, *supra* note 87, at 267.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.* (suggesting that "a person occupying a position of authority can be perceived by subordinates as having little power and vice versa").

<sup>100</sup> CZANDER, *supra* note 87, at 267.

<sup>101</sup> Teresa J. Guess, *The Social Construction of Whiteness: Racism by Intent, Racism by Consequence*, 32 CRITICAL SOC. 649, 656 (2006) (contending that the success of the conceptual social construction is directly related to the power of those who are promoting the particular social constructed ideology.). Guess acknowledges the sophistication of social construction and argues that socially-constructed reality allows for the evaluation of modernism and that such an assessment is required in order to cultivate post structural appraisals. Peter M. Hall, *Social Organization, and Social Processes: Looking Back and Moving Ahead*, 26(1) Symbolic Interaction 33, 36 (2003) (discussing "how actors can create future and distant social conditions for other actors, a form of power that often remains unrecognized"); Teresa Marques, *The Relevance of Causal Social Construction*, 3(1) J. OF SOC. ONTOLOGY 1, 2 (2017) (explaining that social construction is always a reflection of power and that it has two distinct streams: "the social construction of *representations* (ideas, concepts, predicates, etc.) and the social construction of *objects* (people, categories, events, etc.)"). Race is a fundamental part of the American environment. See e.g., Ian F. Haney-Lopez, *The Social Construction of Race: Some Observations on Illusion, Fabrication, and Choice*, 29 HARV. CIV. RTS.-CIV. LIBERTIES LAW REV. 1, 22 (1994) ("Race must be viewed as a social

Judicial opinions are examples of both power and authority. For instance, a “judicial opinion has many functions: it teaches, it explains, it exhorts, it compels.”<sup>102</sup> However, as a hierarchical system, the Court has structured inequities, wherein, depending on their roles some actors have more power than others because of their authority to reward and punish. For example, neither plaintiffs nor defendants have the same authority as their lawyers. However, plaintiffs and defendants do have power. They can fire their lawyers, refuse to cooperate with the court process, lie about pertinent facts, refuse to pay court costs and fees, etc.<sup>103</sup>

To see power as “a function of perception requires the conclusion that psychology underlies all of these relationships.”<sup>104</sup> This is also true of authority relationships, which are formed and are forever influenced by the person’s status in society. To understand the psychology of these relationships presents an opportunity to analyze the motivations that underlie many of society’s social problems.

Both power and authority contain strong elements of unconscious motivation.<sup>105</sup> When analyzing authority, one must be cognizant of the interactive nature of relationships that is a necessary part of authority.<sup>106</sup> Power operates as a relationship of dominance and subordination. Behaviorally, power can manifest as a “highly complex interaction of reciprocity, wherein conflicts can be apparent even when followers appear purely passive in the relationship.”<sup>107</sup>

Power relations are motivational and help facilitate hope, wishes and

---

construction. That is, human interaction rather than natural differentiation must be seen as the source and continued basis for racial categorization.”). Jeffrey J. Pyle, *Race, Equality and the Rule of Law: Critical Race Theory’s Attack on the Promises of Liberalism*, 40 B.C.L. REV. 787, 803 (1999) (suggesting that “the dominant descriptive theme of Critical Race Theory is that American society and law are controlled by an overarching, all controlling white racism that ensures the continued oppression of racial minorities, even as the law officially rejects racial classifications.”). For instance, Slavery was oppressive for African Americans and they remain linked by the legacy of that oppression. Haney-Lopez, *supra* at 22. Martha R. Mahoney, *Whiteness and Women, In Practice and Theory: A Reply to Catharine MacKinnon*, 5 YALE J. L. & FEMINISM 217 (1992) (contending that “[t]he difficulty in seeing women as social actors interacts with the difficulty that white people have in seeing whiteness and its privileges.”).

<sup>102</sup> Anita L. Allen, *Social Contract Theory in American Case Law*, 51 FLA. L. REV. 1, 14 (1999).

<sup>103</sup> See, e.g., Alexandra D. Lahav, *Two Views of the Class Action*, 79 FORDHAM L. REV. 1939, 1948 (2011); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 3 (1991) (“the attorney is an agent of the client and subject to the client’s control in all important matters.”).

<sup>104</sup> CZANDER, *supra* note 87, at 269.

<sup>105</sup> However, unconscious thoughts can often be linked to conscious behavior. See, e.g., Jesse J. Bengson & Keith A. Hutchison, *Variability in Response Criteria Affects Estimates of Conscious Identification and Unconscious Semantic Priming*, 16 CONSCIOUSNESS AND COGNITION 785, 786 (2007); Michael Snodgrass, Edward Bernat & Howard Shevrin, *Unconscious Perception: A Model-Based Approach to Method and Evidence*, 66(5) PERCEPTION AND PSYCHOPHYSICS 846, 847 (2004) (unconscious perception can influence conscious perception).

<sup>106</sup> CZANDER, *supra* note 87, at 270.

<sup>107</sup> CZANDER, *supra* note 87, at 270..

16 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

desires.<sup>108</sup> Additionally, once power relations are placed into the context of societal interactions, one can readily assess how institutions facilitate power within human interactions.<sup>109</sup> Law is always political. And power is obviously important to politics.<sup>110</sup>

Attitudes and beliefs directly influence behavior.<sup>111</sup> For the purpose of this article, “attitude” refers to a person’s favorable or unfavorable evaluation of a subject or an object.<sup>112</sup> Attitudes encompass feelings that are consciously or unconsciously directed towards persons, ideas, objects or groups.<sup>113</sup> A “belief” is what links a subject or object to the attribute.<sup>114</sup> In psychology, most definitions of personality imply that beliefs are part of a person’s personality construct.<sup>115</sup> Beliefs are intrapersonal and often represent a person’s own thinking processes.<sup>116</sup> Accordingly, beliefs and attitudes can be positive, negative, or neutral.<sup>117</sup>

People idealize authority especially when it is combined with fear and submission.<sup>118</sup> Accordingly, the actor must address two distinct but interconnected questions. The first question the actor must address is how decisions are made.<sup>119</sup> The second question the actor must address is how to react to leaders and those in authority who are entrenched and constantly deliver bad decisions.<sup>120</sup>

In society, the authority relationship must be accepted. It is assumed that people are rational and willing to give up unregulated freedom and submit to authority in exchange for the security of a civil society governed by a just, binding rule of law.<sup>121</sup> This agreement helps

<sup>108</sup> See, e.g., MICHEL FOUCAULT, *THE FOUCAULT READER* 47 (Paul Rabinow ed., 1984).

<sup>109</sup> See, e.g., *id.* at 10.

<sup>110</sup> Moe, *supra* note 92, at 215.

<sup>111</sup> Vishal Jain, *3D Model of Attitude*, 3(3) INT’L J. ADVANCED RES. MGMT. AND SOC. SCI. 1, 2 (2014).

<sup>112</sup> Linz Audain, *Critical Legal Studies, Feminism, Law and Economics, and the Veil of Intellectual Tolerance: A Tentative Case for Cross-Jurisprudential Dialogue*, 20 HOFSTRA L. REV. 1017, 1082 (1992). See, e.g., MARTIN FISHBEIN & ICEK AJZEN, *BELIEF, ATTITUDE, INTENTION AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH* 12 (1975).

<sup>113</sup> This is part of the “Social Fabric Matrix.” See, e.g., F. Gregory Hayden, *Values, Beliefs, and Attitudes in a Sociotechnical Setting*, 22(2) J. OF ECON. ISSUES 415; Jain, *supra* 113, at 2 (2014); ROBERT A. BARON AND DONN ERWIN BYRNE, *SOCIAL PSYCHOLOGY: UNDERSTANDING HUMAN INTERACTION*, 415, 421 (1984).

<sup>114</sup> Audain, *supra* note 112, at 1082. See, e.g., FISHBEIN AND AJZEN, *supra* note 112, at 12.

<sup>115</sup> Sylvia Xiaohua Chen, Michael Harris Bond & Fanny M. Cheung, *Personality Correlates of Social Axioms: Are Beliefs Nested Within Personality?* 40 PERSONALITY AND INDIVIDUAL DIFFERENCES 509, 510 (2006).

<sup>116</sup> *Id.*

<sup>117</sup> Jain, *supra* note 111, at 3; Audain, *supra* note 112, at 1082. See, e.g., FISHBEIN AND AJZEN, *supra* note 112, at 13.

<sup>118</sup> Audain, *supra* note 112, at 1081. See, e.g., Ronald C. Dillehay, *Authoritarianism*, In *Dimensions of Personality* 86 (Harvey London & John E. Exner, Jr. eds., 1978).

<sup>119</sup> J. D. Dewsbury, *Engaging an Infinity in Actuality: Exposing Political Space in the Authority of Experience Itself*, 6(1) J. OF POL. POWER 139, 143 (2013).

<sup>120</sup> *Id.*

<sup>121</sup> Allen, *supra* note 102, at 1-2.



legitimize the power of the state and civil authority.<sup>122</sup>

Society is always influx. “The connection between the power of elites and the coercive apparatus of the state remains an unresolved issue in sociology.”<sup>123</sup> For example, some scholars argue that law in the United States is dominated by those who have substantial economic resources (i.e., high levels of income or wealth).<sup>124</sup> Accordingly, it is not surprising that people regularly have conflict with authority. They see life as something of a demand imposed on them by authority figures. Consequently, for members of society, life manifests as a symbolic struggle for obedience and control.

In America, all institutions are created by law, and/or bound by law. Institutional members seek self-gratification and work in ways that are consistent with their personality and social identity.<sup>125</sup> All institutions function in an interactive environment where the member’s needs, wants and desires are often in conflict.<sup>126</sup> Whereas seeking gratification may be a worthy goal, in America’s competitive capitalistic society institutional members are more apt to find anger, frustration and resentment rather than goal fulfillment.

America is a rigid hierarchical structure wherein authority and power are protected by the dominant class.<sup>127</sup> Powerful individuals “easily obtain valued outcomes and better social positions.”<sup>128</sup> Law and public policies tend to tilt toward the wishes of corporations, business and the dominant class.<sup>129</sup> Though often painted as a system that rewards hard work, in reality, America is a competitive, dogmatic system where status is solidified, and protected at the expense of others.<sup>130</sup> When those outside

---

<sup>122</sup> *Id.*

<sup>123</sup> David Jacobs, *Inequality and Police Strength: Conflict Theory and Coercive Control in Metropolitan Areas*, 44(6) AM. SOC. REV. 913, 913 (1979).

<sup>124</sup> Martin Gilens & Benjamin I. Page, *Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens*, 12(3) PERSP. ON POL. 564, 566 (2014) (pointing out that “[s]ome elite theories postulate an amalgam of elites, defined by combinations of social status, economic resources, and institutional positions, who achieve a degree of unity through common backgrounds, coinciding interests, and social interactions.”).

<sup>125</sup> CZANDER, *supra* note 87, at 280.

<sup>126</sup> *Id.*

<sup>127</sup> *See, e.g.*, C. WRIGHT MILLS, *THE POWER ELITE* 3-4 (Oxford Univ. Press, 1956) (contending that social, economic, political and military elites use their status to dominant American society). Gilens & Page, *supra* note 124, at 576 (contending that “when a majority of citizens disagrees with economic elites or with organized interests, they generally lose. Moreover, because of the strong status quo bias built into the U.S. political system, even when fairly large majorities of Americans favor policy change, they generally do not get it.”).

<sup>128</sup> Ana Guinote, *Power and Goal Pursuit*, 33(8) PERSONALITY AND SOC. PSYCHOL. BULL. 1076, 1076 (2007).

<sup>129</sup> Gilens & Page, *supra* note 124, at 567.

<sup>130</sup> DOUG MCADAM, *POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY, 1930-1970*, 37 (1982) (asserting that society is dominated by elites); *see also* Elizabeth A. Armstrong & Mary Bernstein, *Culture, Power, and Institutions: A Multi-Institutional Politics Approach to Social Movements*, 26(1) SOC. THEORY 74, 75 (2008) (contending that the underlying

18 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

of the dominant group demand equality or attempt to better their lot in life, they discover that the dominant group can become pathologically aggressive and destructive.<sup>131</sup>

Authority creates debilitating emotions because of the expectations that the actors have.<sup>132</sup> Even under the best conditions the use of authority causes subordinates to have a host of negative emotional responses.<sup>133</sup> When this occurs, subordinates usually seek to change or reverse the roles evident in the power dynamic.<sup>134</sup> The person with authority usually responds “by engaging in an evaluation, the purpose of which is to shore up the inequitable relationship and put the ‘uppity’ subordinate back into his/her place.”<sup>135</sup> Those who have an authority role are in a position to take advantage of those in a subordinate role.<sup>136</sup> This is made possible by the vulnerability the actor (un)consciously experiences when in a subordinate position.<sup>137</sup>

Law is goal driven and linked to social and political ideology. Scholars have noted that court decisions often favor certain interest groups, social classes, and entrenched institutions.<sup>138</sup> Law, legal rules and policies are indeterminate in application.<sup>139</sup> Wherein, the dominant tradition is to justify domination and privilege through an abstract discourse which claims neutrality in process and outcome.<sup>140</sup> This process encompasses the psychological dynamics of perception and reality, which are the mainstays of power configuration.

---

assumptions about the power of elites have implications for society at large.)

<sup>131</sup> This author acknowledges the various presumptions that power is often centered in the State. See, e.g., Edwin Amenta, *State-Centered and Political Institutional Theory: Retrospect and Prospect*, in *HANDBOOK OF POL. SOC.* 96-114 (Robert Allford et al. eds., 2008), available at <http://socsci-dev.ss.uci.edu/~ea3/State-Centered and Political Institutional Theory.pdf>. However, for the purpose of this article, the author borrows from Foucault, who contended that “power isn’t localised in the State apparatus and that nothing in society will be changed if the mechanisms of power that function outside, below, and alongside the State apparatuses, on a much more minute and everyday level, are not also changed.” See MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977*, 60 (1980). See also, Armstrong & Bernstein, *supra* note 132, at 84.

<sup>132</sup> CZANDER, *supra* note 87, at 281.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Id.*

<sup>138</sup> Audain, *supra* note 112, at 1033 n.55.

<sup>139</sup> *Id.* at 1035.

<sup>140</sup> Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L. J. 599, 615 (1989).

### PART III

#### VI. POWER CONFIGURATION

Power Configuration utilizes concepts from Post Structural Powerist Theory and Social Exchange Theory.<sup>141</sup> A Power Configuration acknowledges that people, institutions and reality are socially and situationally constructed.<sup>142</sup> Power Configuration also asserts that decision making is driven by conscious and unconscious motives. A power relationship is created any time two or more people interact with each other. A Power Configuration occurs when an action, activity or situation involving two parties mutually affect or influence the parties. A Power Configuration presupposes that emotions are “explicit, central features of social interaction.”<sup>143</sup> In addition to Social Construction and Conscious/Unconscious decision making, an actor’s behavioral and/or emotional response to the outcome of the social interaction are a central part of a Power Configuration.<sup>144</sup>

---

<sup>141</sup> Post Structural Powerism asserts that mental states (beliefs, desires, being in pain, experiencing pleasure, etc.) can be comprised by their functional and symbolic interaction role, and as such, have causal relations to other mental states (including unconsciousness) via numerous sensory inputs, and behavioral outputs. Post Structural Powerists contend that power is (1) natural; (2) in all parts of nature; and (3) in all interactions. For a review of Social Exchange Theory see, e.g., Barry Markovsky, David Willer & Travis Patton, *Power Relations in Exchange Networks*, 53(2) AM. SOC. REV. 220, 220-236 (1988) (contending that “Although no single exchange theory dominates the social sciences, a fairly coherent social-exchange perspective exists. In this perspective, social structures and processes impinge on and emerge from resource and sanction transfers between individuals and/or institutions.”); Russell Cropanzano & Marie S. Mitchell, *Social Exchange Theory: An Interdisciplinary Review*, 31 J. MGMT. 874, 874 (2005) (arguing that Exchange Theory bridges disparate disciplines including anthropology, social psychology, and sociology); ..Karen S. Cook, Richard M. Emerson & Mary R. Gillmore, *The Distribution of Power in Exchange Networks: Theory and Experimental Results*, 89(2) AM. J. SOC. 275, 277 (1983). For a general discussion on poststructuralism, see ..Kevin Walby, *Contributions to a Post-Sovereignist Understanding of Law: Foucault, Law as Governance, and Legal Pluralism*, 16(4) SOC. LEGAL STUD. 551 (2007) (contending that law is merely a part of other modes of regulation and plays only a modest role in society); Victor Tadros, *Between Governance and Discipline: The Law and Michel Foucault*, 18(1) OXFORD J. OF LEGAL STUD. 75, 75 (1998) (“attempting to re-establish the importance of Michel Foucault’s work on how law operates”); Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991) (discussing the interconnection between power, language and knowledge).

<sup>142</sup> This means that opportunities for Power Transfers are historically influenced.

<sup>143</sup> Power Configuration incorporates Lawler’s Affect Theory of Social Exchange, which presupposes that emotions are an explicit, central feature of social exchange processes. Further, a Power Configuration (1) conceptualizes individual actors as thinking as well as feeling; (2) treats emotions as internal reinforcements or punishments; and (3) analyzes how individuals’ relational and group attachments are connected to their emotional experiences in social exchange.

<sup>144</sup> Whereas Power Configuration acknowledges some aspects of Lawler’s Theory of Social

20 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

Power Configuration is a conceptual paradigm linking social interaction to social construction. As such, Power Configuration is also a framework that links social relationships to power. Actors can attain, assess, and maintain power in various ways. Because power is present in the resources and means required to achieve outcomes, one can assume that there is great inequality in the distribution of these means, and perhaps in the subsequent result of these outcomes.<sup>145</sup> In social relations each party can continue to exert control over the other, as such, balance does not neutralize power.<sup>146</sup> In fact, it could be argued that those in the social exchange relationship may be controlled by the relationship itself.<sup>147</sup>

*A. Power Configuration is Different from Social Exchange Theory*

Power Interchange occurs when two or more people (or entities) exchange things with each other. This action of interchange can also revolve around the interchanging of information or knowledge. The result of a Power Interchange is a Power Transaction, which can be defined as an activity involving two parties or a situation that reciprocally (mutually) affect or influence each other.

One of the primary differences between Power Configuration Theory and Exchange Theory is that the Power Configuration Theorem rejects the Exchange Theory postulation that social exchange relationships evolve over time into trusting, loyal, and mutual commitments.<sup>148</sup> Rather, the Power Configuration paradigm asserts a conflictive interactionist perspective, and contends that actors and institutions are always in a constant state of conflict and competition.<sup>149</sup>

Power Configuration also rejects the Exchange Theory's conceptualization of mutual dependence and motivation of necessity<sup>150</sup> and the assertion that "power resides implicitly in the other's

---

Exchange, Power Configuration is also part of an integral element of Post Structural Powerism, and as such, must be read as presupposing Psychodynamic theorems, such as Ego and Lacan Psychology.

<sup>145</sup> WRONG, *supra* note 5, at xxi.

<sup>146</sup> Emerson, *supra* note 83, at 33-34.

<sup>147</sup> *Id.*

<sup>148</sup> See Cropanzano & Mitchell, *supra* note 141, at 875.

<sup>149</sup> It is supposition of Power Configuration that there is a constant state of conflict and competition which often translates into dominance and submission, which occurs at both the conscious and unconscious level.

<sup>150</sup> See.. generally Norman Uphoff, *Distinguishing Power, Authority and Legitimacy: Taking Max Weber at His Word by Using Resources-Exchange Analysis*, 22 POLITY 295 (1989); see also ANTHONY HEATH, RATIONAL CHOICE AND SOCIAL EXCHANGE: A CRITIQUE OF EXCHANGE THEORY 18-19 (1976).

dependency.”<sup>151</sup> According to Exchange Theorists, “social relations commonly entail ties of mutual dependence” between actors.<sup>152</sup> For example, A depends upon B to fulfill A’s goals.<sup>153</sup> Exchange Theorists assert that by virtue of mutual dependency, each party must control or influence the other’s conduct. According to Exchange Theorists, these ties of mutual dependence imply that each party has power to “grant or deny, facilitate or hinder, the other’s gratification.”<sup>154</sup> For Exchange Theorists it is merely a question of social relationship.<sup>155</sup>

But Exchange Theory ignores the socio-historical and socio-cultural aspects that influence the structure and psychology of power. As human beings, issues of “power and stereotyping” haunt our past and our present.<sup>156</sup> Power permeates a person’s personal psyche.<sup>157</sup> Power also permeates interpersonal relationships; it is detectible in the workplace, between neighbors, friends, family members, and romantic partners.<sup>158</sup> Power per se is not a bad thing. Those who have power often experience more positive emotions, pursue a more assertive approach in life, and enjoy higher self-esteem.<sup>159</sup> But because of society’s structure, some people have power and some people do not.

There are two critical points when assessing actors in the Power Configuration. First, an actor’s personal sense of power can be distinct from socio-structural indicators of their power.<sup>160</sup> Sometimes an actor’s “personal sense of power coincides with their control over resources, position of authority, or status in the eyes of others, and sometimes it does not.”<sup>161</sup> Second, an actor’s “beliefs about their power can shape their actual influence over others, above and beyond the effects of their socio-structural position.”<sup>162</sup> Power is aggressive and ego driven.<sup>163</sup> Because it

<sup>151</sup> Emerson, *supra* note 83, at 32.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> Emerson, *supra* note 83, at 32.

<sup>155</sup> *Id.*

<sup>156</sup> Susan T. Fiske, *Controlling Other People: The Impact of Power on Stereotyping*, 48(6) AM. PSYCHOL. 621, 621 (1993).

<sup>157</sup> Cameron Anderson, Oliver P. John & Dacher Keltner, *The Personal Sense of Power*, 80(2) J. OF PERSONALITY 313, 313 (2012).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.*

<sup>160</sup> *Id.* at 314.

<sup>161</sup> *Id.* Cameron Anderson, Sanjay Srivastava, Jennifer S. Beer, Sandra E. Spataro & Jennifer A. Chatman, *Knowing Your Place: Self-Perceptions of Status in Face-to-Face Groups*, 91(6) J. OF PERSONALITY AND SOC. PSYCHOL. 1094, 1094 (2006) (to prevent social rejection, individuals tend to perceive their status accurately, and tend to avoid overestimating their own status).

<sup>162</sup> Anderson et al., *supra* note 157, at 314. See Nathanael J. Fast & Serena Chen, *When the Boss Feels Inadequate*, 20(11) PSYCHOL. SCI. 1406, 1406 (2009) (describing power as the “disproportionate control over other individuals’ outcomes as a result of the capacity to allocate rewards and administer punishments”).

<sup>163</sup> Because it is ego driven, power is emotionally based and incapable of complete satisfaction. See, e.g., Fast & Chen, *supra* note 162, at 1406.

22 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

is ego driven, power is emotionally-based and incapable of complete satisfaction.<sup>164</sup> Those “who perceive themselves as powerful behave in ways that increase their actual power.”<sup>165</sup> Yet, those who are considered powerless are usually less aggressive.<sup>166</sup>

Those who want to understand power configurations need not start with or be wary of institutions. Many theories assume that domination and submission is organized around sources of power that are institutional in scope.<sup>167</sup> For example, judge A can interpret the facts one way, while judge B can interpret facts the other way. Yet, the facts do not change. The judge’s opinion is a manifestation of his or her power.<sup>168</sup> However, such power does not necessarily rest on a judicial-institutional foundation. Rather, [the] power can formulate based on notions of personal or inherent supremacy [e.g., race, class, gender, sexual orientation, etc.] conveyed through narratives that cast one group as

<sup>164</sup> Simon Boag, *Ego, Drives, and the Dynamics of Internal Objects*, 5(666) FRONTIERS IN PSYCHOL. 1, 5 (2014), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.812.6513&rep=rep1&type=pdf> (contending that Freud believed that behavior was a result of sexual and aggressive drives); Graham S. Danzer, *From Ego Psychology to Strengths, From Victim to Survivor*, 20 J. OF AGGRESSION MALTREATMENT & TRAUMA 175, 178 (2011). Freud’s basic postulation is that: “(1) there is a powerful (sub)system of the human mind that operates independently of conscious experience; (2) this (sub)system contains mental entities [“ideas”] that are just like conscious mental entities in both their form and their causal powers; (3) these unconscious mental entities are actively prevented from entering consciousness by the operation of a certain force.” *Id.* Gerard O’Brien & Jon Jureidini, *Dispensing With the Dynamic Unconscious*, 9(2) PHIL., PSYCHIATRY, & PSYCHOL. 141, 142, (2002); Vesa Talvitie & Juhani Ihaus, *Biting the Bullet-The Nature of Unconscious Fantasy*, 15(5) THEORY & PSYCHOL. 659, 671 (2005) (“It is the brain that possesses causal power.”).

<sup>165</sup> Anderson et al., *supra* note 157, at 314.

<sup>166</sup> Fast & Chen, *supra* note 162.

<sup>167</sup> Armstrong & Bernstein, *supra* note 132, at 74. K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism*, 94 TEX. L. REV. 1329, 1340 (2016).

<sup>168</sup> Differing notions on personal or inherent supremacy may explain why judges may rule differently on a given matter, despite being given the same facts. Tanya Kateri Hernandez, *Comparative Judging of Civil Rights: A Transnational Critical Race Theory Approach*, 63 LA. L. REV. 875, 887 (2003) (arguing that some judges are susceptible to internalizing cultural disdain for issues that are pertinent to subjugated communities). See Luis Ferre-Sadurni, *Teenager Accused of Rape Deserves Leniency Because He’s From a ‘Good Family.’ Judge Says*, N.Y. TIMES, July 2, 2019, <https://www.nytimes.com/2019/07/02/nyregion/judge-james-troiano-rape.html>. The judge was rebuked for showing bias toward privileged teenagers. *Id.* Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317, 380 (1987) (“Judges continue to come primarily from elite white backgrounds. They undoubtedly share the values and perceptions of that subculture, which may well be insensitive or even antagonistic toward the values, needs, and experiences of Blacks and other minorities.”); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 370 (1982-1983) (contending that “the legal system is an important public area through which the State attempts-through manipulation of symbols, images, and ideas-to legitimize a social order that most people find alienating and inhumane.”). See, e.g., Andrew W. Haines, *The Critical Legal Studies Movement and Racism: Useful Analytics and Guides for Social Action or an Irrelevant Modern Legal Scepticism and Solipsism?* 13 WM. MITCHELL L. REV. 685, 732-734 (1987).

having domination over another.

### B. Power Configuration Analysis

There are traditional four indicators of power in a Power Configuration analysis: (1) the institution, group, or people receive what they seek and value; (2) the institution, group, or people who are over-represented in key decision-making positions; (3) the institution, group, or people who win in the decision-making arena; and (4) those thought to have power, as determined by knowledgeable observers, and peers.<sup>169</sup> In the absence of a voluntary exchange of power, dominance and submission (i.e., power) should be seen solely in terms of who wins and who loses.

## VII. DEATH OF LAW

Traditionally, western philosophy seeks to ascertain “justice” by linking human beings to the world they live in.<sup>170</sup> As Professor Boyle points out, justice is the ineradicable evidence of subjectivity and the judge’s benevolence.<sup>171</sup> Though philosophical in nature, such a supposition also questions whether justice can be applied in a neutral or objective manner.<sup>172</sup> A rational choice framework of justice is both technical and efficient.<sup>173</sup> The technical refers to the law itself, which compels recognition as a legal claim.<sup>174</sup> For example, in all aspects of law, we rely on the Constitution, various codes, judicial precedents and common law to impose a duty or obligation on an individual, group, institution, or the state.<sup>175</sup> Choices, just like rights, carry rhetorical force.<sup>176</sup> When engaging in rational choice, the actor can choose to obey the technical meaning of the law, or adhere to the rhetoric of reality. Hence, rational choice encompasses both the technical and the rhetorical simultaneously, one at the expense of the other, or dithering between the

---

<sup>169</sup> Domhoff, *supra* note 17, at 99.

<sup>170</sup> Joan C. Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 433 (1987). *See also*, RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 3-4, 8-9 (1979).

<sup>171</sup> Boyle, *supra* note 4, at 687, 692.

<sup>172</sup> *Id.*

<sup>173</sup> *See, e.g.*, Howard Gensler, *Law and Economics: A Topical Bibliography*, 26 INT’L J. LEGAL INFO. 184, 188 (1998).

<sup>174</sup> John Calmore, *Critical Race Theory, Archie Shepp, and Fire Music: Securing an Intellectual Life in a Multicultural World*, 65 S. CAL. L. REV. 2129, 2212 (1992).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

24 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

two.<sup>177</sup>

Law touches every actor in society; this means that everyone is responsible for interpreting the meaning of justice. However, law is political.<sup>178</sup> Law and politics create their own reality.<sup>179</sup> Sometimes the realities intersect, sometimes they do not.<sup>180</sup> For human beings, law also operates on the unconscious level. As such, it can be difficult to ascertain a person's true motivation.

Judges act to maximize their own preferences.<sup>181</sup> As such, justice is also political.<sup>182</sup> For American lawyers, "the significance of the [law is political] doctrine is that the practice of law is the political mechanism for formulating and resolving questions of law."<sup>183</sup> The rejection of law, as an "autonomous legal rationality derives principally from the legal realists of the early twentieth century."<sup>184</sup> The early realists correctly surmised that "no pre-existing right determines a particular result, because there are conflicting (and contradictory) rights between which the court must always choose."<sup>185</sup> Critical theorists continued this inquiry, albeit in a more social conscious focus.<sup>186</sup> Some legal scholars have attempted to ignore Critical Legal Theory (CLT).<sup>187</sup> However, this author readily asserts the CLT influence on the Power Configuration.

Influenced by Post-Structural Theory, the Power Configuration can be deterministic and appear predictable and rational, even in an "intuitive

<sup>177</sup> Calmore, *supra* note 174, at 2212.

<sup>178</sup> Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1152 (1985). *See also* Lee Epstein, Jack Knight and Andrew D. Martin, *The Supreme Court as a Strategic National Policymaker*, 50 EMORY L. J. 583, 585 (2001) (contending that "the Justices cannot effectuate their own policy and institutional goals without taking account of the goals and likely actions of the members of the other branches.").

<sup>179</sup> Miro Cerar, *The Relationship Between Law and Politics*, 15 ANNUAL SURVEY OF INTERNATIONAL & COMPARATIVE LAW 19, 19 (2009).

<sup>180</sup> *Id.*

<sup>181</sup> Audain, *supra* note 112, at 1020.

<sup>182</sup> Peller, *supra* note 178, at 1152.

<sup>183</sup> Geoffrey C. Hazard, Jr., *Communitarian Ethics and Legal Justification*, 59 COLO. L. REV. 721, 723 (1988).

<sup>184</sup> George H. Taylor, *Deconstructing the Law: The Politics of Law*, 1 YALE L. & POL. REV. 158, 161 (1985).

<sup>185</sup> *Id.*

<sup>186</sup> Alan Hunt, *The Theory of Critical Legal Studies*, 6(1) OXFORD J. LEGAL STUD. 1, 2-3 (1986) (Critical Legal Studies is "directly and consciously political; and involves the transplantation of political ideas and lessons into the field of legal scholarship"). J. Stuart Russell, *The Critical Legal Studies Challenge to Contemporary Mainstream Legal Philosophy*, 18 OTTAWA LAW REVIEW 1, 1 (1986) (asserting that "the Critical Legal Studies movement has unleashed the most profound challenge to contemporary mainstream Western legal philosophy since Legal Realism swept the United States earlier this century").

<sup>187</sup> Russell, *supra* note 186, at 1. *See, e.g.*, J.E. Bickenbach, *Liberal Ideology and Jurisprudence*, 22 OSGOOD HALL L. J. 773, 774 (1984); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991) (contending that Critical Legal Studies does not have an essential intellectual component).



sense.”<sup>188</sup> A presupposition of Power Configuration is the notion that there are relations which exist independent of a person’s will.<sup>189</sup> Law, both in structure and practice, “serves the needs and interests of the people who own the means of production, because laws and political ideas are generated by the relations of production.”<sup>190</sup> Notwithstanding, like the means of production and government, “ideology and culture” can also have power over people.<sup>191</sup> Power is not fixed or stationary, but rather it is distributed throughout institutions and society, and present in every interaction.<sup>192</sup>

### VIII. THE FOUR GUIDING SUPPOSITIONS OF POWER CONFIGURATION

Power Configuration has at least four guiding suppositions. First, legal rules serve specific social purposes, generally the systematic and structural application of power and these power structures can in some way be logically described.<sup>193</sup> Second, law is too unstipulated to serve an instrumental function, and as such, it is impossible to systematically account for social reality because there is no social reality independent from socially constructed meaning.<sup>194</sup> Third, legal doctrine has no real or cognitive content, and as such, cannot solve any concrete issues or problems.<sup>195</sup> Fourth, the only reasonable way to resolve legal questions is to pay attention to the power dynamics that underlie the issues, and choose among laws and policies that are implicated in the questions.<sup>196</sup> Professor Samantha Godwin convincingly argues the indeterminacy of law:

“For any given set of facts in a case, the adjudicated outcome cannot be dictated by the contents of the law itself. Precedent does not constrain outcome, because one can always distinguish or analogize any given case from any precedential case by emphasizing its

---

<sup>188</sup> Godwin, *supra* note 4, at 366 (contending that “if [the] legal and social questions are radically indeterminate and not merely indeterminate within the prevailing discourse, then the appearance of predictability demands an explanation”).

<sup>189</sup> KARL MARX, A CONTRIBUTION TO THE CRITIQUE OF POLITICAL ECONOMY 12 (2d ed., N. I. Stone trans., Int’l Library Publ’g Co. 1904) (1859).

<sup>190</sup> Godwin, *supra* note 4, at 370.

<sup>191</sup> *Id.* at 371.

<sup>192</sup> See, e.g., SAUL NEWMAN, POWER AND POLITICS IN POSTSTRUCTURALIST THOUGHT: NEW THEORIES OF THE POLITICAL 53 (1st ed. 2005).

<sup>193</sup> Godwin, *supra* note 4, at 362.

<sup>194</sup> *Id.*

<sup>195</sup> Boyle, *supra* note 4, at 687, 692.

<sup>196</sup> See, e.g., Mark Tushnet, *Some Current Controversies in Critical Legal Studies*, 12 GER. L. J. 290, 291 (2011).

26 *EQUAL RIGHTS & SOCIAL JUSTICE* [Vol. 26: 1

similarities or differences from that earlier case. Legal doctrine does not determine outcome, because the application of any set of general principles to any group of specific facts will always be disputable within the norms of legal argumentation.”<sup>197</sup>

Most court decisions serve to “justify domination and privilege through an abstract discourse which claims neutrality in process and outcome.”<sup>198</sup> The Power Configuration describes mundane social interactions and is decidedly anti-formalist. Legal formalism and functionalism are typically interconnected.<sup>199</sup> The functional approach to law highlights relationships and permits a great deal of flexibility.<sup>200</sup> Function also governs the scope of law because there is no prevailing argument which asserts that judges should have the final word in legal disputes.<sup>201</sup> However, “when a conceptual characterization of power is not clear, the use of a pragmatic formalist model may provide a resolution.”<sup>202</sup>

## IX. CONCLUSION

Power is fundamental to society. No goal or legal objective can be accomplished without power. It is difficult to present a comprehensive analysis of life in America without “taking into account the way in which some people are able to decide what should be done and induce others to do it; to actually set the agenda and expect others to follow through.”<sup>203</sup> However, power over individuals cannot be accurately assessed unless it

<sup>197</sup> Godwin, *supra* note 4, at 362. See also James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003, 1007 (1985) (arguing that “law [can be] seen as totally manipulable, a grab bag of arguments, sources, and examples of flip-flop rhetoric.”). Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205, 219 (1979) (discussing analyzing past cases in an effort to discover justice in particular situations).

<sup>198</sup> Minda, *supra* note 140.

<sup>199</sup> William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J. L. & PUB. POL’Y 23, 24 (1998) (“formalism and functionalism are a ‘both-an’ inquiry, rather than an ‘either-or’ inquiry”).

<sup>200</sup> Peter L. Strauss, *Formal and Functional Approaches to Separation of Powers Questions A Foolish Inconsistency*, 72 CORNELL L. REV. 488, 489 (1987). See, e.g., *United States v. Nixon*, 418 U.S. 683, 713 (1974); *Nixon v. Administrator of General Servs.*, 433 U.S. 425, 442-443 (1977). For an example on the courts applying a formalistic framework, see, e.g., *Metropolitan Washington Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 111 S. Ct. 2298, 2312 (1991) (holding that the use of a nine-member congressional board with power to veto Metropolitan Washington Airports Authority decisions unconstitutionally fails on procedural issues).

<sup>201</sup> Easterbrook, *supra* note 79, at 17.

<sup>202</sup> Martin H. Redish & Elizabeth J. Cisar, *If Angels Were to Govern: The Need for Pragmatic Formalism in Separation of Powers Theory*, 41 DUKE L. J. 449, 490 (1991). See also, Eskridge, Jr., *supra* note 201, at 24 (contending that “because state legitimacy depends upon both formal rule-following and functional efficacy, legal reasoning pervasively, and often unconsciously, melds formalist and functionalist justifications”).

<sup>203</sup> Simon & Oakes, *supra* note 6, at 105. See, e.g., BERTRAND, *supra* note 166, at 7.

is paired with the concept of “societal maintenance,” which provides the theoretical justification for techniques directed at institutions and other variables at the societal level.<sup>204</sup>

Power Configuration is not a theory that attempts to justify dominance and submission. But it is a theory that seeks to answer why some acquiesce and in what situation do they do so. Notwithstanding, one need not doubt the great power of social forces to realize that conformity is not the only effect that power produces.<sup>205</sup> Moreover, the striving for independence and resistance is as relevant to power as is conformity.<sup>206</sup> Accordingly, narrowing the emphasis to focus on dominance and submission neglects the various dynamics that actors demonstrate as a result of power dynamics.

Institutions are not necessarily the base of power in society. Fundamentally, the Power Configuration is an analysis of the effect that power has on the individual and society. Law acknowledges that the overall social structure of American society, including differing statuses and degrees and bases of power.<sup>207</sup> As such, the framework for Power Configuration requires the assessment of a wide range of conditions and the interrelated operations of disparate psychological-economic functions at the individual, institutional and societal levels. In so doing, power links law to societal conditions.

---

<sup>204</sup> Justin Woolhandler, *Toward A Foucauldian Legal Method*, 76 U. PITT. L. REV. 131, 135 (2014).

<sup>205</sup> Solomon E. Asch, *Studies of Independence and Conformity: A Minority of One Against a Unanimous Majority*, 70(9) PSYCHOL. MONOGRAPHS 1, 3 (1956).

<sup>206</sup> *Id.*

<sup>207</sup> Ana Guinote, Charles M. Judd & Markus Brauer, *Effects of Power on Perceived and Objective Group Variability: Evidence That More Powerful Groups Are More Variable*, 82(5) J. PERSONALITY SOC. PSYCHOL. 708, 708 (2002).