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17.245 The Supreme Court, Civil Liberties, and Civil Rights
Fall 2006

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Discussion 2: The Supreme Court in the 21st Century

Begin with warm-up review of Constitution:

Sample "Trivial pursuit"-type questions:

Q. How long do you have to be a resident of a state to be elected a representative?

A. None, you just have to live in the state when elected

Q. How old do you have to be to become president?

A. 35 years

Q. How old to be a representative?

A. 25 years

How many appellate courts are there? How is the federal system organized?

- Will post introductory guide to the federal court system online to answer some of these questions
- For more details, see the Hart and Wechsler textbook, *Federal Courts and the Federal System* -- the most frequently cited work by the Supreme Court

Discussion of the Jeffrey Rosen article

Who is the audience?

--Article is directed at the most explicit level to those on the Senate Judiciary Committee who will conduct the hearing on Roberts' confirmation

--The article could also be targeted at the Senate at large, who will be deciding on his confirmation

--Considering its place in the NYT Magazine, it is also intended to focus the media and public opinion on certain issues that typically do not come up per Rosen

Procedural background information on confirmation hearings:

What article of the constitution has to do with the confirmation of a justice?

Article II, Section II-2 of the US Constitution cited:

"He shall have Power, by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Department."

- Senate has final say as to whether any judicial appointment is confirmed.
- However, the Senate Judiciary Committee can refuse to hold a hearing on a nominee.
- In 2 previous appointments, the Democrats blocked the Judiciary Committee from holding a hearing on Roberts' nominations

How specific can questions to nominees be regarding issues that could be raised in future cases?

[Discussion] Nominee sometimes forced to say he cannot comment because it could be an issue he would confront if confirmed to the court. Nomination hearings have become largely flavorless in the view of many commentators and almost pointless because nominees will try to say as little as possible, while senators dig and dig for information.

- “Borking”—the senate’s practice of rejecting nominations to the Supreme Court, coined after Robert Bork was denied the nomination by the Senate after being appointed to the Court by President Reagan.

What is the point of the Rosen article?

--Rosen says the hearing should focus more on important issues that will arise in the future, not solely on the traditional hot-button issues (ex. same sex marriage, abortion, right to privacy) that have figured in the recent past

What are the issues that Rosen says are being neglected?

-Genetic manipulation

Court could be asked to decide the constitutionality of selection for or selection against certain traits in birth;

Are these two morally equivalent?

Is it for the Supreme Court to decide?

Should the decision be left to legislators?

How do we interpret the Constitution to deal with such issues that obviously were not issues at the time of the founding?

Should we be able to select for certain traits? Is that morally equivalent to selecting against another trait such as Down Syndrome?

You can draw a distinction between screening for Down Syndrome with an embryo that has already been created and selecting one of five embryos that have been created that does not have Down Syndrome

-Functional magnetic resonance imaging

Quote from Rosen article:

“ ‘Officials who are examining the suspects could hook them up to fMRI device, show them pictures of the battlefield in Afghanistan, and if they have been in that particular place before’, the device would detect the corresponding brain activity. (Rosen in the New York Times Magazine, 8/28/2005, p27)

What do we do with the information from technology once we have it?

[Main points of discussion on this question]

- It can provide useful evidence among other considerations.
- For example, a DNA test does not prove that a crime was committed, but that a person had likely been in a certain location. Similarly, fMRI may not be able to tell the difference between a person’s thoughts confined in his/her brain and thoughts derived from specific experiences. As such, fMRI may provide supporting evidence, but not conclusive proof of a crime.

- Technology has limitations, other questions will arise:
- -Can suspects train themselves to get around the test?
- -What is the probability that a person tests positive, but has not actually committed a crime?

What is the legal issue at stake?

The right to privacy; The right to privacy has been formulated in constitutional law as the right to keep those things private that you make a particular effort to protect from the outside world. Constitutional law has conferred a right to privacy in a number of contexts: reproductive freedom, sexual autonomy, privacy of the home.

Do you have a right to the thoughts going through your brain? To what extent could a right to have thoughts freely be waived? Can you be punished for thoughts?

Arguments/perspectives on this issue:

1. This is tantamount to injection of a truth serum, same law should apply
2. You have a right to your space, your brain, a geographical argument; can't search without a warrant
3. There is precedent for not allowing individuals to exercise their freedom of speech if it could endanger the life of others, same is true for finding about intentions, whether in one's brain, or announced to the open world
4. Thought is the most fundamental of all freedoms, until it leaves your head, you cannot be responsible for it.

Other points:

- Forcing someone to take a lie detector test yields inadmissible evidence, same should be true for fMRI tests
- 4th and 5th Amendment doctrine already governs most of the search and seizure, criminal procedure law questions

2 basic questions surrounding this technology the Court will have to resolve:

Can this technology be used to gather evidence?

Which if any of this evidence is admissible in court?

Discussion of broader issues raised in Rosen:

Rosen says Supreme Court has traditionally gotten policy based on normative social decisions wrong when they have gone against the constitutional views of the country as a whole.

How might this point apply to Brown vs. Board of Education?

Argument 1: In applying Rosen's argument on social policymaking, he would suggest that Brown perhaps should have been left to the states.

Argument 2: Brown was consistent with majority constitutional view of equal protection, it's not the fault of the court that some people didn't like it.

Summary Point: Many of these scenarios involve technological progress. Technology is driving fundamental changes in Constitutional Law.

Discussion of the Lawrence Tribe article: "The Treatise Power"

Who was the article written for?

First letter was written to Stephen Breyer, the second was written to readers of American Constitutional Law

What is the source of Tribe's consternation?

He needs more information before he can formulate his own ideas, needs more case law to determine the answers to some critical questions about the future direction of the Court

Current legal landscape doesn't permit the type of treatise he wants to write. Many new questions have come up that defy the old categories/approaches to constitutional analysis.

Major fissures that require more answers before a treatise can be written:

-questions of technology, p.

-questions of religion, p.7-8, discussion of Schiavo case

-Does the 1st Amendment mean America must enforce secularism?

-Or, can it simply prevent the government from unreasonably imposing religion to the extent that it undermines the rights of others not sharing the religion or beliefs being imposed?

Tribe's point: lacking an understanding of how the court will address these issues, it becomes impossible to synthesize the state of American constitutional law

Constitutional law is very muddled with regard to religion. There's currently nothing to summarize because there's a sea of changing opinions, but no consensus.

[Tribe's letter] is a statement of recent political American history. 9/11 has introduced a debate over fundamental constitutional values and priorities, about what the constitutional system should look like. Technological changes like stem cell research have led to a values conflict yet to be resolved within Constitutional law.

Should Tribe be able to step back and let the courts answer these questions, or is it the responsibility of academics to help guide constitutional law?

Courts do not have the luxury of withholding an opinion.

Tribe is saying that he does not want to mix politics with constitutional law

Argument appears somewhat circular: Tribe says that we need to develop a perspective on constitutional law independent of divisive political issues; however, without a decision on these value conflicts, it becomes impossible to resolve conflicts in constitutional law.

Summary point: there must be a level at which our understanding of constitutional law should not be totally controlled by irresolvable and fundamental value judgments, but we have to make an effort to understand how people on the other side think