

FOREWORD

*Mark S. Kende**

It used to be easy. Liberals generally liked the U.S. Supreme Court. Conservatives were skeptical. Liberals liked the Court because of decisions made under Chief Justice Earl Warren such as *Brown v. Board of Education*¹ and *Miranda v. Arizona*.² Even with the conservative Chief Justice Warren Burger, the Court issued *Roe v. Wade*.³ These decisions vindicated individual rights claims against the government. Conservatives, by contrast, found the Court to be undemocratic and lacking in “the passive virtues,”⁴ to use Alexander Bickel’s pragmatic term. They argued that controversial issues should generally be resolved by legislatures. Herbert Wechsler even reasoned that the *Brown* decision was not based on “neutral principles.”⁵ The Drake University Constitutional Law Center’s recent symposium on “The Role of Courts in Social Change,” however, shows that, as Bob Dylan sang, “The times they are a-changin’.”⁶ Indeed, the political stereotypes just mentioned have not held true for some time.

For example, under Chief Justice Rehnquist’s stewardship, the Court was very active and struck down a record number of federal statutes.⁷ Yet

* Professor of Law, James Madison Chair in Constitutional Law, Director of the Drake University Constitutional Law Center. B.A., Yale University, 1982; J.D., University of Chicago, 1986.

1. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

2. *Miranda v. Arizona*, 384 U.S. 436 (1966).

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

4. Alexander Bickel, *The Passive Virtues*, 75 HARV. L. REV. 40 (1961).

5. Herbert Wechsler, *Towards Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959).

6. See BOB DYLAN, *The Times They Are A-Changin’*, on THE TIMES THEY ARE A-CHANGIN’ (Sony Records 1964).

7. Seth Rosenthal, *Fair to Meddling: The Myth of the Hands-Off Conservative Jurist*, SLATE, June 27, 2006, <http://www.slate.com/id/2144202> (“Generating the highest-ever annual rate of invalidating federal legislation, the ‘hands-off’ Rehnquist Court scotched laws safeguarding workers, seniors, people with disabilities, school children, and religious minorities and established standards threatening to scuttle even more, including important environmental achievements.”).

Chief Justice Rehnquist was a celebrated conservative. Moreover, one of the most powerful challenges to the pro-judiciary attitudes of liberals came from the left. Professor Gerald Rosenberg's book *The Hollow Hope*⁸ used empirical, anecdotal, and other information to argue that courts had not succeeded and will never succeed in bringing about meaningful social change. Professor Rosenberg therefore was a logical choice to be the symposium's first participant.

In his article, Professor Rosenberg reasserts his book's thesis that decisions like *Brown* and *Roe* did not result in much change. Indeed, he writes that these cases caused a political and cultural backlash that may have hurt, more than helped, their supporters' causes in the long run. He then argues that the recent Massachusetts court decision supporting gay marriage⁹ is bad for the gay rights cause because the country is not yet ready. He also reminds us that courts are made up of elites and that courts have a long history of ruling for the powerful—with the Warren Court as a possible exception. In addition, Rosenberg explains that courts are a weak substitute for an empowered citizenry acting through the political process. Effective implementation of court remedies is dependent on the public's receptivity.

Professor Jane Schacter writes in her article that courts are not the enemies of social change. She argues that courts sometimes produce social change and sometimes produce backlash. Legislatures, however, are no panacea because their decisions can also produce backlash. She advocates a more refined analysis of the precise factors, explaining why certain court decisions and certain legislative decisions produce backlash, while others result in meaningful change. She reasons that gay rights advocates should carefully consider all possible avenues for change and not give up on the judiciary.

Professor John Eastman's article critiques the judicial activism of the Supreme Court, though from a different perspective than Professor

While Mr. Rosenthal's numbers may be right, it should be noted that he is the Legal Director for a liberal advocacy group, the Alliance for Justice. The Rehnquist Court's defenders would certainly argue there were sound legal reasons why these sympathetic groups lost these cases.

8. GERALD N. ROSENBERG, *THE HOLLOW HOPE, CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991). Several other scholars on the left have adopted similar views. See RAN HIRSCHL, *TOWARDS JURISTOCRACY* (2004) (applying a variation of this thesis to courts in several other countries); MARK V. TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (2000).

9. *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

Rosenberg. Professor Eastman asserts that Supreme Court Justices often act like philosopher kings. Yet the Court has no special training or expertise in moral wisdom. And ironically, the Court has rejected natural law as the source of its rights decisions. He writes that the Court's recent ad hoc reliance on foreign law is not the kind of principled approach that would have suited the founding fathers. He concludes that the Court is arrogating for itself the decision-making responsibility of the citizenry.

Professor Gerald Torres' speech emphasizes that social change cannot occur without cultural transformation. Thus, even when social movements are repeatedly defeated in courts or in the legislature, their efforts can still transform the culture because certain issues take center stage. Thus, *Brown's* success should not be determined based on whether the United States is fully desegregated. The more important question is whether the Civil Rights Act of 1964 ever could have passed had *Brown* not helped change our culture's attitude towards racism. Similarly, the gay rights movement lost many battles before winning a few. These losing battles changed the culture.

Professor Mark Tushnet's article looks to the future by examining what various political developments could mean for the conflicting social change agendas of Christian evangelicals and gay rights advocates. Assuming that the judiciary and the other branches remain predominantly Republican, he says that "collaboration" would occur resulting in the overturning of *Roe v. Wade*, since many anti-abortion laws would be enacted. But he writes that the stated Republican opposition to judicial activism might result in fewer legal changes than one would otherwise expect.

By contrast, if the political branches are divided (i.e. Congress is controlled by one party, the Presidency by the other), courts could render decisions somewhere "in between" what liberals and conservatives would like to see. Another possibility is that an unrestrained and partisan Supreme Court could create a constitutional crisis by going too far in one direction. Professor Tushnet then explains that the political and cultural power of the evangelical groups, and of the gay groups, means that their social change wish lists (which he outlines) cannot be viewed as legally far-fetched. Interestingly, though, he writes that it is impossible to fathom this Supreme Court endorsing socio-economic rights since no constituency that supports such a position is powerful enough at present.

As the above discussion shows, the issues surrounding the role of courts in social change are numerous and subject to strong differences of opinion. On behalf of the Drake University Constitutional Law Center,

and Drake Law School, I would like to thank all of our symposium speakers for their excellent work. I also want to compliment the editors and staff of the Drake Law Review for doing a nice job of publishing a volume that continues and furthers the debate. Finally, I would like to express appreciation to the law firm of Belin, Lamson, Zumbach, McCormick, Flynn, P.C. for its continued support of this symposium.