Jorde Oakmont Symposium - Oct. 23, 2022

"The Supreme Court from a Law Clerk's perspective: How the Court works and Tom's relationship with Justice Brennan. Followed by an analysis of The Nixon Tapes Case and it's relationship to Trump's claims of Executive Privilege to protect his possession of Top Secret documents at Mara Lago; and Roe v.Wade now reversed by Dobbs v. Jackson Women's Health Org."

Introduction

Show pictures: the 1973-74 Court, Justice Brennan; 2 yr old Kevin Brennan Jorde with the Justice and Dad; and the 2022-23 Court.

Pictures of the Court show change in gender and race representation, but we know that it does not follow that there will be more progressive views as a result. Also, see NYT article and dynamic photo display over 150+ years of history from 1867 to present. - I will list in my posted Notes.

My talk will be in three parts: (1) The role that Law Clerks play at the Supreme Court, with a particular focus on my time with Justice Brennan; (2) A discussion of the Nixon Tapes Case, which I worked on with Justice Brennan, and how that case is relevant once again in the Trump - Mara Lago Documents investigation and litigation; (3) I will comment on the recent Dobbs decision which over-ruled Roe v. Wade, and thereby extinguished a woman's constitutional right to abortion. Finally, I will conclude with observations about upcoming cases where we go from here. And then take your questions, of course.

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I. The Supreme Court and role of Law Clerks

Role of Law Clerks

- Today 4 Clerks for each Justice; my day = 3
  - Top students in top law schools
  - Appellate or trial court clerk experience for one year
- I was fortunate to be chosen by Justice Brennan for 1973-74 Term
  - He was a lion on the Court, during the Warren Court years, eg, Baker v. Carr, Times v. Sullivan (public figure requires malice)
- Review 8000 cert. petitions for appeal, but only 80 granted (1%)
- Summarize briefs before Oral Argument
- Help draft Opinions, Concurring Opinions and Dissents

My relationship to Justice Brennan

- Coffee at 9:00 sharp, before 10:00 oral argument
- Spend time with the Justice writing opinions
- Kevin Josef Brennan Jorde
  - Picture of honorary Grandpa came to visit May 1989 - Kevin (2)
  - Letter to Kevin to be opened on his 12th birthday
- The Brennan Center for Justice at NYU
  - Justice Brennan retired in 1990 at the age of 85, after 34 years
  - He died at the age of 92
  - On the occasion of his 90th birthday 1995, I was part of a small group of his Clerks that organized a special present to honor and preserve his legacy: We created The Brennan Center for Justice at NYU, where he had taught when on NJ SCt
  - I am proud that I was one of the co-founders of the BC
  - I have been on the Board since inception
  - BC focusses on protecting democracy: the right to vote, the fight against gerrymandering, free and fair elections, reform money in politics. Actions include litigation, Reseach papers/guides, policy/legislation — state and federal levels; election security and integrity, stop ISLT
  - 25 years later = $40MM annual budget and 150 FTE. Brennancenter.org.

II. Nixon Tapes case as example of Supremacy of the Court in structure of government matters (50 years ago)

- When I clerked for Justice Brennan - he asked me to be the clerk handling this case, which came at the end of the Term; unusual timing
- Nixon had refused subpoena to turn over his tapes as potential evidence in Court cases trying criminal charges against the Watergate burglars. He claimed that Executive Privilege protected him from complying with the Court order.
- Court rejected Nixon's claim of Executive Privilege and said every person, including a President, must obey legitimate order of the courts, especially in the context of a criminal case.
- The Court thus reaffirmed Madison v Marbury (1803) that the Supreme Court was the final arbiter on questions of Constitutionality when reviewing Federal statutes or regulations, or State statutes or State Constitutions, or conflicts between branches of government.

- Nixon resigned 2 weeks after the Court's decision, when the tapes revealed his own participation in a cover-up.
- The Supreme Court averted a Constitutional crisis. Nixon had said "maybe" he would comply, which drove the Court to be unanimous 8-0, Rhenquist recused himself.
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Trump and Mara Lago document litigation - now 50 years later Nixon case relevant.

- Trump was subpoenaed to turn over presidential records that DOJ and National Archives believed he had at his home in Florida, in violation of federal law.
    - [The DOJ is investigating whether Trump violated three federal statutes, including the Espionage Act, which broadly deal with the mishandling of government and national security documents and carry potential punishments of fines or maximum prison sentences between three and 20 years, depending on the statute. Presidential Records Act.]
- FBI conducted now famous search of Mara Lago and found 100+ Top Secret documents and x11,000 more. After their seizure the DOJ began using the documents in its criminal investigation.
- Trump found a friendly court and judge in Miami (who he had recently appointed after the lost election) who agreed to send documents to a Special Master for review of executive privilege or attorney client privilege. This would slow down the investigation, of course.
- The Circuit Court, on a DOJ appeal, excluded the 100+ Top Secret documents from the Master's review, saying that the DOJ could use those documents now. The Circuit Court said no one is above the law, citing the Nixon case.
- USSCt declined to stay the 11th Cir. And, the DOJ has now asked the Circuit Court to halt the Special Master completely and let it have access to all documents.
- I am optimistic that Trump's Executive Privilege and Attorney Client claims will be rejected, but the Special Master referral does slow things down, which was the point.

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III. Roe and Dobbs abortion cases as examples of the Court entering the arena of social policy and constitutional rights, 50 years apart, and with very different results. Obviously the Court's composition has changed and the new super majority is moving quickly to rule on major legal issues with great social impact. But more important, the Court's methodology for deciding Constitutional questions has changed. Originalism and historical analysis now hold sway.

Roe v. Wade - living constitution and evolving rights (50 years ago), established that within the right to privacy (Griswold) a woman has a right to abortion. Planned Parenthood v. Casey later adopted standard that States could not place an "undue burden" on a woman's constitutional right to an abortion.

- Justice Brennan observed in a speech 1985: "We current Justices read the Constitution in the only way that we can: as twentieth century Americans . . . [T]he genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."

Dobbs v. Jackson Women's Health Org. The Court overturned Roe, calling it this "egregious decision", which was based on the right of privacy which is no where in the Constitution. The Court said that when a "right" is not specifically stated in the Constitution (+ Amendments), then for a right to exist it must be "deeply rooted" in the country's history. The Court then found that the right to an abortion fails that test.

- The Court's analysis was based on a concept of Originalism and historical analysis. The 14th Amendment was passed in 1868.
- The Court will not pay attention to societal change, scientific advancement, or recognition of past injustices, beyond those rights that were recognized before 1868 (14th Am.) or 1771 (Bill of Rights).
- Precedent (50 years) and stare decisis jettisoned.
- This a Freeze Frame view of rights: BEFORE women and people of color were able to vote, own property, or otherwise fully participate in government and society.
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Where do we go from here re reproductive freedom and autonomy?

- The issue of abortion or forced birth will now revert to the States and to the people's elected representatives, where it had been prior to Roe.

J. Alito said this a # of times in his Opinion. (30+ states made it a crime before Roe.)

- Result is a split between red and blue States regarding abortion/ women's health issues, in how to balance the rights of women and governmental interest in protecting the fetus/unborn
- 26 States already have either passed new laws after Dobbs, or had trigger statutes waiting, or revived older anti-abortion laws that had been on the books before Roe invalidated them.
- Today 40% pop. lives in a State the sanctions forced births. Another 40% of pop. lives in states that affirmatively protect abortion rights. Remaining 20% are up for grabs, because no affirmative or negative statement yet. But result is likely 50/50 split in population.
- Make no mistake, there will be future litigation: right to travel for an abortion; right to receive mail pharmaceuticals which will cause a miscarriage; questions about what doctors can do for women's health
- National policy - if Party controls all branches of government and can overcome a filibuster, and even then must be willing to impose a national policy on the States. This could go back in forth.

What about other rights that are based on Right of Privacy?

- There are many constitutional rights that have the same origins as the right to abortion — namely, the right to privacy and liberty:
  - The right to contraception (*Griswold v. Connecticut*), the right to interracial marriage (*Loving v. Virginia*), the right to same-sex intimacy (*Lawrence v. Texas*), the right to marriage equality for same-sex couples (*Obergefell v. Hodges*)
- Significantly, none of these rights were recognized, either legislatively, legally, or socially, in the 19th century United States (1868). And so would seem not to pass the Court's new method of Constitutional analysis of Originalism.
- But, Justice Alito stated that Dobbs has no bearing on these other unenumerated rights (rights not specifically spelled out in the Constitution but nevertheless recognized as fundamental) because no State interest in a fetus involved in those cases.
- Kavanaugh writes a Concurring Opinion to be clear that Dobbs would not extend to these other rights, in his view (and future vote).
- However, Justice Thomas wrote a Concurrence that undermined this assertion by calling for a new look at the decisions protecting all the above rights, and more (but notably leaves out inter-racial marriage which would negate his own marriage to a white woman (Gini Thomas).

In addition to other right to privacy cases, what else?

Last Term, in the Bruen case, the Court apply Originalism and historical analysis to the Second Amendment (1771) and determined that there was no words in the Amendment itself and no historical record that would support a limit on the right to bear arms in public. The Court struck down discretionary permits for open carry. State must justify restrictions, and they must be rooted in historical tradition of firearm regulation. Eg, felons; court houses; non-discretionary aspects, such as universal background ck

Next Term 2022-23, Democracy and Race on the agenda

Race:

- Affirmative action in college admissions - Students for Fair Admissions v. Harvard and SFFA v. University of North Carolina
- Legislative gerrymandering and Voting Rights Act (1965) - Merrill v. Milligan [Democracy also]

Democracy:

- Independent State Legislature Theory - Moore v. Harper. ISLT is the most important case.
    - In *Moore v. Harper*, the Court decided to consider a fringe claim that would hand extraordinary power over elections to state legislators over voters and their rights. It could rival *Citizens United* and *Shelby County* (no more pre clearance) in undermining American democracy.

    - The claim is that the Constitution gives state legislatures sole power to set election rules and districts, or decide state Electors to the Electoral College — all without the checks and balances provided by state constitutions, state courts, governors who sign or veto laws, voters who pass ballot initiatives, or even election officials who run elections at the county level. The Supreme Court has never supported this idea. Yet.

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QUESTIONS

What are possible responses to all of this?

Move to Canada?

New Federal laws or Constitutional Amendment?

Practical difficulties

Get back into rough and tumble

Shift to State laws and courts.

Changes to the Supreme Court itself?

- Term limits
  - US only major democracy w/o term limits; also only one state
  - 18 years, one new nomination every two years
  - Possible could be done by Statute
  - Justices could stay on in Senior status in the Circuit Courts, thus avoid age limit problems with Constitutional language - serve while on good behavior - no required retirement
  - Consensus: Presidential Commission on the SCt
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- Additional Justices (Roosevelt and Court Packing - but here Garland stolen, and Barrett rushed through after RBG's death)

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NOTES:

Executive privilege was not designed as a shield to prevent investigation of criminal wrongdoing by a president or former president. Indeed, in United States v. Nixon, which grew out of the Watergate scandal, the Supreme Court refused to apply executive privilege in the context of a criminal probe. Finally, there is case law indicating that executive privilege rests with the current president and not the person in office at the time of the creation of the documents. In Trump v. Thompson

Also see: Judge David Carter's opinion refusing to credit claims of Attorney Client privilege or Executive Privilege by Trump attorney, when documents/conversations were in commission of a crime - fraud on the government and lying under oath, which he found.

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Substantive due process is the principle that the Fifth and Fourteenth Amendments protect fundamental rights from government interference. Specifically, the Fifth and Fourteenth Amendments prohibit the government from depriving any person of "life, liberty, or property without due process of law." The Fifth Amendment applies to federal action, and the Fourteenth applies to state action. Compare with procedural due process.

The Supreme Court's first foray into defining which government actions violate substantive due process was during the Lochner Era. The Court determined that the freedom to contract and other economic rights were fundamental, and state efforts to control employee-employer relations, such as minimum wages, were struck down. In 1937, the Supreme Court rejected the Lochner Era's interpretation of substantive due process in *West Coast Hotel v. Parrish, 300 U.S. 379 (1937)* by allowing Washington to implement a minimum wage for women and minors. One year later, in footnote 4 of *U.S. v. Carolene Products, 304 U.S. 144 (1938)*, the Supreme Court indicated that substantive due process would apply to: "rights enumerated in and derived from the first Eight Amendments to the Constitution, the right to participate in the political process, such as the rights of voting, association, and free speech, and the rights of 'discrete and insular minorities.'"

Following *Carolene Products*, the U.S. Supreme Court has determined that fundamental rights protected by substantive due process are those deeply rooted in U.S. history and tradition, viewed in light of evolving social norms. These rights are not explicitly listed in the Bill of Rights, but rather

are the penumbra of certain amendments that refer to or assume the existence of such rights. This has led the Supreme Court to find that personal and relational rights, as opposed to economic rights, are fundamental and protected. Specifically, the Supreme Court has interpreted substantive due process to include, among others, the following fundamental rights:

- The right to privacy, specifically a right to contraceptives. *Griswold v. Connecticut, 381 U.S. 479 (1965)*; The right to pre-viability abortion. *Roe v. Wade, 410 U.S. 113, (1973)*; The right to marry a person of a different race. *Loving v. Virginia, 388 U.S. 1 (1967)*;The right to marry an individual of the same sex. *Obergefell v. Hodges, 576 U.S. 644 (2015)*

See also, for a perspective on the Robert's Court:

https://www.washingtonpost.com/opinions/2022/11/04/supreme-court-john-roberts-tragedy-ruth-marcus/?utm_campaign=wp_post_most&utm_medium=email&utm_source=newsletter&wpisrc=nl_most&carta-url=https%3A%2F%2Fs2.washingtonpost.com%2Fcar-ln-tr%2F3846b6d%2F636533ed7e2620469f031ca5%2F596b0e079bbc0f403f8a5001%2F17%2F72%2F636533ed7e2620469f031ca5&wp_cu=f89d9e1eef1b6042569142baaab2778b%7CC0D737CDEB154969E0430100007FF0C5.