Seminario Internacional

The Role of the United States Supreme Court: Political and Theoretical Issues

Theme: The Rule of Law as the Rule of Persuasive Arguments Made in the Language of Law

I. Background: From the Bottom Up

A. The people and the Court: A brief history

1. An abstract dilemma: The unelected branch

2. John Marshall and the Court as the voice of the people

3. Late 19th Century to 1937 (Roosevelt and the Court-packing plan)

4. The Civil Rights movement

   i. Footnote 4 of United States v. Carolene Products (1938)

   ii. Brown v. Board of Education

5. The present

B. The people and the Court: A living connection

1. Not an abstract dilemma: Regard for the Court

2. Various explanations

   a. Disillusion with the other branches

   b. Fascination with the Court and the seldom-seen Justices

   c. A society saturated with law

C. The people and the law and the courts: The central importance of trial by jury

1. Magistrate court, the people’s court: Between the people and the state

2. Trial courts
a. Service on juries

b. Juries and law

c. Democratic responsibility for practical justice

3. The courthouse in the community: The people’s place

4. A feeling of alignment between the people and the courts: Myth? Reality?

D. “I’ll take it all the way to the Supreme Court”

II. The Court in Relation to the Elected Branches of Government: Speaking With and For the People

A. Preliminary: The Court’s systemic and non-systemic failures (and injustices?)

1. Incoherence

2. Indian Nations (Native American Tribes)

3. Dred Scott v. Sandford (1857)

4. Lochner v. New York (1905)

5. Korematsu v. United States
   a. The role of dissenting opinions
   b. The standard of judicial review

B. The Court and the President

1. Roosevelt and the Court-packing plan

2. Youngstown Sheet & Tube Co. v. Sawyer (1952)

   a. Marbury v. Madison (1803) (“It is emphatically the province and duty of the judicial department to say what the law is.”)
b. Cooper v. Aaron (1958) (Marbury “declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by the Court and the Country as a permanent and indispensable feature of our constitutional system.”)


5. President Clinton

C. The Court and Congress

1. Ordinary economic and social legislation (the Interstate Commerce Clause)
   a. The end of Lochner
   b. The standard of review
   c. The examples of environmental legislation (ICC) and civil rights legislation (Amendments 13, 14, and 15)

2. The Court and Constraints on Congress
   a. The aftermath of Brown
   b. Current federalism constraints

D. The Court, the President Congress, and Congress: Foreign Affairs and the War Power

E. The Court and the States
   a. The aftermath of Brown
   b. Amendment 14
      i. Due Process of Law
      ii. Equal Protection of the Law

E. The Power and Authority of the Court: Dialogue and Judgment
1. “The Least Dangerous Branch”

2. Dialogue
   a. Among the justices: successes and failures
   b. With the people: Planned Parenthood v. Casey (1992)
   c. With the other federal branches and with state governments

F. The central importance of Free Speech

1. Aristotle: Humans as political animals; humans as speaking animals

2. The Free Speech Clause (Amendment 1)

3. The Civil Rights Movement

4. From Nazi marches to flag desecration
   a. Skokie, Illinois, 1977
   b. Texas v. Johnson (1989), its aftermath, and attempts to amend the Constitution

III. Not So Much the Opinions as the Performance

A. Forms of argument and the languages of law: strengths and weaknesses
   1. Applying rules (positivism, legal realism, textualism)
   2. Upholding the unwritten constitution (higher law, natural law, equity)
   3. Codes
   4. Common law (analogy and precedent)

B. The prior commitment: a willingness to persuade and be persuaded
C. The commitment expressed in compact or covenant rather than social contract
   
   1. The Mayflower Compact
   
   2. The Declaration of Independence
   
   3. The Constitution

D. The commitment expressed in the jury trial and the Supreme Court: Performing who we are and would be as a people
   
   1. The theatrical nature of trials (and appellate courts?)
      
      a. Not a science
      
      b. If truth, practical truth
   
   2. The evocative role of dramatic narrative

E. The role of stories of origin: Myth, history, and hope

F. The power and authority of the Court: What it holds and no more