

MEMORANDUM

To: Participants in the Schmooze

From: Ron Kahn

Date: March 2, 2008

Re: My ticket of Admission

In enclose the page proofs for:

“Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?: *Lawrence v. Texas* (2003) in Legal and Political Time”

It will be published this spring in *Studies in Law, Politics and Society*, Volume 44, Special Issue: Constitutional Politics in a Conservative Era: 175-219 (Elsevier Publishers, United Kingdom, 2008). The volume is edited by Austin Sarat.

In the Chapter I discuss what I mean by the process of “principled bi-directional Supreme Court decision-making (PBD).” PBD is accepted by all Justices who are not originalists. Given PBD, I will speak to whether the Supreme Court in the near or foreseeable future is likely to take the following cue from Supreme Court Justice Ruth Bader Ginsburg’s dissent in *Gonzales v. Carhart* (2007):

legal challenges to undue restrictions on abortion procedures do not vindicate some generalized notion of privacy; rather they center on a women’s autonomy to determine her life’s course, and thus enjoy equal citizenship stature.”

What are the implications of *Gonzales v. Carhart* (2007) for the continued right of abortion choice and for a right of equal citizenship for women in the future given *Stenberg v. Carhart* (2000), the Court’s support in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) for the continuation of the right of abortion choice, and the stipulation by the Justices writing the Joint Opinion in *Casey* of the conditions under which the Supreme Court should overturn landmark decisions.

I note that in making the above argument in her dissent in *Gonzales v. Carhart* (2007), Justice Ginsburg draws on the work of Reva Siegel:

Siegel, Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection, 44 *Stanford Law Review* (1992):262-380.

1
3 WHY DOES A MODERATE/
5 CONSERVATIVE SUPREME COURT
7 IN A CONSERVATIVE AGE EXPAND
9 GAY RIGHTS?: *LAWRENCE V.*
11 *TEXAS* (2003) IN LEGAL AND
13 POLITICAL TIME ☆

AU:1

17 Ronald Kahn

19
21 ABSTRACT

23 *Legalists and social scientists have not been able to explain the expansion*
25 *of gay rights in a conservative age because they refuse to respect the*
27 *special qualities of judicial decision making. These qualities require the*
29 *Supreme Court to look simultaneously at the past, present, and future,*
31 *and, most importantly, to determine questions of individual rights through*
a consideration of how citizens are to live under a continuing rights
regime. Unless scholars understand how and why Supreme Court decision
making differs from that of more directly politically accountable
institutions we can expect no greater success in explaining or predicting
individual rights in the future.

33 ☆ Research assistance was provided by Brian Holbrook, Oberlin '09.

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INTRODUCTION

Why does a conservative/moderate Supreme Court in a conservative political age expand implied fundamental rights to sexual intimacy for gays and sustain the fundamental right of women to choose whether to have an abortion? One would expect the Supreme Court in the late 20th and 21st centuries to be quite conservative. Since 1969, when President Nixon named Warren Burger as Chief Justice, and 2005, when Republican President George Bush appointed Chief Justice Roberts, thirteen appointments have been made to the Supreme Court. Eleven of those appointees were made by Republican Presidents.¹

The Supreme Court has not overturned any of the major individual rights cases from the progressive Warren Court era (1954–1969). Moreover, during the years under Chief Justice Warren Burger, 1969–1986, the Supreme Court expanded individual rights in significant ways. It decided that there was a right under the Constitution to abortion choice in *Roe v. Wade* (1973); that gender classifications under the law would be subject to heightened judicial scrutiny in *Craig v. Boren* (1976); and that race can be one factor among many in the admission of students to colleges and universities in *Regents of the University of California v. Bakke* (1978).

During the Rehnquist Court, the Supreme Court has reaffirmed the right to abortion choice in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)² and the principle that race can play a role in university admissions in *Grutter v. Bollinger* (2003). Even with the addition to the Court of Chief Justice Roberts and Justice Alito, the Supreme Court refused to say that race cannot be a factor in attempts by school boards to diversify public schools.³ Most significantly, in *Lawrence v. Texas* (2003), the Supreme Court overturned *Bowers v. Hardwick* (1986) and extended the implied fundamental rights of privacy and personhood to homosexuals.

Moreover, the Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law during a period of dominance of social conservatives, evangelical Christians, and others, who view the protection of their definition of “family values” as a central mission of government. These social conservatives hoped that Republican appointees to the Supreme Court would roll back abortion rights, gay rights, affirmative action policies, and constitutional separation of church and state. However, in these doctrinal areas, the Supreme Court has either sustained doctrine in opposition to the core values of the base of the Republican Party, or actually has expanded rights in these doctrinal areas.

1 In the first section of this chapter, I argue that this conservative-moderate
Supreme Court in a conservative age has expanded implied fundamental
3 rights for gays and sustained the right of abortion choice because of the non-
originalist justices' reliance on what I will call principled bi-directional
5 Supreme Court decision making (PBD). The Court's decision making is
principled because of the importance of rights and polity (institutional)
7 principles; it is bi-directional because of the key relationship between the
internal Court decision-making process and the social and political world
9 outside the Court.

In the second section of this chapter, I explore why so many law school
11 scholars, political scientists, and historians have failed to explain, much less
predict, the expansion of implied fundamental rights by the Supreme Court
13 in the late 20th and early 21st centuries. While focusing on Cass Sunstein's
theory of judicial minimalism, I argue that because both law school scholars
15 and social scientists seek to explain doctrinal change based on phenomena
external to the Court, they fail to understand why a conservative Court in a
17 conservative era expands implied fundamental rights; they fail to recognize
that at the core of Supreme Court decision making is a mutual construction
19 process, in which both internal institutional norms and principles and
external phenomenon are central. Moreover, the external world important
21 to the Court is not simply or primarily a concern about interest group and
legal advocacy politics; it is a concern for lives as lived by citizens under a
23 rights regime.

In the final section of the chapter, I explore the political effects of non-
25 originalist Supreme Court justices' accepting PBD, and originalist justices
rejecting it. I argue that PBD leads to a legal secularity, a form of objectivity
27 that increases the relative autonomy of the Supreme Court from direct
influence of politics. This objectivity also raises questions in the wider
29 society about the legitimacy of the Supreme Court's power to define implied
fundamental rights. This questioning of Court legitimacy has become a
31 defining fissure in American politics and among constitutional scholars of
quite different political stripes. However, even with the legitimacy of PBD
33 becoming a key fissure in American politics, I argue that the Supreme Court
has continued to be a motor for social change in this conservative age.

35 I conclude the chapter with a brief discussion of the implications of
PBD with regard to how we should study the Supreme Court as an
37 institution in a wider process of American political development. I argue
that because of the unique qualities of Supreme Court decision making, as
39 evidenced by the PBD, and the nature of what I call legal time, the Court,
unlike more directly politically accountable institutions, like the Presidency,

1 does not suffer from what Stephen Skowronek has called the waning of
 2 political time.⁴

3 Finally, the special qualities of Supreme Court decision making, when
 4 compared to decision making in more directly politically accountable
 5 institutions, explain why a moderate-conservative Supreme Court in a
 6 conservative political era expands implied fundamental rights and why in the
 7 future a Supreme Court in a liberal era will not simply be liberal in its decision
 8 making.⁵ Moreover, because PBD take rights principles seriously, along their
 9 social construction through application to the lives of our nation's citizens, we
 10 can understand that, although the Supreme Court is not democratic in formal
 11 process terms, it is expansive substantively, in policy terms, with regard to
 12 widening rights protections under the Constitution to minorities.⁶

15 ***PLANNED PARENTHOOD OF SOUTHEASTERN***
 16 ***PENNSYLVANIA V. CASEY (1992) AND LAWRENCE V.***
 17 ***TEXAS (2003): PRINCIPLED BI-DIRECTIONAL***
 18 ***SUPREME COURT DECISION MAKING***

21 We can witness the core elements of PBD and why implied fundamental
 22 rights have been sustained and expanded in a conservative political era
 23 through an analysis of *Planned Parenthood of Southeastern Pennsylvania v.*
 24 *Casey* (1992), the case in which the Supreme Court reaffirmed the right of
 25 abortion choice, and *Lawrence v. Texas* (2003), the case in which the
 26 Supreme Court overturned *Bowers v. Hardwick* (1986) and extended the
 27 implied fundamental rights of privacy and personhood to homosexuals.
 28 These include: (1) a determination of what rights principles are at issue in a
 29 case, and whether these principles have expanded or contracted over the
 30 decades; (2) a crucial social construction process, in which there is a
 31 consideration, through a process of analogy of what rights and social
 32 constructions should be made by the Court in the case before it, in light of
 33 previously defined rights and social constructions; (3) a linking of what might
 34 be called the "empirical" elements of past and present social constructions –
 35 that is the applications of rights principles to lives as lived by individuals –
 36 with "normative" visions of what constitutes justice as central to that right,
 37 through what I will call the "interpretive turn" (Kahn, 2006a, pp. 69–70).⁷

38 There also is a crucial fourth element in PBD, in which there is a
 39 consideration of polity principles by the justices, as to the role of the Court
 compared to more directly political venues, such as the legislative or

1 executive branches of government, as to where constitutional choices should
2 be made in the case before it. Of particular concern is whether the Supreme
3 Court should act in response to periods of high levels of political
4 controversy, interest group politics, or differences as evidenced by public
5 opinion.

PBD is the means through which the Court applies polity (political
7 institutional) and rights principles, in light of the lives of citizens as they
8 have lived them under the privacy rights regime, as the complexity and the
9 diversity of the nation's society, economy, and politics increase. Through a
10 process of analogy, the Court considers whether a legal concept, such as
11 liberty, should be extended to a group that heretofore had been denied such
12 rights, as was the case in *Lawrence* with regard to gay rights.

13 It is important to note that the bi-directional mutual construction process
14 may be viewed as a general and regular feature of Supreme Court decision
15 making. However, the degree of bi-directionality and the range of the social
16 construction process will differ by doctrinal area. For example, I would
17 expect that there are more limits on the social construction process in First
18 Amendment jurisprudence, in speech and religion cases, because of a
19 concern among justices and constitutional scholars, for the development of
20 universal principles, in which one religion is not treated differently than
21 other religions and a speaker is not treated differently based on the content
22 of her speech. Moreover, because the process is cumulative in each doctrinal
23 area, one would expect the breadth and nature of the social construction
24 process, as well as the degree of bi-directionality to be similar within a
25 doctrinal area and different across doctrinal areas. For me it is counter-
26 intuitive to the premise that the Court follows politics that the highest
27 degree of social construction and bi-directionality occurs between the
28 Supreme Court and the lives of gays as constructed by Rehnquist era Court.
29 Moreover, it is significant that the difference between originalists and non-
30 originalists (not simply between liberal and conservatives) on the Court is
31 the dividing line as to how robust the social construction is to be.

Finally, viewing Supreme Court decision making as including rights
33 and polity principles past and present, social constructions past and present,
34 bi-directionality, through the process of analogy, will allow scholars to
35 study how non-originalists and originalists in different Court eras define
36 rights and polity principles and engage in the social construction process to
37 make constitutional choices. Through such study we can see whether there is
38 any built-in, cumulative aspect to Court decision making. In saying this I am
39 not arguing that all rights decisions are necessarily progressive from prior
rights definitions. I am suggesting that today's conservative non-originalists

1 and today's originalists may be different in important ways from those of
 3 prior generations.

5 *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)

7 In deciding whether *Roe* should be overturned, the *Casey* Court pinpoints
 9 the ways in which *Roe* differs from *Plessy* and *Lochner* with regard to its
 11 application of factors at the core of PBD: "Because neither the factual
 13 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."⁸

15 The rights principles and the social constructions that link these principles
 17 to the lives of citizens not only made it difficult for the Court to overturn
Roe; they also forced the Court to discuss the right of abortion choice in
Casey as one of personhood, a far more expansive social construction than
 19 privacy. Women and their families had grown to rely on the existence of
 rights of abortion choice, and that reliance provided the Court additional
 21 reasons for its acceptance of the right of abortion choice as fundamental.⁹
 This expanded concept of personhood in *Casey* was a result of the mutual
 23 construction of legal precedents that increasingly recognized the active place
 of women in society, and rights principles that were extended as a reflection
 25 of that expanded role. It also is attributable to timing and the fading of
 vigorous critiques of substantive due process.¹⁰

27 In *Casey*, the Supreme Court realized that the factual underpinnings of
 the right of abortion choice were moving in the same direction as expanding
 29 interpretations of the right of privacy between 1973 and 1992. For this
 reason, the *Casey* Court concluded that if it were to overturn *Roe*, it could
 31 not be based on a determination by the Court that the rights at issue in *Roe*
 were no longer valid in light of the experiences of our nation's citizens.
 33 Moreover, to decide otherwise would be giving in to political pressure, a
 concession not in the institutional interests of the Court or the rule of law.

37 *Lawrence v. Texas* (2003)

39 When changes in society and in rights principles and doctrine are symbiotic,
 landmark cases will not be overruled; when social constructions in prior

1 landmark cases are no longer tenable, landmark cases are ripe for serious
modification or outright overturning.¹¹ The willingness of the Supreme
3 Court in *Lawrence* to look at the expansion of rights of personhood since
Roe and *Bowers*' failure to engage in PBD are the major reasons why that
5 case was overturned in *Lawrence* (Kahn, 2006a, p. 72).

One can see the *Lawrence* Court saying that a major problem in *Bowers*
7 was the Court's failure to engage in PBD when it argues that the *Bowers*
Court erred by not looking at precedents. It treated the issue as whether one
9 had a constitutional right to engage in a particular sexual act, when in fact
broader rights were at stake. At the heart of *Bowers* was a question about
11 individual rights – the same rights that had formed the basis for the privacy
protections established in such cases as *Griswold v. Connecticut* (1965),¹²
13 *Eisenstadt v. Baird* (1972),¹³ and *Roe v. Wade* (1973).¹⁴ When the *Lawrence*
Court did engage in PBD, it did not simply overturn *Bowers*; it eviscerated
15 it, rejecting many of its premises root and branch (Kahn, 2006a, p. 72).¹⁵

The Court emphasizes that the *Bowers* Court construed the issue too
17 narrowly, as merely involving the right to engage in certain sexual conduct.
“The laws involved in *Bowers* and here ... have more far-reaching
19 consequences, touching upon the most private human conduct, sexual
behavior, and in the most private of places, the home ... When sexuality
21 finds overt expression in intimate conduct with another person, the conduct
can be but one element in a personal bond that is more enduring. The liberty
23 protected by the Constitution allows homosexual persons the right to make
that choice.”¹⁶

One also can see PBD in action when the *Lawrence* Court considers the
25 validity of *Bowers* (1986) in light of two subsequent cases, *Casey* (1992) and
Romer v. Evans (1996),¹⁷ and finds that they “cast [the *Bowers*] holding into
27 even more doubt.”¹⁸ “The foundations of *Bowers* have sustained serious
erosion from our recent decisions in *Casey* and *Romer*. When our precedent
29 has been thus weakened, criticism from other sources is of greater
significance.”¹⁹ Because PBD is a continuing process, the *Casey* decision
31 is especially significant. There is a shift in *Casey* toward recognition of
abortion rights issues as involving the right of personhood, a far more
33 forceful statement about liberty interests than the passive notion of privacy
found in *Roe v. Wade* (1973). The *Lawrence* Court specifically refers to this
35 critical social construction regarding the depth of women's right to abortion
choice in *Casey*:
37

39 These matters, involving the most intimate and personal choices a person may make
in a lifetime, choices central to personal dignity and autonomy, are central to the

liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.²⁰

There is a specific reaffirmation in *Lawrence* of the *Casey* conditions that must be present in order for the Court to overturn landmark decisions (Kahn, 2006a, p. 77). These conditions required the *Lawrence* Court to consider both substantive components (principles and prior social constructions) of what privacy meant prior in *Bowers* and what personhood meant in *Casey* as well as what "pure animus" meant in *Romer*.²¹

One also sees PBD at work as the Court considers the continued validity of *Bowers* in light of *Romer v. Evans* (1996). The *Lawrence* Court writes, "*Romer* invalidated an amendment to Colorado's Constitution, which named as a solitary class persons who were homosexuals, lesbians, or bisexual either by 'orientation, conduct, practices or relationships,'"²² and noted that in *Romer* the Supreme Court had concluded that the amendment violated the Equal Protection Clause because it was "born of animosity toward the class of persons affected,"²³ The Court viewed the Colorado amendment as based on pure animus.

As in *Casey*, the *Lawrence* Court had to consider what letting *Bowers* stand would do to key institutional norms that inform the Court's legitimacy. More specifically, the importance of PBD, in which rights principles are applied in light of the lived of persons, can be seen in *Lawrence* when the Court discusses why it does not simply follow the will of the majority, as expressed by state legislatures or the history of majority animus against homosexuals. In so doing, the Supreme Court draws on its institutional norms that are quite distinct from those of political institutions. We see this when the Court explains why it cannot simply make decisions on a finding that there has been a moral condemnation of homosexual acts over the years by a majority of citizens, or the state legislature. Justice Kennedy, relying on *Casey*, notes that the Court's "obligation is to define the liberty of all, not to mandate our own moral code."²⁴

[T]he Court in *Bowers* was making the broader point that for centuries there have been powerful voices to condemn homosexual conduct as immoral ... These considerations do not answer the question before us, however. The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.²⁵

1 Supreme Court decision making does not start and stop at the founding.
2 “[H]istory and tradition are the starting point but not in all cases the ending
3 point of the substantive due process inquiry.”²⁶ It is through the lens of
4 PBD, looking both backward and forward, that the Court articulates what
5 liberty means. Through PBD, there is an application of concepts of
6 emerging awareness, reliance, and workability, as used in *Casey*, becomes
7 critical to understanding the *Lawrence* Court’s decision to overturn *Bowers*.
8 Reliance is defined at the level of individuals, rather than at the level of
9 political institutions.

10 The Court directly confronts the important question of whether “the fact
11 that the governing majority in a State has traditionally viewed a particular
12 practice as immoral is sufficient reason for upholding a law prohibiting the
13 practice.”²⁷ In doing so, it affirms the importance of a continuous and
14 continuing PBD when the Court interprets the Constitution.
15

16 Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or
17 the Fourteenth Amendment known the components of liberty in its manifold
18 possibilities, they might have been more specific. They did not presume to have this
19 insight. They knew times can blind us to certain truths and later generations can see that
20 laws once thought necessary and proper in fact serve only to oppress. As the
21 Constitution endures, persons in every generation can invoke its principles in their own
22 search for greater freedom.²⁸
23

24 Justice O’Connor’s *Lawrence* concurrence also features a robust PBD.
25 O’Connor rejects traditional norms as a sufficient basis for disadvantaging
26 groups of citizens: “Moral disapproval of a group cannot be a legitimate
27 governmental interest under the Equal Protection Clause because legal
28 classifications must not be ‘drawn for the purpose of disadvantaging the
29 group burdened by the law.’”²⁹ Moreover, O’Connor specifically alludes to
30 the importance of the liberty interests at stake in the case: “We have been
31 most likely to apply rational basis review to hold a law unconstitutional
32 under the Equal Protection Clause where, as here, the challenged legislation
33 inhibits personal relationships.”³⁰

34 Even though O’Connor wants a more toned down response to *Bowers*,
35 one based on the Equal Protection Clause and the substantive elements in
36 *Romer*, an analysis of her PBD reveals broad agreement with many of the
37 majority’s substantive conclusions.³¹ There are far more similarities between
38 O’Connor’s views and the non-originalist Justices in the majority, than there
39 are between O’Connor and the originalists in dissent.³²

*Fighting over the Legitimacy of Principled Bi-Directional Supreme Court
Decision Making*

The vehement opposition to the non-originalist PBD by Justice Scalia and the other originalists on the Court, Justices Thomas and Rehnquist, provides the most persuasive evidence for the importance of non-originalist PBD in contemporary Supreme Court decision making. It is quite clear that Justice Scalia here and in other cases is trying to stop PBD employed by non-originalists. It is also quite clear that Justice Scalia understands the political implications of engaging in PBD. For example, in *Romer*, Scalia predicted the broad outlines of expanded rights for gays that are found in the *Lawrence* decision. In *Bowers*, he argued that if the Court engages in a decision-making process with the characteristics of what I have called PBD, then *Romer* and *Bowers* could not stand together – as they did not in *Lawrence*.³³ Nor are Scalia and the non-originalists simply discussing forms of argumentation, or syntax, as they advocate quite different processes of Supreme Court decision making.³⁴

In *Lawrence*, Scalia continues to attack the conditions laid down in *Casey* under which the Supreme Court is to overturn landmark decisions,³⁵ the very same conditions that are at the core of PBD. Scalia's conception of history and tradition is in marked contrast to that of the Justices in the *Lawrence* majority. Scalia emphasizes that "fundamental rights" must be "so rooted in the traditions and conscience of our people as to be ranked as fundamental."³⁶ This is quite different from Kennedy's approach in *Lawrence*: "[H]istory and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry."³⁷

Thus, we see the bases for Scalia's opposition to the *Lawrence* Court's finding that there is "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."³⁸ For him, an "emerging awareness" as defined by the non-originalists does not establish a "fundamental right" (Kahn, 2006a, p. 72). For Scalia, the continued presence of state laws against homosexual sodomy offer clear evidence that the protection of such acts is not "deeply rooted in the nation's history and traditions."³⁹

Scalia recognizes that PBD is central to the *Lawrence* decision and its antecedents when he argues that one should not "believe" the *Lawrence* majority's disclaimer that its reasoning will not lead to legal recognition of same-sex marriage.⁴⁰ Scalia writes,

1 If moral disapprobation of homosexual conduct is “no legitimate state interest” for
2 purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense
3 of neutrality) “[w]hen sexuality finds overt expression in intimate conduct with another
4 person, the conduct can be but one element in a personal bond that is more enduring;”
5 what justification could there possibly be for denying the benefits of marriage to
6 homosexual couples exercising “[t]he liberty protected by the Constitution”?⁴¹

7 For Scalia, the *Lawrence* decision builds on an illegitimate social
8 construction process which, if allowed to continue, will lead to a
9 constitutional right to same-sex marriage. As in *Romer*, where Scalia
10 predicted that *Bowers* and *Romer* could not stand together⁴², Scalia is
11 predicting here that, if the PBD that began in *Griswold* and persisted all the
12 way through *Lawrence* is allowed to continue, establishing a right to same-
13 sex marriage under the Constitution is just a matter of time.

14 Thus, Scalia’s rejection of a robust PBD as central to his approach to
15 interpreting the Constitution means that his notion of what constitutes the
16 mandate of history and tradition is dramatically different from the non-
17 originalists (Kahn, 2006a, p. 83). In rejecting the emerging awareness and
18 reliance arguments used in *Casey* and *Lawrence* as simply result-oriented⁴³,
19 Scalia opposes rights which evolve and are defined and redefined under non-
20 originalist PBD. One sees this when he seeks the narrowest reading of the
21 *Lawrence* decision, and refuses to admit that *Casey* expanded the basis of
22 abortion choice from a right of privacy to personhood, and when he refuses
23 to accept the view that a rule of law can include a changing definition by the
24 Supreme Court of what constitutes liberty under the Constitution (Kahn,
25 2006a, pp. 83–84). Most importantly, he refuses to accept the *Lawrence*
26 majority view that simple moral opposition is not sufficient justification for
27 upholding a law under rational basis review.

28 29 30 *Rejection of Political Contestation as a Basis for Determining Individual* 31 *Rights*

32 The Supreme Court sustains and expands individual rights, even gay rights,
33 because, as explored above, majority and concurring Justices in *Casey* and
34 *Lawrence* strongly reject political contestation and majoritarian opinion as
35 reasons on which to decide implied fundamental rights cases. When the
36 *Casey* and *Lawrence* Courts engaged in PBD, they considered whether the
37 rights at issue in these cases, privacy and personhood, are still important and
38 expanding and whether citizens have accepted these rights in their lives.

1 Non-originalist Justices accept the idea that because the Supreme Court is
 3 supposed to be a counter-majoritarian institution, it should not make
 constitutional choices on the same bases as more directly political
 accountable institutions.

5 For example, the *Casey* Court stresses that the politically controversial
 nature of *Plessy* and *Lochner* is what links these cases with *Roe*. The Court
 7 describes these cases as of “comparable dimension,” because all three cases
 “responded to national controversies and take on the impress of the
 9 controversies addressed.”⁴⁴ The Justices discuss overruling under conditions
 of “intensely divisive controversy,” and find that when such cases are
 11 decided, there is a “dimension present whenever the Court’s interpretation
 of the Constitution calls the contending sides of a national controversy to
 13 end their national division by accepting a common mandate rooted in the
 Constitution.”⁴⁵ In such situations, the Court emphasizes that it must
 15 ensure that its decisions are not perceived as giving into political pressure if
 the Court wants to retain its legitimacy. Decisions must be “sufficiently
 17 plausible”; decisions viewed as “compromises with social and political
 pressures” lack plausibility because they are viewed as unprincipled, and
 19 place the Court in the position of being viewed simply as a political body,
 and thus illegitimate.⁴⁶ For non-originalists, PBD adds to the plausibility of
 21 their decisions, and thus to the Court’s legitimacy as an institution which is
 called upon to follow the rule of law, not politics. The Court highlights its
 23 institutional legitimacy concerns, specifically at issue if it were to overturn
Roe:

25 Whether or not a new social consensus is developing on [the abortion] issue, its
 27 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
 29 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
 31 essence of *Roe*’s original decision, and we do so today.⁴⁷

33 *Expanding Gay Rights in a Conservative Political Age*

35 Understanding the key components of non-originalist Supreme Court
 37 decision making helps explain why a conservative Court in a conservative
 age chooses to expand the rights to abortion choice and homosexual privacy
 39 and personhood. The Supreme Court sustains the right of abortion choice
 and expands gay rights because of the institutional effects of the Supreme

1 Court accepting and engaging in PBD. PBD causes the Supreme Court to be
2 simultaneously empirical and normative and inward and outward looking in
3 its decision making. It results in the mutual construction of the internal and
4 external through a process I will call the “interpretive turn.”

5 The fact that PBD is both empirical and normative means that the Court
6 must ask whether the acts of citizens or groups, compared to others who
7 have such acts protected, in light of governing principles, such as equal
8 protection and rights of privacy and personhood, should be given similar
9 legal protections. It is empirical because justices engage in the application of
10 legal concepts through a consideration of the day-in and day-out lives of
11 citizens and classes of citizens, both those who have and those who have not
12 been granted constitutional protections in the past. Social constructs are
13 informed by adduced social “facts,” but they are not the social facts
14 themselves.⁴⁸ Social facts gain meaning in constitutional law cases through
15 the process of social construction; they gain resonance in light of definitions
16 of polity and rights principles, social constructions in prior decisions, and
17 the lives of citizens.⁴⁹

18 The process is also normative. The empirical only gains meaning through
19 application of core evaluative standards derived from what justice, liberty,
20 and equality have meant in the past and present, with a concern for what
21 rights and justice might mean in the future. This was demonstrated in *Casey*
22 and *Lawrence* when all Justices engaged in a decision-making process which
23 was simultaneously normative and empirical. The fact that it is simulta-
24 neously empirical and normative means that justices must look at issues of
25 gay rights in terms of questions of fairness and equality.

26 Supreme Court decision making has a second important quality; it is
27 simultaneously internal (“inward looking”) and external (“outward look-
28 ing”). Internal influences are such things as (1) the “law itself” (whether in
29 the form of the Constitution, statutes, or settled legal doctrine in the form of
30 precedent) and (2) “judicial norms and procedures” – including “the norm
31 that judges be apolitical, a norm reinforced by the requirement that judges
32 craft their legal rulings according to a ‘legal grammar’ in which some forms
33 of argument (historical, textual, structural, prudential, and doctrinal) are
34 considered legitimate and others (whim, personal policy preference) are not”
35 (Kahn & Kersch, 2006b, pp. 17–18).

36 The process is also external or outward looking to social, political,
37 institutional, cultural, historical, and intellectual forces. Here we focus in
38 more direct terms on the lives of individuals and groups in the world outside
39 the Court, as the Court engages in a mutual construction of the external
with the internal. I note that the external also comes into the law as part of

1 social constructions developed in prior cases, and the external is opened up
 2 again when the Court decides a case and engages in a new process of social
 3 construction.⁵⁰ Thus, there is a past, present, and future aspect to the
 4 consideration of gay rights.

5 At the core of Supreme Court decision making, is an “interpretive turn,”
 6 in which the normative and empirical are mutually constructed, through a
 7 consideration of the “internal” legal and “external” lives of citizens as lived
 8 under a rights regime. The interpretive turn in the Supreme Court “locates
 9 the ground of (Court) objectivity as internal, rather than external to
 10 interpretation.”⁵¹ This means that the process produces an objectivity and
 11 separateness from the direct effect of either the internal legal or the external
 12 lives of individuals. This quality is distinctive to the Supreme Court, and is
 13 crucial to understanding its decision making and place in American political
 14 development.

15 The mutual construction of the legal and empirical through the
 16 interpretive turn means that the process occurs through the simultaneous
 17 consideration of the normative and empirical, as applied within the
 18 contemporary social matrix.⁵² The empirical is looked at through the prism
 19 of rights principles, notions of liberty and equality in the law. It centers on
 20 the Court’s construction of the social, political, and economic world outside
 21 the Court, in light of rights and polity principles, precedent, and the social
 22 constructions that have been developed over the decades by prior Courts.

25 **SOCIAL SCIENTISTS AND LEGAL SCHOLARS** 26 **FAILED TO EXPLAIN (MUCH LESS PREDICT) THE** 27 **EXPANSION OF GAY RIGHTS**

28 *Historians and Political Scientists*

29
 30
 31 The unique qualities of the dual mutual construction process and the
 32 Supreme Court’s autonomy from the direct effects of other political
 33 institutions have important ramifications for how we study the Supreme
 34 Court as an actor in American political development and the politics that
 35 surround the Court. In “system” terms, the unique qualities of the mutual
 36 construction process inform the boundary conditions of the Supreme Court.
 37 To view Supreme Court decision making as primarily internal or narrowly
 38 legalist is to proceed according to a faulty assumption – that the process is
 39 simply about rights as norms mechanically applied. However, few scholars

1 now view Supreme Court decision making in such narrowly legalist terms.
The greater problem in contemporary scholarship is not a belief in legalism,
3 but the notion that Supreme Court decision making can be explained only
by factors external to the Court.

5 Both social scientists and legal scholars seek to explain doctrinal change
based on phenomena outside the Court. This is because all such externalist
7 approaches are built on expectations of correlations of Court action with
factors outside the Court, whether they are public opinion, international
9 events such as the embarrassment during the cold war with the denial of
equal rights to African-Americans,⁵³ critical elections,⁵⁴ or the policy view
11 of Presidents and those they appoint to the Court.⁵⁵ Correlations do not
explain Court actions. They are one-dimensional; they only explore the
13 external, and do not link them to the internal legal. Both social scientists and
legalists fail to recognize that at the core of Supreme Court decision making
15 is a mutual construction process, in which both internal institutional norms
and principles and external phenomena, such as their view of the lives of our
17 nation's citizens are taken into account. This bi-directional mutual
construction process has unique qualities which are different from more
19 directly politically accountable institutions.

The first indication of the problems inherent to standard historical and
21 social science approaches to explaining doctrinal change is the willingness of
all too many scholars to view the motor of doctrinal change as one of law
23 versus politics, with law and politics segmented as internal and external
elements, and the place of law as secondary to politics in such accounts.

25 The nature of the social construction process provides clear evidence that
the "law" versus "politics" dispute that has dominated much of the
27 academic debate over the nature of Supreme Court decision making is
misguided. This debate is better conceptualized as being about the respective
29 influences of internal and external factors on Supreme Court decision
making, with "law" being an important potential internal influence and
31 electoral "politics" being a significant potential external influence (though
elections do not comprise the whole of potential external influences). The
33 complex interplay of these factors is distinctive to courts as institutions, and
it is crucial to understanding them as such. It is because of this dynamic
35 perpetually playing itself out in courts that courts are not "little
legislatures." The interplay of the internal and external taking place in
37 courts also gives them a special place in accounts of American political
development. As seen above, the Court links or bridges the internal to the
39 external in its decision making, through what I have called a mutual
construction process.

1 Because Supreme Court decision making cannot be segmented into
 3 internal and external elements, since such elements are bi-directional in ways
 we have explored, analyses explaining doctrinal change and the Court as an
 institution in the process of American political development that are based
 5 on a problematic of “Law” versus “Politics” are lacking and unpersuasive.⁵⁶

Historians and historically oriented social scientists have tried to make a
 7 link directly between specific historical events, such as a critical election or
 the “growth of the administrative state,” and Court decision making – with
 9 no great success.⁵⁷ They have argued Court decisions result from
 “revolutions” in the nation, such as the Founding, the passage of the Civil
 11 War amendments, and the New Deal. Although recently some of these
 historians have begun to reconsider the revolutions thesis, historians in and
 13 out of the legal academy, such as William J. Novak, G. Edward White, and
 Barry Cushman, have argued that change in doctrine is the result of
 15 historical events such as the New Deal revolution and critical elections.
 Some legal scholars have adopted the historians’ external stance by arguing
 17 a revolutions theory. These include the preeminent “revolutions” constitu-
 tional scholar of our age, Bruce Ackerman, who argues that periods of
 19 normal politics are punctuated by periods of constitutional revolutions, such
 as the Founding period, the passage of Civil War Amendments, and the
 21 New Deal. With regard to the New Deal era, Ackerman argues that critical
 elections and the growth of the administrative state caused the Supreme
 23 Court to decide the *West Coast Hotel* case, and produce a revolution in
 jurisprudence with its rejection of *Lochner* era polity and rights principles.

25 Too many historians fail to emphasize the incremental, but constant nature
 of change in the law, because they center their analysis only on landmark
 27 cases, asking whether they can be explained by specific historical events,
 rather than looking at the evolution of doctrine over the decades. Landmark
 29 cases, whether they overturn prior cases or not, tend to be products of a long-
 term process during which rights principles and their supporting social,
 31 economic, and political constructions have been under attack.⁵⁸

Attitudinalism, a popular political science approach to explaining
 33 doctrinal change that seeks to explain Supreme Court decision making
 based on the attitudes that Justices have to government policies, clearly
 35 demonstrates the problem with simply externalist analyses of Supreme
 Court decision making.⁵⁹ This is because of the importance of institutional
 37 norms and processes on the Supreme Court; these severely restrict Justices
 from making decisions on attitudinal grounds.⁶⁰ The presence of constitut-
 39 ing institutional norms and practices means that Supreme Court rulings
 have objectivity and are independent of individual subjective policy opinions

1 held by each participant in a majority opinion.⁶¹ The collective nature of
2 decision making acts as a constraint on individual preferences. Preexisting
3 institutional norms and expectations of behavior limit the effect of a priori
4 policy choices on judicial decision making. Because of this, Supreme Court
5 decision making is not reducible to the sum total of individual private
6 preferences of Justices, in contrast to what the attitudinalists argue. Because
7 of the dual mutual construction process (normative and empirical and
8 internal and external), the act of decision making is also not reducible to
9 historical and political events external to the Court.

10 The attitudinal model may be viewed as external because the policy wants
11 of justices are viewed by attitudinalists as policy positions or ideologies in
12 the minds of justices prior to the case itself. Graber argues that the scholar
13 should not preload her analysis by the emphasis on internal “legal”
14 arguments, or external strategic and policy preferences. Graber argues that
15 “no decision can be explained entirely as a sincere or sophisticated effort to
16 secure policy preferences,” – a view that attitudinalists fail to acknowl-
17 edge.⁶² While Justices do have attitudes about policy, law, precedent, and
18 external strategic concerns limit the application of simple policy wants.
19 While law does not compel a specific action by the Court, for Graber a clear
20 line of precedents with regard to Court action does produce a boundedness
21 of action in Court decision making, to a far greater degree than scholars of
22 external strategic causation are willing to admit.

23 Another behavioral explanation for Court decision making that also does
24 not take seriously the importance of the mutual construction process are
25 those that emphasize that Justices act strategically to further the
26 institutional interests of the Court. The operation of the mutual construc-
27 tion process in implied fundamental rights cases provides additional
28 evidence for why the Supreme Court is not simply or primarily “strategic”
29 in its decision making.⁶³ In *Casey*, the Court provided a detailed
30 explanation of the conditions under which landmark decisions are to be
31 overturned, argued for a robust PBD, and specifically rejected political
32 contestation and the votes of legislatures and the wider public as central to
33 its determination of the implied fundamental rights. In *Romer*, the Court
34 relied on the *Casey* conditions, and its support of a robust PBD, to find
35 unconstitutional an amendment to the Colorado Constitution that would
36 have denied gays the use of regular legislative, executive, and state court
37 means to protect their rights. Finally, in *Lawrence*, the Court reaffirmed
38 *Casey*’s conditions for overturning landmark decisions, and engaged in PBD
39 that resulted not simply in overturning *Bowers* on minimalist equal
protection grounds, but in an expansive opinion extending rights of

1 personhood and liberty to gays, one that did not preclude the Court from
deciding that gays have a right to same-sex marriage under the Constitution.

3 If the Supreme Court chose to be strategic with regard to its institutional
needs, in *Casey* and *Lawrence*, it would be far more concerned about the
5 political reactions by Congress, the states, and the people. Strategic factors as
explanations for Court action in *Casey* and *Lawrence* are submerged because
7 Justices accept institutional norms that ask them to consider substantive
constitutional questions as to what constitutes privacy, personhood, and
9 liberty through the mutual construction process as described above. The
Court does not focus on its strategic institutional interests; it engages in the
11 process to decide whether rights have been violated by government, in
comparison to what rights have been protected in the past.

13 This does not mean that Justices never think strategically. Rather, they
rarely think in solely strategic terms.⁶⁴ There are indications of strategic
15 considerations in *Casey* and *Lawrence*. This seems particularly so in
O'Connor's concurrence in *Lawrence*, where she specifically decides to leave
17 for another day the question of the constitutionality of laws that outlaw
sodomy for both heterosexuals and homosexuals, trusting that state
19 legislatures will not pursue such laws given the *Lawrence* decision. As
much as one might want to argue that O'Connor is thinking strategically,
21 when she chooses not to overturn *Bowers* or invoke due process principles as
the basis for her decision, it would be unwise to interpret her concurring
23 opinion as primarily or simply strategic. If strategic institutional concerns of
the Court with regard to political reaction to a decision on gay rights were
25 central to her thinking, why did she engage in an expansive social
construction of gay rights in her equal protection analysis?

27 Justice Scalia critiques O'Connor's position in *Lawrence* by arguing that
O'Connor cannot have it both ways. She cannot set up a social construction
29 of rights that limit government from being able to say simply that a state's
belief that homosexual sodomy is immoral is permissible (even under the
rational basis, or minimal scrutiny test), and then argue that the very same
31 PBD will not lead to increased homosexual rights, even, perhaps, the right
to marry. Scalia is arguing that the dynamics of PBD as described in *Casey*,
continued in *Romer*, and reaffirmed in *Lawrence*, are present in her non-
33 originalist concurrence; that to accept her concurrence has left the fox in the
chicken coop with regard to future increases in implied fundamental rights,
35 including the rights of homosexuals.

37 One could say that O'Connor chose to respect institutional concerns by not
39 overturning *Bower*, and by using an equal protection basis to simply invalidate
the Texas anti-sodomy law. However, even if this is accurate (and there is talk

1 of trusting legislatures to do the right thing in O'Connor's concurrence), the
2 nature of O'Connor's definition of the rights involved, and her respect for
3 PBD as outlined in *Casey*, continue to be important to the future of implied
4 fundamental rights. Rarely are cases only about strategic-institutional
5 concerns, even, as Graber has demonstrated, in times when Presidents are
6 brought to the Court for abuses of power during times of war.⁶⁵

7 Moreover, strategic approaches do not work because the separation of the
8 analysis of Supreme Court decision making into the legal, institutional-
9 strategic, and attitudinal cannot adequately explain the reasons for doctrinal
10 change. Graber finds that there is an intermingling of the legal, strategic,
11 and attitudinal in Supreme Court decision making:

12 Legal and strategic explanations both rely as much on interpretation as logic. Any finite
13 series of decisions can be described without logical contradiction as good faith efforts to
14 interpret the law or as sophisticated efforts to realize policy preferences ... The extent to
15 which any judicial decision was motivated by legal or strategic factors, at bottom,
16 depends on contestable theories about what constitutes good legal and strategic practice.
17 (Graber, 2006, p. 45)

18 He concludes, "The most fruitful investigations will explore the ways in
19 which legal, strategic, and attitudinal factors interact when justices make
20 decisions, and not engage in fruitless contests to determine which single
21 factor explains the most" (Graber, 2006, p. 60).

22 *Cass Sunstein's Theory of Judicial Minimalism*

23
24
25 Pragmatic legalists, law school scholars, such as Cass Sunstein, also would
26 have led us not to expect the *Lawrence* decision due to their faith in judicial
27 minimalism as the primary jurisprudential strategy for the mature
28 Rehnquist Court. Ironically, support for judicial minimalism in the past
29 was favored by conservative scholars and jurists, but now has become a
30 central idea in the scholarship of progressives such as Cass Sunstein and
31 Mark Tushnet.⁶⁶

32 Sunstein and other pragmatic legalists, like behavioral political scientists,
33 have rejected the presence and the importance of the social construction
34 process within Supreme Court decision making, and seem to be siding with
35 behavioral political scientists in looking primarily to external rather than
36 jurisprudential guideposts for Court decision making.⁶⁷ Sunstein failed to
37 predict the depth and breadth of the rights of homosexual rights of privacy
38 and sexual intimacy in *Lawrence v. Texas* (2003) because "judicial
39 minimalism" as a statement of what Supreme Court decision making is or

1 should be distorts the nature of Supreme Court decision making. This
distortion has at its base a pragmatic and ends-oriented conception of
3 Supreme Court decision making, in contrast to Sunstein's prior model of
Court decision making which had as its central premise that the Supreme
5 Court was not to accept the status quo as neutral. This concept, that
the Court should not accept the status quo as neutral, essentially depends on
7 the presence of the social construction process.

One could ask why the Court did not simply overturn the anti-sodomy
9 statute based on an argument of desuetude, as Sunstein favored, rather than
eviscerating *Bowers* and employing a maximalist mode of decision making
11 in *Lawrence*.⁶⁸ As we saw above, the answer lies in the fact that the Court's
failure to engage in the social construction process in *Bowers* would rob
13 principles and social constructions in cases before and after *Bowers* of their
precedential value, thus undermining rights important to a majority of the
15 Court. It also would undercut non-originalist principles in *Casey* as to the
nature of the social construction process, further adding to a critique of
17 the non-originalist view of the rule of law and the Supreme Court's role as
the arbiter of the Constitution.

19 Allowing *Bowers* to stand or deciding the case on equal protection
grounds, or even on a more minimalist basis, would have undermined moral
21 propositions that were already in the law that were important to six
members of the Court, including O'Connor.⁶⁹

23 It is quite clear that even though O'Connor wants a more minimalist
response to *Bowers*, based on the Equal Protection Clause and the
25 substantive elements in *Romer*, an analysis of her social construction
process provides evidence that she agrees with many of the substantive
27 conclusions that are at the core of the majority's opinion. However, of
importance to our consideration of Sunstein's minimalism, O'Connor is not
29 minimalist in her analysis, only in her decision to utilize an equal protection
rather than a substantive due process rationale. That is, O'Connor engages
31 in a social construction process that does not shy away from key elements of
the *Bowers* decision, including the notion that moral disapproval of gays
33 cannot be a rational basis for denying rights, and that *Bowers*, and the Texas
law itself rested on the imputation of inferiority of gays by the state.

35 It is also quite clear that the reason why so many scholars failed to predict
that *Bowers* would be overturned, and why even fewer scholars predicted
37 that it would be eviscerated to the point of *Lawrence* raising questions about
the possibility of a right to marry, was because of their acceptance of judicial
39 minimalism as a strategy for Court action. This strategy is not an adequate
explanation of the process of Supreme Court decisions, with institutional

1 rules that favor the application of past polity and rights principles through a
process of social construction, a process the *Bowers* Court avoided. Had
3 *Bowers* been viewed in light of other landmark cases that were overturned,
such as *Plessy* and *Lochner*, and in light of *Casey*, a case in which the Court
5 chose not to overturn *Roe v. Wade*, the *Lawrence* decision would not have
been unexpected.

7 There are implications of these findings for future constitutional theory. If
any theory redefining the rights of subordinated groups is to have legitimacy
9 in the interpretive community and wider society, it must be meaningful to
people as to the nature of the world they see about them, and how the world
11 should look in the future. For example, Lessig raises important questions
about concepts of meaning in Ackerman's theory. He demonstrates that
13 Ackerman's work centers on "the modalities of social meaning."⁷⁰ Lessig
argues that fear of faction leads Ackerman to resist Mark Tushnet's call for
15 plasticity in the process of constitutional change, with the result that major
constitutional moments are rare and hard to achieve. Fear of faction also
17 leads Ackerman to give the Supreme Court a major role in putting new
constitutional values into effect, by the synthesis of inter-generational
19 constitutional values in the process of deciding cases.

There is a similar problem in Sunstein's constitutional theory. Any
21 transformative theory of constitutional change must involve a concern for
changes in meanings as to what constitutes structural inequalities and how
23 they should be linked to definitions of what constitute denials of equal
protection of the law. Through case analysis we can identify new social
25 constructs that have validity because there is such agreement on them over
time. Moreover, there is a linkage between the definition of social constructs
27 and whether legal classifications that refer to specific subordinated groups
are to be subjected to close Court scrutiny. Again, social constructs are not
29 simply facts from social scientists – nor do social constructs necessarily
change when social reality changes, as in the case of *Lochner*. Social
31 constructs have within them images of superordination and subordination
that become constitutionally recognized as precedent: concepts of the
33 average women accepted in pre-*Reed* cases and rejected post-*Reed* and
Craig; children as subject to psychological coercion in *Lee v. Weisman*; and
35 the relationship between women and their spouses in *Casey* with regard to
spousal notification. As these social constructs change so do our visions of
37 the denial of equal protection of the law, and what constitutes public and
private action.⁷¹

39 In critiquing Bruce Ackerman's vision of constitutional change, Lessig
argues that Ackerman favors too much plasticity in the translation by the

1 Supreme Court and lesser courts of the meaning of alterations of the
2 Constitution. He believes that high levels of plasticity in the translation
3 process undercut the moral meaning of structural change and the values of
4 Constitution. However, when one looks at rights of privacy and sexual
5 intimacy, the social construction process in *Lawrence* demonstrates a tighter
6 fit with polity and rights principles, and precedent, than *Bowers*. This
7 suggests an appropriate level of plasticity, in Lessig's terms, in the definition
8 of rights of personhood for homosexuals. Thus, *Lawrence* increases the
9 legitimacy of the Court among legal scholars and other members of the
10 interpretive community.

11 However, through case analysis that considers the construction of social,
12 economic, and political world outside the Court, we can identify when the
13 Court is changing the translation of constitutional principles to take in the
14 new realities of life. Definitions of intimate relations, privacy, and state
15 power over private space become so meaningful to the nation that to deny
16 them to some groups just because they are disfavored is seen as unjust. It is
17 the important difference in the meaning of the rights of citizens before the
18 law that is at the core of the process of change in the rights of subordinated
19 groups. Differences in constitutional principles, of due process versus equal
20 protection, can tell us much about the meaning and legitimacy of the acts
21 which are looked at, as Sunstein has emphasized.⁷² However, in Sunstein's
22 concept of judicial minimalism, the advocacy of polity principles over rights
23 principles, and the lack of emphasis on the way the Court constructs the
24 world outside itself, mischaracterizes how the Supreme Court makes its
25 decisions and therefore is not a cogent model for understanding that process.

26 Sunstein's theory also fails to account for how the Court deals with
27 subordinated groups in the equal protection and implied fundamental rights
28 contexts. *Casey*'s intellectual relationship to *Lawrence* goes beyond its
29 employment of PBD, as discussed above, and also includes ideas about
30 pregnant women's relationships to society and to their families and partners.
31 Similar types of choices must be made by courts when they must decide
32 questions of the rights of subordinated groups, such as homosexuals,
33 because the landscape is somewhat similar, though not identical, to that of a
34 pregnant woman in private and public space. The Court must ask what is to
35 remain private and what must be public, with regard to what the more
36 powerful can do to the less powerful.

37 A constitutional theory of subordinated groups requires that choices to be
38 made on the basis of past traditions of oppression, as to which classifications
39 in the law should be suspect. However, if one determines which groups are
40 to be suspect in a fashion discussed by Sunstein, one still has a decision to

1 make as to which conditions or situations need to be compared. In the
2 suspect classification system, once we decide who is in (gender, religion, and
3 race, but not sexual preference and size of body, for example) then we can
4 look at all such classifications and scrutinize what level of argument in
5 support of the classification the state must give to allow it to exist.

6 But the analysis cannot stop there, and this may be why Sunstein is
7 misguided in his analysis. The meaning of race, religion, and sexual
8 orientation is not the same in all contexts. With regard to sexual orientation
9 classifications, a court must decide whether a majority's view of sexual
10 orientation is to be the basis for permitting or denying some fundamental
11 right or interest. To make this decision, we have to consider questions other
12 than whether a majority of Americans favor homosexuals engaging in some
13 right or interest. To make a decision on pure animus by the majority, as we
14 saw in *Romer*, is not permissible, because the Court is about defining rights,
15 not simply following politics. The social construction process is how rights
16 are defined.

17 Therefore, a new theory on the rights of subordinated groups must be
18 more questioning about politics and the fairness of the political system than
19 Sunstein's concept of judicial minimalism. Moreover, it must recognize that
20 trusting courts should be valued over trusting politics, because not to take
21 such a stance undermines the fundamental rights in the Constitution.
22 Understanding the process of social construction is the key to developing a
23 theory of the rights of subordinated groups.

24 We need to ask whether Sunstein's minimalism and his constitutional
25 theory based on polity principles with rights principles in the background,
26 can best conceptualize how the rights of subordinated groups are
27 determined, especially in light of the more complex causes and manifesta-
28 tions of the subordination of minorities. Finally, in our search for a theory
29 of the rights of subordinated groups, we must ask the following basic
30 questions about the relationship among constitutional theory, practice, and
31 liberalism: Are the problems found in Sunstein's concept of judicial
32 minimalism caused by his acceptance of central premises in liberal theories
33 of the state, society, and law? Is the problem of establishing a theory of
34 subordinated groups a problem of American exceptionalism, with a too
35 unitary theory of American political thought? These questions are for
36 another day.⁷³

37 The major problem with Sunstein's concept of judicial minimalism is his
38 failure to continue to call on the Supreme Court to reject the status quo as
39 neutral. The process through which the Supreme Court decides whether or
40 not to reject the neutrality of the status quo provides an argument for the

1 importance of the role of the Court's construction of the social, economic,
 3 and political world outside the Court in the process of its decision making.
 5 A process of construction, but not the specific process of construction that is
 7 advocated by Sunstein, is central to Supreme Court decision making. As
 9 Alschuler demonstrates, the Court engaged in such constructions well before
 11 the age of judicial realism.⁷⁴ Moreover, the construction of the social,
 economic, and political world outside the Court is mandatory if polity and
 rights principles are to continue to have meaning in our changing society.
 Again, I am not advocating acceptance of the specific way in which Sunstein
 asks the Court to construct the social, political, and economic world outside
 the Court.

These concerns become more apparent when we ask whether Cass
 Sunstein's *One Case at a Time* does justice to the complexities of constitutive
 Supreme Court decision making. First, there is no discussion of the social
 construction of rights or polity principles; nor is there discussion of the
 necessity that the Supreme Court reject the status quo as neutral. Sunstein
 also does not offer a discussion about the relationship of polity and rights
 principles in Supreme Court decision making, even though he does admit
 that the Court rejects an all-rights or all polity-based constitutional theory.
 Nor is there a discussion about whether and when minimalism may not be
 warranted in a line of cases. For example, while the reasonableness test, and
 not maximalism, may have been warranted in *Reed v. Reed* (1971) to
 encourage government action on gender discrimination, one can ask
 whether maximalism may be warranted later in the development of
 principles protecting against gender discrimination. Perhaps more impor-
 tantly, there is no discussion of when maximalism may be an appropriate
 strategy to protect individual rights.

Might there be minimalist and maximalist ages and, if there are, when do
 they occur? Is minimalism usually and always in order? Is this a time-bound
 argument about the Court now? Or does the lack of minimalism in the
 Warren and Burger Court constitute a criticism of those Court eras? What
 historical, institutional, political culture, legal, and political factors inform
 the presence of minimalism and maximalism? Perhaps this book should be
 read as a primer on how to get progressive legal change in this conservative
 post-Reagan era. One can ask what effect minimalism may have on the
 degree to which individual rights principles will be viewed as foundational in
 the future.

One Case at a Time can be read as a more complex polity malfunction
 justification for Supreme Court decision making than that offered by John
 Hart Ely (Ely, 1980). Sunstein's vision of a properly running Madisonian

1 Republic is far more demanding than Ely's because the political system is to
 3 deliberate on public-regarding values, not simply keep a numerical majority
 5 from being unfair to a discrete and insular minority. Also, while Sunstein's
 7 minimalism eschews natural rights, such rights are part of the background
 9 of his deliberative democracy to a degree not found in Ely's constitutional
 theory. The reason for this is that rights talk undermines the Supreme Court
 and political institutions in the process of solving constitutional problems
 because jurists disagree on the basis for such actions. This is a pragmatic
 argument for retail rights protection, rather than for the wholesale,
 maximalist change.⁷⁵

11 Viewing fundamental rights principles as secondary to polity norms as
 13 Sunstein does in his concept of judicial minimalism will result in less
 15 protection of individual rights, because Sunstein's trust of political institu-
 17 tions that is at the core of his judicial minimalism is unwarranted; and the
 Court in many areas of doctrine, such as privacy rights, has said it is
 unwarranted. Without maximalist decisions, states and the national govern-
 ment would just stonewall to limit minimalist privacy rights, as they did on
 racial segregation. Is there evidence that political institutions will take cues for
 increased rights protection should the Court make minimalist decisions?
 Would they not cave in to the naked preferences of whatever group has power
 in a state or the national government to stop the protection of rights?

21 I also question whether it is best for the Supreme Court to have a
 23 minimalist approach in an argument for a right. While it is true that
 25 minimalism may foster a decision for a new right because Justices can agree
 27 on the right for different reasons, the minimalist approach may not be best
 for the development of constitutional law, the contribution of the
 interpretive community to that development, and to the clarification of
 what rights and government powers the nation can expect. Minimalism may
 stifle a full discussion of legal arguments in later cases. Institutional values
 like deliberation and political and social stability in the short run seem more
 important to Sunstein than a clear definition of individual rights. This may
 sacrifice the needs of subordinated groups.

35 THE LEGITIMACY OF PBD: A DEFINING FISSURE 37 ON AND OFF THE SUPREME COURT

39 There are two primary effects of non-originalist PBD.⁷⁶ The first effect is an
 objectivity, or universalism, in the way the Court thinks about legal

1 questions. The second effect is an autonomy (relative) of the Supreme Court
 3 from the direct influence of politics and more directly politically accountable
 5 institutions, such as the Presidency and Congress. These effects constitute
 7 important differences between the Supreme Court and political institutions
 9 and lead to defining fissures on and off the Supreme Court.

11 The importance of the objectivity of the legal process cannot be
 13 overemphasized. Here objectivity does not refer to the objectivity of facts.
 15 Supreme Court decision making is objective because the Court engages in an
 17 analogical process in deciding whether a right defined in prior cases should
 19 apply in the case before the Court. In defining what equal protection or
 21 liberty means, objectivity is gained because the Court is asked to compare
 23 behaviors, rather than evaluate how society views those behaviors.⁷⁷ To
 25 decide what constitutes equal protection or liberty, to remain objective and
 27 autonomous, the Court must focus on actions, not actors; comparison with
 29 contexts of actions that have been protected in the past play a principal role
 31 in determining whether previously unprotected groups should come under
 33 the umbrella of constitutional protection.

35 This process produces a legal secularism which is a defining characteristic
 37 of the Supreme Court, most legal institutions, and of the rule of law itself.
 39 We see legal objectivity in *Roe* when the Court respects the differences
 among and between the religious and non-religious as to their views about
 when life begins. We see it in *Lawrence* as well, when the Court considers
 whether it is appropriate for the Supreme Court to decide questions of rights
 on the basis of a society's Judeo-Christian values, and castigates former
 Chief Justice Warren Burger for his concurrence in *Bowers* which justified
 the constitutionality of anti-homosexual sodomy laws on the premise that
 sodomy violated Judeo-Christian values.⁷⁸ Deciding *Bowers* on such a
 consideration disregarded basic (non-originalist) institutional norms as to
 how individual rights are determined. As the *Lawrence* Court illustrates, it is
 not legitimate for the Supreme Court to decide questions of individual rights
 in general, and gay rights in particular, either on the premise that
 homosexual sodomy is a violation of Judeo-Christian values or on the
 basis that state legislatures, or the people themselves, think certain conduct
 is simply immoral; such decisions must be made after the Court *first* engages
 in PBD.

The legal objectivity or secularism of the non-originalist PBD and the
 attendant Court autonomy are politically significant. The legal objectivity of
 PBD also helps explain why a conservative Court in a conservative political
 era not only expands the jurisprudential basis for the right of abortion
 choice – moving from a concept of privacy to one of personhood, but also

1 why personhood rights under the Constitution were extended to homo-
sexuals, in the dramatic and unexpected expansionist decision in *Lawrence v.*
3 *Texas* (2003).⁷⁹

First it results in the core difference on the Rehnquist and Roberts Court
5 being between non-originalists and originalists, rather than between
conservatives, moderates, and liberals. Non-originalism is not simply the
7 converse of originalism; nor is it disrespectful of foundational polity and
rights principles that are at the core of the Constitution, as originalists
9 would argue. The political implications of this are enormous for the future
of homosexual rights (Goldford, 2005).

11 For non-originalists accepting the components of PBD is the basis for
claims of Court legitimacy and its uniqueness among governmental
13 institutions; for originalists accepting the components of PBD is the basis
for criticizing the legitimacy of the Supreme Court as a forum to define
15 implied fundamental rights.

In the framework of a mutual construction process with robust PBD,
17 disagreements between originalists and non-originalists regarding how the
Constitution should be interpreted become clearer. In this context, we can
19 explain the response by Justice Scalia to the substance of *Casey* and its rules
or conditions under which the Supreme Court may overturn landmark
21 decisions. We also can better understand Justice Scalia's opposition to the
acceptance of these conditions in both the *Lawrence* majority opinion and
23 his even more heated response to Justice O'Connor's concurring decision.
The doctrinal implications of her acceptance of a robust PBD with regard to
25 future implied fundamental rights are what most concerned Justice Scalia.
This also helps us understand why he viewed O'Connor as disingenuous
27 when she argued that one should not fear that her invalidation of the Texas
sodomy law on equal protection grounds might lead to a constitutional right
29 to same-sex marriage.

All Justices, originalists, and non-originalist alike, agree to follow
31 precedent, consider polity and rights principles in making constitutional
choices, and engage in analogical reasoning. All see themselves as dealing
33 with the normative and empirical in ways that are special to courts. All see
themselves as engaging in a process of interpretation. Both originalists and
35 non-originalists acknowledge that Supreme Court decision making has
normative and empirical elements, and that it is both inward and outward
37 looking.

Where they differ primarily pertains to what should be included in the
39 process of social construction. The conflict between the originalists and non-
originalists is over the relationship between the internal and external (and

1 the normative and empirical). The “external” reference point for most
originalists is the narrow time frame of founding periods. Originalists reject
3 the permissibility of the external in Court decision making moving beyond
the founding periods of the Constitution and its amendments. For Scalia,
5 and most originalists, the manner in which privacy, personhood, and
homosexual rights have developed is not principled because the rights reflect
7 rights principles that are defined in terms of the lives of individuals well past
the founding of the Constitution and the Civil War Amendments.

9 Originalists oppose consideration of the rights of gays in terms of looking
at their lives, through the normative and empirical PBD, because the
11 normative bases of these rights come from implied fundamental rights which
were established by an expansive notion of the empirical. The rights do not
13 derive from the “original intent” of the Constitution – they are not tied
directly to the words of the Constitution or its amendments. Scalia refuses to
15 accept PBD and all rights based on that process, if that process moves
beyond intentions derived from founding periods. Thus, *Roe*, *Casey*, *Romer*,
17 and *Lawrence* are all illegitimate claims of “Constitutional” law. This
suggests that a primary fissure on the mature Rehnquist Court, with regard
19 to, among other things, the treatment of implied fundamental rights, is
between originalists and non-originalists, rather than between conservatives,
21 moderates, and liberals, and at the core of such differences is the legitimacy
of a robust PBD.⁸⁰ Many scholars argue that all Justices, originalists, as well
23 as non-originalists, engage in the interpretive turn through a process of
construction, and one is not more objective than the other in terms of the
25 bases on which they make constitutional choices.⁸¹ They are correct.
However, the attack by the originalists on a core element of the non-
27 originalist decision making, PBD’s application of principles to the lives of
citizens, is tantamount to a rejection of the validity and legitimacy of the
29 process itself, and thus of much of contemporary constitutional law.

The legitimacy of an expansive PBD and the nature of its components is
31 not simply the defining fissure within the mature Rehnquist Court: it has
become a core conflict within the interpretive community, and, more
33 generally within contemporary American politics. This was evident in 2005,
as the Senate considered the “nuclear option” to get rid of long-standing
35 institutional rules that require sixty votes, rather than a simple majority, to
close debate, and thus to stop a filibuster for nominations to the federal
37 courts. It was also evident in the Senate’s consideration of President George
W. Bush’s nominee, Judge John Roberts, to replace Justice O’Connor on the
39 Supreme Court, when questions centered on whether he would honor
precedents.

1 The legal objectivity or secularism witnessed in PBD in *Casey* and
2 *Lawrence* is exactly what the religious right and social or cultural
3 conservatives off the Court also oppose, and their secularist opposition
4 admire. Thus, there is a feedback effect between differences on the Court
5 over the legitimacy of a robust PBD, and the cases that result from such
6 differences, to American politics, one which portends to be with us for many
7 years. These differences are not simply over controversial Court decisions,
8 such as *Roe*, *Casey*, and *Lawrence*, they are over the nature of Court
9 decision-making process and the place of the Court in American political
10 development.

11 The key issue in this debate is whether a social construction process is to
12 occur in the future. The question debated today is not whether a
13 conservative, moderate, or liberal will be appointed to the Court, but
14 rather will the nominee will be a non-originalist or originalist. Criticism
15 from cultural conservatives now focuses on Justices Kennedy and
16 O'Connor, not because they are liberal; they are not. Rather, they are
17 criticized for the *Casey* and *Lawrence* decisions and their view of Court role.
18 They are criticized because they accept the components of a Court decision
19 making whose rules allow the continuation of implied fundamental rights of
20 privacy and personhood, and their application to the rights of homosexuals.
21 The central question has become whether appointees will honor precedents
22 that employ the main components of that process and, most importantly,
23 engage in PBD in the future, with the possible result that implied
24 fundamental rights will be expanded, as they were in the past, in *Casey*,
25 *Romer*, and *Lawrence*.⁸²

PBD as a Motor for Social Change

27
28
29 Social constructions become “pictures in precedents” of the rights principles
30 of liberty, privacy, and personhood.⁸³ As these pictures grow, new groups
31 are viewed as possible candidates for protection under them. These core
32 elements of objectivity and autonomy represent an invitation, a hope, to
33 groups not currently afforded equal protection of law – that they also might
34 partake in the protection of basic rights like liberty, privacy, and
35 personhood. When these new groups step up to bat, they argue to court
36 that they also deserve protection, and the mutual construction process,
37 which links the normative and the empirical, makes it increasingly more
38 difficult for courts to say no. The rights development process gains a
39 persona of its own, on the Supreme Court, in the legal-interpretive

1 community of law professors and social scientists, and the wider interpretive
 3 community of legal advocacy groups, journalists, bloggers, and the
 5 informed public. With such hopes, there continues to be an important role
 for legal advocacy groups and members of the wider interpretive community
 in American political development.⁸⁴

7 However, the heated debate that abounds today over the place of the
 Supreme Court in our system of governance is caused in part by the effects
 of its objectivity and autonomy. Controversy is greatest as the Court
 9 engages in PBD that applies principles, such as privacy and personhood, to
 groups in the society which do not have such rights. The objectivity of non-
 11 originalist decision making and the institutional norms of PBD which lead
 to judicial autonomy from pressures of majoritarian politics infuriate the
 13 religious right and other cultural conservatives. The exercise of this legal
 secularism becomes politically charged and controversial especially when it
 15 brings new minority groups under the protection of law. This objectivism
 may not be understood, or appreciated, by the wider public, and the
 17 politicians they elect. It is an anathema to citizens and groups who hold
 strong moral positions as to what constitutes proper behaviors and lifestyle,
 19 and who seek government support of them. For these citizens, the Court's
 mandate to be legally objective appears as a legal secularism that does not
 21 respect their moral and ethical values, that is, their sectarianism.

One can ask: Why should views and votes of the people of Kansas on
 23 questions of gay rights and the right to abortion choice be trumped by the
 Supreme Court?⁸⁵ One response is that its decision-making process,
 25 institutional norms, and place in American political development call on
 the Supreme Court to decide questions of individual rights, and do so in
 27 ways peculiar to it as a legal, not political, institution. The social
 construction process, interpretive turn, consideration of internal-legal and
 29 external-social factors at the level of lives of citizens, and the cumulative
 nature of the comparison of principles and past social constructions,
 31 through a process of analogy, lead the Court to the *Casey* and *Lawrence*
 decisions, that is to landmark decisions which are at loggerheads with the
 33 majority coalition.

35 *The Supreme Court and the Non-Waning of "Legal Time"*

37 In such a setting, PBD is closely linked to the place of the Supreme Court in
 39 American political development. There has been a feedback effect from
 conflicts over the legitimacy of PBD to general American politics (Keck,

2006). This suggests that the bi-directionality between the internal Court and the world outside occurs at several levels, at the level of a consideration of the lives of citizens, as the Court makes decisions about rights of privacy and personhood, and at the level of politics itself. However institutional norms lead the Court to reject the politics from outside, as it continues to respect core elements of PBD and expand rights.

These unique qualities of Supreme Court decision making also mean that the “legal time” of the Supreme Court is quite different from the “political time” of directly “political” institutions such as the Presidency, as are the resulting path trajectories of the Supreme Court in American political development.⁸⁶

Stephen Skowronek argues that throughout the history of our nation there has been “a waning of political time” in which each president can meet his commitments, due in part to the “thickening” of political institutions. Ever-increasing expectations of political change through Presidential action are met with less time in which to meet such demands – even though resources of the Office of the President have increased through the decades. This problem is most evident in presidents elected in periods of reconstructive politics. Presidents Lincoln, Roosevelt, and Reagan each had shorter time periods in which to carry out programs of reconstruction.

The universalism and objectivity of PBD, basic norms of what the rule of law means, and the place of the Supreme Court today as the final arbiter of the Constitution, lead to a far greater autonomy of the Supreme Court from other governmental institutions than is found in the Presidency – making the Supreme Court less subject to the sort of thickening that Skowronek describes in political institutions. The processes of increasing returns are weaker on the Court, and the Court’s autonomy means that, a large extent, the “reconstruction” of the law is in the hands of the Court. It is usually the end point of incremental moves in prior cases that pinpoint the anachronistic nature of the social constructions supports individual rights, and thus the rights themselves. Thus, the Supreme Court is able to make constitutional choices in opposition to the primary commitments of the majority coalition, and the major political institutions that it may control, over a longer time frame than the President, who is more subject to the effects of the thickening of government with each passing decade.

Also, the Supreme Court may not be as change resistant as political institutions, and as change resistant as is assumed by Pierson’s concept of path dependence, that is based on increasing returns. There may be fewer start-up and switching costs to develop new social understandings, than in political institutions (Pierson, 2000, pp. 260–261). The Supreme Court has

1 mechanisms to change the direction of the law, by overturning landmark
 3 cases, when principles and social constructions of them become anachro-
 5 nistic. The Court can distinguish prior decisions, and reinterpret what the
 7 underlying social facts mean, if the rights at issue are not so out of kilter
 9 with the world outside the Court. This may sound ironic to those who view
 stare decisis as if it were a narrowly legalistic, mechanical process – but it is
 true.⁸⁷ The autonomy, universalism, and objectivity of PBD results in the
 Supreme Court viewing its relationship with political institutions as less
 threatening to it than are political institutions to each other.

The basic constitutional theories of the “rule of law” over government,
 and constitutional law as a means to limit the abuse of government power,
 provide the Supreme Court with additional institutional incentives to
 question the action of political institutions, rather than accept them.

The Supreme Court is subject to fewer “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 from the Supreme Court, in order to secure stability.
 In other words, cases are not heard unless “reversals of course” or a
 change in the path of the law is a real possibility. The hypothetical
 alternatives, of changing paths, that political institutions are supposed to
 abhor under increasing returns path dependence, constitute 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 as great.

CONCLUSION

Legalists and social scientists have not been able to explain the expansion of
 gay rights in a conservative age because they refuse to respect the
 importance of the special qualities of judicial decision making. These
 qualities require the Supreme Court to look simultaneously at the past,
 present, and future and to consider what individual rights should be in terms
 of the lives of the nation’s citizens, not simply their political desires. Unless
 political scientists, historians, and legal theorists respect the complexities of
 the Court’s internal decision process and how the outside world is brought
 into the Court – in ways quite different from more directly politically
 accountable institutions – they will not have any greater success in the future
 in predicting or explaining the expansion of individual rights.

UNCITED REFERENCES

Erickson & Simon (1998); Skowronek (1982); Tushnet (2000).

NOTES

1. President Nixon appointed Chief Justice Burger (1969) and Justice Blackmun (1970), and Justices Powell and Rehnquist, both in 1972. President Ford appointed John Paul Stevens (1975). Democratic President Carter had no appointees to the Supreme Court. President Reagan appointed Sandra Day O'Connor (1981), reappointed Justice William Rehnquist as Chief Justice and Justice Scalia in 1986, and Justice Kennedy (1988). President George Herbert Walker Bush appointed Justices David Souter (1990) and Clarence Thomas (1991). Only two appointees to the Supreme Court were made by a Democratic President, Bill Clinton, who appointed Justices Ruth Bader Ginsburg (1993) and Stephen Breyer (1994). It was not until 2005, eleven years later that additional appointments would be made to the Supreme Court. In 2005, Republican President George W. Bush appointed John Roberts as Chief Justice and in 2006 Samuel Alito as an Associate Justice to the Supreme Court.

2. Some scholars of quite different political persuasions have argued that *Casey* only upheld *Roe* technically. They emphasize that the *Casey* Court, under its "undue burden test" allowed Pennsylvania to institute a 24-hour wait period before an abortion, a rule requiring doctors to discuss with patients the growth of the fetus and alternatives to abortions, and state record keeping on abortions, while not allowing states to require spousal notification, even with a bypass provision.

To ascertain, whether or not *Casey* simply upheld *Roe* technically, or was rights expansive, one must do more than an analysis in policy terms of whether the Pennsylvania abortion law has made it harder or easier in the short run to get an abortion; one would have to explore whether the right itself is more or less fundamental when you compare the Court decisions. In this regard the *Casey* decision upheld the fundamental right to choose an abortion, and in important ways made the right more fundamental. The jettisoning of the trimester framework in *Casey* was a significant step in expanding the right of abortion choice because it did away with medical science as the ground on which the right to choose rested. *Casey* got rid of the collision course, as O'Connor described it, which would undermine the right to choose as medical science now allows fetuses to be kept alive, albeit with scientific aids, closer to conception and women to have safe abortions closer to term.

See *Gonzales v. Carhart*, No. 05-380 (2007), the most recent Supreme Court "partial birth abortion" case, in which the fundamentality of the right to choose is evident, along with its trumping of the protection of the potential life when Justice Kennedy openly states the constitutionality of lethal injections for fetuses rather than allow certain abortion procedures. Kennedy writes, "Some doctors, especially later in the second trimester, may kill the fetus a day or two before performing the surgical evacuation. They inject digoxin or potassium chloride into the fetus, the umbilical cord, or the amniotic fluid. Fetal demise may cause contractions and make greater

dilation possible. Once dead, moreover, the fetus' body will soften, and its removal will be easier." Moreover, based on *Roe* and *Casey* a state could pass a law today which would permit women to choose an abortion up to term, as long as it met standards of humanity as described in *Gonzales v. Carhart*.

3. See *Parents Involved in Community Schools v. Seattle School District No. 1*, 05–908 (2007), a Supreme Court case which did limit the discretion of schools boards to use race as a factor in the placement of students in public schools; however, in that case a majority of the Roberts Court allows race to be a factor, among others, in the assignment of students to schools.

4. See Skowronek (1997, pp. 407–464) for a discussion of the waning of political time, which is the increasingly narrow window during which each subsequent president can make reforms that are demanded by the majority coalition that elected him. The notion that most windows for change are narrow in American politics is evident in numerous works on American politics (Baumgartner & Jones, 1993; Kingdon, 2003).

5. See Kahn (1994) for an analysis of the Warren and Burger Courts in this regard.

6. In discussing contemporary non-originalist Supreme Court decision making, I am not invoking John Hart Ely's notion that the Court's role is to keep the pluralist political system open procedurally for discrete and insular minorities. Rather, I am arguing here that the Court's application of past rights principles and social constructions through a process of analogy to the new case it is to decide means that substantive issues of justice are considered. As *Lawrence* Tribe has argued (Tribe, 1980) and the *Lawrence* Court affirms, rights questions have never been simply procedural, even though many scholars wish to perceive them as such. There must be substantive questions of justice that trigger and inform choices about rights, even ones that center on procedural fairness.

See Kahn (2006a, pp. 78–81) for the view that both Justice Kennedy, in the *Lawrence* majority opinion that rests on due process grounds, and Justice O'Connor, in a concurring opinion that rests on equal protection grounds, demonstrate that there are substantive non-procedural fairness elements in making their constitutional choices.

7. In emphasizing that PBD is central to doctrinal change, I recognize that the Court is peppered by a large number and wide range of analogies to prior cases and suggestions for argumentation as found in the many competing briefs it receives and oral arguments it hears. However, because many cases come before the Supreme Court because of conflicting decisions in lower federal courts and state courts and because of the importance and complexity of the issues raised in such cases, rarely can a Court's decision be viewed as primarily due to the number, intensity, and the content of briefs and oral arguments.

8. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 864 (1992).

9. See Kahn (1994, pp. 257–258) and Kahn (1999a, 1999), for details of the Court moving from a privacy to a personhood basis for the right of abortion choice.

10. *Lawrence's* rights analysis can also be read as an overt rejection of Scalia's substantive due process methodology articulated in his plurality opinion in *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), a case which involved the question whether a

1 father of a child that resulted from an adulterous affair has any rights with regard to
 2 that child. In this case, Scalia invoked *Bowers v. Hardwick* for the proposition that
 3 the Court should not recognize as fundamental rights that do not have a deep and
 4 specific common law reference. Concurring Justices O'Connor, Kennedy, Stevens
 5 and dissenting Justices Brennan, Marshall, and Blackmun refused to accept this
 6 proposition.

7 11. Many times there are Supreme Court decisions that signal the possibility of a
 8 landmark case being overturned, such as the cases involving segregation in higher
 9 education prior to *Brown*. Also, in many *Lochner* era cases the right of contract and
 10 liberty under the Due Process Clauses did not trump the police powers of
 11 government. See Kahn (1999b, pp. 50–59) for the place of the social construction
 12 process in death penalty cases, one which has resulted in recent years in Supreme
 13 Court cases which limit the circumstances in which the death penalty is permitted.
 14 Perhaps, the Court will reconsider its failure to socially construct a relationship
 15 between government institutions, race, and death penalty conviction rates in
 16 *McCleskey v. Kemp*, 481 U.S. 279 (1987). This is a case ripe for modification or even
 17 overturning.

18 12. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

19 13. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

20 14. *Roe v. Wade*, 410 U.S. 113 (1973).

21 15. Rather than basing its decision on due process rights of privacy and
 22 personhood grounds, the *Lawrence* Court could have found the Texas law banning
 23 homosexual sodomy unconstitutional on equal protection grounds, or on more
 24 minimalist grounds, such as desuetude, as advocated by Cass Sunstein, in Sunstein
 25 (2003). Acceptance of the social construction process, in which rights principles and
 26 social constructions, past and present, are compared through a process of analogy,
 27 means that considerations by justices as to whether to be minimalist or maximalist in
 28 their decision making are not their first or primary concern. For a full and detailed
 29 critique of Sunstein's theory of judicial minimalism as applied to *Casey* and *Lawrence*,
 30 see Kahn (2005).

31 16. *Lawrence v. Texas*, 539 U.S. 558, 567 (2003).

32 17. *Romer v. Evans*, 517 U.S. 620 (1996).

33 18. *Lawrence v. Texas*, 539 U.S. 558, 573 (2003).

34 19. *Ibid.* at 576. The Court here refers to criticism in the interpretive community,
 35 drawing on work by Charles Fried and Richard Posner. Moreover, the courts of five
 36 states have declined to follow *Bowers* in interpreting provisions in their own state
 37 constitutions parallel to the Due Process Clause of the Fourteenth Amendment. In
 38 *Bowers*, one cannot see the level of settled expectations in the interpretive community
 39 and among jurists that sustains its constitutional validity.

40 20. *Ibid.* at 574 (quoting *Casey*, 505 U.S. 833, 851).

41 21. *Lawrence v. Texas*, 539 U.S. 558, at 574 (2003) (quoting *Romer*, 517 U.S. 620,
 42 at 624). In this chapter I focus on the most controversial implied fundamental rights,
 43 the right of sexual intimacy and the possibility of the right to marry for gays and the
 44 right of abortion choice for women. However, to fully understand why such rights
 45 have expanded in a conservative age and to understand the crucial role played by the
 46 acceptance of PBD by non-originalist, whether liberal, moderate, or conservative, I
 47 need to explore the controversy as to whether such rights are to be found in the Due

1 Process Clauses of the 14th and 5th Amendment or the Equal Protection Clause of
the 14th Amendment. Moreover, we see in both the doctrinal areas of due process
3 and equal protection, the Supreme Court has opposed strict tiered analysis and
favored a more robust consideration of substantive rights and procedural
considerations.

5 22. *Ibid.* at 574 (quoting *Romer*, 517 U.S. 620, 624).

23. *Ibid.* (quoting *Romer*, 517 U.S., 620, 634).

7 24. *Ibid.* at 571 (quoting *Casey*, 505 U.S. 833, 850).

25. *Ibid.*

9 26. *Ibid.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, at 857
(1998), Kennedy, J. (concurring)).

27. *Ibid.* at 577.

11 28. *Ibid.* at 578–579.

29. *Ibid.* at 583 (quoting *Romer*, 517 U.S. 620, 633).

13 30. *Ibid.* at 580. This phrase, “the challenged legislation inhibits personal
relationships” implies that Justice O’Connor, like the *Lawrence* majority, is
concerned about due process liberty interests of homosexuals.

15 31. O’Connor is not minimalist in her analysis of the substantive rights at issue in
Lawrence. She is a minimalist only in her conclusion to base this decision on the
17 equal protection rather than due process grounds. That is, O’Connor engaged in
PBD which did not shy away from criticizing key substantive elements of the *Bowers*
19 decision, including its key premise that moral disapproval of gays by government is a
rational basis for denying rights. Contrast this with Sunstein’s theory that minimalist
justices think primarily in pragmatic terms.

21 32. The depth of O’Connor’s social construction of rights at issue in the anti-
sodomy law raises questions about the argument that we can view O’Connor simply
23 as a centrist justice because of her views about judicial role, as lucidly explored by
Keck (2004). This view speaks only to minimalist outcomes, i.e., that O’Connor
chose not to overturn *Bowers* and rested her argument on equal protection grounds.
25 It does not speak to the impact and implications of her reasoning including social
constructions on future constitutional law.

27 33. *Romer v. Evans*, 517 U.S. 620, 620–644 (1996).

34. Scholars who view Supreme Court decision making as simply patterns of
argumentation, rather than processes through which Justices decide cases, the
29 answers to which are not known prior to the process itself, understate the degree
to which Justices view Court decision making as a constitutive process, rather than
31 one in which Justices make arguments in support of a preconceived policy
desire. Moreover, one can see PBD at work in the cases, with justices discussing
33 the nature of the process, as we see in *Casey* and in other cases as well. When
Justice Scalia vehemently criticizes Justice O’Connor for engaging in PBD in *Casey*,
it is part of a running debate in numerous abortion rights cases. For example,
35 see *Webster v. Reproductive Services*, 492 U.S. 490, 529 (1989), where O’Connor
in concurrence opposes the trimester framework in *Roe*, and *Scalia*, concurring
37 at 532–537, excoriates O’Connor, and other non-originalists on the Court for
engaging in what I have called a PBD. Justice Scalia opposes the non-originalists for
39 making constitutional choices that respect the bi-directionality between rights
principles and individuals in society under a rights regime created by the Court, as

1 well as the importance of the cumulative nature of principles and social constructions.

3 There are important similarities among the non-originalist justices, whether conservative, moderate, or liberal, with regard to how they engage in constitutional interpretation, and, most importantly, with regard to their rejecting, as binding on
5 them, the principles and social constructions present at the founding of the Constitution and the Civil War Amendments. They also disagree with the originalists
7 that the Court should continue to follow 18th and 19th century polity principles as to the power of the Supreme Court to make robust constitutional choices.

9 Finally, it is not simply the vehemence and the bellicosity of Justice Scalia's response to non-originalist PBD that suggest the importance of PBD to
11 contemporary Court decision making, but also the number and depth of the arguments used by both originalists and non-originalists in debating the canons of what constitute legitimate constitutional interpretation. There is a relationship
13 between acceptance and rejection of PBD, and the components of that process, to actual Court choices. The Justices are not simply discussing a colleague's trope or logic, given the fact that this debate has occurred at numerous times within the
15 Burger and Rehnquist Court eras, and builds on debates about Court decision making and institutional role in the Warren Court era.

17 Moreover, because Court decision making is not simply an individual act by a Justice, but rather is part of a continuing written discussion among the justices, studying patterns of written opinions allows scholars access to the decision-making
19 process itself. When one sees arguments and antagonisms reappear over many cases, and we can document changes in the opinions by justices, one can conclude there are significant differences among the justices with regard to how they view Supreme
21 Court decision making, and the components of that process that they view as legitimate. For example, Justice Potter Stewart dissents in *Griswold v. Connecticut*,
23 381 U.S. 479, 529–531 (1965) finding that there is no right to privacy in the Constitution that allows married couples to decide whether to use contraceptives. In
25 *Roe v. Wade*, 410 U.S. 113, 169 (1973), we see Justice Stewart concurring, and supporting the right of abortion choice because *Griswold* and later cases such as
27 *Eisenstadt v. Baird*, 405 U.S. 438 (1972) “make clear that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due
29 Process Clause of the Fourteenth Amendment.” In mentioning this example I am not saying that PBD is simply the institutional norm that Justices follow precedent. It is a much more active, constitutive process, as is evident in the reason Justice Stewart
31 gives for recognizing the right of abortion choice for women.

35 35. *Lawrence v. Texas*, 539 U.S. 558, at 586–592 (Scalia, J., dissenting).

36. *Ibid.* at 593 (2003).

33 37. *Ibid.* at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998), Kennedy, J. (concurring)).

35 38. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003).

39. *Ibid.* at 594.

37 40. *Ibid.* at 604. (quoting Kennedy's majority opinion at 578). For the argument that *Bowers* and *Romer* cannot stand together, see Scalia's dissent in *Romer v. Evans*,
517 U.S. 620, 640–644.

39 41. *Ibid.* at 604–605 (quoting Kennedy majority opinion at 574, 578, and 567).

42. *Romer v. Evans*, 517 U.S. 620, 620–644 (1996).

43. Part of the opposition by Scalia and the other originalists on the Court to the *Casey* decision, and now to the *Lawrence* decision, is that the right to privacy itself is not found in the Constitution. For them *Griswold*'s right of privacy was a misinterpretation of the Constitution, as was *Roe*. Therefore, the right of homosexual sodomy as part of the right of privacy is not a right protected in the Constitution and thus any PBD which follows *Roe*, including the PBD process as outlined in *Casey*, is illegitimate. Originalists refuse to consider the impact of such rights of changes in the social, economic, and political world outside the Court since *Griswold* in 1965 and *Roe* in 1973. The attack by originalists on the non-originalist PBD takes quite direct forms. Scalia cannot rest his case against homosexual rights on the view that all rights not specifically stated in the Constitution cannot be fundamental rights. Thus, Scalia leaves the door ajar, conceptually, for the Court at times to define implied fundamental rights when government is very abusive of its citizens.

44. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 861 (1992).

45. *Ibid.* at 866–867.

46. *Ibid.* at 865–866.

47. *Ibid.* at 869.

48. The analysis of PBD is not centered simply or primarily on the question of whether the Supreme Court uses, misuses, or misinterprets social science data or social, economic, and political facts, in a single case. Erickson Rosemary J. and Rita J. Simon (1998, pp. 149) find that the Supreme Court gives far more weight to the decisions in prior cases or precedents, rather than the quality of the social science data used in precedents. Few citations are made to social science data when discussing precedents. This suggests that what are considered in later cases are not social facts or data, but rather the social constructions derived from the social facts. I would suspect that issues of the quality of data may be more central in other areas of law than constitutional law, such as environmental law and torts.

49. See Hirsch (1992, pp. 115–193), for a lucid critique of the Supreme Court for disregarding social facts, when defining liberty interests under the Constitution. Here, I argue that it is through the social construction process that the Court extends rights to groups previously unprotected.

50. This is to be expected because Supreme Court decision making in the area of American constitutional law always has had significant common law roots, in which legal principles were applied in light of the economic, social, and political world outside the Court (see Strauss (1996); One can see it in Kahn (2002) and Levi (1949).

51. See Goldford (2005 p. 186).

52. See Hacking (1999, pp. 7–37) for the argument: “Ideas do not exist in a vacuum. They inhabit a social setting. Let us call that the *matrix* within which an idea, a concept or kind, is formed.” One can see this process at work when Justices must determine whether a right has been violated.

53. See Dudziak (2000).

54. For a theory of doctrinal change which focuses on periods of “higher lawmaking” versus normal times, and the impact of critical elections in the 1930s, resulting in the formation of the post-*Lochner* era activist Supreme Court, see Ackerman (1991, 1998).

1 55. See Comiskey (2004, Chapter 7), for a fascinating review of the difficulties that
Presidents have had in attempting to pack the Supreme Court; also see Silverstein
3 and Haltom (1996) with regard to Clinton's Ginsburg and Breyer nominations to the
Supreme Court.

5 56. See Kahn and Kersch (2006b, pp. 3–6), for the analytic limitations of the “law
against politics” debate.

7 57. For the most comprehensive critique of arguments made by historians that
external political events can explain *West Coast Hotel*, and the judicial “revolution”
of 1937, see Cushman (1998). For an insightful discussion of the debate in the early
9 20th century over whether the Constitution should be changed by evolution through
interpretation or by amendment, see Gillman (1997). However, in this discussion,
Gillman continues the traditional reification by externalist scholars of the
11 importance of 1937 as the key dividing line between the Court following originalist
thinking and one in which the Constitution is to be defined as a “living” document.
13 Also, see Kahn (2002) for an argument that 1937 is not an important dividing line as
to the Constitution as a living document.

15 58. See Klarman (2004, 2005) and Welke (2001) for recent works by historians
which do not have these limitations.

17 59. See Segal and Spaeth (1993, 2002) for classic statements of the attitudinal
approach. See also Spaeth and Segal (1999) for the view that, when Justices disagree
with the establishment of a precedent, they rarely shift from their previously stated
19 positions in later cases. The analysis is in terms of end product policy, not in terms of
a consideration of the principles and social constructions in prior cases, influencing
how the Justices engage in the interpretive turn in later cases.

21 60. See Goldford (2005, p. 334).

23 61. *Ibid.* 348. Thus, the Constitution, in principle (and as constitutive practice) is
distinct from whatever anyone says about it, including the founders. The
Constitution can be invoked as a critical standard against current practices which
are alleged to be unconstitutional.

25 62. See Graber (2006, p. 35).

27 63. See Kahn (2006a, pp. 75–81) for an extended analysis of why Justices in *Casey*
and *Lawrence* were not acting strategically.

29 64. Political scientists need not accept the externalist stance of behavioralists, nor
legalist pragmatism. See Graber (1997, p. 802) for the argument that “If the right to
abortion and the right to engage in homosexual sodomy both follow logically from a
more general right of privacy, then a society whose constitution is interpreted as
31 protecting that general right of privacy should not keep abortion legal and ban
homosexual sodomy. At the very least, Supreme Court justices in gay rights cases
should not reject general constitutional rights to privacy without explaining why they
33 are still protecting abortion.”

35 65. All political signals indicated that maximalist decisions in *Casey*, *Romer*, and
Lawrence would trigger negative political reactions, and they did. If the Court simply
had strategic concerns, it is difficult to understand why the Court in both *Casey* and
37 *Lawrence* specifically rejects the importance of the presence of controversy and
growing political contestation and controversy over abortion choice and gay rights,
at a time when a centerpiece of the governing majority, and the administration that it
39 elected, was its opposition to the right of abortion choice and expanded gay rights.

66. See Sunstein (1999) and Tushnet (1999). Tushnet is even more trusting of politics and more dedicated to a minimalist role for the Supreme Court than is Sunstein. See Graber (2000) for a superb analysis of this book. See Kahn (2006b), for the argument that Tushnet's popular constitutionalism is another externalist theory of constitutional change, with many similarities to Sunstein's minimalism.

67. See Sunstein (2003).

68. See Sunstein (1999, p. 200).

69. See Kahn (2006a, pp. 78–81). In recent decades, Justices of all stripes have moved away from a mechanistic three-tiered formula for applying equal protection principles. This has increased the presence of substantive as opposed to procedural denial of access to the political system bases for invoking equal protection principles. Primary examples of this can be found in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), a case granting heightened Court scrutiny for the disabled, and *United States v. Virginia*, 518 U.S. 515 (1996), a case finding Virginia Military Institute in violation of the equal protection principles because it was a male-only state university.

70. See Lessig (1989) for the place of what I call social constructions in what Lessig describes as context in the “process of translation” in Supreme Court decision making. Also, see Lessig (1995) “The Regulation of Social Meaning,” *The University of Chicago Law Review* 62 (1995): 943–1045.

71. The social construction component of PBD forces Justices to apply past rights principles and social constructions to the case before them, through a process of analogy, that forces them to ask whether the aspects of individuals' lives for which a right to be left alone has been requested is similar to the aspects of individuals' lives that have been protected from government intrusion in prior cases. And they must do with concern for what is just, not simply popular. This process is quite different from how more directly politically accountable institutions make decisions.

72. See Sunstein (1988) for Sunstein's view of the relationship between due process and equal protection which the Supreme Court rejected in *Lawrence*.

73. See Kahn (1999c) and Smith (1997) for the important argument that the American liberal tradition is built on multiple traditions which are less supportive of the needs of subordinated groups.

74. See Alschuler (2000) for the argument that judges were deciding cases with a strong regard to the nature of the world outside the court well before the period of Holmes and judicial realism. Pragmatists over-emphasize the degree to which courts before the 1920s simply applied principles when deciding cases.

75. A similar strategy of minimalism in the more general political system in the post-Reagan age might be President Clinton's pursuit of piecemeal healthcare reform after his universal healthcare proposal was rejected.

76. See Kahn (2006a) for a fuller discussion of these characteristics of the contemporary Supreme Court.

77. The old adage “If it looks like a duck, walks like a duck, and quacks like a duck, then it must be a duck” is apropos here, given the importance of the process of analogy in legal thinking.

78. *Lawrence v. Texas*, 539 U.S. 558, 571 (2003).

79. See Kahn (1994, pp. 257–258, 1999a) for details of the Court moving from a privacy to a personhood basis for the right of abortion choice.

1 80. See Kahn (2006a, pp. 90–92) for an expanded analysis of the basic components of PBD.

3 81. See Goldford (2005, p. 186): “Originalist intent itself ... is not discovered, but rather constructed by interpretation, and thus cannot be the ground of objectivity in the sense in which originalism understands it.” Thus, he finds originalism is not the
5 obverse of non-originalism.

7 82. In making this argument, I am not arguing for a Whiggish view of history, i.e., that all change is progress, and progress is preordained by PBD. I am arguing that the rate of social change by the Supreme Court, and its pattern of change, will be different from those of other institutions in the wider political system. I am also
9 arguing that non-originalist PBD makes it easier for legal advocacy groups to define injustices that have not yet received a level of visibility and concern that would
11 produce action by the wider political system. See Kersch (2006), for a superb argument against viewing constitutional change through Supreme Court decision making in Whiggish terms. Moreover, an interesting question arises as to
13 whether a PBD with a robust social construction process could lead to a retrenching of individual rights. I think not. When the Court has overturned landmark
15 decisions, such as in *Brown* and *Loving*, it has made more robust, complex, and filigreed social constructions to expand rights. This is an interesting issue for
17 future study, for one could ask is this what is happening presently with regard to affirmative action. However, in this regard, it is not clear that the Court has
19 ever been robust in the PBD surrounding affirmative action. Finally, as David Strauss has argued Strauss (1989), the Supreme Court has taken the least progressive
21 of possible paths from *Brown*, but the overall political system may have taken an even more conservative path on overcoming the affects on racial segregation and
discrimination.

23 83. See Kahn (2006a, p. 94) for an extended analysis of this process.

84. For evidence of the bi-directionality of influence between the Supreme Court and interpretive community, particularly with regard to the role of legal advocacy
25 groups, see Kersch (2006), Nackenoff (2006), Novkov (2006), and Keck (2006), and the other contributions to Kahn and Kersch (2006a).

27 85. For an anecdotal account of the conservative movement in Kansas’s disdain for liberals and liberalism in general and homosexuals in particular, see Frank
29 (2004). It seems that an important dimension in Kansas is not simply opposition to liberal social policies, but also disdain for the legal objectivity (secularism) of the Supreme Court and its institutional autonomy. The Terri Schiavo case, which
31 involved a conflict over whether courts or Congress should make the decision whether she was to stay on life support systems, is an example of contemporary
33 social conservative thinking which rejects legal objectivity for politics that will support their moral choices.

86. See Skowronek (1997, pp. 407–464), for a discussion of “political time” with
35 regard to presidencies through time.

87. This does not mean that the Court always engages in a (re)construction
37 process, and always seeks to interpret the Constitution in light of change outside the Court. Polity and rights principles and the social constructions on which they are
39 built may become static. However, this is not the usual process of Supreme Court decision making and doctrinal change.

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