THE SUPREME COURT AND "THE REALITY OF LIVED LIVES"

CAROL NACKENOFF[1]

ABSTRACT

Ronald Kahn has contributed importantly to understanding the Court's principled decision-making and members' awareness of changing social facts. He sees a Court that is responsive to changes in "lived lives" and that is increasingly rights-protective even as its membership became more conservative. Kahn expects continued Court recognition of emerging fundamental rights because most members engage in bidirectional decision-making and regard certain social facts as precedential. This essay contends that heavy focus on gay rights, with decisions authored by Justice Anthony Kennedy, generates a skewed image of the Court; gay rights may be an outlier. Justices also embrace polity and rights principles that result in rights-protective decisions that do not readily fit a progressive narrative. The fact that Republican presidents have made a large majority of recent Court appointments but that *Roe v. Wade* remains and gay rights have been affirmed also makes sense when looking at who replaced whom from 1981 to 2018.

1. Richter Professor of Political Science, Swarthmore College. There are variations on this phrase "the lived lives of persons outside the Court," "the lived lives of individuals," "looking at the reality of the lived lives of same-sex couples." All of these variants, including the quotation in the title, *come from* Kahn (2014). Thanks to Harry Hirsch, Mark Graber, Tracy Tucker, and Kahn's Department of Politics colleagues who facilitated the event celebrating Kahn's career, "The Constitution in American Political Development: A Symposium," held April 14–15, 2017, at Oberlin College. Additional thanks to Swarthmore student Leo Elliott (2019) for research assistance on this paper.

Constitutional Studies, Volume 4

KEYWORDS: *implied fundamental rights, equal protection, social facts, rights expansion, Justice Anthony Kennedy, gay rights, abortion*

I. PREFACE

Ronald Kahn and I shared a beloved mentor in J. David Greenstone at the University of Chicago. David asked me several times whether I knew "Ronnie" Kahn, who had left for Oberlin a few years before I arrived at Chicago; it was as if he instinctively knew that I needed to meet Kahn.[2] However, I did not meet Kahn until he organized a 1991 American Political Science Association (APSA) panel on Greenstone's Legacy following our mentor's untimely death in 1990. We subsequently participated in a panel at the University of Chicago in preparation for a memorial volume for Greenstone (Ericson and Green 1999), and shortly thereafter, I began inviting Kahn in as an external honors examiner for my new Swarthmore seminar on constitutional law. He did a great job with the Swarthmore students, challenging them and stimulating them, and has come back frequently in that role. Occasionally, I traveled to Oberlin to conduct honors exams for one or more of his excellent students. Over the years, Kahn and I became good friends, and he pushed me to expand my horizons. One of those ways was in encouraging me (and building my confidence) to hazard writing a chapter on reformers and American Indians for the *Supreme Court and American Political Development project* (Kahn and Kersch 2006; Nackenoff 2006). Kahn knew that I had written about late-nineteenth-century reformers who were self-styled Friends of the Indian, but this venture would be the first time I would write about reform in the context of law. The experience launched a number of subsequent projects that I surely would not have undertaken without this initial push and encouragement from Kahn. Kahn was extremely generous with advice, offering his experience and expertise to me and to my students who were considering law school. He has been recognized for his extraordinary mentoring by the Law and Courts Section of the APSA. It is an honor to participate in this event celebrating Kahn's career, and it is hard to realize that he is retiring. Here, I will reflect and comment on some contributions and major themes in Kahn's scholarly work.

2. When Steve Skowronek read us portions of Kahn's early syllabi at the Symposium at Oberlin, they reminded me so clearly of David Greenstone's influence and of Greenstone's preoccupation at the time with scholars such as Wittgenstein (with language, words are like tools in a toolkit; their meanings are socially established) and Ralf Dahrendorf (the distinction between class in itself/for itself). See Wittgenstein (1953/1978) and Dahrendorf (1959).

II. A VISION OF THE COURT

Asking how Republican presidents could have made thirteen of fifteen appointments to the Court from 1969 through 2006 [3] and not have overturned any major individual rights decisions of the progressive Warren Court, Kahn challenges scholars of the Court to offer satisfactory explanations. This is not just a matter, he contends, of the difficulty of chipping away at—or unraveling—certain liberal decisions. Rather, Kahn insists that we recognize that "the Supreme Court has reaffirmed and expanded implied fundamental rights and equal protection under the law during a period of political dominance by social conservatives, evangelical Christians, and other groups who largely view the protection of their definition of family values as a central mission of government" (Kahn 2014, 1293, 1299–1300). Thus, for Kahn, *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992) placed *Roe v. Wade* (1973) on an even firmer footing by removing it from the realm of privacy and moving the rationale closer to a Fourteenth Amendment liberty interest,[4] while at the same time recognizing new social facts about women's roles. The majority opinion in *Casey* notes that

> for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. (505 U.S. 833 [1992], 856)[5]

Justices Sandra Day O'Connor, Anthony Kennedy, and David Souter—Republican nominees all—added that "an entire generation has come of age free to assume *Roe's* concept of liberty in defining the capacity of women to act in society, and to make reproductive decisions" (505 U.S. 833 [1992], 860).[6] The recognition that

---

3. This count does not include Justices Sonia Sotomayor and Elena Kagan, appointed by President Obama, Democrat, and Justices Neil Gorsuch and Brett Kavanaugh, appointed by President Trump, Republican.

4. Some substantive due process opponents would find little difference, I presume, between a right to privacy defense of abortion and one based on liberty interest, although liberty is at least mentioned in the Fourteenth Amendment and for natural law proponents, is foundational.

5. It is noteworthy that this passage includes a citation to an important recent study on abortion by a political scientist (Petchesky 1984/1990).

6. In this part, the three were also speaking for the majority.

women had begun, by 1973, to participate more fully in the economic and social life of the nation, the connection these justices recognized between women's control of reproductive decisions and more equal access to employment opportunities, and their awareness that such control affected their ability more generally to act in society were just the kinds of indicators that Kahn used to vindicate the claim that the justices—at least all but the most staunchly originalist—attended to changing social facts outside the Court. For the *Casey* majority, the state's "vision of the woman's role, however dominant that vision has been in the course of our history and our culture" appears insufficient to override the deeply personal interest a woman who bears the burden of pregnancy and childbirth has in making reproductive decisions (505 U.S. 833 [1992], 852).

In the new book, *Constructing Individual Rights in a Conservative Age* (Kahn, forthcoming), Kahn argues that the *Casey* majority recognized that, given the expanding role of women in the economy, society, and political system, denying the right of abortion choice would be of greater scope and degree than in 1973. Recently, he introduced a distinction between social facts *writ small* and those that are *writ large*, or "precedential social facts" (Kahn, forthcoming). "A Precedential Social Fact may emphasize polity principles or rights principles, although in most cases precedential social facts include within them the culminations of polity and rights principles by prior Courts that are now accepted by all but the most originalist of justices" (Kahn, forthcoming).[7] In *Casey*, there is a reconstitution of the precedential social fact (defined as a social fact writ large) that was *Roe*, leading to a more active notion of liberty than *Roe's* privacy interest. This is a new understanding of liberty and equal protection that is *bigger* than *Roe*.

Kahn draws from this that "*Roe* cannot legitimately be overturned" (Kahn, forthcoming).[8] I will return to examine this claim later. It does remind one of Bruce Ackerman's claim about the New Deal constitutional moment, in that certain sorts of non–Article V changes are held to have a kind of super-status at law (Ackerman 1991, 47–49 and chap. 5). It is not just about social facts in Casey, Kahn says, but precedential social facts.

Returning to the narrative about changing social facts following *Casey*, Kahn is certainly right in claiming that what the majority saw in *Casey* helped the Court find its way to *Lawrence v. Texas* (2003). In *Lawrence*, Justice Kennedy wrote for the

---

7. Part 2, Chapter 2, "Social Facts Writ Large: Precedential Social Facts," draft supplied by Ronald Kahn (March 20, 2017).

8. Part 2, Chapter 2, "Changed Factual Conditions, Social Constructions, and Overturning Landmark Decisions," draft supplied by Ronald Kahn (March 20, 2017), 30.

majority that laws and traditions of the past half-century "show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex" (539 U.S. 558 [2003], 572, 572).[9] Autonomy, dignity, and the ability to make choices about intimate matters were increasingly linked to personhood. In *Lawrence*, Kennedy reasoned that, in *Casey*,

> the Court reaffirmed the substantive force of the liberty protected by the Due Process Clause. The Casey decision again confirmed that our laws and tradition afford constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education . . . [These are among] "the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy." Persons in a homosexual relationship may seek autonomy for these purposes, just as heterosexual persons do. The decision in *Bowers* would deny them this right. (539 U.S. 558 [2003], 574)

Kahn has long been interested in how the Court remains connected to developments outside the Court. He insists on the bidirectionality of Supreme Court decision-making, wherein justices who are guided by polity and rights principles they bring to the bench also draw on social constructions to make sense of changes in the world outside the Court.[10] Polity principles are "justices' deeply held ideas about where decisionmaking power should be located when deciding questions of constitutional significance," such as beliefs about federalism and beliefs about whether courts or electorally accountable institutions were more appropriate to make constitutional decisions (Kahn 1994, 20). Rights principles are beliefs "about legally enforceable claims for individual powers, privileges, or immunities guaranteed under the Constitution, statutes, and law," and can be expressed as negative liberties or positive claims upon government (Kahn 1994, 21–22).

For Kahn, the Court remains rooted in the world outside, but not (or not chiefly) because of responsiveness to the political agendas of dominant elites built

---

9. In this passage in *Lawrence,* Kennedy quotes his own concurrence in *County of Sacramento v. Lewis* (1998, 857).

10. Polity principles refer to "justices' deeply held ideas about where decision-making power should be located when deciding questions of constitutional significance" and include beliefs about state, local, or national governments should make such decisions and whether courts or electorally accountable institutions should decide particular types of issues. Rights principles are justices' beliefs about "legally enforceable claims for individual powers, privileges, or immunities guaranteed under the Constitution, statutes, and law" (Kahn 1994, 21–22).

in through the appointment process, and not because of responsiveness to public pressures or changes in public opinion.[11] Rather, because of a disposition to attend to "*the lived lives of persons outside the Court* [emphasis added]," the Court remains in conversation with social, cultural, economic, and perhaps political changes "out there" (Kahn 2014, 1293).

What classifications in law have staying power? For Kahn, the *legitimacy* of social constructions is central to whether or not landmark decisions are overturned. What are the empirical applications of past and present social constructions? Kahn argues that applying the right principles to the lived lives of individuals leads to normative visions of what constitutes justice.

There is no break for Kahn, between the *Lochner*-era Court and the New Deal Court in terms of how the Court incorporates social facts into its decision-making. There is no rift between an age of formalism and an age of realism; following Tamanaha, Kahn sees this as a false dichotomy (Tamanaha 2009; Kahn 2014, 1302–304). Precedential social facts inform most justices' decision-making, whether they are liberal, moderate, or conservative. Although Kahn's work generally focuses on decision-making from the Warren Court to the present, he is making larger claims about how the Court works—and how it *should* work. In fact, in the new book project, we get the sense that the development of constitutional theory is an essential means by which to try to *change* outcomes, increasing the chances for decisions other than, for example, *McCleskey v. Kemp* (1987).[12] The clear articulation of the social facts, and the polity and rights principles, that underlie a particular social construction, is held up as a form of engagement with, and defense of rights.

When I think about Kahn's work on gay rights from *Romer v. Evans* (1996) to *Obergefell v. Hodges* (2015), I am every now and again tempted to think about his claims in relationship to John Hart Ely's argument in *Democracy and Distrust* that the Court has warrant to intervene to address failures of the political process that make it impossible for discrete and insular minorities to use the political process to address exclusion or discrimination (Ely 1980). After all, Justice Kennedy's majority opinion in *Romer* makes the equal protection point that "[h]omosexuals are forbidden the

11. The classic formulation for the first contention is Dahl (1957). On public opinion as a constraint, see, for example, McGuire and Stimson (2004); see also empirical investigation and review of the literature (Casillas, Enns, and Wohlfarth 2011).

12. Specifically, *McCleskey's* holding that racially disparate impact in death penalty cases are insufficient to trigger any heightened scrutiny; statistical studies (here, the 1983 Baldus study) do not relieve the petitioner of burden to demonstrate that there was racial bias present in his own case. Kahn mentions this case as a paradigmatic example.

safeguards that others enjoy or may seek without constraint. They can obtain specific protection against discrimination only by enlisting the citizenry of Colorado to amend the State Constitution" (517 U.S. 620 [1996], 631), a kind of legally created disability. The legal imposition of disability argument recurs in Justice Kennedy's majority opinion in *Obergefell*: that given our long history of disapproval of same-sex relationships, the "denial to same-sex couples of the right to marry works a grave and continuing harm. The imposition of this disability on gays and lesbians serves to disrespect and subordinate them" (*Obergefell*, slip opinion, 22).

In this sense, gays and lesbians might be viewed a discrete and insular minority, uniquely disadvantaged by the political process.[13] But the comparison between the two scholars ends here. Kahn argues that Ely "harbors the problems of a static view of political culture" (Kahn 1999, 257, n. 34). Ely's approach is about the appropriate use of the power of judicial review in opening up the democratic *process* (the Constitution evinces a textual commitment to representative democracy); Kahn's is about an evolving conception of the *substance* of rights (Ely 1980; Kahn 1994, 188; Kahn 1999). Ely found no substantive rights in liberty and contended that the effort to read such rights into the Fourteenth Amendment—substantive due process—was a contradiction in terms, famously likened to "green pastel redness" (Ely 1980, 18). In Kahn's view, Justice Kennedy "is arguing that rights should not be defined as they were in the past" and that "principles of liberty and equality with regard to a right to same-sex marriage change over time and inform each other" (Kahn 2015, 307).

Kahn's constitution is very much alive. And it is that way, he argues, because of the bidirectional way the institution functions. The connection to lived experience is maintained because of the way some critical mass of other-than-hard-core originalist justices over time understand their roles and duties. His constitution is not only Justice Kennedy's (on equal protection and liberty interests) but is also Justice William Douglas's in *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966), where "notions of what constitutes equal treatment for purposes of the Equal Protection Clause do change" (669). "What constitutes liberty and abuse of government authority changes as our nation changes" (Kahn, forthcoming).[14] For Kahn, the decision in *Obergefell* was not contingent upon a crystallization of

13. Justice Antonin Scalia, however, saw the power dynamic differently. He wrote in dissent (*Romer*, 636, 648) that Colorado Proposition 2 was a "modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority to revise those mores through use of the laws." This powerful minority was geographically concentrated.

14. Part 2, Chapter 2, "Social Facts Writ Large: 'Precedential Social Facts'," draft supplied by Ronald Kahn (March 20, 2017), 20.

momentum on same-sex marriage.[15] Rather "emerging fundamental rights develop through a process that is, importantly, legal and bidirectional" (Kahn 2015, 307). In the case of *Obergefell*, the Court simply came to realize that marriage, viewed as central to the liberty of heterosexual couples, was also central to the liberty interests of same-sex couples.

Kahn also argues that Justice Kennedy "emphasizes that the Supreme Court should not wait for democracy to act when fundamental rights principles already known to courts will be abridged in doing so;" thus in *Obergefell*, Kennedy wrote that "individuals need not await legislative action before asserting a fundamental right. The Nation's courts are open to injured individuals who come to them to vindicate their own direct, personal stake in our basic charter" (Kahn 2015, 307; *Obergefell*, slip opinion, 24). For Kahn, because Kennedy understands that "fundamental rights are not fixed if change is to come to society," the Court can be proactive in protecting rights (Kahn 2015, 307). He sees Justice Kennedy endorsing his claim that the Supreme Court has a vital role to play in democracy: "It is the role of the Supreme Court, engaging in a bidirectional legal process, to determine implied fundamental rights, not political institutions directly accountable to the electorate" (Kahn 2015, 307).

Kahn uses Justice Kennedy to channel some of his views of how the Court functions. I would suggest, however, that this association between Kennedy and a rights-expanding Court generates certain problems of analysis.[16] For instance, Justice Kennedy, in *Schuette v. Coalition to Defend Affirmative Action* (2014), was willing for political institutions directly accountable to the electorate to determine, in a state constitutional amendment, that race preferences will not be used with respect to school admissions in Michigan.[17] And yet his reading of citizen prerogatives in

---

15. Some (notably Justice Scalia) accused Justice Kennedy in capital punishment cases of looking for momentum in public opinion or in state laws for a determination of what was cruel and unusual. See, for example, Justice Scalia's dissents in *Roper v. Simmons* (2005) and *Atkins v. Virginia* (2002).

16. Is Justice Kennedy's positions on taking cognizance of race in academic admissions or public school assignment decisions of a similar piece? Kahn has much less to say about race, where it is challenging to make a case about the Court's more expansive notion of equal protection since *Regents of the University of California v. Bakke* (1978), *City of Richmond v. J. A. Croson* (1989), *Adarand Constructors v. Peña* (1995), and *Shaw v. Reno* (1993). And are there rights expansions that are potentially illiberal? Are there different kinds of rights in conflict in *Citizens United v. Federal Election Commission* (2010), so that rights expansion needs to be considered differently? See, for example, Kersch (2004). And see further discussion below.

17. *Schuette v. Coalition to Defend Affirmative Action* (2014). For pieces that compare Justice Kennedy's approach in *Romer* and *Schuette*, see Pollvogt (2014) and Barnes (2016).

Schuette arguably placed racial minorities in a position relative to the political process that is comparable to the LGBT situation considered in *Romer*.

With Justice Kennedy playing a lead role, the Court has made it much harder for academic institutions to take race into account in school assignment or university admissions decisions. In this last matter, Kahn characterizes the glass as at least half-full: the moderate-conservative Court has not barred affirmative action altogether. I contend that the Court has left only a very, very small shred of discretion for schools to take race into account—but here, Justice Kennedy's polity and rights principles led him to the conclusion that "there is no authority in the Constitution of the United States or in this Court's precedents for the Judiciary to set aside Michigan laws that commit [the policy determination to bar race-based affirmative action] to the voters" (*Schuette*, slip opinion, 18).[18] We should hear more from Kahn about which classifications—and which lived lives—the Court will turn over to the elective branches, and why.[19]

Let us continue to think about the liberal rights penchant of a moderate-conservative court. I would *like* to believe there is some kind of path dependence such that precedential social facts, once embraced, do not get eroded. I'd *like* to believe that the "lived lives" the justices think about are those we see being noticed in *Roe*, *Casey*, and *Lawrence*. But I also would like to see Kahn talk about what it would take to falsify the claim that, once embraced, precedential social facts do not get eroded. Securing rights via the judiciary may instead be contingent and insecure. Why are we sure that it isn't chiefly about counting votes?

I did some simple back-of-the-envelope work to see whether it was so surprising that, in the face of heavy assault on *Roe* and backlash against gay rights and gay unions in a number of states via referenda (although not necessarily reflective of trends in public opinion about abortion or gay rights), and the number of judicial appointments Republican presidents have gotten to make, the right to an abortion has not been overturned as of 2018 and same-sex marriage is now the law of the land. I went back to every justice present for the *Roe* decision and tried to devise a

18. Kennedy, J. writing for the plurality. Presumably a key difference between Colorado Proposition 2 (see *Romer*) and Michigan's state constitutional ban on affirmative action, for Kennedy, is that the former singled out gays and lesbians; the Michigan voters endorsed an across-the-board ban.

19. Arguably, placing racial minorities outside the normal political process (by requiring supermajorities to reverse this decision by Michigan voters) should be more closely scrutinized than a voter decision such as Colorado Proposition 2, because a lower level of scrutiny (rational basis plus?) was applied when the issue was sexual orientation. This lower level of scrutiny, and Kennedy's animus test, continued through most of the other important gay rights decisions he authored.

TABLE 1. Net Change in Abortion and Gay Rights Votes on the Court Since *Roe v. Wade*

Justice	Replaced by	Appointed by	Abortion/ Gay Rights Change
Brennan (1956)	Souter (1990)	Eisenhower (D)*	
Stewart (1958)+	O'Connor (1981)	Eisenhower	
White (1962)	Ginsburg (1993)	Kennedy	Ab+, GR+
Burger (1969)	Scalia (1986)	Nixon	Ab–
Blackmun (1970)	Breyer (1994)	Nixon	
Powell (1972)	Kennedy (1987)	Nixon (D)*	GR+
Rehnquist (1972; 1986 CJ)	Roberts (2005)	Nixon	
Stevens (1975)	Kagan (2010)	Ford	
O'Connor (1981)	Alito (2006)	Reagan	Ab–, GR-
Scalia (1986)	Gorsuch (2017)	Reagan	
Kennedy (1988)	Kavanaugh (2018)	Reagan	No direct evidence to date
Souter (1990)	Sotomayor (2009)	GHW Bush	
Thomas (1992)	Currently Serving	GHW Bush	
Ginsburg (1993)	Currently Serving	Clinton	
Breyer (1994)	Currently Serving	Clinton	
Roberts (2005)	Currently Serving	George W. Bush	
Alito (2006)	Currently Serving	George W. Bush	
Sotomayor (2009)	Currently Serving	Obama	
Kagan (2010)	Currently Serving	Obama	

+Goldberg (1962–1965, nominated by Kennedy) was replaced by Fortas (1965–1969, nominated by Johnson; neither was present at the time of Roe.

*Although selected by Republican presidents, both Brennan and Powell were self-identified Democrats.

Sources: Kathleen M. Sullivan and Noah Feldman, *Constitutional Law*, 19th ed. (Foundation Press/ West Academic, 2016), Appendix: Table of Justices; Oyez for checking votes on *Bowers*, *Roe*, *Romer*, *Lawrence*, *Casey*, *Windsor*, *Obergefell*.

Note: This calculation could clearly be more fine-tuned to account for Kennedy's votes to uphold partial birth abortion bans, various justices' votes on required federal or state spending for therapeutic or nontherapeutic abortions, and more, but these cases should stand as a good test of marked shifts on the Court.

simple story about change in personnel and change in Court position on *just* abortion and gay rights.

Although the seven-member majority in *Roe* included four Republican-appointed justices, two of them (Brennan and Powell) identified as Democrats. It can hardly be claimed that abortion was an issue Eisenhower would have been thinking about, or that Nixon cared a great deal about it or foresaw the issue looming when he appointed Justice Harry Blackmun.[20] Justice Byron White, a *Roe* dissenter (alongside Justice William Rehnquist), was replaced by Justice Ruth Bader Ginsberg in 1993, who has been a reliable liberal vote on abortion and gay rights. Justice O'Connor's replacement, Justice Samuel Alito, has been consistently more conservative on abortion and gay rights. Clearly, several Republican appointees have been less conservative on these issues than the president who nominated them and than some social conservative supporters probably would have anticipated (Justices Blackmun, Souter, and Kennedy). Despite the fact that Republicans have had many more appointees to the Court in the period covered by the table (fourteen versus five, excluding the two Democratic appointees Goldberg and Fortas, neither of whom was on the Court at the time of *Roe*), there has been relatively little rightward shift in positions on these two rights issues. In the case of eight Court replacements, Republican presidents replaced Republican-appointed justices or Democratic presidents replaced Democratic-appointed justices; one Democratic appointee was replaced by a subsequent Democratic appointee; and in three cases, a Republican-appointed justice was replaced by a Democratic-appointed justice.[21] Looking at the party of the White House incumbent at time Court vacancies occurred does not tell us enough to suppose there should have been a shift on abortion or gay rights, even if some Republican presidents and their allies wanted very much to effect a change in the Court's position.[22] There could, of course, be shifts when intraparty replacements occur; this is clearly apparent in the replacement of

20. Nixon made recorded but not public comments that it was probably important to permit abortion under some circumstances such as rape (or interracial pregnancies), although he worried about increased promiscuity and the effect of abortion on families. See, for instance, Totenberg (2009).

21. When Justices Brennan, Stewart, Burger, Powell, Rehnquist, O'Connor, and Scalia were replaced, these Republican-nominated justices were replaced by a Republican president. When Justice White was replaced by Justice Ginsberg, a Democratic appointee was replaced by a Democratic appointee. When Republican appointees Blackmun, Stevens, and Souter were replaced, they were replaced by a Democratic president. It would be better yet to locate departing and replacing justices on an ideological spectrum, especially on the issues of abortion and gay rights.

22. My remark assumes a sitting president successfully places someone on the bench when a vacancy occurs, which was not the case with Obama's pick of Merrick Garland in 2016 following the death of Justice Scalia.

Justice O'Connor by Justice Alito, and is likely to be the case in the replacement of Justice Kennedy by Justice Kavanaugh As the table indicates, however roughly, judicial replacements from the time of the *Roe* Court to the time of Justice Kennedy's retirement left the Court slightly more liberal on gay rights (plus one) and slightly less liberal on abortion (minus one. A number of recent decisions, however, have been made by a closely divided Court, and that makes the appointment of Justice Kavanaugh, and the possibility of any further appointments during the Trump Administration, very important.

Although the recognition in *Casey* of the social fact that modern women's lives have changed is noteworthy, it is important to remember several other critical things about the *Casey* decision. First, every restriction Pennsylvania placed in the way of a woman seeking an abortion was upheld save for the spousal notification requirement.[23] Second, *Roe*'s trimester framework was eliminated, and the Court acknowledged the state had an interest in a woman's health and in potential life throughout pregnancy. And third, the strict scrutiny that attended to the fundamental rights analysis in *Roe*—at least during the first trimester of pregnancy—finally yielded to the more relaxed (and more subjective) undue burden test that O'Connor first embraced in 1983 (*City of Akron v. Akron Center for Reproductive Health* 1983). Justice Blackmun bemoaned the retreat from strict scrutiny and feared that the right of a woman to seek an abortion rested on a very slender thread (505 U.S. 833 [1992], 929–34, 940–43). I do not think he was wrong. We can count votes. While Justice Gorsuch is likely to maintain the basic position of his predecessor, Justice Scalia, the replacement of Justice Kennedy with Justice Brett Kavanaugh probably means that most or all of *Roe* will be gone—and the rights-expanding parts of *Casey* along with it. The conservative alternative to *Roe* may, indeed, reflect polity and rights principles, but they will be different ones as concerns abortion. Different principles could include federalism and deference to democratic decision-making as the way to resolve such issues.

If we expand our consideration to other issue arenas, the claim that the moderate-conservative Court has been engaged in rights-expansion does not seem clear. To be fair, *Kahn* admits that precedential social facts may be more important and prevalent in some arenas than others (Kahn, forthcoming).[24] I have already raised the issue of affirmative action. Let me offer a few additional examples for which evidence for *Kahn*'s proposition is complicated, troubling, or even arguably negative. *Buckley v. Valeo* (1976) may be alive, but it has been transformed by

23. Kahn's response would be approximately what he contends in footnote 6 of Kahn (2015, 1296–1297).

24. Part 2, Chapter 2, draft supplied by Ronald Kahn (March 20, 2017), 18.

subsequent Court decisions into an almost-meaningless and easy-to-work-around affirmation of rules restricting campaign contributions.[25] One could cast recent campaign finance decisions as an expansion of speech rights—after all, corporations and wealthy individuals have more opportunities to "speak" with their money than they did before; but this seems an insufficient analysis. One could also read these decisions as a withdrawal of power from Congress to address lack of public confidence in the integrity of the electoral process, equalize access to the political process, or curb the role of large investors in democratic elections, creating at least an appearance of corruption.[26] The Court has, in recent years, also read corporate speech rights more broadly; has shown an inclination to read the federal Religious Freedom Restoration Act [RFRA][27] as providing reasons to exempt closely held, for-profit corporations from contraceptive mandates; and possibly has found reasons for exempting certain businesses that serve the public or public employees from having to take action in support of gay marriage that they claim violates their free exercise rights.[28] As *Kahn* has pointed out, a narrow Court majority also has found a nascent individual right or liberty interest in not participating in the health insurance market under the commerce clause in *NFIB v. Sebelius* (Kahn 2013).[29]

Yet *NFIB* suggests that it may become harder for the federal government to invoke the Commerce Clause—as it has become harder to invoke Section 5 of the Fourteenth Amendment—to reach congressionally determined problems of equal

---

25. In *Buckley v. Valeo* (1976), campaign expenditure limits under FECA by candidates or campaigns were held an unconstitutional restriction on core First Amendment speech rights; McCain-Feingold provisions were largely upheld until *Citizens United* (2010) and *McCutcheon v. Federal Election Commission* (2014) further weakened both *Buckley* and post-*Buckley* campaign reform statutes.

26. It appears that Congress may now act only to thwart *quid pro quo* corruption of the electoral process. It is not clear that the Court *ever* endorsed the notion that Congress had power to equalize access to the political process, although some have read *Austin v. Michigan Chamber of Commerce* (1991) as supporting an antidistortion rationale (*Austin* was overturned in *Citizens United*). The *per curiam* opinion in Buckley stated clearly: "the concept that government may restrict the speech of some elements of society in order to enhance the relative voice of others is wholly foreign to the First Amendment" (*Buckley*, 48–49). For an interesting recent treatment of campaign finance thinking, the corruption rabbit hole, and equal access, see Hasen (2016).

27. Passed in 1993, RFRA became P.L. 103-141.

28. In the October 2017 term, the Court agreed to hear oral arguments in the case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission* and ruled narrowly that, in hearing the case, the Colorado Civil Rights Commission violated the free exercise clause 584 U.S.___). The Supreme Court has been asked to grant certiorari in another case posing the larger issues of free speech and free exercise rights.

29. Kahn (2013) does not think it likely that the Court will expand this nascent right.

protection. The Court seems to be moving toward a principle that government should not prefer irreligion to religion with its money, finding the "wall of separation" that Jefferson (1802) and *Everson* (1947) talked about as an erroneous and discriminatory reading of the Establishment Clause.[30] Is there, then, something inexorable about the Court's movement toward protection of individual rights? Or are the kinds of gains to which *Kahn* points fraught, contingent, and more easily subject to reversal than his analysis might suggest?

III. CONCLUSION

In *The Supreme Court and Constitutional Theory*, Kahn made an important contribution to the study of law and courts by insisting, at a time when exposure to attitudinal and behavior models were turning students into cynics about the Court, that individual justices were faithful to a set of polity and rights principles that could be discerned in their opinions (Kahn 1994). Justices, he argued, were principled actors who did not understand their job as voting on their personal policy preferences, and sometimes they made the distinction between their preferences and their votes clear. Justice Kennedy, for example, famously noted in his concurrence in *Texas v. Johnson* [striking down the state's flag desecration ban] "The hard fact is that sometimes we must make decisions we do not like. We make them because they are right, right in the sense that the law and the Constitution, as we see them, compel the result. And so great is our commitment to the process that, except in the rare case, we do not pause to express distaste for the result" (*Texas v. Johnson* 1989, 421–22). And Kahn has pointed to the joint opinion in *Casey* as another example in which Justices O'Connor, Souter, and Kennedy penned an opinion at odds with their personal beliefs—an opinion that did not simply reflect a commitment to *stare decisis* (Kahn 2006, especially 97–99; see also Kahn, forthcoming, Part 2 of Chap. 2, March 20, 2017, 19–20, 31–33).

Yet there are different kinds of liberal and republican principles, and justices could come to different conclusions and be consistently faithful to polity and rights principles. How should we anticipate that liberal rights principles will prevail? This is the clear direction in *Kahn*'s account. We should not expect a retreat from the recognition of certain implied fundamental rights.

Let me restate and review Kahn's argument. If Supreme Court justices are neither results-driven nor doctrinaire, but rather guided by their own balancing of

30. I point here to *Trinity Lutheran Church of Columbia, Inc. v. Comer* (2017) and the implications for state Blaine Amendments prohibiting expenditure of state funds for religious organizations or institutions.

polity and rights principles, and if replacement is not the chief driver of constitutional change, what is it that makes constitutional decision-making dynamic and, Kahn would claim, increasingly rights-protective? The answer lies in Kahn's claim about attention to what is going on outside the Court—the social construction process. In considering "past principles and their application in the world outside the Court," the *Casey* majority *would not have been able* to claim that the rights at issue in *Roe* were invalid based on the experiences of American citizens (Kahn 2007, 26). Implied fundamental rights, including rights of liberty, privacy, and personhood, come to apply to new groups (Kahn 2006, 93 for one formulation). Among the factors that matter in determining whether a right should be sustained are "workability and citizen reliance on rights" and application of rights principles "to the lived lives of citizens under the law" (Kahn 2006, 69–70).

Lawrence, *Windsor*, and *Obergefell*—all decisions penned by Kennedy—make the best case for *Kahn*'s view of constitutional change. And Kennedy himself, the author of all three opinions (plus *Romer*) may be a good stand-in for how *Kahn* views judges as both principled and increasingly individual rights-affirming—in this arena of constitutional law.[31]

Given what I have noted about conservative retrenchment in other arenas of constitutional law, including in the matter of abortion, , how should we think about nonparallel trajectories? Is the Court, instead of protecting rights under the Equal Protection Clause, practicing a kind of LGBT exceptionalism? Is it the case that, as Russell Robinson argues, "the only site of vitality in equal protection jurisprudence is the claims of lesbian, gay, bisexual, and transgender (LGBT) individuals" (Robinson 2016, 154)?[32] The Seventh Circuit Court decision in April 2017 holding that employment discrimination on the basis of sexual orientation constituted sex discrimination could presage the next big step in securing LGBT rights, especially as it notes the Equal Employment Opportunity Commission's (EEOC's) 2015 determination to that effect and cites the Supreme Court's *Oncale* opinion.[33] For *Kahn*,

---

31. Justice O'Connor, who was another such justice for Kahn in *Casey*, did not support overturning *Bowers v. Hardwick* (1986) in *Lawrence* (but provided a sixth vote for the conclusion in the latter case that singling out same-sex couples for laws banning sodomy was an equal protection violation). She left the Court before any additional key decisions involving the rights of same-sex couples. Justice Souter, part of that *Casey* trio, joined Justice Kennedy in *Lawrence* and left the Court before *Windsor*.

32. Robinson (2016, 151) uses the term LGBT exceptionalism.

33. *Hively v. Ivy Tech Community College of Indiana*, decided April 4, 2017, by the Seventh Circuit Court of Appeals and which extends protections of Title VII of the Civil Rights Act of 1964 to LGBT persons, is at odds with other circuit court decisions and there is a good chance the Supreme Court will take up the issue. In the slip opinion at 8-9, the decision points to the EEOC's July 15, 2015, holding in *Baldwin*

some rights get entrenched. But if, as I have argued, some seem more fragile and contingent, how do we more fully acknowledge and theorize these changes?

I know, from more than thirty-five years of experience in the classroom, that hope and optimism are important to good teaching. *Kahn* has faith in the Court—hope and optimism. For him, the glass is at least half-full. Students often ask me, "So where is the good news?" Kahn can deliver it. Young, idealistic students need that optimism. I have much less hope and optimism about the Court, and I am deeply concerned about the future, especially given the possibility of yet another Court seat opening up in the next few years. Whether or not Justice Kennedy jeopardized his legacy on gay rights by retiring during the Trump administration, it is hard to imagine that Justice Breyer or Ginsburg would willingly depart given the jeopardy facing *Roe* and *Casey* after Justice Kennedy's departure. I certainly *hope* that Kahn's perspective is vindicated. I fervently hope that his *Constructing Individual Rights in a Conservative Age* comes out soon and makes me feel better about what is likely to lie ahead.

Kahn, I am sure, is going to continue to watch the Court closely, and tell us why we are not simply backsliding. I wish him a very happy retirement, and hope that he gets the Court that he has spent his career working for—and that we deserve.

REFERENCES

Ackerman, Bruce. 1991. *We, the People, Vol. 1: Foundations*. Cambridge, MA: Harvard University Press.

Baldus, David C., Charles A. Pulaski, and George Woodworth. 1983. "Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience," *Journal of Criminal Law and Criminology* 74: 661–753.

Barnes, Kristen. 2016. "Breaking the Cycle: Countering Voter Initiatives and the Underrepresentation of Racial Minorities in the Political Process." *Duke Journal of Constitutional Law and Public Policy* 12: 123–78.

Casillas, Christopher J., Peter K. Enns, and Patrick C. Wohlfarth. 2011. "How Public Opinion Constrains the U.S. Supreme Court." *American Journal of Political Science* 55: 74–88.

v. Foxx (No. 0120133080) in which it committed the EEOC to the position that the Title VII prohibition against sex discrimination includes discrimination on the basis of sexual orientation. Although the Seventh Circuit emphasized that there was no duty to defer to the EEOC position, the court took additional guidance from the Supreme Court's *Oncale v. Sundowner Offshore Services* decision (1998), holding that male-on-male sexual harassment could constitute sexual discrimination under Title VII. It is noteworthy that Justice Scalia, who wrote for a unanimous Court in *Oncale*, was usually supportive of expanded constructions of sex discrimination by the EEOC (including extension to forms of sexual harassment); Justice Gorsuch is not as likely to support the *Chevron* rule (*Chevron U.S.A., Inc. v. Natural Resources Defense Council* [1984]) as was his predecessor, which could play a role in future Title VII sex and sexual orientation cases.

Dahl, Robert A. 1957. "Decision-Making in a Democracy: the Supreme Court as a National Policy Maker." *Journal of Public Policy* 6: 279–95.

Dahrendorf, Ralf. 1959. *Class and Class Conflict in Industrial Society.* Stanford, CA: Stanford University Press.

Ely, John Hart. 1980. *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.

Ericson, David F., and Louisa Bertch Green, eds. 1999. *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism*. New York: Routledge.

Hasen, Richard L. 2016. *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections*. New Haven, CT: Yale University Press.

Kahn, Ronald. 1994. *The Supreme Court and Constitutional Theory, 1953–1993*. Lawrence: University Press of Kansas.

———. 1999. "Liberalism, Political Culture, and the Rights of Subordinated Groups: Constitutional Theory and Practice at a Crossroads." In *The Liberal Tradition in American Politics: Reassessing the Legacy of American Liberalism*, edited by David F. Ericson and Louisa Bertch Green, 171–97. New York: Routledge.

———. 2006. "Social Constructions, Supreme Court Reversals, and American Political Development, Lochner, Plessy, Bowers but not Roe." In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 67–113. Lawrence: University Press of Kansas.

———. 2007. "Originalism, the Living Constitution, and Supreme Court Decision Making in the Twenty-First Century: Explaining *Lawrence v. Texas*." *Maryland Law Review* 67: 25–35.

———. 2013. "The Commerce Clause and Executive Power: Exploring Nascent Individual Rights in National Federation of Independent *Business v. Sebelius*." *Maryland Law Review* 73: 133–86.

———. 2014. "Understanding United States v. Windsor and the Symposium Contributions Using Unidirectional and Bidirectional Models of Supreme Court Decision Making." *Case Western Reserve Law Review* 64: 1293–339.

———. 2015. "The Right to Same-Sex Marriage: Formalism, Realism, and Social Change in *Lawrence* (2003), *Windsor* (2013), and *Obergefell* (2015)." *Maryland Law Review* 75: 271–315.

———. Forthcoming. *Constructing Individual Rights in a Conservative Age: The Supreme Court and Social Change in the Rehnquist and Roberts Court Eras*. Lawrence: University Press of Kansas.

Kahn, Ronald, and Ken I. Kersch, eds. 2006. *The Supreme Court and American Political Development*. Lawrence: University Press of Kansas.

Kersch, Ken I. 2004. *Constructing Civil Liberties: Discontinuities in the Development of American Constitutional Law*. Cambridge and New York: Cambridge University Press.

Jefferson, Thomas. Letter to the Danbury Baptists, January 1, 1802. https://www.loc.gov/loc/lcib/9806/danpre.html.

McGuire, K. T., and James A. Stimson. 2004. "The Least Dangerous Branch Revisited: New Evidence on Supreme Court Responsiveness to Public Preferences." *Journal of Politics* 66: 1018–1035.

Nackenoff, Carol. 2006. "Constitutionalizing Terms of Inclusion: Friends of the Indian and Citizenship for Native Americans 1880s-1920s." In *The Supreme Court and American Political Development*, edited by Ronald Kahn and Ken I. Kersch, 366–413. Lawrence: University Press of Kansas.

Petchesky, Rosalind. 1984/1990. *Abortion and Woman's Choice*. Boston: Northeastern University Press.

Pollvogt, Susannah W. 2014. "Thought Experiment: What If Justice Kennedy Had Approached *Romer v. Evans* the Way He Approached *Schuette v. BAMN*?" Available at SSRN: https://ssrn.com/abstract=2436616 or http://dx.doi.org/10.2139/ssrn.2436616.

Robinson, Russell K. 2016. "Unequal Protection." *Stanford Law Review* 68: 151–233.

Tamanaha, Brian Z. 2009. *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*. Princeton, NJ: Princeton University Press.

Totenberg, Nina. "Tape Reveals Nixon's Views on Abortion." Interviewed by Robert Siegel. *All Things Considered*. NPR. June 23, 2009. http://www.npr.org/ templates/story/ story.php?storyId=105832640.

U.S. Equal Employment Opportunity Commission. *Baldwin v. Foxx*, Appeal No. 0120133080, decided July 15, 2015. https://www.eeoc.gov/decisions/0120133080.pdf.

Wittgenstein, Ludwig. 1953/1978. *Philosophical Investigations*. Oxford: Blackwell.

CASES CITED

Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995)

Atkins v. Virginia, 536 U.S. 304 (2002)

Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1991)

Bowers v. Hardwick, 478 U.S. 186 (1986)

Buckley v. Valeo, 424 U.S. 1 (1976)

Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984)

Citizens United v. Federal Election Commission, 558 U.S. 310 (2010)

City of Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983)

City of Richmond v. J. A. Croson, Co., 488 U.S. 469 (1989)

County of Sacramento v. Lewis, 523 U.S. 833 (1988)

Everson v. Board of Education, 330 U.S. 1 (1947)

Harper v. Virginia State Board of Elections, 383 U.S. 663 (1966)

Hively v. Ivy Tech Community College of Indiana 853 F.3d 339 (2017)

Lawrence v. Texas, 539 U.S. 558, 572 (2003)

McCleskey v. Kemp, 481 U.S. 279 (1987)

McCutcheon v. Federal Election Commission, 572 U.S. 185 (2014)

Masterpiece Cakeshop, Ltd v. Colorado Civil Rights Commission, 584 U.S. ___ (2017)

National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012)

Obergefell v. Hodges, 576 U.S. ___ (2015)

Oncale v. Sundowner Offshore Services, 523 U.S. 75 (1998)

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

Regents of the University of California v. Bakke, 438 U.S. 265 (1978)

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

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

Roper v. Simmons, 543 U.S. 551 (2005)

Schuette v. Coalition to Defend Affirmative Action, 572 U.S. 291 (2014)

Shaw v. Reno, 509 U.S. 630 (1993)

Texas v. Johnson, 491 U.S. 397 (1989)

Trinity Lutheran Church of Columbia, Inc. v. Comer, 582 U.S. ___ (2017)

United States v. Windsor, 570 U.S. 744 (2013).