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Ronald Kahn

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ORIGINALISM, THE LIVING CONSTITUTION, AND SUPREME COURT DECISION MAKING IN THE TWENTY-FIRST CENTURY: EXPLAINING *LAWRENCE V. TEXAS*†

RONALD KAHN*

One way to explore the relationship between originalism and the living Constitution at the turn of the twenty-first century is to consider why a conservative/moderate Supreme Court in a conservative era chose to extend, in a non-minimalist way, the rights of privacy and personhood to gay men and lesbians in *Lawrence v. Texas*,¹ thereby overturning *Bowers v. Hardwick*,² a case in which the Supreme Court refused to consider the possibility of such rights. To understand why this occurred, one must explore the role of what I will call the Social Construction Process (SCP) in non-originalist decision making—and the opposition to it by the originalist jurists on the Court.³

I. THE SOCIAL CONSTRUCTION PROCESS IN SUPREME COURT DECISION MAKING

A. *Planned Parenthood of Southeastern Pennsylvania v. Casey*

The major elements of the SCP at the core of *Lawrence* are outlined in the joint opinion by Justices Souter, O'Connor, and Kennedy in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁴ In that opinion, the three Justices argued why it was proper for the Supreme

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† [Editor's Note: Portions of this Essay are drawn from RONALD KAHN, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but Not Roe*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 67 (Ronald Kahn & Ken I. Kersch eds., 2006)].

* James Monroe Professor of Politics and Law, Oberlin College.

1. 539 U.S. 558 (2003).

2. 478 U.S. 186 (1986); see also *Lawrence*, 539 U.S. at 578 (overturning *Bowers* and holding that the Due Process Clause protects consenting adults in their right to engage in private sexual conduct).

3. See RONALD KAHN, *Social Constructions, Supreme Court Reversals, and American Political Development: Lochner, Plessy, Bowers, but Not Roe*, in *THE SUPREME COURT AND AMERICAN POLITICAL DEVELOPMENT* 67 (Ronald Kahn & Ken I. Kersch eds., 2006) [hereinafter *Social Constructions*] (analyzing the importance of the SCP in Supreme Court decision making in order to elucidate the place of the Supreme Court in American political development). In this Essay, I am referring to the originalism of Justices Scalia and Thomas. I understand that originalists differ as to whether they base their originalism on the language of the Constitution as written, or on arguments about the intent of the Framers and/or ratifiers of the Constitution.

4. 505 U.S. 833, 854–55 (1992).

Court to overturn *Plessy v. Ferguson*,⁵ find school segregation unconstitutional in *Brown v. Board of Education*,⁶ overturn *Adkins v. Children's Hospital of the District of Columbia*⁷ with its core *Lochner* era laissez faire ethos, and abdicate right-of-contract principles in *West Coast Hotel Co. v. Parrish*,⁸ but also why it was improper for the Supreme Court to overturn *Roe v. Wade*.⁹

The *Casey* Court realized that the factual underpinnings of the right of abortion choice were moving in the same direction as expanding interpretations of the right of privacy between 1973 and 1992.¹⁰ For this reason, the *Casey* Court concluded that if it were to overturn *Roe*, it could 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.¹¹ To decide otherwise, the Justices argued, would simply be giving in to political pressure, an act not in the institutional interests of the Court or the rule of law.¹² Thus, as *Casey* demonstrates, justices engage in a SCP that considers past principles and their application in the world outside the Court, and the SCP is the core element in a non-originalist vision of the rule of law.¹³

The SCP includes the following elements: (1) a determination of whether the rights principles at issue in a case have expanded or declined since prior landmark decisions that involved such rights; (2) a consideration of these rights principles in light of their application to the lives of citizens since prior landmark and lesser cases (thus, workability and citizen reliance on rights are important in determining whether a right should be sustained); (3) a rejection of the view that the Court's determination of the nature of rights and their application should simply or primarily be based on levels of political controversy, interest group politics, or public opinion; and (4) analogizing between contemporary rights principles and their social constructions and the rights principles and social constructions in prior landmark and lesser cases (thus increasing the Court's legitimacy and institutional interests).¹⁴

5. 163 U.S. 537 (1896).

6. 347 U.S. 483 (1954).

7. 261 U.S. 525 (1923).

8. 300 U.S. 379 (1937).

9. 410 U.S. 113 (1973); *Social Constructions*, *supra* note 3, at 69.

10. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 864 (1992).

11. *Id.*

12. *Id.* at 867.

13. *Social Constructions*, *supra* note 3, at 78.

14. *Id.* at 69–70.

When changes in society and in rights principles and doctrine are symbiotic, landmark cases will not be overruled; when social constructions in prior landmark cases are no longer tenable, landmark cases are ripe for serious modification or outright overturning.¹⁵ Thus, the willingness of the Supreme Court to consider changes in rights principles, such as the *Casey* Court's expansion of the rights of personhood in light of the social constructions of what constitutes such rights since *Roe*,¹⁶ and, as we shall see, the failure to engage in the SCP in *Bowers v. Hardwick*¹⁷ is the major reason why that case was overturned in *Lawrence*.¹⁸

B. *Lawrence v. Texas*

The importance of the SCP to modern non-originalist Court decision making is evidenced in *Lawrence v. Texas*.¹⁹ *Bowers v. Hardwick* could not be sustained because the *Bowers* Court had refused to engage in the SCP,²⁰ and when the *Lawrence* Court did engage in the SCP, it had not simply to overturn *Bowers*, but to eviscerate it.²¹ The *Lawrence* Court considers the validity of *Bowers* in light of two interven-

15. *Id.* at 72. Many times there are Supreme Court decisions that signal the possibility of a landmark case being overturned, such as the cases involving segregation in higher education prior to *Brown*. Also, in many *Lochner* era cases the right of contract and liberty under the Due Process Clause did not trump the police powers of government. See Ronald Kahn, *Institutional Norms and the Historical Development of Supreme Court Politics: Changing "Social Facts" and Doctrinal Development*, in *THE SUPREME COURT IN AMERICAN POLITICS* 50–59 (Howard Gillman & Cornell W. Clayton eds., 1999), for a discussion of the SCP in death penalty cases, which has recently resulted in reducing the circumstances where the imposition of the death penalty is permitted. Perhaps in the future the Court will reconsider its failure to socially construct a relationship between government institutions, race, and the death penalty in *McCleskey v. Kemp*, 481 U.S. 279, 297–99 (1987). This is a case ripe for modification or even for overturning.

16. 505 U.S. at 857.

17. 478 U.S. 186 (1986).

18. 539 U.S. at 578.

19. 539 U.S. 558 (2003).

20. *Bowers*, 478 U.S. at 190–91.

21. *Lawrence*, 539 U.S. at 578–79; *Social Constructions*, *supra* note 3, at 75. Rather than basing its decision on Due Process right of privacy and personhood grounds, the *Lawrence* Court could have found the Texas law banning homosexual sodomy unconstitutional on Equal Protection grounds, or on more minimalist grounds, such as desuetude. See Cass R. Sunstein, *What Did Lawrence Hold?: Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27–33, for an articulation of this argument. Acceptance of the SCP, in which rights, principles and social constructions, past and present, are compared through a process of analogy, means that considerations by justices as to whether to be minimalist or maximalist in their decision making are not their first or primary concern. See generally Ronald Kahn, *Why Lawrence v. Texas Was Not Expected: A Critique of Pragmatic Legalist and Behavioral Explanations of Supreme Court Decision Making*, in *THE FUTURE OF GAY RIGHTS IN AMERICA* 229 (H. N. Hirsch ed., 2005) (critiquing Sunstein's theory of judicial minimalism as applied to *Casey* and *Lawrence*).

ing cases, *Planned Parenthood of Southeastern Pennsylvania v. Casey*,²² and *Romer v. Evans*,²³ and finds that they “cast [the *Bowers*] holding into even more doubt.”²⁴ The *Lawrence* Court specifically refers to this critical social construction regarding the depth of women’s right to abortion choice in *Casey*.²⁵ There is a specific reaffirmation in *Lawrence* of the *Casey* conditions which must be present in order for the Court to overturn landmark decisions.²⁶ These conditions required the *Lawrence* Court to consider (a) substantive components (principles and prior social constructions) of what privacy meant prior to *Bowers*; (b) what personhood meant in *Casey*; and (c) what “animosity” meant in *Romer*.²⁷

More specifically, the importance of the SCP, in which rights principles are applied in light of the lives of persons, can be seen in *Lawrence* when the Court discusses why it is in the Court’s institutional interests not simply to follow public opinion, the will of the majority as expressed by state legislatures, or the history of majority animus against homosexuals.²⁸ We also 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 state legislatures.²⁹ 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.”³⁰ Engaging in the SCP is the way non-originalists on the Court think about individual rights, a process which is not a simple application of their personal moral codes.

In Justice O’Connor’s concurrence and in Justice Scalia’s dissent in *Lawrence*, we also see the centrality of the SCP to contemporary non-originalist Supreme Court decision making. One can see O’Connor’s commitment to engaging in a robust SCP when she agrees with her non-originalist colleagues that the Court should not base its decision simply on accepting the moral disapproval of homosexuals by the legislature or the public: “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protec-

22. 505 U.S. 833 (1992).

23. 517 U.S. 620 (1996).

24. *Lawrence*, 539 U.S. at 573.

25. *Id.* at 574 (quoting *Casey*, 505 U.S. at 851); *Social Constructions*, *supra* note 3, at 76.

26. *Social Constructions*, *supra* note 3, at 77.

27. *Lawrence*, 539 U.S. at 574 (quoting *Romer*, 517 U.S. at 634); *Social Constructions*, *supra* note 3, at 77.

28. *Social Constructions*, *supra* note 3, at 77.

29. *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)); *Social Constructions*, *supra* note 3, at 77.

30. *Lawrence*, 539 U.S. at 571 (quoting *Casey*, 505 U.S. at 850); *Social Constructions*, *supra* note 3, at 77.

tion Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’³¹ Moreover, O’Connor specifically alludes to the importance of the liberty interests at stake in the case: “We have been most likely to apply rational basis review to hold a law unconstitutional under the Equal Protection Clause where, as here, the challenged legislation inhibits personal relationships.”³²

Even though O’Connor wants a more toned-down response to *Bowers*, one based on the Equal Protection Clause and the substantive elements in *Romer*, an analysis of her SCP provides evidence that she agrees with many of the substantive conclusions at the core of the majority’s opinion.³³ Considering the substantive components of O’Connor’s analysis of the Texas law with regard to notions of permissibility of majoritarian views of sexuality, personhood, and morality, and her support of the SCP, there are far more similarities between O’Connor’s views and the non-originalist Justices in the majority than there are between O’Connor and the originalists in dissent.³⁴

The most persuasive evidence for the importance of the non-originalist SCP in contemporary Supreme Court decision making is the vehement opposition to it by the Court’s originalist Justices, Scalia, Thomas, and Rehnquist. This opposition is most evident in Scalia’s detailed, determined, and heartfelt dissent in *Romer*, where he was prescient in the view that *Romer* and *Bowers* could not stand to-

31. *Lawrence*, 539 U.S. at 583 (O’Connor, J., concurring) (quoting *Romer*, 517 U.S. at 633); *Social Constructions*, *supra* note 3, at 80.

32. *Lawrence*, 539 U.S. at 580. This phrase, “the challenged legislation inhibits personal relationships” implies that Justice O’Connor, like the *Lawrence* majority, is concerned about the Due Process liberty interests of homosexuals. *Id.*; see also *Social Constructions*, *supra* note 3, at 80.

33. *Social Constructions*, *supra* note 3, at 80–81. 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 Equal Protection rather than Due Process grounds. That is, O’Connor engaged in a SCP which did not shy away from criticizing key substantive elements of the *Bowers* decision, including its key premise that moral disapproval of gays by government is a rational basis for denying rights. *Id.* at 81 n.63.

34. *Id.* at 81. 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 as a centrist justice because of her views about the judicial role. See THOMAS M. KECK, *THE MOST ACTIVIST SUPREME COURT IN HISTORY: THE ROAD TO MODERN JUDICIAL CONSERVATISM 199–203* (2004) (arguing that O’Connor’s conception of the role of the judiciary influences her decision making more than her political leanings). This view speaks only to minimalist outcomes, for example, that O’Connor chose not to overturn *Bowers* and rested her argument on Equal Protection grounds. It does not speak to the impact and implications of her reasoning, including social constructions on future constitutional law. *Social Constructions*, *supra* note 3, at 81 n.64.

gether,³⁵ and in *Lawrence*, where he continued to attack both the conditions laid down in *Casey*, under which the Supreme Court is to overturn landmark decisions,³⁶ and its robust SCP. Here, I concentrate on Scalia's dissent in *Lawrence*.

In contrast to the non-originalist Justices, Scalia believes that Supreme Court decision making is bounded by constitutional principles that existed at the establishment of the Constitution and its amendments—not those formed by the Court's subsequent definition of implied fundamental rights.³⁷ He believes that the Court should accept the policies of legislatures, as long as they do not violate the specific words of the Constitution, or cannot be directly inferred from those words.³⁸ Scalia emphasizes that “fundamental rights” must be “so rooted in the traditions and conscience of our people as to be ranked as fundamental.”³⁹ This is quite different from what Kennedy said in his majority opinion in *Lawrence*: “history and tradition are the starting point but not in all cases the ending point of the substantive due process inquiry.”⁴⁰ Scalia also recognizes that the SCP is central to the *Lawrence* decision when he argues that one should not believe the majority opinion when it says the present case “does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.”⁴¹ This is because, for Scalia, the *Lawrence* decision builds on an illegitimate, decades-long social construction process. Scalia writes,

If moral disapprobation of homosexual conduct is “no legitimate state interest” for purposes of proscribing that conduct; and if, as the Court coos (casting aside all pretense of neutrality), “[w]hen sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring”; what justification could there possibly be for denying the benefits of

35. *Romer*, 517 U.S. at 636; *Social Constructions*, *supra* note 3, at 82.

36. *Lawrence*, 539 U.S. at 586–92 (Scalia, J., dissenting); *Social Constructions*, *supra* note 3, at 82.

37. *Lawrence*, 539 U.S. at 598; *Social Constructions*, *supra* note 3, at 82.

38. *Social Constructions*, *supra* note 3, at 82.

39. *Lawrence*, 539 U.S. at 593 (citing *Reno v. Flores*, 507 U.S. 292, 303 (1993)); *Social Constructions*, *supra* note 3, at 82.

40. *Lawrence*, 539 U.S. at 572 (majority opinion) (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998) (Kennedy, J., concurring)).

41. *Id.* at 604 (Scalia, J., dissenting) (quoting *id.* at 578 (majority opinion)). In *Romer*, as in *Lawrence*, Scalia argues that *Bowers* and *Romer* can't stand together, and deplores the non-originalist Justices' use of the SCP. See *Romer*, 517 U.S. at 640–44 (Scalia, J., dissenting); *Social Constructions*, *supra* note 3, at 82–83.

marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”?⁴²

As in *Romer*, where Scalia predicted that *Bowers* and *Romer* could not stand together,⁴³ Scalia is predicting here that, if, in my terms, the SCP that began in *Griswold*, and was continued in *Roe*, *Casey*, rejected in *Bowers*, and accepted in *Romer* and now *Lawrence*, is allowed to continue, establishing a right of same-sex marriage under the Constitution may be just a matter of time.⁴⁴

Thus, we see the bases for Scalia’s opposition to the 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.”⁴⁵ For him, an “emerging awareness” as defined by the non-originalists does not establish a “fundamental right.”⁴⁶ For Scalia, the continued presence of state laws and arrests for homosexual sodomy offer the only clear evidence that the protection of such acts is not “deeply rooted in this Nation’s history and tradition.”⁴⁷ Scalia’s rejection of a robust SCP as central to his approach to interpreting the Constitution means that his notion of what constitutes the mandate of history and tradition is dramatically different from the non-originalists.⁴⁸ In viewing the emerging awareness and reliance arguments used in *Casey* and *Lawrence* as simply result-oriented,⁴⁹ Scalia opposes rights which evolve and are defined and redefined under the non-originalist SCP. One sees this when he seeks the narrowest reading of the *Lawrence* decision, and refuses to

42. *Lawrence*, 539 U.S. at 604–05 (quoting *id.* at 578, 567 (majority opinion)) (internal citations omitted).

43. *Romer*, 517 U.S. at 644 (Scalia, J., dissenting).

44. *Lawrence*, 539 U.S. at 604–05; *Social Constructions*, *supra* note 3, at 83.

45. *Lawrence*, 539 U.S. at 572 (majority opinion).

46. *Social Constructions*, *supra* note 3, at 83.

47. *Lawrence*, 539 U.S. at 594 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 192 (1986) (Scalia, J., dissenting)).

48. *Social Constructions*, *supra* note 3, at 83.

49. *Id.* 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 the right to an abortion found in *Roe*. Therefore, according to these originalists, the right of homosexual sodomy as part of the right of privacy is not a right protected in the Constitution. Any SCP which follows *Roe*, including the SCP outlined in *Casey*, is illegitimate. These originalists refuse to consider the impact on such rights of changes in the social, economic, and political world outside the Court since *Griswold* in 1965 and *Roe* in 1973. But 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 such implied fundamental rights when government is exceptionally abusive of its citizens. *Id.* at 83 n.73.

admit that *Casey* expanded the basis of abortion choice from a right of privacy to personhood, and when he refuses to accept the view that a rule of law can include a changing definition by the Supreme Court of what constitutes liberty under the Constitution.⁵⁰ Justice Scalia writes,

More illuminating than this bald, unreasoned disclaimer is the progression of thought displayed by an earlier passage in the Court's opinion, which notes the constitutional protections afforded to "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," and then declares that "[p]ersons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do."⁵¹

Despite claims to the contrary, Scalia engages in a SCP, as do all originalists.⁵² For example, Scalia engaged in a SCP when he approved the Court's invalidation of anti-miscegenation laws in *Loving v. Virginia*.⁵³

In *Loving*, however, we correctly applied heightened scrutiny, rather than the usual rational basis review, because the Virginia statute was "designed to maintain White Supremacy." A racially discriminatory purpose is always sufficient to subject a law to strict scrutiny, even a facially neutral law that makes no mention of race.⁵⁴

Scalia seems willing to accept the social construction in *Loving* because, even though the Virginia law applied equally to people of all races, he was willing to view it as the subordination of African Americans to whites.⁵⁵ Scalia's views on the difference between rejecting the constitutionality of anti-miscegenation laws on the one hand, and accepting laws criminalizing acts when engaged in by homosexuals, but not heterosexuals, suggest that, at some level, all cases pertaining to individual rights involve a SCP.⁵⁶

50. *Social Constructions*, *supra* note 3, at 83–84.

51. *Lawrence*, 539 U.S. at 604 (quoting *id.* at 574 (majority opinion)) (emphasis omitted).

52. *Social Constructions*, *supra* note 3, at 84; see also DENNIS J. GOLDFORD, *THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM* 186 (2005) (observing that "[o]riginal intent itself . . . is not discovered, but rather is constructed by interpretation, and thus cannot be the ground of objectivity in the sense in which originalism understands it," and, thus, finding originalism is not the converse of non-originalism).

53. 388 U.S. 1 (1967).

54. *Lawrence*, 539 U.S. at 600 (Scalia, J., dissenting).

55. *Id.*; *Social Constructions*, *supra* note 3, at 84.

56. *Social Constructions*, *supra* note 3, at 84.

All of the Justices, originalist and non-originalist alike, agree to follow precedent, consider polity and rights principles in making constitutional choices, and engage in analogical reasoning. All see themselves as dealing with the normative and empirical in ways that are special to courts. All see themselves as engaging in a process of interpretation. As I explain elsewhere, both originalists and non-originalists acknowledge that Supreme Court decision making has normative and empirical elements, and that it is both inward and outward looking.⁵⁷ Where they differ is in their views as to what should be included in the SCP. The “external” reference point for many conservative originalists, like Scalia, is the narrow time frame of the founding period.⁵⁸ Originalists reject the permissibility of the external in Court decision making moving beyond the founding periods of the Constitution and its amendments. Thus, for Scalia, and most originalists of similar viewpoint, the manner in which privacy, personhood, and homosexual rights have developed is not principled because in their view the rights principles under the Due Process Clauses of privacy-personhood since *Griswold* do not reflect principles in the Constitution, and thus any social constructions from those principles that reflect the lives of citizens are illegitimate.⁵⁹

It is the strict limitation that originalist Justices such as Scalia place on the SCP which differentiates their jurisprudence from that of the non-originalist Justices.⁶⁰ Thus, the set of parameters as to the nature of the SCP, and its place in the Court’s effort to define individual rights, is radically different for Scalia (and Justices Thomas and Rehnquist) as compared to non-originalists on the Supreme Court.⁶¹ This difference has been a defining fissure of the mature Rehnquist Court and it will continue to be one on the Roberts Court.⁶²

II. THE SOCIAL CONSTRUCTION PROCESS AND ORIGINALISM IN THE TWENTY-FIRST CENTURY

The importance of the differences between originalists and non-originalists with regard to what constitutes an appropriate SCP in contemporary implied fundamental rights cases, and the acceptance of a robust SCP by conservatives and moderates, not simply liberals, on the Supreme Court, has important implications with regard to the rela-

57. *Id.* at 90.

58. *Id.* at 90–91.

59. *Id.* at 91.

60. *Id.* at 84–85.

61. *Id.*

62. *Id.* at 85. It also has become a defining fissure in contemporary American politics.

tionship between originalism and the living Constitution in the twenty-first century. First, it helps explain why a conservative/moderate Supreme Court in a conservative political era expands the jurisprudential basis for the right of abortion choice—moving from a concept of privacy to one of personhood—and why rights of personhood under the Constitution have been robustly extended to homosexuals in the dramatic and unexpected rights-expanding decision in *Lawrence v. Texas*.⁶³

The second implication of my argument is that the primary fissure on the mature Rehnquist Court, with regard to the treatment of implied fundamental rights is between originalists and non-originalists over the level of robustness of the SCP, not differences among conservatives, moderates and liberal Justices. For non-originalists of all ideological stripes, and liberal originalist scholars, such as Jack Balkin, the SCP is central to a modern rule of law and a basis for the Supreme Court's legitimacy and uniqueness among governmental institutions; for originalists it undermines the Supreme Court as a legal institution.⁶⁴

The presence of a robust SCP in the decision making of non-originalist Justices of all stripes raises serious questions about the importance of efforts by constitutional theorists to develop liberal-progressive originalist constitutional theories, not just those by Justice Scalia who seeks to bolster conservative ones. This is so because at the core of modern implied fundamental rights doctrine, and in other areas of constitutional doctrine, is the development and application of rights principles through engaging in a SCP, a process that is far removed from the premises and intentions that jurists and scholars have constructed as occurring in the founding period.⁶⁵ The importance

63. See RONALD KAHN, *THE SUPREME COURT AND CONSTITUTIONAL THEORY, 1953–1993*, at 257–59 (1994) (detailing the Court's use of the SCP in expanding privacy rights and basing its affirmation of the abortion right on the right to personhood); Ronald Kahn, *Institutional Norms and Supreme Court Decision-Making: The Rehnquist Court on Privacy and Religion*, in *SUPREME COURT DECISION-MAKING* 175–98 (Cornell W. Clayton & Howard Gillman eds., 1999) (same); see also Mark Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997) (arguing that abortion rights have more staying power than rights of basic welfare because of the intellectual proclivities of liberal constitutional theorists and law professors).

64. See Jack M. Balkin, *Abortion and Original Meaning* (Yale Law Sch. Pub. Law & Legal Theory, Research Paper Series, Paper No. 128, 2006), available at <http://ssrn.com/abstract=925558>.

65. Perhaps the best example of this point is that most of the First Amendment speech doctrine is a product of post-1917 Espionage Act developments. See KEN I. KERSCH, *FREEDOM OF SPEECH: RIGHTS AND LIBERTIES UNDER THE LAW* 114–19 (2003) (detailing the evolution of expanded First Amendment rights as partially rooted in post-1917 Espionage Act cases).

of the SCP also raises questions about the importance of constitutional theories that argue for popular constitutionalism, such as those of Mark Tushnet and Larry D. Kramer, which seek to take the Constitution away from the courts.⁶⁶ Moreover, the presence of a robust social construction process as seen in *Casey* and *Lawrence* raises serious questions about the importance of constitutional theories that oppose maximalist and support minimalist Supreme Court decision making, such as that of Cass Sunstein.⁶⁷

I question whether such attempts will have a serious impact on Supreme Court decision making in the future. If originalist and pragmatic principles are not central to implied fundamental rights cases like *Casey* and *Lawrence* which were decided by a moderate-conservative Supreme Court in a conservative age, one can ask whether they will have an impact on Court decision making in far less controversial areas of constitutional law.

Finally, in such a setting, the role of the SCP in Court decision making and the conflicts between originalists and non-originalists are closely linked to the place of the Supreme Court in American political development. There is a feedback effect from conflicts between originalists and non-originalists over the SCP on the Court to more general American politics.⁶⁸ This suggests that the bi-directionality between the internal Court and the world outside occurs at several levels, at the level of the lived lives of citizens as the Court makes decisions about rights of privacy and personhood as we see in the SCP, and at the level of politics itself.⁶⁹ Thus, there is a feedback effect between differences on the Court over the legitimacy of a robust SCP. The Court's differences are not simply over controversial Court decisions, such as *Roe*, *Casey* and *Lawrence*, they are over the nature of the Court's decision-making process and the place of the Supreme Court in American political development.

66. See Ronald Kahn, *The Constitution Restoration Act, Judicial Independence, and Popular Constitutionalism*, 56 CASE W. RES. L. REV. 1083 (2006), for a critique of Mark Tushnet's theory of popular constitutionalism. I argue that the SCP provides a direct relationship between the Supreme Court and the lived lives of citizens, a process that may make the Supreme Court more democratic substantively (if not procedurally) than the more directly politically accountable institutions which Tushnet favors as forums for making constitutional choices. See also LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

67. See Sunstein, *supra* note 21.

68. *Social Constructions*, *supra* note 3, at 95.

69. *Id.*