

Tushnet's *The New Constitutional Order*

Mark Tushnet defines *Constitutional order* (or *Regime*) in the following way: “A reasonably stable set of institutions through which a nation’s fundamental decisions are made over a sustained period, and the principles that guide these decisions(1). He notes, “These institutions and principles provide the structure within which ordinary political contention occurs, which is why I call them *constitutional* rather than merely political (2). The institutions are the Supreme Court, national political parties, Congress and Presidency. As in *Taking the Constitution Away from the Courts*, Mark argues here that constitutional principles articulated by the Supreme Court cannot be understood except in the context of institutional arrangements prevailing in the national government’s other branches.

1. Mark also notes that the new constitutional order, if it is a new constitutional order, has the following qualities: Aspiration to achieve justice through law is far more chastened than in New Deal Great Society Regime or constitutional order.
2. Statutes and constitutional doctrines establish conditions within which individuals and corporations seek their own ends, which for some is to achieve justice.
3. At any moment we can observe a dominant set of institutions and principles, some residues of a prior regime, and some hints of what might be the institutions and principles that may animate a succeeding one.

If, as I argue in the enclosed paper, constitutional orders are gradually constructed and transformed, then we need, as part of the analysis of constitutional change and orders, an understanding of the “bottom up” process of construction by the Supreme Court through which polity and rights principles in a regime are tested, by analogy, through their application in the world outside the Court.

The enclosed paper which I presented at the Western Political Science Association Meetings in Denver last week, may help us think about the way this bottom up process might work. In part, I argue that through time concepts of interdependence among social, economic, and political facts become better understood, thus revising a constitutional order’s notion of individual agency and state action. If this is so, then one can overstate the degree to which elected political “institutions” in general, and the Supreme Court in particular, are path dependent. That is, I question whether Paul Pierson’s concept of path dependence (as responding to increasingly returns, risk avoidance, and short time perspective) is applicable to the Supreme Court. Rather, I argue that Supreme Court doctrine and principles are shaped through an incremental process of testing polity and rights principles, and revising them through a construction process in a changing social, economic, and political world, and the interpretive communities understanding of that world.

In a sense the notion of constitutional order may be a summing up, at different points in time, of longer-term changes made by elected institutions and courts as they react not simply to other institutions, but to these social, economic, and political factors, to as they make or interpret laws.

This seems to be what Stephen Skowronek is saying in *The Politics That Presidents Make*. Presidents are placed within institutional and sequences, as opposed to creating them. I am

asking us to think about bottom up factors with regard to change in constitutional regimes by the Supreme Court and courts. Lower aspirations are a product of increased complexity in social, economic, and political institutions. This thickening reduces the possibility of seeing constitutional regimes in clear terms; it makes it less possible for future presidents, Congress, and the Supreme Court to reconstruct the world outside in wide aspirational and policy terms. It is less clear what justice is on the wholesale.

If I am correct than cases that define regimes, such as *Brown* for the New Deal-Great Society constitutional order, or *Casey* as compared to *Roe*, in the “new” constitutional order, will be minimalist in the short run, with lines of cases being maximalist in the long run, in Sunstein’s terms. Perhaps the effects of extra-institutional factors such as globalization and “Code” or “architecture” of cyberspace, in Lawrence Lessig’s work, means that scholarship will have to get beyond the institutional world of the Supreme Court and elected bodies, and look outside the world of Dahl’s “equilibrium” model. We must see the world outside elected institutions and courts not simply, or mostly in institutional terms. Rather, we must ask how institutions construct and react to a changing social, economic, and political into themselves. It is this outside world, as Tushnet hints at in this book, which resulted in “interest group liberalism” being viewed more and more as anachronistic in the new constitutional order, as social, economic, and political complexity and interdependence impact the nature of both institutions and principles themselves.

I discuss the construction process by the Supreme Court in the attached paper. As Tushnet has cogently demonstrated, we can expect “less aspirations” in law and politics in the new constitutional order. That is in the nature of complexity and complex knowledge. It will result in less large programs of change, and more segmented change. However, change and justice can happen on the retail not just on the wholesale that we thought we saw in the New Deal Great Society days.

Therefore, perhaps Tushnet has identified the process of future change, at least the top down part of it, rather than a new constitutional order. And perhaps the order that Ackerman sees as higher-law making and normal politics, is only an order forced on us by scholars seeking understanding, in part because it is harder to see and understand incremental change from below.

Social Constructions, Path Dependence, and Supreme Court Reversals:

Lochner, and *Plessy*, But Not *Roe*

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- V. Introduction

Many reasons have been offered as to why *Lochner* and *Plessy* were overturned, and *Roe* has not been overturned. Why different reasons are offered is at the core of the differences

among scholars to as how to explain Supreme Court decision-making and doctrinal change. Explanations tend to take two primary forms. One form emphasizes concentrating on internal Supreme Court institutional norms and the application of precedent which sometimes is called the legalist approach. In this chapter it shall be called the internal approach. It views doctrinal change primarily as the result of changes in the application of principles and the logic of the law. A second major approach seeks to explain doctrinal change through emphasizing the impact of the historical and political events outside the Court. This I shall call the external approach. While most law school scholars emphasize the internal approach to doctrinal change and political scientists and historians, that is social scientists, tend to favor the external approach, scholars of each approach can be found on law school faculties. After briefly discussing the external and internal approaches to Supreme Court decision-making, in section 2 of the chapter I shall argue that neither an internal or external approach alone can explain doctrinal change.

This becomes clear in sections 3 and 4 of the chapter, in which I compare the constitutive decision-making process through which the Supreme Court overturns *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905), but not *Roe v. Wade* (1973). I will argue that the constitutive Supreme Court decision-making process requires the Supreme Court to construct the social, economic, and political world outside the Court. In that construction, and not simply in the application of polity and rights principles to the case at hand, the Court brings the outside social, economic and political world into its decision-making. Such a process leads the Supreme Court to overturn *Plessy* and *Lochner*, but not *Roe*. This construction process is central to understanding how the Supreme Court bridges the internal and the external; it requires us to reject analyses of Supreme Court decision-making and the process of doctrinal change based on the analysis of only internal or only external factors.

In section 5 of the chapter, I explore the main elements of Paul Pierson's concept of path dependence, which emphasizes that institutions tend to follow the path of increasing institutional returns, and rarely change from such a path.(2000). I argue that the analysis of why the Supreme Court overturns *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905), but not *Roe v. Wade* (1973), raises important questions about the applicability of increasing returns path dependence to explain doctrinal change and the Supreme Court in American political development. O do so because Pierson's concept is based primarily on an external analysis of causes of change by institutions, or, at least, the relationship of the internal and external is not specified in the theory. In order to bridge the internal and the external, a method must be found to relate internal institutional norms and the Court's decision-making process to the world outside the Court. When we do this, some of the primary assumptions about path dependence, as explained by Paul Pierson, such as the status quo bias of political institutions and the place of critical moments, junctures, or triggering events outside the institution as forces for change, may be questioned (2000). The place of the construction process also requires us to question the view of external-oriented scholars, such as Bruce Ackerman, that doctrinal change is the result of revolutions and single triggering events (1991, 1998).

Section 6 of the chapter will explore the implications of my findings about the role of the construction process for the applicability of Pierson's concept of path dependence for understanding the place of the Supreme Court in American political development and, more briefly, for the usefulness of viewing Supreme Court decision-making and the process of doctrinal change as legalists and externalists tend to do.

In a section of this chapter which is yet to be written, I will consider evidence from other chapters in *The Supreme Court and American Political Development* as to the usefulness of

Pierson's view of path dependence for the study of the Supreme Court and American Political Development, and for the separation of the analysis of the Supreme Court and American political development into internal and external explanations.

II Studying the Supreme Court and Explaining Doctrinal Change

E. External Approaches

Behavioral political science and most historical analyses of Supreme Court decision-making and doctrinal change rely on external explanations. External explanations or approaches view doctrinal change as a result of major events outside the Court. These include the preeminent revolutions constitutional scholar of our age, Bruce Ackerman (1991, 1998). He argues that periods of usual normal politics are punctuated by periods of constitutional revolutions or "higher law-making," such as the Founding period, the passage of Civil War Amendments, and the New Deal which resulted from critical elections in the 1930s and the growth of the administrative state in response to the Depression. The Court's response to the New Deal and the growth of the administrative state was the *West Coast Hotel* case, which is viewed as a revolution in jurisprudence because of its rejection of *Lochner* era jurisprudence. Many historians also have adopted the historians' externalist stance and revolutions theory, including historians in and out of the legal academy, such as William J. Novak (2002), G. Edward White (2001), and Barry Cushman (1998), although they have begun to reconsider this view.

Behavioral political scientists also argue that external factors explain Supreme Court decision making. They view the internal process of decision-making as not central to explaining Court action. These include attitudinalists such as Segal and Spaeth (1993, 1996, 1999) who view Justices' policy proclivities and ideologies as causative of Court decision-making, rather than a constitutive decision-making process in which precedent and the application of polity and rights principles to the case at hand as central to Court decision-making. Other externalists explain Supreme Court decision-making as responding to politics outside the Court. These include such preeminent political scientists as Robert Dahl and Martin Shapiro (See Kahn, 1994), and more recent adherents of this view such as Gerald Rosenberg (1991), as well as many contemporary rational choice scholars of the Court.

E. Internal (Legalist) Approaches

Internal or legalist approaches to Supreme Court decision-making are employed by most law school teachers and scholars of constitutional law. The legalist approach is primarily normative in the sense that it centers on the quality of the arguments and interpretive strategies used by Supreme Court justices to decide cases. Legalists evaluate justices's arguments in light of precedents, choice of polity and rights principles, interpretive stances, and the history of the Supreme Court as viewed by the Founders and subsequent interpreters. Court decisions are evaluated in light of moral theories, policy arguments, and social and political theories which are favored or opposed by the particular legal scholar. Internalists or legalists seek to influence Justices to support or change decisions and principles of law and to accept THEIR view of moral or political theory, approach to interpreting the Constitution and statutes, vision of the intent of the Founders, policy stances, and visions of the social and economic world outside the Court.

E. Constructing the Outside World in Constitutive Supreme Court Decision-making

In order to analyze whether an internal or external approach alone and whether path dependence viewed as Pierson's increasing returns are the best ways to study the Supreme Court in American political development, we need to explore the constitutive Supreme Court decision-making process through which polity and rights principles are applied in specific cases. Most importantly, we must do so by explaining the construction process through which the Supreme Court brings the outside social, economic, and political world into its decision-making as it applies polity and rights principles.¹

This construction process can be seen in the Supreme Court's decision in *Brown v. Board of Education* (1954) to overturn *Plessy v. Ferguson* (1896), which had said that race segregation was constitutional. It can also be seen in the Supreme Court's overturning of Lochner Era principles in *West Coast Hotel v. Parrish* (1937). Most importantly, one can gain an insight into why an increasing returns vision of path dependence may be questioned when we compare the construction process in the two cases above with *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992), a case in which the Supreme Court chose not to overturn *Roe v. Wade* (1973), the case which established the right of abortion choice.

The construction process forces us to conceptualize constitutional law in ways different from legalists and externalists. The principles that are at issue in a case only gain meaning through their application in the social, political, and economic world outside the Court (Kahn 1999a, 1999b). Moreover, except for the most originalist of Justices, the construction process in a case and the comparison of social constructions among cases, inform most Justices' decision making, whether they be conservative, moderate, or liberal. When social constructs are clear in a doctrinal area, it is far more difficult for all justices, "conservative," "moderate," and "liberal," to reject precedents, because to do so they must address, and then reject, not simply the polity and rights principles in prior cases, but the social constructs that have been developed in prior cases.²

Whereas polity and rights principles are applied across doctrinal areas, social constructs occur within doctrinal areas and help Justices make sense of how they should view a doctrinal issue in a new case. Non-originalist justices must look at social constructs, born of the application of polity and rights principles, and compare them to social, economic, and political constructs in prior cases. Moreover, understanding the construction process forces one to see that elements central to both legalist and externalist methods of inquiry are needed to understand the Supreme Court in American development.³

¹ We shall use the term social constructs, as the description of what result from a construction process that brings the political, economic, as well as the social world outside the Court into its decision-making.

²For originalists, the social construction process does not play a major role in the development of doctrine because they picture polity and rights principles as fixed, along with the social, political, and economic constructions in the founding years of the part of the Constitution that is to be interpreted.

³I suspect that the role of social constructs may differ within doctrinal areas. As the abortion rights cases will demonstrate, social constructs are central to the analysis of what constitutes "ordered liberty" under the Fourteenth Amendment Due Process Clause. However, social constructs may be less central to First Amendment speech cases because of the importance of the

It is this social construction process which is central to exploring whether the increasing returns approach to path dependence and the revolutions theory is valid when applied to the Supreme Court and American political development. In most cases social constructs are in place after there are enough cases through which a new line of doctrine is established. For example, the construction process with regard to gender rights under the Equal Protection Clause became clarified between *Reed v. Reed* (1971), when the Supreme Court outlawed an invidious gender classification under what it said was minimal scrutiny, and *Craig v. Boren* (1976), the case in which the Court said all gender classifications were now to be scrutinized by the Court under an intermediate level of scrutiny. In each gender rights case between 1971 and 1976, the Court debated how the social, economic, and political world was to be constructed in its search for a level of scrutiny to be applied in future cases. Social constructs become part of the precedential base for a line of cases, and are key to the analogical process of legal decision-making (Kahn and Dennehy 1999) In 1996, the Court again made the level of scrutiny higher in *United States v. Virginia*, when it said the state must demonstrate an “exceedingly persuasive justification” to use gender classifications which it views as invidious.

III. The Construction Process and The Court’s Decision Not to Overturn *Roe v. Wade* (1973): *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)

One can see the construction process at work by analyzing why the Supreme Court chooses to overturn landmark decisions. The *Casey* decision is an excellent case through which to demonstrate the importance of the construction process in Supreme Court decision-making. The *Casey* decision is perhaps the most dramatic example of this because it both upheld the central tenets of the right of abortion choice that were first enunciated in *Roe v. Wade* (1973) and greatly added to the specificity of the linkage between the right and the social and economic lives of women and their families.

In *Casey*, the Rehnquist Court argued that settled expectations in a right to abortion choice that were created in *Roe* in 1973 must be continued in 1992. Important to this view was the Court’s reading of the social facts in 1973 as compared to 1992. The role of women in the workforce and sexual mores in 1992 provided clear evidence to the Court that the liberty interests of women that were at risk in 1973, if childbirth was forced upon them, were even more at risk in 1992. These social facts seemed so important that the Court talked about a woman’s right of personhood in *Casey*, an equal protection concept rather than simply a right of privacy. Also, to overturn *Roe*, given that the right of abortion choice had proven to be workable to new generations of citizens and had become a settled expectation among citizens, would place the Supreme Court as an institution and the rule of law itself at risk.

The opposition by the originalists on the Court to the *Casey* decision is that the right to abortion choice itself is not found in the Constitution. They refuse to accept the process of social

premise of content neutrality in First Amendment theory and practice, as seen in cases in which the Rehnquist Court has approved flag burning and banned content-based hate speech laws. Social constructs may also be less central to environmental law cases, because they involve complex factual and scientific issues and procedural questions. Therefore, the role of social, economic, and political facts in doctrinal change requires careful evaluation and comparison of each doctrinal area.

construction in *Roe*; they also clearly refuse to consider the impact on the constitutionality of the right of abortion choice on changes in the social, economic, and political world outside the Court since 1973. A conceptualization of the construction process asks us to not think in narrowly legalistic terms or only at the level of polity and rights principles. It asks us to accept the view that precedents involve both polity and rights principles and social constructions in prior cases and lines of doctrine.⁴

⁴Even before 1937, the Court, under its concept ordered liberty the electorate can limit liberty of some citizens unless it can be said that a rational and fair man would necessarily admit that the proposed statute would infringe upon fundamental principles as they have been understood by the traditions of our people and our law. I note that ordered liberty has within it a changing notion of tradition, law, and fundamental rights, as the line of cases from *Griswold* to *Casey* suggests. The social construction process is central to the analysis of what constitutes ordered liberty.

Social constructs thus foster the transformative nature of law as new social facts, changes in the social, economic, and political world outside the Court, require justices to build on, and revise prior social constructs. The social facts which the Court develops in *Casey* are far more nuanced than in *Roe*. This is seen, in part, in the reasons the Court gives in *Casey*, compared to prior abortion rights cases, in deciding that Pennsylvania's requirement of spousal notification of an upcoming abortion violates a woman's right to choose. Social constructs force us to ask what is different and the same in society from the past when it has to decide what constitutes a just decision. Thus, social constructs speak to our country's social, economic, and political changes, and form a basis for developing and at times reconsidering individual rights and the powers of government.⁵

In *Casey*, the Supreme Court reaffirmed the right of abortion choice that it had declared in *Roe v. Wade* (1973), and it said that it would ask whether what a government did to limit access to abortions constituted an "undue burden" on the right to abortion choice. It then applied this principle to parts of the Pennsylvania law, including a 24 hour waiting period before abortions could be performed, and a spousal notification provision. However, we can't understand the importance of the social construction process to considering the applicability of Pierson's concept of path dependence to the Supreme Court and American political development unless we compare *Casey* with the two landmark cases that the Supreme Court chose to overturn: *Plessy v. Ferguson* (1896) and *Lochner v. New York* (1905).

IV. The Construction Process and the Decision to Overturn *Lochner v. New York* (1905) and *Plessy v. Ferguson* (1896), But Not *Roe v. Wade* (1973)

A. The Justices Explain The Construction Process: *Roe v. Wade* (1973) Compared to *Lochner v. New York* (1905) and *Plessy v. Ferguson* (1896)

In order to highlight the special character of social constructions in the process of Supreme Court decision making I will compare the decision in *Casey* not to overturn *Roe v. Wade* to the Court's decision to overturn *Lochner* in *West Coast Hotel* and *Plessy* in *Brown v.*

⁵Constitutional theorists must incorporate changes in Court constructions, and the construction process itself, as they consider what comprises liberty and equal protection, while continuing to bolster support for traditional values, norms, and doctrines as they are transformed. Courts are supposed to be counter-majoritarian so that substantive values in the Constitution limit political bodies and those with power. However, too many theories, especially those of most critical theorists ("Crits"), present facts about injustice without constructing a theory that relates social facts of the past to the present, or links social constructs to long-held polity and rights principles.

Board of Education.

In the *Casey* decision, Justices O'Connor, Kennedy, and Souter directly confront the question of whether the principles they enunciate in their joint opinion about when to overrule a landmark case are in accord with the Court's decisions to overturn *Lochner* in 1937 and *Plessy* in 1954. They describe these cases of "comparable dimension" to *Roe* "that have responded to national controversies and taken the impress of the controversies addressed." (861) In the analysis of these cases one sees the central role that the writers of the joint opinion place on the importance of social construction of facts, in light of polity and rights principles. The Justices in the joint opinion in *Casey* emphasize that at the core of the decision in *West Coast Hotel* to overrule *Atkins* and the basic premises of the *Lochner* era, was the fact that the social constructions in *Atkins*, and in the *Lochner* case and in many *Lochner* era cases, were incorrect, with regard to factual assumptions about the social, economic, and political world outside the Court. They write,

The *Lochner* [era] decisions were exemplified by *Atkins v. Children's Hospital of District of Columbia*, 261 U.S. 525 (1923), in which this Court held it to be an infringement of constitutionally protected liberty of contract to require the employers of adult women to satisfy minimum wage standards. Fourteen years later, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), signaled the demise of *Lochner* by overruling *Atkins*. In the meantime, the Depression had come and, with it, the lesson that seemed unmistakable to most people by 1937, that the interpretation of contractual freedom protected in *Atkins* rested on fundamentally false factual assumptions about the capacity of a relatively unregulated market to satisfy minimal levels of human welfare. See *West Coast Hotel Co.*, *supra*, at 399. As Justice Jackson wrote of the constitutional crisis of 1937 shortly before he came on the bench: "The older world of laissez-faire was recognized everywhere outside the Court to be dead." *The Struggle for Judicial Supremacy* 85 (1941). The facts upon which the earlier case had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Court-packing crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law. (861-862)

The Court is arguing that social constructions made by the Court in the *Lochner* era with regard to its faith in economic markets to protect the public welfare, and on the conceptual separation of economic from political institutions had been misguided. Such ideas no longer could be sustained. They were based on conceptual and factual assumptions that no longer could be accepted.

In Larry Lessig's terms, a process of translation had occurred. This resulted in the Court saying in *West Coast Hotel* that a formerly uncontested truth, that the concept of laissez-faire economics which lay at the heart of the Court's view of a right of contract between employer and employee, was a construction of the world outside the Court that simply was no longer valid. The Court was saying that it is now an uncontested truth that laissez-faire economics was

not only based on “false factual assumptions” about the bargaining power of employer and employee and the health of bakers; it also had a fundamentally flawed notion of the relationship between the state and economic institutions and practices, as Sunstein (1987 1993) has so eloquently demonstrated. Therefore, unlike *Casey*, where the right of privacy becomes a right of personhood for women, in light of an analysis of the development of rights of privacy since *Roe* and the construction of the place of women in the social, economic, and political world outside the Court, in *West Coast Hotel* it is now uncontested that the right of contract is no longer valid because the construction of the social, economic, and political world outside the Court on which it is based makes little or no sense

In considering why *Plessy v. Ferguson* (1896) was overturned in *Brown v. Board* (1954), the Court notes that there were significant changes between 1896 and 1954 as what was and was not contested about the social, economic, and political world outside the Court, and the relationship between the political and social. In the *Casey* Joint Opinion, Justices Souter, Kennedy, and O’Connor argue that the Supreme Court “repudiated” the “understanding of the facts and the rule” in *Plessy v. Ferguson* (1896). They write,

The *Plessy* Court considered the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it. *Id.*, at 551. Whether, as a matter of historical fact, the Justices in the *Plessy* majority believed this or not, see *id.*, 557, 562 (Harlan, J., dissenting), this understanding of the implication of segregation was the stated justification for the Court's opinion. But this understanding of the facts and the rule it was stated to justify were repudiated in *Brown v. Board of Education*, 347 U.S. 483 (1954) (Brown I). As one commentator observed, the question before the Court in *Brown* was whether discrimination inheres in that segregation is imposed by law in the twentieth century in certain specific states in the American Union. And that question has meaning, and can find an answer only on the ground of history and of common knowledge about the facts of life in the times and places aforesaid. Black, *The Lawfulness of the Segregation Decisions*, 69 Yale L.J. 421, 427 (1960).

The Joint Opinion continues,

The Court in *Brown* addressed these facts of life by observing that whatever may have been the understanding in *Plessy*'s time of the power of segregation to stigmatize those who were segregated with a "badge of inferiority," it was clear by 1954 that legally sanctioned segregation had just such an effect, to the point that racially separate public educational facilities were deemed inherently unequal. 347 U.S., at, 494-495. Society's understanding of the facts upon which a constitutional ruling was sought in 1954 was thus fundamentally different from the basis claimed for the decision in 1896. While we think *Plessy* was wrong the day it was decided, see *Plessy*, *supra*, at 552-564 (Harlan, J., dissenting), we must also recognize that the *Plessy* Court's explanation for its decision was so clearly at odds with the facts apparent to the Court in 1954 that the decision to

reexamine *Plessy* was, on this ground alone, not only justified but required. (862-863)

In an extraordinary statement about the importance of social constructions to the Court's making of constitutional law, these moderate and conservative justices make it clear that *Plessy* was misguided not simply in how it read the requirements of the 14th Amendment Equal Protection Clause; *Plessy* was wrong in terms of its construction of social facts about the nature of the "badge of inferiority" caused by segregation of the races.

The Justices again emphasize the place of social constructions in Supreme Court decision-making when they write,

West Coast Hotel and *Brown* each rested on facts, or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions. Each case was comprehensible as the Court's response to facts that the country could understand, or had come to understand already, but which the Court of an earlier day, as its own declarations disclosed, had not been able to perceive. As the decisions were thus comprehensible, they were defensible, not merely as the victories of one doctrinal school over another by dint of numbers (victories though they were), but as applications of constitutional principle to facts as they had not been seen by the Court before. In constitutional adjudication, as elsewhere in life, changed circumstances may impose new obligations, and the thoughtful part of the Nation could accept each decision to overrule a prior case as a response to the Court's constitutional duty. (863-864).

In quite clear language, the Justices are saying that decisions to overrule cases, like the decisions in the original cases themselves, do not rest simply on their definition of rights and polity principles, as seen in the term "victories of one doctrinal school over another," no matter the number of victories. They also rest on the Justices' construction of the conditions of the times as they apply those principles. Therefore, it is possible that the Court could be misguided as to the nature of polity and rights principles, because of their social construction of citizen and group roles in that society. Moreover, it is possible that a polity or rights principle could continue, but its reference point could change with changes in the social, economic, and political world outside the Court. In these decisions we see the Supreme Court's own description of the place of social constructs in Supreme Court decisions: "changed circumstances may impose new obligations." Lawrence Lessig offers a reason why such constructions of the world outside the Court existed at the time of *Plessy*. He argues that changed readings in law relate to or are informed by changed discourses outside the law—in this case science. He writes, "At the time *Plessy* was decided, science supported the racist status quo. Science, for example, told judges that interracial sex produces degenerate children—certainly one of the more extreme perversions of science from the period" (Lessig 1995, 424).

B. How *Roe* Differs from *Plessy* and *Lochner*

Between *Lochner*, decided in 1905, and *West Coast Hotel*, decided in 1937, and between *Plessy*, decided in 1896, and *Brown*, decided in 1954, there were breakdowns in the faith that

the Court had in its constructions of the social, economic, and political world outside the Court, upon which the right of contract in *Lochner* and *Atkins*, and the constitutionality of racial segregation in *Plessy*, were based. The *Casey* Court emphasizes the way in which *Roe* differs from *Plessy* and *Lochner*. Justices O'Connor, Souter, and Kennedy write,

Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973. To overrule prior law for no other reason than that would run counter to the view, repeated in our cases, that a decision to overrule should rest on some special reason over and above the belief that a prior case was wrongly decided.

It is important to note that rights principles central to *Griswold* (1965) and *Roe* (1973) had become even more clearly defined by 1992, to the point that a concept of personhood replaces one of simple privacy in *Casey*. Because the factual underpinnings between 1973 and 1992 as socially constructed by the Court were in the same direction as the right of privacy, the Court concludes that if it were to overturn *Roe* it would simply be because it had been wrongly decided in policy terms, and not on a determination by the Court of whether the rights at issue in *Roe* were still valid in light of the lives of our nation's citizens.⁶ However, since *Roe* both the principles on which it was based and the social constructions of those principles have expanded. The

C. Social Constructs, The Overruling of Precedents, and Institutional Norms: A Confirmation of Historical Institutional Premises As to Preference Formation

Historical Institutionalists have argued that the impact of institutional norms, such as concern for the continued legitimacy and preservation of an institution, and not simply the need to secure individual policy preferences, inform the choices of members of institutions. We see an excellent example of this in the discussion in the Joint Opinion of the consequences to the

⁶The constructions of the social, economic, and political world outside the Court mentioned above do not fully elucidate all the constructions in *Plessy* and *Lochner* not only became contested, but were replaced by new uncontested constructions of the world outside the Court in *Brown* and *West Coast Hotel*. For example, in *Brown*, one could discuss how the Court no longer accepts the notion that there is a separation of the social and political with regard to segregation laws, especially with regard to schools, which are the cradles of citizenship.

Supreme Court if it were to overrule *Roe v. Wade* (1973). In this discussion we also see how the Supreme Court's consideration of the social constructions in its decision-making is central to the continued legitimacy of the Court and, ironically, for respect for the rule of law. Justices O'Connor, Kennedy, and Souter write,

The examination of the conditions justifying the repudiation of *Atkins* by *West Coast Hotel* and *Plessy* by *Brown* is enough to suggest the terrible price that would have been paid if the Court had not overruled as it did. In the present cases, however, as our analysis to this point makes clear, the terrible price would be paid for overruling. Our analysis would not be complete, however, without explaining why overruling *Roe*'s central holding would not only reach an unjustifiable result under principles of *stare decisis*, but would seriously weaken the Court's capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. To understand why this would be so, it is necessary to understand the source of this Court's authority, the conditions necessary for its preservation, and its relationship to the country's understanding of itself as a constitutional Republic. (864-865)

The Justices first discuss the sources of the Court's legitimacy,

The underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation. (865-866)

At the core of the above argument is the belief that the Supreme Court will be seen as legitimate only if it makes principled decisions, through a consideration of polity and rights principles and by employing social constructions that fit the social, economic, and political realities of the times. Since the Court failed to do so in *Lochner* and *Plessy*, it led to these cases being overruled in *West Coast Hotel* and *Brown*. Also, at the core of the discussion about legitimacy is the need for the nation to understand that the Supreme Court makes decisions that are "grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make." (866) The Court is also saying here that decisions whether to overrule a case only must be "sufficiently plausible" to be accepted by the nation. Moreover, decisions that are viewed as "compromises with social and political pressures" lack plausibility because they are viewed as unprincipled

and place the Court in the position of being viewed like an elected body which simply replies to public opinion and interest group power, rather than as a legal institution. Here the Justices are discussing why they can't make decisions simply on the basis of their policy desires or the desires of those who are politically active in raising controversies: to do this could undermine the Supreme Court's legitimacy as an institution.

The Justices then ask under what circumstances would the Supreme Court "fail to receive the benefit of the doubt in overruling prior cases"? There are two. The first is if the Court overruled cases very often, and that is "hypothetical," the Justices say, since overrulings are so rare. The Justices discuss the second circumstance,

Where, in the performance of its judicial duties, the Court decides a case in such a way as to resolve the sort of intensely divisive controversy reflected in *Roe* and those rare, comparable cases, its decision has a dimension that the resolution of the normal case does not carry. It is the dimension present whenever the Court's interpretation of the Constitution calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution.(866-867)

In such situations, the Court must ensure that its decisions are not perceived as giving into political pressure if the Court wants to sustain its legitimacy. The burden of proof is on overturning—which attests to the significance of the few decisions that have been overturned. The Justices continue,

The Court is not asked to do this very often, having thus addressed the Nation only twice in our lifetime, in the decisions of *Brown* and *Roe*. But when the Court does act in this way, its decision requires an equally rare precedential force to counter the inevitable efforts to overturn it and to thwart its implementation. Some of those efforts may be mere unprincipled emotional reactions; others may proceed from principles worthy of profound respect. But whatever the premises of opposition may be, only the most convincing justification under accepted standards of precedent could suffice to demonstrate that a later decision overruling the first was anything but a surrender to political pressure and an unjustified repudiation of the principle on which the Court staked its authority in the first instance. So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question. Cf. *Brown v. Board of Education*, 349 U.S. 294, 300 (1955) (*Brown II*) ("[I]t should go without saying that the vitality of th[e] constitutional principles [announced in *Brown I*,] cannot be allowed to yield simply because of disagreement with them").

The Court concludes its discussion of the principles it must follow in deciding whether to overturn a controversial landmark decision, such as *Roe v. Wade* (1973), by saying,

The Court's duty in the present cases is clear. In 1973, it confronted the already-divisive issue of governmental power to limit personal choice to undergo abortion, for which it provided a new resolution based on the due process

guaranteed by the Fourteenth Amendment. Whether or not a new social consensus is developing on that issue, its divisiveness is no less today than in 1973, and pressure to overrule the decision, like pressure to retain it, has grown only more intense. A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today. (868-869)

One can see the use of social constructions of the nature of the relationship between men and women and parents and daughters with regard to abortion choice in the parts of *Planned Parenthood* in which the Court must decide whether spousal notification is to be permitted, the constitutionality of the twenty-four hour rule between securing and the abortion itself, and parental notification of abortions. The Court refuses to allow states to give spouses the right to be notified prior to an abortion. The Court considers the interests of both spouses, respect for potential life, and, most importantly, the fear of spousal abuse or influence by the spouse over the decision, when it said spousal notification is an "undue burden of the right of abortion choice. There are also issues about the private nature of the choice. The Court accepts social facts about the possibility of spousal abuse as impacting a women's liberty to choose to the point of denying the liberty to choose. In Larry Lessig's terms the possibility of such spousal abuse is no longer contested by the experts; thus opening the way to an increased protection of the right of abortion choice (1995, 424). The Court does not view the 24 hours rule and parental notification and permission for the unwed as an undue burden, as long as judicial bypasses are in place.

In these parts of the decision the Court must socially construct these roles and make generalizations about them as the rights principles behind abortion choice are applied. Scholars have differed greatly over the policy outcomes in *Planned Parenthood*, which allowed the twenty-four hours rule and the continuation of parental notification, but denied spousal notification, because they questioned the social constructions used by the Court, as well as the application of principles. Some scholars believe that the central holding of *Planned Parenthood* (1992) which sustained the central holding of *Roe*, actually is weaker than the central holding in *Roe*, due to the Court's decisions on the specific aspects of the Pennsylvania law at issue in the case. I do not think this interpretation is valid. In *Planned Parenthood* (1992) the social construction of women in society as it relates to the Court's definition of liberty, compared to *Griswold* and *Roe*, is much more filigreed, sensitive, and built on the Court's recognition of the expanding place of women in the social, political, and economic life of the nation (Kahn 1994, 257-258; 1999a) The clarity of the joint opinion's discussion of social constructions, and its argument for the importance of social constructions in Supreme Court decision-making, resulted in a vibrant counter-discussion by Justice Scalia, joined by Justices White and Thomas.

D. Social Constructions and Judicial Review

Because justices and judges are not simply doctrinal and logical in the application of principles, they must ask how each new case is similar or different from prior cases while still supporting the rule of law in a constitutive decision making process. As we saw above, an example would be the change from a view of the social facts in light of precedent in *Plessy v.*

Ferguson (1896) compared to *Brown v. Board* (1954). The social construct in *Plessy* is one in which there is a stark separation of public and private causation, where the space on a train is viewed as social in nature, and thus private, rather than as public in nature, and a right of citizenship, such as being on a jury. *Brown v. Board* (1954) rejects that social construct with a discussion of the role of schools in educating citizens, as well as notions of the state making distinctions between racial groups in schools, given the linkage to the role of schools to citizenship and basic equal protection of the law, which segregation denied. There is a rejection of the civil--social distinction in *Plessy* when the state makes the separation in general, and in particular when the issue is education.

Moreover, *Brown* gets its moral force from the creation of a social construct that rejects *Plessy*'s, and offers a more clear definition in the reformed liberal tradition of the state's role in the development of citizens as linked to equal protection of the law. In a broad sense, social constructs are drawn from a linking of fundamental rights and polity principles in the Constitution to recognized social, economic, and political structural inequalities, which also help in the redefinition of a right or polity principle. This forms a modified or reconstructed social construct. *Brown* does not get its moral force from psychological experiments with dolls and differences in self-esteem between black and white children, psychological data which has been subject to criticisms from social scientists and legal scholars alike.

Social constructs include various social "facts" which inform us of the structural inequalities that made us conclude that feelings of inferiority to white children by African-American children was not individual in nature, but a product of state action. In *Plessy*, blacks, and not the state, were responsible for their feelings of inferiority because of government-enforced segregation of races. In *Brown*, this social construct is no longer valid; because the role of education has changed equal protection before the law is no longer possible for blacks. The tasks of being a citizen in a changing society require education provided by the state.

By centering on social constructions in precedents and lines of cases, we move beyond the idea of social facts as reality and the use of facts in one case at a time. We study the progression from a social construction in a case to a social construction which becomes central to a doctrinal area, to which later Courts must give obeisance if the rule of *stare decisis* is to be honored.

The social construct is a key part of a preference formation process that is central to constitutive Supreme Court decision-making and the part of institutional practice which new historical institutional scholars are concerned about explaining. In fact, the development of social constructs, if they fit with change in the world outside, can add legitimacy to Court decision-making among the interpretive community and wider public. However, when the social construct in a doctrinal area is so out of kilter with social, political, and economic structures, and their impact on citizens, the doctrine, or landmark case, is ripe for overturning. The best way to see the role of social constructs in the development of constitutional law is to compare social constructs within doctrinal areas.

Finally, the primary objective of political scientists is empirical: to determine whether constructions made by the Court fit with the world outside the Court, and see whether construction which no longer fit inform doctrinal change. It is not primarily to judge which social constructs are good or bad in a normative sense. As we explored above the objective is to identify social constructs in key doctrinal areas of constitutional law and to see the relationship of the patterns of social constructs to the Court's decision to support or reject landmark decisions. Once we study and compare the patterns of social constructs in doctrinal areas, we

can consider the normative implications of different patterns, and the role of constitutional theory and other factors outside the Court which influence the development of constitutional law in the future.

IV. Path Dependence as Increasing Returns and The Supreme Court's Construction Process

A. Introduction

The term “path dependence” is generally used to support a few key claims. Paul Pierson writes, “Specific patterns of timing and sequence matter; starting from similar conditions, a wide range of social outcomes may be possible; large consequences may result from relatively “small” or contingent events; particular courses of action, once introduced, can be virtually impossible to reverse; and, consequently, political development is often punctuated by critical moments or junctures that shape the basic contours of social life.”(2000, 251)

However, Pierson makes the argument for a narrower definition of path dependence, one which centers on “increasing returns” or the process through which institutions usually reinforce what they are doing through the impact of positive feedback processes. Pierson argues that increasing returns dynamics capture two key elements which are central to most analysts’ intuitive sense of path dependence: they pinpoint how the costs of shifting from one alternative to another will in certain social contexts increase markedly over time, and they draw attention to issues of sequence and timing, distinguishing formative moments from the periods that reinforce divergent paths. Therefore, as we shall explore below, at the core of the view that political institutions stay on the same path and become dependent on that path is the costs and difficulties of shifting to a new path. We shall briefly consider the components of Pierson’s argument.

B. The Possibility and Costs of Changing Paths

At the core of the concept of increasing returns is the view that those who are first out of the gate have a strong incentive to focus on a single alternative and to continue down a specific path once initial steps are taken in that direction. In comparison to economic institutions, Pierson argues that politics is even more conducive to increasing returns processes because of these following properties: the central role of collective action; the high density of institutions; the possibilities for employing political authority to magnify power asymmetries; and its intrinsic complexity and opacity (2000, 257). Increasing returns processes are particularly intense in politics because politics is less prone than economics to processes which may offset path dependence. In contrast to economic institutions, political organizations are weak or absent in efficiency-enhancing mechanisms, have a stronger status quo bias generally built into them, and political actors have shorter time horizons than economic actors.(2000, 257) Unlike economic markets where profits and prices rule, to demonstrate advantage and interest in the political market is more opaque.

At the core of increasing returns analysis is the notion that preceding steps in a particular direction induce further movement in the same direction. In an increasing returns process the probability of further steps along the same path increases with each move down the path.(2000, 252) Pierson argues that despite massive social, economic, and political changes over time self-reinforcing dynamics associated with collective action processes mean that organizations have a

strong tendency to persist once they are institutionalized. For Pierson, politics involves struggles over the authority to establish, enforce, and change rules governing social action in a particular territory, and not over simple exchange of goods. Also, “institutional constraints are ubiquitous.” (2000, 259)

Pierson argues that institutions induce self-reinforcing processes that make reversals of course increasingly unattractive over time. Institutions view new institutions and policies as costly to create and often generate learning effects, coordination effects, and adaptive expectations. Institutions encourage individuals and organizations to invest in specialized skills, deepen relationships with other individuals and organizations, and develop particular political and social identities. Pierson notes, “The whole point of path dependence, however, is that these previous choices are often relevant to current action. In cases of increasing returns, social adaptations represent investments that yield continuing benefits. Actors may be locked into a current option because massive new investments may be required before some theoretically superior alternative generates a higher stream of benefits.” (2000, 259 at note 14) These factors make the cost of exit from established relationships very high indeed. Pierson writes, “These activities increase the attractiveness of existing institutional arrangements relative to hypothetical alternatives. As social actors make commitments based on existing institutions and policies, their cost of exit from establishments arrangements generally rises dramatically.”(2000, 259)

Institutions and policies may encourage individuals and organizations to invest in specialized skills, deepen relationships with other individuals, and develop particular political and social identities—all factors which make political institutions tend to follow the status quo.

B. Short Time Perspectives, Status Quo Bias, and Tenacious Outlooks of Political Actors, and the Importance of Binding Rules

Pierson mentions four major barriers to change in political institutions that are subject to increasing returns that often make path dependent effects particularly intense in politics: the short time horizons of political actors, the strong status quo bias associated with decision rules that govern most political institutions (2000, 261), the tenacity of the staying power of outlooks of political actors, and the importance of binding rules. He writes,

The development of basic social understandings involve high start-up costs and learning effects; they are frequently shared with other social actors in ways that create network effects and adaptive expectations. The need to employ mental maps induces increasing returns (2000, 260-261).

Moreover, this is true at the individual level and at the group level, as “communities of discourse” often come to share and reproduce a similar ideology (2000, 261).

Pierson emphasizes that the difference in time-horizons between elected officials and investors “has profound consequences.” Pierson writes, “Once on a particular path, political actors will have a powerful incentive to stay on it. Switching costs are typically borne in the long run and the benefits only accrue in the long run to someone else. Public policies and (especially) formal institutions are change resistant. Both are generally *designed* to be difficult to overturn (2000, 262).

Pierson argues that because of the above qualities of political institutions, basic outlooks

on politics are “generally tenacious.” They also are path dependent, and “marked by dynamics of increasing returns.”(2000, 260) Social interpretation is path dependent and usually adds to stability and change.

Most important, Pierson argues that government must deliver public goods like defense and environmental protection because markets can’t deliver them. Delivery of public goods requires “a complex array of complementary institutions designed to circumscribe and legitimate that authority” and “legally binding rules.” He writes, “Legally binding rules are not just a foundation of political activity (like property rights in the economy). They are instead the very essence of politics.”(2000, 257)

Finally, Pierson argues power asymmetries can reflect the operation of positive feedback processes over substantial periods. Increasing returns processes can transform a situation of relatively balanced conflict, in which one set of actors must openly impose its preferences on another set to one in which power relations become so uneven that anticipated reactions and ideological manipulation make open conflict unnecessary. Pierson notes, “When certain actors are in a position to impose rules on others, the employment of power is self-reinforcing... Relatively small disparities in political resources among contending groups may widen dramatically over time as positive feedback sets in.” (2000, 259)

Pierson’s summarizes that in settings in which increasing returns or path dependent processes are at work, political life is likely to be marked by four features:

1. *Multiple equilibria.* Under a set of initial conditions conducive to increasing returns, a number of outcomes-perhaps a wide range-are generally possible.
2. *Contingency.* Relatively small events, if they occur at the right moment, can have large and enduring consequences.
3. *A critical role for timing and sequencing.* In increasing returns processes, *when* an event occurs may be crucial. Because earlier parts of a sequence matter much more than later parts, an event that happens “too late” may have no effect, although it might have been of great consequence if the timing had been different.
4. *Inertia.* Once an increasing returns process is established, positive feedback may lead to a single equilibrium. This equilibrium will in turn be resistant to change (2000, 263)

F. Studying Path Dependence in Political Institutions

2. Countering Functional Explanations in Political Science With Historical Studies

Study of increasing returns processes provide a plausible counter to functionalist, rational choice explanations in political science, which Pierson argues often go unchallenged. He writes, Functionalist arguments take the following form: Outcome X (e.g., an institution, policy, or organization) exists because it serves the function Y. In a world of purposive actors, it may indeed be the case that the institution have something to do with an explanation for its emergence and persistence... Thinking in functionalist terms about an institution, policy, or social organization may be a

good way to derive causal hypotheses, but functional accounts are far from being the only plausible ones. Many alternatives to the outcome in question might have been possible and a dynamic of increasing returns may have locked in a particular option even though it originated by accident, or the factors that gave it an original advantage may have long since passed away. *Rather than assume relative efficiency as an explanation, we have to go back and look.* Thus, recognizing the possibility of path dependence necessarily draws social scientists to an investigation of history, if only to evaluate the validity of functionalist assertions (2000, 263-264).

Increasing returns analysis, he argues, is ground-breaking not simply because it describes the characteristics of these processes; it identifies conditions conducive to path dependence. In making these arguments, Pierson argues,

The main properties of increasing returns processes provide considerable support for many of the key claims of "historical institutionalist" analyses in political science. The phrase is a fortunate one, as it captures two critical themes explored here. This work is historical because it recognizes that political development must be understood as a process that unfolds over time. It is institutionalist because it stresses that many of the contemporary political implications of these temporal processes are embedded in institutions-whether formal rules, policy structures, or norms (2000, 264-265)

2. Focus on Critical Moments, Junctures or Triggering Events, and Branching Points

If political life is marked by the qualities listed above, Pierson argues that we need to focus on branching points and on the specific factors that reinforce the paths established at those points. We need to study critical moments, that is what David and Ruth Collier have called "mechanisms of reproduction," which carry and often amplify the effects of a critical juncture through time. We need to study both critical junctures and explain why particular historical junctures have lasting consequences, or why they are critical (2000, 265). That is, we must study path dependence which for Pierson rests on assertions of increasing returns processes. We must not center path dependent arguments about positive feedback only on "big" events. Pierson argues that little ones that happen first or at the right time can have major consequences as well.

For Pierson, the crucial object of study becomes the critical juncture or triggering events, which set development along a particular path, and the mechanisms of reproduction of the current path. An awareness of increasing returns processes can change not only the questions we ask but also the answers we provide, and provide a fruitful source of hypotheses about the sources of social outcomes (or rights).

In such a study the significance of temporal processes must not be left implicit or be downplayed. (265). However, Pierson argues that critical moments in politics, distinctive developmental sequences, and institutional rigidities make it difficult for social actors to escape from established paths. Pierson hopes that knowledge of the dynamics of increasing returns processes can greatly sharpen our understanding of why particular junctures (and which aspects of them) are critical and why timing often counts for so much in politics.

Pierson also cautions us to not view the social world as overly static. We must be careful not to view increasing returns processes as generating only brief moments of "punctuation" in a largely frozen social landscape. To many, the significance of path dependence is belied or camouflaged by the evident dynamism of social life. To meet this challenge, we need to develop concepts and methods of inquiry that imply that a particular alternative is permanently locked in, following the move onto a self-reinforcing path. Therefore, the objective is to identify paths caused by increasing returns processes.

Because path dependence is a way to narrow conceptually the choice set and to link decision making through time, Pierson emphasizes that "It is not a story of inevitability in which the past neatly predicts the future." (2000, 265) Thus, no path is inevitable. However, we must study whether previously viable options may be foreclosed in the aftermath of a sustained period of positive feedback, and whether cumulative commitments on the existing path (precedent) will often make change difficult and will condition the form in which new branchings will occur. (2000, 265).

VI. The Internal and External, Path Dependence as Increasing Returns, and the Supreme Court in American Political Development

A. The Internal and External

One can see that dichotomy of explanations of doctrinal change into internal and external approaches makes it impossible to understand the relationship of internal institutional norms, precedents, and the law, and the social, economic, and political world outside the Court. Such an explanation requires one to rethink the nature of Supreme Court decision-making and view it as a process in which the Supreme Court applies polity and rights principles through the construction of the social, economic, and political world outside the Court. Through this construction process new individual rights are established and old rights are redefined. The construction process also is central to the Court defining and redefining the power of governmental institutions. This construction process cannot be viewed as simply internal to the Court. Moreover, the Supreme Court has engaged in a construction process since its inception. (Kahn 2002 and Strauss 1996). However, increased recognition of the external nature of Supreme Court decision-making is the product of 20th century developments including the legal realist movement and recognition by social scientists of the interdependence among political, social, and economic factors in society and institutions. This recognition also results in reinterpretations of what constitute state action and individual agency, as we saw in the Court overturning of *Plessy* and *Lochner*, and its decision not to overturn *Roe*.

It is the construction process that is key to doctrinal change, and whether landmark decisions are overturned. Landmark decisions are ripe for overturning when rights and polity principles are based on constructions of the social, political, and economic world outside the Court that simply do not make sense given the realities of the changing world outside the Court and the construction of those realities by the Court, spurred on by the interpretive community. We saw this through a comparison of the Supreme Court's consideration of whether to overturn the landmark *Plessy*, *Lochner*, and *Roe* cases.

A. Path Dependence as Increasing Returns

Moreover, decisions by the Supreme Court as to whether to overturn landmark cases, as explored in this chapter study, suggest that constitutive Supreme Court decision-making, a process in which polity and rights principles are applied through a construction process in which the political, social, and economic world is brought into the Court, is best viewed as incremental, occurring over many years.

This raises serious questions about various aspects of Pierson's concept of path dependence. Some of the features which Pierson finds intrinsic to politics and political institutions may not be intrinsic to the Supreme Court. These include the prominence of collective action problems, the prospects for using political authority to amplify asymmetries of power, short time perspectives of political actors, and the strong status quo bias associated with decision rules.

The Supreme Court may not be as change resistant as political institutions, and as change resistant as assumed by Pierson's concept of path dependence which is based on increasing returns. This is so in part because the construction process allows a natural process of application of polity and rights principles to the world outside the Court. This does not mean that the Court always engages in a (re)construction process, and always seeks to interpret the Constitution in light of change outside the Court, as the *Lochner* Period demonstrates. Polity and rights principles and the social constructions on which they are built, such as in the *Lochner* case, may become static. However, this is not the usual process of Court decision making and doctrinal change.

These qualities of the Supreme Court and its decision-making process result in fewer incentives and more costs for Justices to be path dependent. There may be less start-up costs to develop new social understanding than in political institutions, in part because the construction process continually brings new understandings into Supreme Court decision-making (Pierson 2000, 260-61). Also, the Supreme Court is a unique institution in American politics because it has the authority to make final decisions about the nature of individual rights and the legitimate use of governmental power.

While binding rules are important to both the Supreme Court and political institutions, part of the rules require justices to engage in an interpretive turn both at the polity and rights principle level, and at the level of social, economic, and political construction. Moreover, the Supreme Court is the major institution under our Constitution with the authority to circumscribe and legitimate acts of institutions of the state as well as private institutions through its power to establish "legally binding rules." Also, it is not limited by elections and popular opinion. Therefore, the Supreme Court has more of a free reign than political institutions to make constitutional choices and to engage in the construction process. Thus, political institutions may have greater incentives than the Supreme Court to engage in increasing returns to seek equilibrium with rather than question the actions of other institutions, and to shape its choices to wider social, political, and economic world.

Moreover, the Supreme Court is subject to less "switching costs" for changing paths because it tends to hear cases and issues over which lower courts and society are in conflict; institutions outside the Court are not sure what the law is or what the Constitution requires, and in many cases are demanding an answer, in order to secure stability. Settled expectations may be needed by path dependent political institutions; however the Supreme Court must engage in constitutive decision-making and the construction process to provide such expectation. In other words cases are not heard if "reversals of course" are not a real possibility. The hypothetical

alternatives, which political institutions abhor, are part of the regular business of the Supreme Court.

While the “Cost of Exit” from paths for political institutions is high, the cost of exit and change for the Supreme Court is not. Change is based on a constitutive decision-making process in which polity and rights principles and the social constructions from prior cases in which such principles have been applied, are compared to principles at issue and constructions in the new case. As we saw in the Court’s considerations of the constitutionality of principles at the core of the *Plessy* and *Lochner* decisions, for the Court not to overturn those cases would require it to continue constructions of the social, economic, and political world outside the Court which were no longer valid. As stated in the *Casey* joint opinion, if they had not overturned these landmark decisions, the Court would have had to accept constructions in 1954 and 1937 which no longer had meaning and reject constructions of the social, economic, and political world which were now uncontested by the nation and most of its jurists. To not overturn *Plessy* and *Lochner*, would add to the illegitimacy of not only the Court but the rule of law, which in part gets its moral support from having the Constitution engage in what Lessig calls “Translation with Fidelity” (Lessig, 1995). When the incremental constitutive Supreme Court decision-making process becomes so out of kilter with the social, economic, and political world outside the Court, then the possibility of even landmark cases being overturned will increase, if not in the short run, in the long-run. *McCleskey v Kemp* (1987), the capital punishment is a candidate for overturning. In future years it will look as anachronistic as *Lochner* looked in 1937 and *Plessy* looked in 1954. (Kahn, 1999b)

However, such landmark cases as *West Coast Hotel* (1937) and *Brown v. Board* (1954) should not be viewed as critical moments, junctures or triggering events, or even branching points from a normal status quo system of the Court in which paths are reinforced. Usually such cases occur after a far longer-term incremental process of testing accepted polity and rights principles, and then found wanting, as many scholars have demonstrated in their analysis of the *Lochner* era. Thus, landmark cases are not the result of big events, revolutions, or historical points as many externalists argue. Such events and big cases tend to ratify, and state the results, of an incremental process in which social, political, and economic constructs have been under attack, at times for decades. This finding raises additional questions about path dependence viewed as a process of increasing returns. Moreover, the route not taken in *Casey*, the overturning of *Roe*’s right to abortion, and the rejection of political pressure as a basis for such an action, is additional evidence not only of the importance of the construction by the Court of the world outside, but also of the degree to which that process is related to internal institutional norms and rules. The construction process makes the Court less inner-directed and less concerned about the loss of equilibrium with the world outside compared to political institutions, upon which Pierson’s model is based.

Pierson cautions us not to view the social world as overly static and not to view increasing returns processes as generating only brief moments of “punctuation” in a largely frozen social landscape, and to develop concepts that identify paths caused by increasing returns processes. However, if we base our study of the Supreme Court on the assumptions that Pierson makes about (political) institutions, we are less likely to understand the Supreme Court and American political development.

Part of the problem with Pierson’s notion of path dependence is that it seems to concentrate on the boundary problems of institutions, and how institutions act to ensure increasing returns as the external world changes. Pierson supports historical institutional

premises for his research on path dependence: it is historical because it recognizes that political development must be understood as a process that unfolds over time; it is institutionalist because it stresses that many of the contemporary political implications of these temporal processes are embedded in institutions-whether formal rules, policy structures, or norms. However, there is no analysis of how the internal is linked to the external, even for political institutions, other than providing a statement of expected institutional responses or “emotions” to the world outside. However, as explored above, the nature of the ideal typical responses of institutions to the external world are based on events external to institutions, as is typical of externalists. Without a theory of institutions that relates the internal to the external in a particular institution(s) much of the heavy lifting in testing the usefulness of Pierson’s concept of path dependence must be done by scholars of particular institutions. The difference between political institutions upon which the concept of path dependence is based and legal institutions, such as the Supreme Court, may be too wide to bear the weight of the concept’s generalizations.

However, a similar problem faces those scholars who rely only on an internal or an external approach to understanding the Supreme Court in American political development. My objective is to develop an approach to Supreme Court decision-making that identifies and emphasizes the importance of the construction process within and across doctrinal areas. Such a method of inquiry will help bridge the gaps between the internal and the external, found not only in Pierson’s concept of path dependence but in much of the scholarship on the Supreme Court which seeks explanations for doctrinal change that are either internal or external to that institution.

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