

INTRODUCTION TO A SPECIAL ISSUE OF *CONSTITUTIONAL STUDIES*

The editors of *Constitutional Studies* are very pleased to present this special issue as a *Festschrift* honoring the scholarly contributions of Ronald Kahn. In an active and ongoing career beginning in the 1970s Kahn has established himself as a strong and at times professionally lonely voice in political science advocating a focus on the content of legal decision-making as well as on the political contexts in which decisions took place. During a period when the discipline of political science as it applied to law and courts seemed relentlessly focused on the project of reducing jurisprudence to the expression of quantifiable policy preferences, Kahn's work reminded readers and practitioners of the elements of doctrine, narrative, and judgment that ultimately defined the lasting significance of rulings.

At the same time, Kahn never fell into the internalist, doctrine-driven camp popular among law school faculty of the same period. Instead, Kahn has devoted himself—particularly in recent years including his forthcoming work—to identifying the mutual influences of legalistic polity and right principles on the one hand, and social constructions of identities, roles, and practices on the other. In what Kahn calls a “bidirectional” analysis, he has presented a persuasive case that attempts to reduce judicial reasoning to either deterministic expressions of extra-judicial politics or purely autonomous legal deductions from first principles are equally misguided. The truth lies in the interaction between these different discourses. Legal principles express their content through the construction of social and economic life; it is these constructions as much as formal rules that determine the meaning of constitutionally protected rights and institutional rules.

Examples of the bidirectional interaction between legal principles and social constructions are evident in all areas of law, but certainly considerations of economic and gender relations have been particularly fruitful areas of investigation. One of Kahn's most important insights drawn from investigations of these areas of jurisprudence is that the enduring power of a precedent depends at least as much on the depth of the social constructions on which it relies as on the sophistication

of its formal logic. Kahn applies this reasoning to explaining why *Roe v. Wade* has not suffered the fate of *Lochner v. New York*. *Lochner* depended on a paper-thin social construction of worker-employer relations. By contrast, whatever its other strengths or weaknesses, *Roe* incorporated a social construction of the place of women in society that included considerations of autonomy, personhood, identity and gender equality in addition to formal legalistic categories of “privacy.”

In his recent and upcoming work Kahn has further refined his ideas about the social construction of facts as an element in the construction of legal narratives, identifying “precedential social facts” as those that become accepted as the basis for the extension of legalistic principles. To be sure, there are judicial voices that resist the recognition of the role that socially constructed facts in jurisprudence, even their own. The difference, in Kahn’s view, between formalistic originalism and what are often called “progressive” judicial philosophies is not defined by differences of doctrine but rather by the relative willingness of judges to attend to “the lived lives of persons outside the Court.” The more justices remain willing to consider the social reality of lived experience the more the Court “remains in conversation with social, cultural, economic, and perhaps political changes “out there” (Kahn 2014, 1293).

Ordinarily, at this point an introductory essay would present a review of the arguments of the essays in this collection. In this instance, however, a reader is better directed to Kahn’s own excellent critical summary of the contributions in this special issue. The editors ask readers to note that in the best tradition of a *Festschrift* the essays collected here engage Kahn’s theories critically and productively, in some cases challenging the adequacy of his formulations, in others extending his insights in new directions. These essays are a rich source of substantial contributions to our understanding of the interactions among law, politics, and society in their own right. The authors are an outstanding collection of some of the best writers in the field. *Constitutional Studies* is proud to present their work to scholars and the public in this forum.