MEMORANDUM

To: Participants in the Schmooze
From: Ron Kahn
Date: March 2, 2008
Re: My ticket of Admission

In enclose the page proofs for:


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:

WHY DOES A MODERATE/CONSERVATIVE SUPREME COURT IN A CONSERVATIVE AGE EXPAND GAY RIGHTS?: LAWRENCE V. TEXAS (2003) IN LEGAL AND POLITICAL TIME

Ronald Kahn

ABSTRACT

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 special qualities of judicial decision making. These qualities require the Supreme Court to look simultaneously at the past, present, and future, 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.

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

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In the first section of this chapter, I argue that this conservative-moderate Supreme Court in a conservative age has expanded implied fundamental 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 Supreme Court decision making (PBD). The Court's decision making is principled because of the importance of rights and polity (institutional) principles; it is bi-directional because of the key relationship between the internal Court decision-making process and the social and political world outside the Court.

In the second section of this chapter, I explore why so many law school scholars, political scientists, and historians have failed to explain, much less predict, the expansion of implied fundamental rights by the Supreme Court 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 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 conservative era expands implied fundamental rights; they fail to recognize that at the core of Supreme Court decision making is a mutual construction process, in which both internal institutional norms and principles and external phenomenon are central. Moreover, the external world important 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 rights regime.

In the final section of the chapter, I explore the political effects of non-originalist Supreme Court justices’ accepting PBD, and originalist justices rejecting it. I argue that PBD leads to a legal secularity, a form of objectivity that increases the relative autonomy of the Supreme Court from direct influence of politics. This objectivity also raises questions in the wider society about the legitimacy of the Supreme Court’s power to define implied fundamental rights. This questioning of Court legitimacy has become a defining fissure in American politics and among constitutional scholars of quite different political stripes. However, even with the legitimacy of PBD 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.

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 institution in a wider process of American political development. I argue that because of the unique qualities of Supreme Court decision making, as evidenced by the PBD, and the nature of what I call legal time, the Court, unlike more directly politically accountable institutions, like the Presidency,
does not suffer from what Stephen Skowronek has called the waning of political time.\textsuperscript{4}

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


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

There also is a crucial fourth element in PBD, in which there is a 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
executive branches of government, as to where constitutional choices should be made in the case before it. Of particular concern is whether the Supreme Court should act in response to periods of high levels of political controversy, interest group politics, or differences as evidenced by public opinion.

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

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

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

Planned Parenthood of Southeastern Pennsylvania v. Casey (1992)

In deciding whether Roe should be overturned, the Casey Court pinpoints the ways in which Roe differs from Plessy and Lochner with regard to its application of factors at the core of PBD: “Because neither the factual underpinnings of Roe’s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973.”

The rights principles and the social constructions that link these principles 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 privacy. Women and their families had grown to rely on the existence of rights of abortion choice, and that reliance provided the Court additional reasons for its acceptance of the right of abortion choice as fundamental. This expanded concept of personhood in Casey was a result of the mutual construction of legal precedents that increasingly recognized the active place of women in society, and rights principles that were extended as a reflection of that expanded role. It also is attributable to timing and the fading of vigorous critiques of substantive due process.

In Casey, the Supreme 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. 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. 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.


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.\textsuperscript{11} The willingness of the Supreme Court in \textit{Lawrence} to look at the expansion of rights of personhood since \textit{Roe} and \textit{Bowers}' failure to engage in PBD are the major reasons why that case was overturned in \textit{Lawrence} (Kahn, 2006a, p. 72).

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

The Court emphasizes that the \textit{Bowers} Court construed the issue too narrowly, as merely involving the right to engage in certain sexual conduct. “The laws involved in \textit{Bowers} and here ... have more far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home... When 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. The liberty protected by the Constitution allows homosexual persons the right to make that choice.”\textsuperscript{16}

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

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

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

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

Justice O’Connor’s Lawrence concurrence also features a robust PBD. O’Connor rejects traditional norms as a sufficient basis for disadvantaging groups of citizens: “Moral disapproval of a group cannot be a legitimate governmental interest under the Equal Protection Clause because legal classifications must not be ‘drawn for the purpose of disadvantaging the group burdened by the law.’” 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.”

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 PBD reveals broad agreement with many of the majority’s substantive conclusions. 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.
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. 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.

In Lawrence, Scalia continues to attack the conditions laid down in Casey under which the Supreme Court is to overturn landmark decisions, 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.” 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.”

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.” 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.”

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. 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 marriage to homosexual couples exercising “[t]he liberty protected by the Constitution”?41

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

Thus, Scalia’s rejection of a robust PBD 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 (Kahn, 2006a, p. 83). In rejecting the emerging awareness and reliance arguments used in Casey and Lawrence as simply result-oriented43, Scalia opposes rights which evolve and are defined and redefined under non-originalist PBD. One sees this when he seeks the narrowest reading of the Lawrence decision, and refuses to 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 (Kahn, 2006a, pp. 83–84). Most importantly, he refuses to accept the Lawrence majority view that simple moral opposition is not sufficient justification for upholding a law under rational basis review.

Rejection of Political Contestation as a Basis for Determining Individual Rights

The Supreme Court sustains and expands individual rights, even gay rights, because, as explored above, majority and concurring Justices in Casey and Lawrence strongly reject political contestation and majoritarian opinion as reasons on which to decide implied fundamental rights cases. When the Casey and Lawrence Courts engaged in PBD, they considered whether the rights at issue in these cases, privacy and personhood, are still important and expanding and whether citizens have accepted these rights in their lives.
Non-originalist Justices accept the idea that because the Supreme Court is supposed to be a counter-majoritarian institution, it should not make constitutional choices on the same bases as more directly political accountable institutions.

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

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

*Expanding Gay Rights in a Conservative Political Age*

Understanding the key components of non-originalist Supreme Court decision making helps explain why a conservative Court in a conservative age chooses to expand the rights to abortion choice and homosexual privacy and personhood. The Supreme Court sustains the right of abortion choice and expands gay rights because of the institutional effects of the Supreme
Court accepting and engaging in PBD. PBD causes the Supreme Court to be simultaneously empirical and normative and inward and outward looking in its decision making. It results in the mutual construction of the internal and external through a process I will call the “interpretive turn.”

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

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

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

The process is also external or outward looking to social, political, institutional, cultural, historical, and intellectual forces. Here we focus in more direct terms on the lives of individuals and groups in the world outside 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
social constructions developed in prior cases, and the external is opened up again when the Court decides a case and engages in a new process of social construction. Thus, there is a past, present, and future aspect to the consideration of gay rights.

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

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

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

Historians and Political Scientists

The unique qualities of the dual mutual construction process and the Supreme Court’s autonomy from the direct effects of other political institutions have important ramifications for how we study the Supreme Court as an actor in American political development and the politics that surround the Court. In “system” terms, the unique qualities of the mutual construction process inform the boundary conditions of the Supreme Court. To view Supreme Court decision making as primarily internal or narrowly legalist is to proceed according to a faulty assumption – that the process is simply about rights as norms mechanically applied. However, few scholars
now view Supreme Court decision making in such narrowly legalist terms. The greater problem in contemporary scholarship is not a belief in legalism, but the notion that Supreme Court decision making can be explained only by factors external to the Court.

Both social scientists and legal scholars seek to explain doctrinal change based on phenomena outside the Court. This is because all such externalist approaches are built on expectations of correlations of Court action with factors outside the Court, whether they are public opinion, international events such as the embarrassment during the cold war with the denial of equal rights to African-Americans, critical elections, or the policy view of Presidents and those they appoint to the Court. Correlations do not explain Court actions. They are one-dimensional; they only explore the 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 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 nation’s citizens are taken into account. This bi-directional mutual construction process has unique qualities which are different from more directly politically accountable institutions.

The first indication of the problems inherent to standard historical and 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 versus politics, with law and politics segmented as internal and external elements, and the place of law as secondary to politics in such accounts.

The nature of the social construction process provides clear evidence that the “law” versus “politics” dispute that has dominated much of the academic debate over the nature of Supreme Court decision making is misguided. This debate is better conceptualized as being about the respective influences of internal and external factors on Supreme Court decision making, with “law” being an important potential internal influence and electoral “politics” being a significant potential external influence (though elections do not comprise the whole of potential external influences). The 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 perpetually playing itself out in courts that courts are not “little legislatures.” The interplay of the internal and external taking place in 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 external in its decision making, through what I have called a mutual construction process.
Because Supreme Court decision making cannot be segmented into 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 on a problematic of “Law” versus “Politics” are lacking and unpersuasive. Historians and historically oriented social scientists have tried to make a link directly between specific historical events, such as a critical election or the “growth of the administrative state,” and Court decision making – with no great success. They have argued Court decisions result from “revolutions” in the nation, such as the Founding, the passage of the Civil War amendments, and the New Deal. Although recently some of these historians have begun to reconsider the revolutions thesis, historians in and 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 historical events such as the New Deal revolution and critical elections. Some legal scholars have adopted the historians’ external stance by arguing a revolutions theory. These include the preeminent “revolutions” constitutional scholar of our age, Bruce Ackerman, who argues that periods of normal politics are punctuated by periods of constitutional revolutions, such as the Founding period, the passage of Civil War Amendments, and the New Deal. With regard to the New Deal era, Ackerman argues that critical elections and the growth of the administrative state caused the Supreme Court to decide the West Coast Hotel case, and produce a revolution in jurisprudence with its rejection of Lochner era polity and rights principles.

Too many historians fail to emphasize the incremental, but constant nature of change in the law, because they center their analysis only on landmark cases, asking whether they can be explained by specific historical events, rather than looking at the evolution of doctrine over the decades. Landmark 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, economic, and political constructions have been under attack.

Attitudinalism, a popular political science approach to explaining doctrinal change that seeks to explain Supreme Court decision making based on the attitudes that Justices have to government policies, clearly demonstrates the problem with simply externalist analyses of Supreme Court decision making. This is because of the importance of institutional norms and processes on the Supreme Court; these severely restrict Justices from making decisions on attitudinal grounds. The presence of constituting institutional norms and practices means that Supreme Court rulings have objectivity and are independent of individual subjective policy opinions.
held by each participant in a majority opinion. The collective nature of
decision making acts as a constraint on individual preferences. Preexisting
institutional norms and expectations of behavior limit the effect of a priori
policy choices on judicial decision making. Because of this, Supreme Court
decision making is not reducible to the sum total of individual private
preferences of Justices, in contrast to what the attitudinalists argue. Because
of the dual mutual construction process (normative and empirical and
internal and external), the act of decision making is also not reducible to
historical and political events external to the Court.

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

Another behavioral explanation for Court decision making that also does
not take seriously the importance of the mutual construction process are
those that emphasize that Justices act strategically to further the
institutional interests of the Court. The operation of the mutual construc-
tion process in implied fundamental rights cases provides additional
evidence for why the Supreme Court is not simply or primarily “strategic”
in its decision making. In Casey, the Court provided a detailed
explanation of the conditions under which landmark decisions are to be
overturned, argued for a robust PBD, and specifically rejected political
contestation and the votes of legislatures and the wider public as central to
its determination of the implied fundamental rights. In Romer, the Court
relied on the Casey conditions, and its support of a robust PBD, to find
unconstitutional an amendment to the Colorado Constitution that would
have denied gays the use of regular legislative, executive, and state court
means to protect their rights. Finally, in Lawrence, the Court reaffirmed
Casey’s conditions for overturning landmark decisions, and engaged in PBD
that resulted not simply in overturning Bowers on minimalist equal
protection grounds, but in an expansive opinion extending rights of
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.
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
political reactions by Congress, the states, and the people. Strategic factors as
explanations for Court action in *Casey* and *Lawrence* are submerged because
Justices accept institutional norms that ask them to consider substantive
constitutional questions as to what constitutes privacy, personhood, and
liberty through the mutual construction process as described above. The
Court does not focus on its strategic institutional interests; it engages in the
process to decide whether rights have been violated by government, in
comparison to what rights have been protected in the past.
This does not mean that Justices never think strategically. Rather, they
rarely think in solely strategic terms. There are indications of strategic
considerations in *Casey* and *Lawrence*. This seems particularly so in
O’Connor’s concurrence in *Lawrence*, where she specifically decides to leave
for another day the question of the constitutionality of laws that outlaw
sodomy for both heterosexuals and homosexuals, trusting that state
legislatures will not pursue such laws given the *Lawrence* decision. As
much as one might want to argue that O’Connor is thinking strategically,
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
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
central to her thinking, why did she engage in an expansive social
construction of gay rights in her equal protection analysis?
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
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
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-
originalist concurrence; that to accept her concurrence has left the fox in the
chicken coop with regard to future increases in implied fundamental rights,
including the rights of homosexuals.
One could say that O’Connor chose to respect institutional concerns by not
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
of trusting legislatures to do the right thing in O’Connor’s concurrence), the nature of O’Connor’s definition of the rights involved, and her respect for PBD as outlined in *Casey*, continue to be important to the future of implied fundamental rights. Rarely are cases only about strategic-institutional concerns, even, as Graber has demonstrated, in times when Presidents are brought to the Court for abuses of power during times of war.65

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

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

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

*Cass Sunstein’s Theory of Judicial Minimalism*

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

Sunstein and other pragmatic legalists, like behavioral political scientists, have rejected the presence and the importance of the social construction process within Supreme Court decision making, and seem to be siding with behavioral political scientists in looking primarily to external rather than jurisprudential guideposts for Court decision making.67 Sunstein failed to predict the depth and breadth of the rights of homosexual rights of privacy and sexual intimacy in *Lawrence v. Texas* (2003) because “judicial minimalism” as a statement of what Supreme Court decision making is or
should be distorts the nature of Supreme Court decision making. This distortion has at its base a pragmatic and ends-oriented conception of Supreme Court decision making, in contrast to Sunstein’s prior model of Court decision making which had as its central premise that the Supreme 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 the presence of the social construction process.

One could ask why the Court did not simply overturn the anti-sodomy statute based on an argument of desuetude, as Sunstein favored, rather than eviscerating *Bowers* and employing a maximalist mode of decision making in *Lawrence*. 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 principles and social constructions in cases before and after *Bowers* of their precedential value, thus undermining rights important to a majority of the 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 the non-originalist view of the rule of law and the Supreme Court’s role as the arbiter of the Constitution.

Allowing *Bowers* to stand or deciding the case on equal protection grounds, or even on a more minimalist basis, would have undermined moral propositions that were already in the law that were important to six members of the Court, including O’Connor. It is quite clear that even though O’Connor wants a more minimalist response to *Bowers*, based on the Equal Protection Clause and the substantive elements in *Romer*, an analysis of her social construction process provides evidence that she agrees with many of the substantive 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 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 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 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.

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 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 minimalism as a strategy for Court action. This strategy is not an adequate explanation of the process of Supreme Court decisions, with institutional
rules that favor the application of past polity and rights principles through a process of social construction, a process the Bowers Court avoided. Had 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 chose not to overturn Roe v. Wade, the Lawrence decision would not have been unexpected.

There are implications of these findings for future constitutional theory. If any theory redefining the rights of subordinated groups is to have legitimacy 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 should look in the future. For example, Lessig raises important questions about concepts of meaning in Ackerman’s theory. He demonstrates that Ackerman’s work centers on “the modalities of social meaning." Lessig argues that fear of faction leads Ackerman to resist Mark Tushnet’s call for plasticity in the process of constitutional change, with the result that major constitutional moments are rare and hard to achieve. Fear of faction also leads Ackerman to give the Supreme Court a major role in putting new constitutional values into effect, by the synthesis of inter-generational constitutional values in the process of deciding cases.

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

In critiquing Bruce Ackerman’s vision of constitutional change, Lessig argues that Ackerman favors too much plasticity in the translation by the
Supreme Court and lesser courts of the meaning of alterations of the Constitution. He believes that high levels of plasticity in the translation process undercut the moral meaning of structural change and the values of Constitution. However, when one looks at rights of privacy and sexual intimacy, the social construction process in Lawrence demonstrates a tighter fit with polity and rights principles, and precedent, than Bowers. This suggests an appropriate level of plasticity, in Lessig’s terms, in the definition of rights of personhood for homosexuals. Thus, Lawrence increases the legitimacy of the Court among legal scholars and other members of the interpretive community.

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

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

A constitutional theory of subordinated groups requires that choices to be made on the basis of past traditions of oppression, as to which classifications in the law should be suspect. However, if one determines which groups are to be suspect in a fashion discussed by Sunstein, one still has a decision to
make as to which conditions or situations need to be compared. In the suspect classification system, once we decide who is in (gender, religion, and race, but not sexual preference and size of body, for example) then we can look at all such classifications and scrutinize what level of argument in support of the classification the state must give to allow it to exist.

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

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

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

The major problem with Sunstein’s concept of judicial minimalism is his failure to continue to call on the Supreme Court to reject the status quo as neutral. The process through which the Supreme Court decides whether or not to reject the neutrality of the status quo provides an argument for the
importance of the role of the Court’s construction of the social, economic, and political world outside the Court in the process of its decision making. A process of construction, but not the specific process of construction that is advocated by Sunstein, is central to Supreme Court decision making. As Alschuler demonstrates, the Court engaged in such constructions well before the age of judicial realism. 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 importantly, 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
Republic is far more demanding than Ely’s because the political system is to deliberate on public-regarding values, not simply keep a numerical majority from being unfair to a discrete and insular minority. Also, while Sunstein’s minimalism eschews natural rights, such rights are part of the background 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

Viewing fundamental rights principles as secondary to polity norms as Sunstein does in his concept of judicial minimalism will result in less protection of individual rights, because Sunstein’s trust of political institutions 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 government 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?

I also question whether it is best for the Supreme Court to have a minimalist approach in an argument for a right. While it is true that minimalism may foster a decision for a new right because Justices can agree 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.

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

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

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

This process produces a legal secularism which is a defining characteristic of the Supreme Court, most legal institutions, and of the rule of law itself. 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. 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
why personhood rights under the Constitution were extended to homosexuals, in the dramatic and unexpected expansionist decision in *Lawrence v. Texas* (2003).\(^7\)

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

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

In the framework of a mutual construction process with robust PBD, disagreements between originalists and non-originalists regarding how the Constitution should be interpreted become clearer. In this context, we can explain the response by Justice Scalia to the substance of *Casey* and its rules or conditions under which the Supreme Court may overturn landmark decisions. We also can better understand Justice Scalia’s opposition to the acceptance of these conditions in both the *Lawrence* majority opinion and 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 future implied fundamental rights are what most concerned Justice Scalia. This also helps us understand why he viewed O’Connor as disingenuous 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 to same-sex marriage.

All Justices, originalists, 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. 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.

Where they differ primarily pertains to what should be included in the process of social construction. The conflict between the originalists and non-originalists is over the relationship between the internal and external (and
the normative and empirical). The “external” reference point for most
originalists is the narrow time frame of founding periods. Originalists reject
the permissibility of the external in Court decision making moving beyond
the founding periods of the Constitution and its amendments. For Scalia,
and most originalists, the manner in which privacy, personhood, and
homosexual rights have developed is not principled because the rights reflect
rights principles that are defined in terms of the lives of individuals well past
the founding of the Constitution and the Civil War Amendments.

Originalists oppose consideration of the rights of gays in terms of looking
at their lives, through the normative and empirical PBD, because the
normative bases of these rights come from implied fundamental rights which
were established by an expansive notion of the empirical. The rights do not
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
accept PBD and all rights based on that process, if that process moves
beyond intentions derived from founding periods. Thus, Roe, Casey, Romer,
and Lawrence are all illegitimate claims of “Constitutional” law. This
suggests that a primary fissure on the mature Rehnquist Court, with regard
to, among other things, the treatment of implied fundamental rights, is
between originalists and non-originalists, rather than between conservatives,
moderates, and liberals, and at the core of such differences is the legitimacy
of a robust PBD. Many scholars argue that all Justices, originalists, as well
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
bases on which they make constitutional choices. They are correct.
However, the attack by the originalists on a core element of the non-
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
process itself, and thus of much of contemporary constitutional law.

The legitimacy of an expansive PBD and the nature of its components is
not simply the defining fissure within the mature Rehnquist Court: it has
become a core conflict within the interpretive community, and, more
generally within contemporary American politics. This was evident in 2005,
as the Senate considered the “nuclear option” to get rid of long-standing
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
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
Supreme Court, when questions centered on whether he would honor
precedents.
The legal objectivity or secularism witnessed in PBD in *Casey* and *Lawrence* is exactly what the religious right and social or cultural conservatives off the Court also oppose, and their secularist opposition admire. Thus, there is a feedback effect between differences on the Court over the legitimacy of a robust PBD, and the cases that result from such differences, to American politics, one which portends to be with us for many years. These differences are not simply over controversial Court decisions, such as *Roe, Casey*, and *Lawrence*, they are over the nature of Court decision-making process and the place of the Court in American political development.

The key issue in this debate is whether a social construction process is to occur in the future. The question debated today is not whether a conservative, moderate, or liberal will be appointed to the Court, but rather will the nominee will be a non-originalist or originalist. Criticism from cultural conservatives now focuses on Justices Kennedy and O'Connor, not because they are liberal; they are not. Rather, they are criticized for the *Casey* and *Lawrence* decisions and their view of Court role. They are criticized because they accept the components of a Court decision making whose rules allow the continuation of implied fundamental rights of privacy and personhood, and their application to the rights of homosexuals.

The central question has become whether appointees will honor precedents that employ the main components of that process and, most importantly, engage in PBD in the future, with the possible result that implied fundamental rights will be expanded, as they were in the past, in *Casey*, *Romer*, and *Lawrence*.

**PBD as a Motor for Social Change**

Social constructions become “pictures in precedents” of the rights principles of liberty, privacy, and personhood. As these pictures grow, new groups are viewed as possible candidates for protection under them. These core elements of objectivity and autonomy represent an invitation, a hope, to groups not currently afforded equal protection of law – that they also might partake in the protection of basic rights like liberty, privacy, and personhood. When these new groups step up to bat, they argue to court that they also deserve protection, and the mutual construction process, which links the normative and the empirical, makes it increasingly more difficult for courts to say no. The rights development process gains a persona of its own, on the Supreme Court, in the legal-interpretive approach.
community of law professors and social scientists, and the wider interpretive
community of legal advocacy groups, journalists, bloggers, and the
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

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
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-
originalist decision making and the institutional norms of PBD which lead
to judicial autonomy from pressures of majoritarian politics infuriate the
religious right and other cultural conservatives. The exercise of this legal
secularism becomes politically charged and controversial especially when it
brings new minority groups under the protection of law. This objectivism
may not be understood, or appreciated, by the wider public, and the
politicians they elect. It is an anathema to citizens and groups who hold
strong moral positions as to what constitutes proper behaviors and lifestyle,
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
respect their moral and ethical values, that is, their sectarianism.

One can ask: Why should views and votes of the people of Kansas on
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,
institutional norms, and place in American political development call on
the Supreme Court to decide questions of individual rights, and do so in
ways peculiar to it as a legal, not political, institution. The social
construction process, interpretive turn, consideration of internal-legal and
external-social factors at the level of lives of citizens, and the cumulative
nature of the comparison of principles and past social constructions,
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
majority coalition.

The Supreme Court and the Non-Waning of “Legal Time”

In such a setting, PBD is closely linked to the place of the Supreme Court in
American political development. There has been a feedback effect from
conflicts over the legitimacy of PBD to general American politics (Keck,
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
mechanisms to change the direction of the law, by overturning landmark
cases, when principles and social constructions of them become anachro-
nistic. The Court can distinguish prior decisions, and reinterpret what the
underlying social facts mean, if the rights at issue are not so out of kilter
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.
NOTES


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 school 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.

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.


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

11. 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 Clauses did not trump the police powers of government. See Kahn (1999b, pp. 50–59) for the place of the social construction process in death penalty cases, one which has resulted in recent years in Supreme Court cases which limit the circumstances in which the death penalty is permitted. Perhaps, the Court will reconsider its failure to socially construct a relationship between government institutions, race, and death penalty conviction rates in *McCleskey v. Kemp*, 481 U.S. 279 (1987). This is a case ripe for modification or even overturning.

**Conservative Age Expand Gay Rights?**


15. Rather than basing its decision on due process rights 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, as advocated by Cass Sunstein, in Sunstein (2003). Acceptance of the social construction process, 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. For a full and detailed critique of Sunstein’s theory judicial minimalism as applied to *Casey* and *Lawrence*, see Kahn (2005).


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


21. *Lawrence v. Texas*, 539 U.S. 558, at 574 (2003) (quoting *Romer*, 517 U.S. 620, at 624). In this chapter I focus on the most controversial implied fundamental rights, the right of sexual intimacy and the possibility of the right to marry for gays and the right of abortion choice for women. However, to fully understand why such rights have expanded in a conservative age and to understand the crucial role played by the acceptance of PBD by non-originalist, whether liberal, moderate, or conservative, I need to explore the controversy as to whether such rights are to be found in the Due
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 and equal protection, the Supreme Court has opposed strict tiered analysis and favored a more robust consideration of substantive rights and procedural considerations.

22. Ibid. at 574 (quoting Romer, 517 U.S. 620, 624).
24. Ibid. at 571 (quoting Casey, 505 U.S. 833, 850).
25. Ibid.
26. Ibid. at 572 (quoting County of Sacramento v. Lewis, 523 U.S. 833, at 857 (1998), Kennedy, J. (concurring)).
27. Ibid. at 577.
28. Ibid. at 578–579.
29. Ibid. at 583 (quoting Romer, 517 U.S. 620, 633).
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.
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 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 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.
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 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. It does not speak to the impact and implications of her reasoning including social constructions on future constitutional law.
34. Scholars who view Supreme Court decision making as simply patterns of argumentation, rather than processes through which Justices decide cases, the 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 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 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, 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 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 making constitutional choices that respect the bi-directionality between rights principles and individuals in society under a rights regime created by the Court, as
well as the importance of the cumulative nature of principles and social constructions.

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 them, the principles and social constructions present at the founding of the Constitution and the Civil War Amendments. They also disagree with the originalists 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.

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 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 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 Burger and Rehnquist Court eras, and builds on debates about Court decision making and institutional role in the Warren Court era.

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 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 Court decision making, and the components of that process that they view as legitimate. For example, Justice Potter Stewart dissents in *Griswold v. Connecticut*, 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 *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 *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 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 gives for recognizing the right of abortion choice for women.

36. Ibid. at 593 (2003).
37. Ibid. at 572 (quoting *County of Sacramento v. Lewis*, 523 U.S. 833, 857 (1998), Kennedy, J. (concurring)).
39. Ibid. at 594.
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.
41. Ibid. at 604–605 (quoting Kennedy majority opinion at 574, 578, and 567).

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.


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).


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.


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).
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 and Haltom (1996) with regard to Clinton’s Ginsburg and Breyer nominations to the Supreme Court.

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

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 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 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. Also, see Kahn (2002) for an argument that 1937 is not an important dividing line as to the Constitution as a living document.

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

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 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.

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

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.


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

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 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 are still protecting abortion.”

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 *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 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.


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. 


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.


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

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 obverse of non-originalism.

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 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 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 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 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 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 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 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.

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 groups, see Kersch (2006), Nackenoff (2006), Novkov (2006), and Keck (2006), and the other contributions to Kahn and Kersch (2006a).

85. For an anecdotal account of the conservative movement in Kansas’s distain for liberals and liberalism in general and homosexuals in particular, see Frank (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 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 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 regard to presidencies through time.

87. This does not mean that the Court always engages in a (re)construction process, and always seeks to interpret the Constitution in light of change outside the Court. Polity and rights principles and the social constructions on which they are built may become static. However, this is not the usual process of Supreme Court decision making and doctrinal change.
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- The references listed below were noted in the text but appear to be missing from your literature list. Please complete the list or remove the references from the text.
- *Uncited references*: This section comprises references that occur in the reference list but not in the body of the text. Please position each reference in the text or delete it. Any reference not dealt with will be retained in this section.

**Queries and/or remarks**

<table>
<thead>
<tr>
<th>Location in Article</th>
<th>Query / remark</th>
<th>Response</th>
</tr>
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<tbody>
<tr>
<td>AU:1</td>
<td>Please clarify what (’09) stands for in note $.</td>
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<td>AU:2</td>
<td>In note 9, please indicate if Kahn (1999) is 1999b or 1999c.</td>
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<tr>
<td>AU:3</td>
<td>In note 55, Silverstein and Halton (1996) has been changed to Silverstein and Haltom (1996) as per the reference list. Please confirm.</td>
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<td>AU:4</td>
<td>Spaeth and Jeffrey (1999) has been changed to Spaeth and Segal (1999) as per the reference list. Please confirm.</td>
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<td>AU:5</td>
<td>In footnote 66, Graber (2000) is not in the reference list. Please check.</td>
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<td>AU:6</td>
<td>Please provide the volume number in Sunstein (2003).</td>
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