

The Commerce Clause and Executive Power: Exploring *Nascent Individual Rights in National Federation of Independent Business v. Sebelius* (2012)

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[To Schmooze participants: This paper is part of a larger project entitled “Constructing Individual Rights In the Rehnquist and Roberts Court Eras: Why a Moderate/Conservative Supreme Court in a Conservative Era Expands Individual Rights?” Please do not quote without permission.]

## Introduction

Does *Sebelius* suggest any means through which the Supreme Court in the future might limit executive and legislative authority over social and economic policy in general and health care policy in particular?

Does the fact that five justices support the notion that the Commerce Clause only applies to action not inaction, that is, only after an individual has entered the economic system, mean that this distinction (between action and inaction) will allow the Supreme Court to limit Congress and Executive action in support of ever increasing complex social and economic policy?

While the Internet colloquy on *Sebelius* on the day the decision was announced centered on the political implications of *Sebelius* [perhaps for reasons explored below]. However, in this paper I wish to explore the possible legal implications of five justices supporting the *Sebelius*' action/inaction distinction under the Commerce Clause. <sup>1</sup> Is the Supreme Court in *Sebelius* opening the way to

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<sup>1</sup> For the record, I agree with the view that Justice Roberts did not want to overturn Obamacare because of long standing polity principles, including the view that the Supreme Court should not overturn Congressional legislation if a constitutionally viable reason can be found in support of such legislation.

an individual right or liberty interest that would trump the power of the executive and legislative branches of government over social and economic legislation? Is the action/inaction distinction in *Sebelius* a “loaded weapon” to be used by future Courts to define a new libertarian individual right? Can the rights talk in *Sebelius* be the basis of future “conservative” rights, which could be viewed as another product of what Tom Keck has called the conservative rights revolution in our nation?<sup>2</sup>

While Commerce Clause cases are usually not viewed as involving individual rights, but rather as cases involving polity principles, such issues of federalism or separation of powers, issues involving constitutional structures may also raise issues involving individual rights. For example, in *INS v. Chadha* (1983), Justice Powell, in concurrence, emphasizes that the use of the legislative veto by the House in this context is unconstitutional because individual rights are violated. When the legislative veto permits Congress to deport Mr. Chadha, without applying general rules to individual cases or the procedural safeguards found to courts and in quasi-judicial bodies in administrative agencies, individual rights are violated.

My work to date has centered on what are usually thought of as the development of progressive individual rights. Explored to date is the question why a conservative/ moderate Supreme Court in the conservative political age since the 1990’s has expanded implied fundamental rights to sexual intimacy for gays and

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Secondarily, I think Roberts feared politically that an overturning of Obamacare would raise the specter of *his* Court being viewed as a new “*Lochner* Court.” These institutional concerns do not preclude the fact that also at issue in *Sebelius* are nascent rights principles that conservative justices now, and perhaps liberal justices in the future, might support, as they analyze such principles in light of the changing world outside the Court.

<sup>2</sup> See Thomas Keck, *The Most Activist Supreme Court in History* (University of Chicago Press, 2004).

sustained the fundamental right of women to choose whether to have an abortion?<sup>3</sup> One would expect the Supreme Court in the late 20<sup>th</sup> and early 21<sup>st</sup> centuries to be 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. Republican Presidents made eleven of those appointees.<sup>4</sup>

However, 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 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 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)

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<sup>3</sup> See Kahn, "Social Constructions, Supreme Court Reversals, and American Political Development: *Lochner*, *Plessy*, *Bowers*, But Not *Roe*." In *The Supreme Court and American Political Development*, ed. Ronald Kahn and Ken I. Kersch. Lawrence, KS: University Press of Kansas, 2006: 67-113 and "Why Does a Moderate/Conservative Supreme Court in a Conservative Age Expand Gay Rights?: *Lawrence v. Texas* (2003) in Legal and Political Time," in Austin Sarat (ed.), 44 *Studies in Law, Politics and Society*, Special Issue: Constitutional Politics in a Conservative Era: 173-217 (London, United Kingdom: JAI Press-An Imprint of Emerald Group Publishing Limited, 2008).

<sup>4</sup> President Nixon appointed Chief Justice Burger (1969) and Justice Blackmun (1970), and Justices Powell and Rehnquist, both in 1972. President Ford appointed John Paul Stevens (1975). Democratic President Carter had no appointees to the Supreme Court. President Reagan appointed Sandra Day O'Connor (1981), reappointed Justice William Rehnquist as Chief Justice and Justice Scalia in 1986, and Justice Kennedy (1988). President George Herbert Walker Bush appointed Justices David Souter (1990) and Clarence Thomas (1991). A Democratic President, Bill Clinton appointed Justices Ruth Bader Ginsburg (1993) and Stephen Breyer (1994). It was not until 2005, eleven years later that additional appointments would be made to the Supreme Court. In 2005, Republican President George W. Bush appointed John Roberts as Chief Justice and Samuel Alito as an Associate Justice to the Supreme Court a year later.

During the Rehnquist Court, the Supreme Court reaffirmed the right to abortion choice in *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992)<sup>5</sup> and the principle that race can play a role in university admissions in *Grutter v. Bollinger* (2003), and heightened the level of court scrutiny of gender classifications in *United States v. Virginia* (1996). 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. Even with the addition to the Court of Chief Justice Roberts in 2005 and Justice Alito in 2006, the Supreme Court refused to say that race couldn't be a factor in attempts by school boards to diversify public schools.<sup>6</sup>

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<sup>5</sup> 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 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.

Also, 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 supports 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*.

<sup>6</sup> See *Parents Involved in Community Schools v. Seattle School District No.1*. 05-908 (2007), a Supreme Court case which did limit the discretion of schools boards to use race as a factor in the placement of

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 expanded rights in these areas.

To explain why a conservative-moderate Supreme Court in a conservative age has expanded implied fundamental rights for gays and sustained the right of abortion choice, one must explore the nature of Supreme Court decision-making, with particular regard to how Supreme Court decision-making relates to the social, economic, and political world outside the Court. This analysis will also help explain why social scientists and other legal scholars expert in the Supreme Court and constitutional law have not been able to explain or predict the expansion of privacy rights and other individual rights. We also need to explore whether social scientists, historians and legalists have explored the relationship of Court institutional processes and norms and world outside the Court as they seek to explain doctrinal change. This paper asks similar questions with regard to understanding the possibility of the development of what are perceived to be “conservative” rights

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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.

principles in *Sebelius*.<sup>7</sup> Or is there a different trajectory of what are viewed as conservative compared to progressive rights? If there is a different trajectory than we must explore even more deeply how to explain that different trajectory.

To make sense of *Sebelius* and the possibility of nascent rights creation, we must first explore how social scientists and legalists have explained Supreme Court decision-making as a process and its relationship to the world outside the Court. Only by doing so can we understand how rights are created and develop over time, and the role of the Supreme Court in defining such rights.

There are two Models of the relationship of the Supreme Court to the world outside. Model 1 seeks to explain Court decision-making in unidirectional terms, either internally from text or precedent, or externally from the social, economic, and political realities of the world outside. Model 2 explains Court decision-making and doctrinal change as a bidirectional relationship between legal principles and precedents and the social, economic, and political world outside the Court. The theoretical and methodological underpinnings of the relationship between Supreme Court decision-making and the world outside the Court need to be explored.<sup>8</sup> To repeat, Model 1 explains Supreme Court decision-making in unidirectional terms, either from the historical, political, social facts and events outside the Court or from text, statute, or precedent. Model 2 explains Supreme Court decision-making in bidirectional terms, as a mutual construction process between text, precedent, and

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<sup>7</sup> Of course, one could ask similar questions with regard to what are perceived as conservative rights defined in *District of Columbia v. Heller* (2008).

<sup>8</sup> This paper will center on the use of Model 1 or 2 to explain doctrinal change on the Supreme Court. However, the models and ideas explored here can be applied the analysis of decision-making and doctrinal change in lesser federal courts and state courts.

principles and the social, political, and historical realities of the lived lives of persons.

Finally, these two models have additional distinguishing characteristics. These are in regard to the methods used to study the Supreme Court and doctrinal change and the assumptions about the role of Court norms and process on case outcomes. Thus, in order to understand whether the nascent rights articulated by five justices in *Sebelius* have a possibility for development in the future, we need to explain why Model 2 assumptions and methods must be used, and the origins of Model 1, to see why it cannot explain the development of rights, whether or not the rights are viewed as progressive or conservative.

The differences between the models can be better understood through a look at the impact on the study of courts and constitutional by what Brian Z. Tamanaha calls the Formalist-Realist Divide; this Divide dominates our nation's vision of the relationship between law and politics and whether we view courts as legal or political bodies.<sup>9</sup> The origins of Model 1, why most political scientists and legal scholars continue to accept the divide, and why Model 2 assumptions must be relied upon in explaining Court decisions can be explained by this divide within the interpretive community--even though the divide is a myth. Tamanaha demonstrates that the divide has always been a myth because justices and judges since the founding of our nation have rejected a divide between formalist law and the realist world outside the Court.

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<sup>9</sup> See Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010).

Because Model 2 assumptions and methods reject the divide, Model 2 has a better chance of explaining the development of progressive rights and the nascent conservative rights in *Sebelius*. Unfortunately, acceptance of the divide and Model 1 assumptions about Court decision-making and its relationship to the world outside the Court by most political scientists to this day lead them to employ behavioral, usually quantitative normal science methods when explaining Court action and to not view the impact of Court processes and norms as causative of Court action. Scholars, who employ the Model 2 assumptions of bidirectionality and a mutual construction process, reject normal science and quantitative methods for the explanation of Court action. Instead, they use interpretive methods, which rest of methodological assumptions employed by what has been called the historical institutional or political development approach.<sup>10</sup> Methods used in both models are empirical; therefore one could label Model 1 methods as empirical behavioralism and Model 2 methods as empirical interpretive.

#### Analyzing *Sebelius*

Using Model 2 assumptions and methods, we look at the polity and rights principles that are articulated by Chief Justice Roberts and the four other justices of the Court who define the refusal of persons to buy insurance, as a right not to have the government force you into interstate commerce. We see Roberts articulate

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<sup>10</sup> The divide is at work in the idea that before 1937 the Court was law-like and originalist in its thinking and after 1937 when it became realist in its decisions through its introduction of what was viewed as a new living Constitution. Also, see Kahn, "Marbury v. Madison as a Model for Understanding Contemporary Judicial Review." In *Marbury Versus Madison: Documents and Commentary*, ed. Mark A. Graber and Michael Perhac, 155-180. Washington, D.C.: CQ Press, 2002 for a critique of scholars who seek to analyze *Marbury v. Madison* (1803) in either unidirectional legal or realist terms, thus employing Model 1 assumptions to explain the decision.

numerous polity principles about deference of the Court to the political system, and the need for the Court not to find laws unconstitutional. The search for Roberts ends with him finding the individual mandate as constitutional under the government's taxing power. However, this case is not just about the polity principles of the five justices finding a right not to be forced into interstate commerce.

This is because these justices must make an argument about whether inaction by citizens can be defined by specific acts of persons or by the effects of non-action on the overall economic system and health care policy. There must be a construction of what action and inaction means when citizens are asked to pay the mandate or refuse to do so. So the justices on all sides of the question as to whether a right exists not to pay the mandate must look at whether government regulation was permitted over what are viewed by the five justices in *Sebelius* as non-actions, or the failure to enter interstate commerce.

Therefore, the Court looks at issues in *Sebelius* through the lens of prior Commerce Clause cases, including *Wickard v. Filburn* (1942), *Perez v. United States* (1971), *United States v. Lopez* (1995), and *Heart of Atlanta Motel v. United States* (1964) and *Katzenbach v. McClung* (1964) to see whether any of the cases allowed government regulation of "non-actions" by citizens, even though the failure of African-Americans to travel interstate in *Heart of Atlanta Motel* and *Katzenbach* was a predicate for ending race discrimination in public accommodations.

In *Sebelius*, the justices must construct how they are to view persons who fail to pay the mandate in light they are members of the economic system and the Commerce Clause allows the federal government to regulate interstate commerce.

However, because issues of social policy, health policy, are also involved in *Sebelius*, *the* justices must consider whether health care issues are different from traditional commercial transactions. Is the mandate simply an economic action, or might it also involve questions of whether all citizens cannot get health-care because some citizens choose not to pay the mandate. It is the definition of polity and rights principles, constructions of such principles in past cases, compared to the principles and constructions at issue at the time of the case before the Court, as in *Sebelius*, that define the contours of the legal arguments, and the rights which are ultimately defined.

In such a discussion, there is no formalist-realist divide. Law and principle only gain meaning through a continuing look at polity and rights principles and their economic and social construction. The opinions by the justices can't be explained by assuming unidirectional impact of historical events, politics, or economic and social facts outside the Court, or the analysis of law. There must be a mutual construction process that includes past polity and rights principles, past constructions of those principles, in light of contemporary polity and rights principles and their construction in terms of the lived lives of persons. To explain doctrinal change, one must engage in Model 2 assumptions and methods, because they embody a mutual construction process engaged in by all justices on the Supreme Court today, as have all Supreme Court justices.

There will be differences among justices as to what goes into the mutual construction mix, as demonstrated by the differences between non-originalist and

originalist justices in *Casey* and *Lawrence*.<sup>11</sup> But no justice can define an individual right or even the powers of the President without engaging in some kind of mutual construction process, which brings the outside world into the Court.

What is so intriguing about the nascent individual rights under the Commerce Clause in *Sebelius* is that, if they are built upon by future Courts the ability of future presidents to meet social and economic problems will be severely limited. However, this fact and the increasingly complex economic and social system of our nation suggest that the nascent individual rights articulated by five justices in *Sebelius* will not be expanded by future Courts, in part because the Court must engage in a bidirectional mutual construction process. This may suggest that because of a growing more complexity in our nation and the required mutual construction process, that there is less of a likelihood that conservative rights, like those articulated in *Sebelius*, and I would add in *District of Columbia v. Heller* (2008), will be expanded. When progressive rights are at issue, which seek more equality and increased social and political inclusivity, the chance of rights expansion is greater. However, clearly the expansion of progressive rights are not assured, as evident when the Supreme Court refused to engage in a deeper social construction process, thus limiting the expansion of rights for African-Americans in *Washington v. Davis* (1976) or *McCleskey v. Kemp* (1987).

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<sup>11</sup> See Kahn, "Social Constructions, Supreme Court Reversals, and American Political Development: *Lochner*, *Plessy*, *Bowers*, But Not *Roe*." In *The Supreme Court and American Political Development*, ed. Ronald Kahn and Ken I. Kersch. Lawrence, KS: University Press of Kansas, 2006: 67-113.