Can Courts Act as Agents of Social Change?

WESeminar and Wesleyan Law Association Meeting
October 23, 2010
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Some Background

- I have 25 years of government and policy experience (all three levels of government and a year internationally) and have taught for the last 10 years at UAlbany’s Rockefeller College.
- This lecture is taken from my graduate “law and public policy” class.
  - Normally a three hour lecture!!
    - You get the short version – will give you time to ask questions and make comments.
Basic Question

• Basic question for us this morning is:
  • What role do courts play in moving social change forward?
    • Are they “dynamic”?
      • That is, do they act as “leading indicators” and move social policy ahead?
    • Or are they “constrained”?
      • That is, do they act as “lagging indicators” and follow already existing trends?
        o Furthermore, would legislatures or agencies (or voters) enact the policy without the courts nudging them to do so?
  
• Rosenberg’s *The Hollow Hope* as a straw man for the discussion.
A Little Context

• Basic American Federalism
  • Three branches of government
    • Legislative – enacts laws that sets policy
    • Executive – carries out the policy (by executing the law)
    • Judicial – insures that the policy is consistent with the Constitution and other laws
  • Three levels of government
    • Federal – largest budget, smallest workforce
    • State – smaller budget, larger workforce
    • Local – smallest budget, largest workforce
• BUT US federal system emphasizes devolution to states and localities (X Amendment etc), so there is not a monolithic American social policy (cf. with other Western countries)
Are Courts “Dynamic”?

- Courts are “free from electoral constraints and institutional arrangements that stymie change” (Rosenberg p. 22)
- “Insulated as they are from political pressures, and charged with the duty of enforcing the Constitution, courts are in the strongest position to insist that unconstitutional conditions be remedied, even at significant financial cost” (J. Brennan in concurrence in *Rhodes v. Chapman* 1981, 359)
- Courts have the ability to produce social reform as they can “provide an escape from the pathologies of rigid bureaucracies, ossified institutions, and a reluctant or biased citizenry” (Rosenberg p 25)
Examples of Dynamic Courts

- Some Potential Examples of Dynamic Courts Making Policy
  - Gideon v. Wainwright (1963) – right to counsel
  - Griswold v. Connecticut (1965) – right to contraception
  - Loving v. Virginia (1967) – freedom to marry across races
  - Roe v. Wade (1973) – freedom of reproductive choice
  - Lawrence v. Texas (2003) – right to consensual private conduct
Are Courts Constrained?

- Another view of courts is that they are constrained because they lack the “power of sword and purse” (Hamilton).
- The major constraints on courts as actors for policy change are:
  - Limited Constitutional powers
    - Not every social reform or set of rights can be “solved” by the Constitution (i.e., rights are “bounded”).
  - Lack of true judicial independence
    - Appointment process and Congressional ability to override rulings limits unfettered independence.
  - Lack of implementation power
    - Most decisions are not self-executing and thus must have the support of other branches (particularly executive) to make the policy change happen.
Constrained Courts (con’t)

- However, Rosenberg and others argue that even with constraints there may be conditions that might allow court to function as an agent for change:
  - Courts may produce change when others provide inducement to compliance.
  - Courts may produce change when others impose costs to induce compliance.
  - Courts may produce change when decision can be imposed by the market.
  - Courts may produce change by providing leverage for others to act and they are willing to act.
Same-Sex Marriage as a Case Study

• Basic hypothesis to test is:
  • Would same-sex marriage (or gay marriage or equal marriage rights) be happening as fast without courts in the forefront of granting rights?

• What’s the legal theory behind granting these rights?
  • That is, what is the legal “hook” that courts are using to grant marriage rights to gays and lesbians?
    • Due process and equal protection grounds (XIV Amendment)

• And is it better for marriage equality advocates to go through the courts or engage popular support for legislative changes to grant these rights?
Same-Sex Marriage as a Case Study II

- A little history – three early state court cases
  - *Baehr v. Lewin* (1993) – Hawaii Supreme Court ruled that denial of same-sex marriage was denial of equal protection clause in state constitution.
- However, subsequent political and court decisions changed the landscape…*Baehr* and *Baker* both overturned (thought Vermonter now have equal marriage rights through legislation).
Same-Sex Marriage as a Case Study III

- What is the current situation? (from the *Freedom to Marry* organization)
  - Five states (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire) plus the District of Columbia have the freedom to marry for gay couples.
  - Three more states (Maryland, Rhode Island and New York) officially pledge non-discrimination against marriages between same-sex couples from other states.
  - Various states now offer broad protections short of marriage, including civil union in New Jersey, and broad domestic partnership rights in Oregon, Washington, Nevada, and California. Smaller packages of protections for same-sex couples are available in Hawaii, Maryland, Maine, Colorado, and Wisconsin.
Same-Sex Marriage as a Case Study IV

- How did gay couples get full marriage rights in the five states and DC?
  - Massachusetts – court case (*Goodridge* 2003) and subsequent legislative action
  - Connecticut -- court case (*Kerrigan and Mock* 2008) and subsequent legislative action
  - Iowa – court case (*Varnum* 2009)
  - Vermont – legislative action (2009)
  - New Hampshire – legislative action (2009)
  - District of Columbia – legislative action (2009)
Same-Sex Marriage as a Case Study IV

- Most recent case – federal court and state (CA) law -- *Perry vs. Schwarzenegger* (2010)

- Background:
  - California Supreme Court ruled in May 2008 to uphold the freedom to marry.
  - But **Proposition 8**, a constitutional amendment designed to supersede the court ruling, narrowly passed in November 2008 and made same-sex marriage illegal.
  - On August 4, 2010, Federal District Court Chief Judge Vaughn R. Walker overturned Prop 8. The ruling found that Prop 8 violates the U.S. Constitution’s guarantees of equal protection and due process. Judge Walker lifted a temporary stay on his ruling, but the Ninth Circuit Court of Appeals granted a stay, meaning same-sex couples currently cannot marry in California while the case is on appeal. Oral arguments are set for the week of December 6, 2010.
Conclusions?

• Courts may enact social change but ultimately only voters (and legislatures) can make lasting changes in social policy.
  • Why?
    • Because as discussed earlier, courts are not equipped to be in a position to enact policy in the same way that legislators can or to carry it out in the same way that the executive branch does.

• However, as shown in the example of same sex marriage (and in other areas – e.g., voting rights and desegregation), courts can play a role in facilitating action.
  • Why?
    • Because courts are insulated from some political pressures and can take the heat (“activist judges”) to do things that politicians or voters want to do but are reluctant to be out in front of.
Thanks!!

- There are many more issues that I could time discussing (e.g., don’t ask, don’t tell), but I think that you have been waiting long enough to add your own thoughts.

- Thanks again to the Wesleyan Law Association and the Wesleyan Parents’ Office for allowing me to do this. I hope that it has been thought provoking.

- BEAT AMHERST!!