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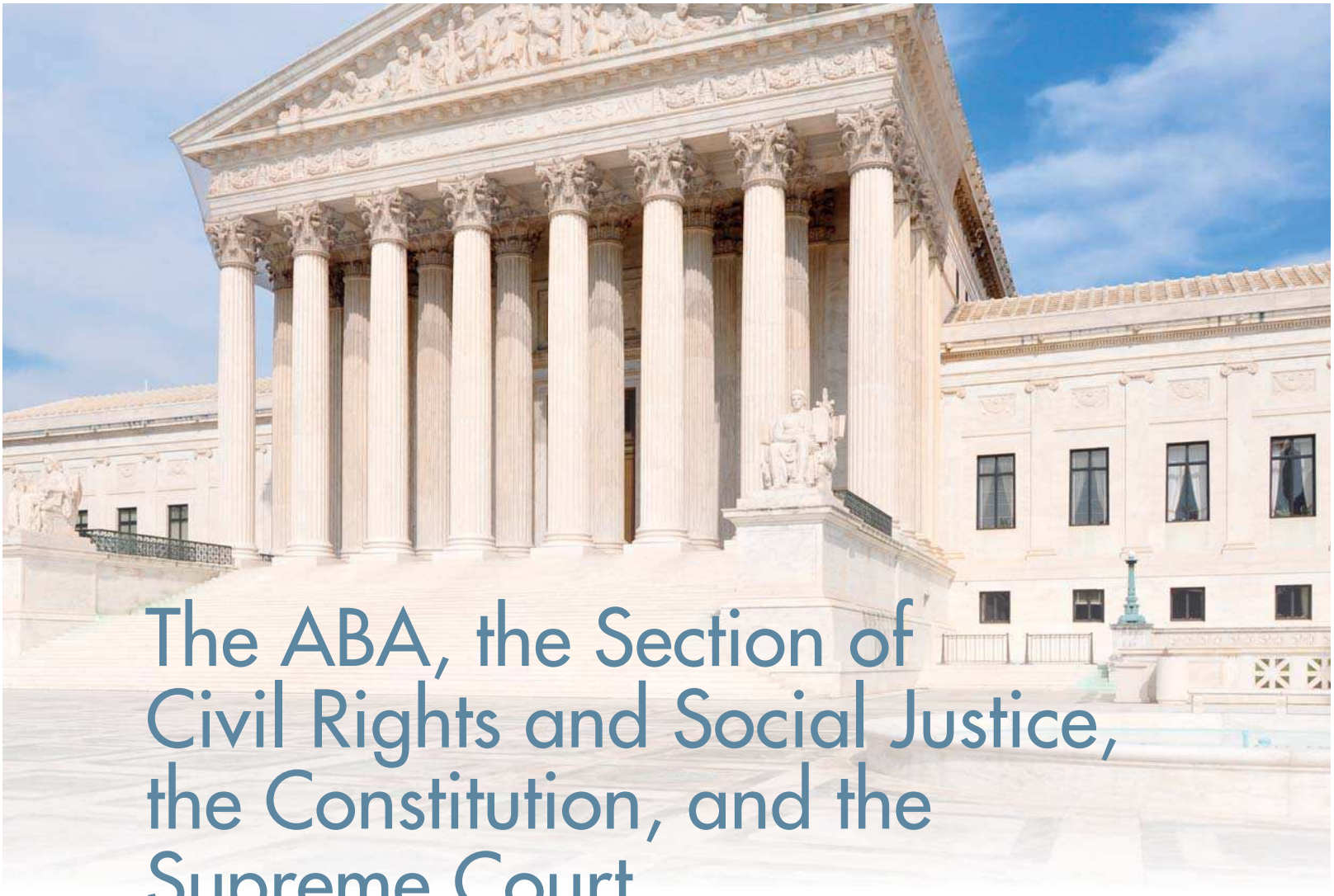


The ABA, the Section of Civil Rights and Social Justice, the Constitution, and the Supreme Court

By Abner J. Mikva and Stephen Wermiel

When Bert Jenner, former ABA president and lifelong Republican activist, first proposed a "Civil Rights" section to the American Bar Association 50 years ago, the idea was troubling to the ABA House of Delegates. Even though the US Congress was considering far-reaching changes (the Voting Rights Act, the Civil Rights Act, anti-lynching laws, and anti-poll tax laws) and the civil rights movement with Martin Luther King Jr. was also pushing for sweeping change, the ABA was reluctant to get involved. The Association was little more than two decades past its own dark history when even Thurgood Marshall could not become a member because of his race. It had been a comfortable all-white, predominantly male "good old boys" fraternity for lawyers. The radical proposal was hard to digest, but Jenner was persistent: despite a long gestation and a quarrel over the name, his idea resulted in the birth of the Section of Individual Rights and Responsibilities. Some diehards insisted on accenting the last word whenever the Section was acknowledged.

The Section changed the public face of the ABA. It started taking positions on controversial legislation, urged the filing of lawsuits, lobbied various units of government, and worked with others to push changes in our segregated society. Because of its activities, more women and minorities started joining the ABA, making up for the defections of the old guard that could not adjust to the changes in our society. The Section not only changed the ABA and the society we live in (and even its name to the present Section of Civil Rights and Social Justice), but it changed the US Constitution as well.

Well, not literally. Literally, it looks more or less the same, although in 1966 there were only 24 amendments, not the 27 we have today.

What was dramatically different about the Constitution 50 years ago was its interpretation by the Supreme Court.

The Court itself is a good place to start: in 1966, the Court consisted of nine white men. Not until 1967 did the first African American, Thurgood Marshall, join the Court, and it was 14 more years before Sandra Day O'Connor became the first woman justice. It would take 43years from

the Section's founding for Sonia Sotomayor to become the first Hispanic on the Court.

The path of the Constitution during the past 50 years is a twisted road. In the hands of the Supreme Court, the Constitution has become a far more inclusive document, embracing major segments of American society that were previously excluded. The Court has also interpreted the Constitution to bring about substantial progress for civil rights and civil liberties. There have also been significant cutbacks and reversals, however, that undermine the expansion of rights and equality.

In 1966 the nation was in the middle of the civil rights movement and the Supreme Court was at the height of the progressive tenure of Chief Justice Earl Warren (1953–1969), during which the justices read the Constitution to expand many rights and liberties.

That year, cases that were representative of the Warren Court included *Katzenbach v. Morgan* (384 U.S. 641), upholding the power of Congress to pass the landmark Voting Rights Act of 1965, and *Miranda v. Arizona* (384 U.S. 436), part of a criminal law revolution, establishing the right of arrested defendants to remain silent and request legal representation and leading to the famous police warnings that are deeply engrained in American culture.

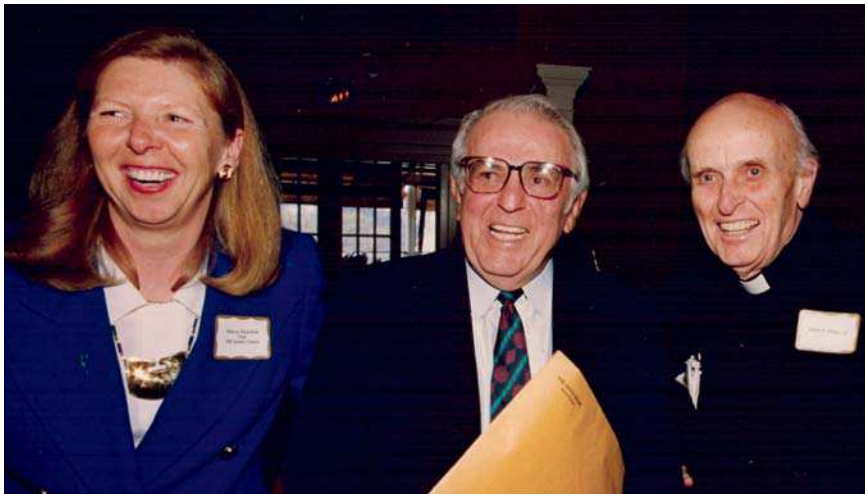
One year earlier, the Supreme Court for the first time had found a right to privacy implicit in the guarantees of the Bill of Rights. The decision, *Griswold v. Connecticut* (381 U.S. 479), was important in its own right but also because privacy became a foundation for numerous other major advances for civil liberties. The ruling was also important because it helped establish the principle that constitutional rights are not limited to those expressly spelled out in the Constitution and the Bill of Rights and may include implied rights. Two years earlier, the Supreme Court cemented the principle that freedom of speech should include criticism of government officials. Under the First Amendment, the Court ruled in *New York Times v. Sullivan* (376 U.S. 254) that Americans should be free to criticize, even ridicule, their public officials without fear of liability for falsehoods that are neither reckless nor intentional. The decision transformed libel law from purely a matter of state law to the provenance of the First Amendment and famously declared "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" (at 271).

Much of the attention of the Supreme Court and the nation at the time was focused on the struggle for civil rights. This was not only an effort to breathe life into the principle of equality guaranteed by the Equal Protection Clause of the 14th Amendment, but also a movement to have our society embrace African Americans as full and equal participants in our democracy.

In 1966 the Supreme Court was in the middle of this struggle. The time was 12 years after the iconic ruling in *Brown v. Board of Education* (347 U.S. 483) when the Court ruled that the maintenance of racially segregated public schools violated the Equal Protection Clause. In the years after 1954, the Court ordered the desegregation of many other facets of American life—public transit systems, public golf courses, municipal theaters, and public swimming pools. Congress passed the Civil Rights Act of 1964. The Court quickly upheld critical provisions, finding in *Heart of Atlanta Motel v. U.S.* (379 U.S. 241) that Congress could use its power to regulate interstate commerce as the basis for barring race discrimination in public accommodations, private businesses that served the general public.

Twelve years after *Brown*, much was left to do. School systems in many states had made little progress on desegregation by 1966 and continued to defy the Court's ruling. Two years later the Supreme Court would finally lose its temper at the slow pace of school desegregation 14 years after Brown. In *Green v. County School Board of New Kent County* (391 U.S. 430), the Court ruled that desegregation required numerous affirmative and aggressive steps by school officials; merely offering the choice that any student may attend any school was insufficient.

A year after the ABA Section of Individual Rights and Responsibilities was founded, the Court wrestled with another, perhaps more subtle, form of race discrimination: state bans on interracial marriage. *In Loving v. Virginia* (388 U.S. 1) in 1967, the Court ruled that Virginia's ban on interracial marriage violated both



Former Section Chairs Rebecca Westerfield, Abner Mikva and Robert Drinan

the due process and equal protection guarantees of the 14th Amendment

The Supreme Court was also preoccupied with voting rights. In 1966 the Court ruled that state poll taxes violated the Equal Protection Clause. The decision in *Harper v. Virginia Board of Elections* (383 U.S. 663) found that poll taxes served little purpose other than to discriminate against the poor in their ability to vote. In the years immediately preceding 1966, the justices also established the principle that under the Equal Protection Clause, legislative districts should be apportioned equally based on population to guarantee equality of representation (*Reynolds v. Sims*, 377 U.S. 533, 1964). This was transformative for voting districts in many parts of the country, giving new weight to the electorate in many urban areas and reducing the previously outsized influence of more rural areas where fewer residents had been represented by more legislators.

One issue that was just beginning to bubble up for the justices was the constitutionality of the death penalty. In 1963 then Justice Arthur Goldberg raised questions about it in a dissent from the Court's refusal to hear a challenge to the death penalty. Goldberg was joined by Justice William Brennan in his opinion in *Rudolph v. Alabama* (375 U.S. 889). It would be nearly a decade before the death penalty would move to center stage, a spot it has occupied in the Court since 1972. Concern over the fairness of the death penalty has similarly been front and center for our ABA Section for most of this period.

This is at least a partial picture of the way the Constitution looked 50 years ago when the Section was founded within the ABA to work on many of these issues.

It should be readily apparent that even after the flurry of constitutional expansion of the 1960s, the Constitution remained an incomplete document. As Justice Thurgood Marshall observed in a 1987 speech on the Constitution bicentennial, the Constitution of the framers in 1787 required "several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today" (http://thurgoodmarshall.com/the-bicentennial-speech).

So, too, the Constitution of the Warren Court (1953–1969) did not include women for equality purposes, nor gays and lesbians for either privacy or equality principles.

It was in the Court under the tenure of Chief Justice Warren Burger (1969–1986) that the Court recognized equality for women. After several false starts, the Court in 1976 in *Craig v. Boren* (429 U.S. 190) brought gender under the umbrella of the Equal Protection Clause. The Court ruled that while race discrimination required the Court to engage in the most exacting scrutiny of government conduct and motives, gender discrimination required a more middle-of-the-road standard. The Court said the government could only treat men and women differently if there was an important objective that would be achieved in a manner substantially related to that goal.

Bringing gender equality under the Equal Protection Clause built on the much earlier approval of the 19th Amendment in 1920 that gave women the right to vote. An amendment to achieve full equality for women, known as the Equal Rights Amendment, fell short of ratification in 1982 even after the deadline for approval was extended from 1979. In the three decades that have followed, the Supreme Court for the most part has continued to enforce the equal protection standard against gender discrimination, underscoring its importance in 1996 in *U.S. v. Virginia* (518 U.S. 515) when Justice Ruth Bader Ginsburg emphasized that government gender classifications may only be justified by an "exceedingly persuasive justification" (at 531).

Also critical to the rights of women is the line of Supreme Court decisions dealing with abortion as a fundamental constitutional right. After finding a right to privacy that protected the right of married couples to use contraceptives in 1965 in *Griswold*, the justices in 1972 in *Eisenstadt v. Baird* (405 U.S. 438) extended the right to unmarried people as well. Building on the privacy notions of sexual behavior from *Griswold* and *Eisenstadt*, the Court in 1973 ruled in *Roe v. Wade* (410 U.S. 113) that women have a fundamental right to decide to end their pregnancies through abortion, at least until the fetus reached viability in the final stages of pregnancy.

Perhaps no Supreme Court decision in history has been revisited as many times as *Roe*. In the four ensuing decades, state legislatures have tried ever more creative ways to limit the right to abortion, usually arguing that new laws are necessary for maternal health. The justices have ruled on parental consent, parental notification, spousal consent, informed consent, waiting periods, second doctor requirements, hospitalization rules, and more. After holding steady for nearly 20 years, the Court in 1992 in *Planned Parenthood v. Casey* (505 U.S. 833) reaffirmed the right to abortion but gave states more leeway than in Roe to regulate as long as they do not impose an "undue burden" on a woman's ability to obtain an abortion. For most of the past 40 years, the Court has seemed only one vote away from overruling *Roe*.

Now for the first time in eight years, the Court has agreed to take up a new abortion case, a dispute over a Texas law that requires abortion clinics to meet the same standards as ambulatory surgical centers, including staff size and training, building size, and availability of particular equipment. The Texas law, similar to abortion restrictions passed in some other states, also requires that doctors who perform abortions have admitting privileges at a local hospital. Abortion providers say the law will reduce

the number of clinics in the state from 40 to 10. A decision in the case is expected in June 2016.

The path to include the rights of gays and lesbians in the Constitution has had a slow and rocky trajectory. Although the privacy of intimate relationships and autonomy from *Griswold*, *Eisenstadt*, and *Roe* might well have been extended to protect the privacy of gays and lesbians as well, the Supreme Court first went in the opposite direction. In *Bowers v. Hardwick* (478 U.S. 186) in 1986, the justices ruled that gays had no right of sexual privacy. This exclusion of gays and lesbians from equal constitutional status lasted until 2003 when the Court overruled *Bowers* in *Lawrence v. Texas* (539 U.S. 558) and found that gays and lesbians enjoy the same right to sexual privacy enjoyed by heterosexuals. From there, states slowly began to recognize same-sex marriages as valid and equal; momentum grew in state legislatures and state and federal courts until in 2015 the Supreme Court in *Obergefell v. Hodges* (June 26, 2015) ruled that the Constitution requires recognition of and protection for same-sex marriages.

While during the past 50 years, the Constitution has, thus, become more inclusive than ever before in its history, a more conservative Supreme Court has cut back on some rights and liberties. In the past 30 years, the Court has seen more conservative majorities, first in the tenure of Chief Justice William Rehnquist (1986–2005) and now under Chief Justice John Roberts (2005–present).

Perhaps the most dramatic shift is the Court's abandonment of the effort to desegregate public schools and refusal to deal with the effects of resegregation of schools in many urban areas. In a series of decisions between 1991 and 1995, culminating in Missouri v. Jenkins (510 U.S. 70), the justices permitted school districts to get out from under ongoing desegregation orders if they had eliminated their original, separate school systems, even though those school systems remained racially polarized. And then in 2007, in *Parents Involved in Community Schools v. Seattle School District No. 1* (551 U.S. 701), the Court closed the door to the use of race in public schools, ruling that school districts could not voluntarily use race to try to achieve better racial diversity in their public elementary and secondary schools. Indeed, so deep was the change in attitudes that Chief Justice Roberts likened the use of race to achieve greater racial diversity in classes to the invidious motivation of the former southern segregationists.

Desegregation is not the only place that race has been a focus of constitutional cutbacks by a conservative Court. The justices have curtailed affirmative action in most fields, leaving the door open a crack to use race as one of many factors to promote diversity in higher education but otherwise buying into the view that use of race for affirmative action is just race discrimination by another name. The Court's conservative majority has also gutted much of the Voting Rights Act of 1965, ruling in *Shelby County v. Holder* (June 25, 2013) that Congress could no longer use an old formula for determining when state or local government units had to submit proposed election changes for US Justice Department review because of past abuses effecting minority voters.

The list of constitutional provisions on which the Court has cutback or changed direction is too long to cover here, but a few are worth noting. The justices have limited many of the rights that were integral to the criminal procedure revolution, either curtailing their scope or expanding the idea of harmless mistakes that do not violate an individual's rights. The justices have also limited the ability of Congress to identify and remedy society's ills, restricting the power to regulate interstate commerce and also cutting back on the power to enforce due process or equal protection through legislation regulating the states.

One of the few subjects on which the Court has continued to protect, even expand, civil liberties is freedom of speech. Under Chief Justice Roberts, the Supreme Court has issued a number of decisions striking down laws or rejecting legal claims that were intended to limit First Amendment protection for various forms of offensive speech. The Court rejected a congressional prohibition on videos depicting animal crush images (*U.S. v. Stevens*, April 20, 2010), overturned a California law banning the sale of violent video games to minors (*Brown v. Entertainment Merchant's Association*, June 27, 2011), and upheld a protest at a military funeral by the Westboro Baptist Church (*Snyder v. Phelps*, March 2, 2011).

The Section of Individual Rights and Responsibilities was founded out of a need to encourage the ABA and American lawyers generally to focus on the protection of civil rights and civil liberties. In interpreting the Constitution, the Supreme Court has at times expanded these rights and broadened the inclusiveness of the Constitution. But with twists and turns in the path of individual constitutional liberty at the hands of the Supreme Court, the work of what today is the Section of Civil Rights and Social Justice is needed now as much as ever.

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