

# Constitutional Law in the 21st Century: Privacy, Personhood, & Freedom | Jeffrey Rosen

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## Topics for Discussion:

Justice Louis Brandeis

**Olmstead v. United States (1928) – Search or Seizure**

**Katz v. United States (1967) - Expectation of Privacy**

**Roe v. Wade (1973)**

**John Wilkes (General Warrants)**

**Drones**

**Right to Be Forgotten**

**Proportionality principle**

**Congress vs. Courts**

Like Jefferson, Brandeis believed that the greatest threat to our constitutional liberties was an uneducated citizenry, and that democracy could not survive both ignorant and free. — Jeffrey Rosen

Before Sept. 11, the idea that Americans would voluntarily agree to live their lives under the gaze of a network of biometric surveillance cameras, peering at them in government buildings, shopping malls, subways and stadiums, would have seemed unthinkable, a dystopian fantasy of a society that had surrendered privacy and anonymity. — Jeffrey Rosen

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.” – Preamble to the Constitution (William Samuel Johnson, Alexander Hamilton, Gouverneur Morris, James Madison, and Rufus King)

“Ways may someday be developed by which the Government, without removing papers from secret drawers, can reproduce them in court, and by which it will be enabled to expose to a jury the most intimate occurrences of the home.” – Justice Louis Brandeis (dissenting opinion in the *Olmstead v. United States* - wiretapping case on the fourth amendment)



Amendment I: **Congress shall make no law** respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Amendment IV: The right of the people to be **secure in their persons, houses, papers, and effects**, against **unreasonable searches and seizures**, shall not be violated, and no warrants shall issue, but upon **probable cause**, supported by oath or affirmation, and **particularly describing the place to be searched, and the persons or things to be seized**.

Amendment V: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, **except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger**; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be **a witness against himself**, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI: In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment VIII: Excessive bail shall not be required, nor excessive fines imposed, **nor cruel and unusual punishments inflicted**.



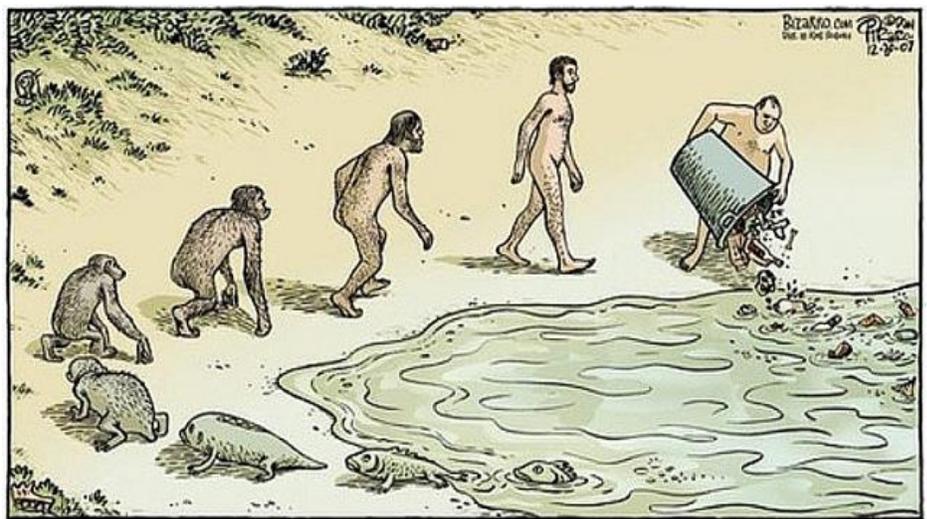
**BIG IDEA:** What interests me about the American legal system – indeed, any legal system accountable to interpretation and precedent – is that it relies on the qualitative judgements of human beings who arrive biased by their own experiences, prodded by their biology, and influenced by the culture, politics, and opinions of the world around them. Preparing for this discussion has granted me an enormous amount of respect for the role played by judges in the legal system, and for the legal process itself. One may be excused for feeling safer in the knowledge that there is a system (not an arbitrary pontiff), albeit an imperfect one, that is responsible for protecting our rights in times of changing sentiment. So, in this sense, it is the legal process itself that deeply interests me.

Having said this, what is of particular interest to me is how this qualitative organ of jurisprudence has, and will continue, to shape the contours of civil society and the ways in which we experience the powers of government to incarcerate, surveil, silence, kill, and protect human beings living within this system of laws. It is the mechanisms by which a minority of individuals working within the court system apply their preconceptions, ideas, and mental frameworks in the service of interpreting the meaning and spirit of the law. It is no small observation to note that the outcomes of the cases they oversee and the opinions they form inform the entire

system from now unto some unknown future. (remember that there are some important cases we want to focus on & we want to mention how concerning it is that supreme court nominations are so often politicized around a narrow – though not unimportant – set of issues like abortion, civil rights legislation, gun laws, and religion in school)

There are two general areas that I am most interested in covering today. Each separates into two parts. The first deals with the ongoing technological revolution in information acquisition, storage, & processing, and how that impacts privacy, autonomy, agency, and freedom. This focuses mainly on questions concerning the first and fourth amendment – free speech and privacy. The second deals with the revolution in neuropsychology, bioethics, cybernetic organisms, artificial intelligence, and the genomic sciences. As we advance our understanding of neuro-causality and material determinism, will our notions of free will change? How will this affect our notions of personal responsibility and culpability for crimes? Will this push us towards a preventative legal system as opposed to a punitive system of jurisprudence? And what about genetic engineering? How will our laws determine the application of advancements in this field? What about artificial intelligence, cybernetic organisms, and the rights of personhood? Where does theory of mind fit in?

1. **The Organ of Jurisprudence** — How the Law Evolves to Meet Changing Notions of Being, Self, and Agency brought on by Technology - There are 27 amendments to the constitution, but only four that fall within the bill of rights – the original, first 10 amendments – are particularly relevant to our conversation today. (Questions that arise from the types of changes to norms of agency expression, privacy, and to the integrity of one’s own thoughts and one’s own body. The first, the fourth, the fifth, and the sixth. Perhaps you could start by helping us understand how the law has evolved with respect to the constitution, bill of rights, and previous, landmark rulings and opinions – like *Olmsted v. United States*, for example? Can you lay a foundation for our audience to appreciate just how organic law is?
2. **The Founders’ Intentions** — So, with respect to this recognition of the law’s evolution, how do you feel the intention of the founders has fared throughout our history? Has it waxed and waned in relevance or has it been a more or less linear departure from those intentions as the decades and centuries roll on?
3. **Surviving Progress** — The founders make very clear in the 52-word preamble to the constitution that securing the blessings of liberty to themselves and to us, their posterity, was of the highest order of importance. The subject of freedom remains one of the sources of contention in American politics, whether we are talking about guns, abortion, surveillance, taxes – but, it seems to me that our freedoms are being infringed upon in ways that not only couldn’t have been imagined by our founders, but in ways that even we struggle to appreciate and define. For example, the freedom to be alone in our own thoughts. Something as basic as one’s ability to sit in silence may become impossible in the near future with some of the innovations we can foresee in bionics and augmented reality. It’s already a challenge in ways that were not the case 10 or 20 years ago. What does the constitution have to say about these developments – and I’m happy to provide specific examples – but, how do you see the constitution protecting us from the momentum of our own innovations and our own ambitions for progress?



4. **Privacy from Government vs. Private Sector** — Why does the constitution provide less protection against privacy today than it did 200 years ago? How has the empowerment of the commercial sector (Facebook, Google, etc.) impacted this?

5. **Unreasonable Search or Seizure** — Can we talk about **Olmstead v. United States**, and the implications it had for privacy in the context of advancements in the technology of the time (telephone) and how the courts' and the country's notions of what constituted a search and what could be deemed a seizure changed? The fact that a conversation traveling over a wire could be seized, I think, required a leap of conceptual thinking that cannot be underestimated. How does this notion of proportionality and the "proportionality principle" apply to modern interpretations of the law and its application in this regard?

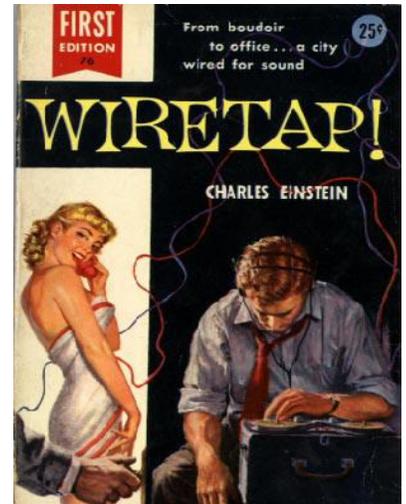
\*\*\*Brandeis was remarkably prescient in his dissenting opinion. It seems that so much hinges on that word "reasonable." Unreasonable search or seizure...

6. **Reasonable Expectation of Privacy** — Talk to me about the fourth amendment and "reasonable expectation of privacy in the context of **Katz v. United States.**" How did this ruling come about, and how are courts today approaching the question of what defines a reasonable expectation of privacy? Do I have a reasonable expectation of privacy when I'm playing in my private pool with my children?

7. **Privacy in the Home** — What is our right to privacy in the home as it is being interpreted by the courts and as it is being intruded upon by governments and private corporations? What is the public's opinion on these and other matters of surveillance? Do we have any idea, and how much does it matter? (Case of body scanners as place where public outrage had an effect?)

8. **Secure in our Persons** — This notion of being secure in our persons, and that our persons will not be seized – that we, in other words, will not be seized by the government without probable cause and only under a warrant that specifies – *that identifies* – the person whose freedom will be taken away, is fraught with ambiguity as we move into a world where we may exist in part or in all, in the cloud, on the Internet, residing on a server. Whether it's some avatar or in the more controversial ideas of futurists in the valley, the disembodied self. Have you considered this particular language in the fourth amendment and how it may present challenges to the protection of liberty in the coming decades? \*\*\*Surveillance State mentioned further down.

9. **Utility Functions and Jurisprudence** — Advances in narrow A.I. like Natural Language Processing (NLP) software is already proving useful in the legal profession. The most immediate and profound challenges of interpreting the law in the age of intelligent machines is front and center in autonomous driving vehicles. Specifically, in respect to the formulation of utility functions and assessing the value of property and human life in a way that we've never dealt with before, where we hand over the decisions for which individuals would be accountable and we hand them over to machines. I have two separate questions in this regard. The first is, how is the legal profession dealing with these issues currently (is this a place where congress must act before the courts) and how do you foresee the law dealing with these issues in the near future. The second deals with jurisprudence itself and how that may change in the age of algorithms, where utility functions and



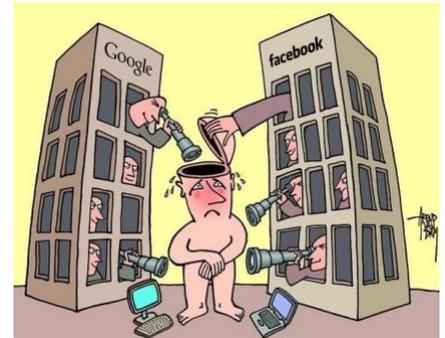
precise, quantitative values for otherwise qualitative, linguistic constructions like the law, may be used to effectively try people, extra judiciously. You seem to be an advocate of translation of the constitution so that its spirit remains intact and not being constrained by just the limitations of the language. How would this be managed in the age of machines and the law? I know one of your recent graduates works at Facebook. What does he say about this?



10. **Role of Congress vs. the Courts** — Forever, our focus had been on the collection of information. But now, the most innocuous forms of information that we disseminate publicly can be mined to create some of the most revealing insights about our personal lives. How do we manage this? Where does the fourth amendment fall? And where will the restrictions come from? Will they come from the courts or from the congress?

11. **Threat Tolerance & Proportionality Principle** — How does the government manage to deal with the increasing immediacy of threats, including massive cyber-attacks on the Internet itself, in the context of individual privacy?

12. **Synthetic News & Simulation** — How can the constitution protect us from synthetic news? Companies can already create videos of people saying things that they never said. What does the law say here? How can the bill of rights protect us from the impact of engineered code deciding what we see, what jobs are available to us, how likely we are to commit a crime, etc.? (stereotyping)



13. **The Social Contract** — Rousseau spoke about the social contract as



something that we didn't have to sign, but which was an implied agreement between citizens and their government – you take away some of our rights, and in return, we should get certain benefits of civil society. Something similar should exist in the world of big data. The right to be forgotten in Europe is one example. What else can be done to reverse some of the overreach of private entities in selling and disseminating our data without our consent? This is a good time to bring up TOS.

14. **Justice Brandeis** — You often ask, “what would Brandeis do?” Do you ever ask yourself “what would Brandeis say?” What would he say if he learned how the courts have interpreted the law today?

15. **Net Neutrality vs. Content Neutrality** — There has been a great deal of attention focused on net neutrality but not enough on neutrality “within the net.”(e.g. Facebook & Google). Is there any discussion in the legal profession about how these major platforms are able to exert pressures on virtual traffic similar to those of the backbone providers?

16. **Neurolaw** — At present, the law's official position – that conscious, intentional, rational, and uncompelled agents may properly be held responsible – is justified. What happens if the neuroscientific consensus comes to the view that all thoughts and actions are pre-determined by our biology and that free will is just an illusion? The law is built on a Cartesian view of mind and brain – Dualism. Physicalism. Monism. – Will this lead to more executive overreach into the realm of prevention and way from punishment? \*\*\* Bring up the case of Aaron Hernandez.



17. **Designer Babies** — What does the law have to say around genomics and genetic engineering? Is there clarity around our rights not to have our genetic material used without our consent? Also, what about our right to manipulate our own genetic material? How does this come together?
18. **Theory of Mind** — There are many in Silicon Valley who talk about the need to develop a theory of mind, in the event that we are able to create “conscious machines.” Is anyone in the legal profession thinking about these things, and what would the constitution have to say about this?
19. **Surveillance State** — What does the fourth amendment say about mass surveillance? Does it prohibit it in your view, considering the language “describing the place to be searched, and the persons or things to be seized?”
20. **Upcoming Supreme Court Cases** – TBD



[From Warrants to Wiretaps: Jeffrey Rosen Tracks Changes in the Constitutional Right to Privacy over the Centuries](#)

[In the Age of Trump: A New Surge of Interest in the Constitution](#)

[Squarespace is dropping Richard Spencer’s think tank and other “alt-right” websites](#)

[The Delete Squad: Google, Twitter, Facebook and the New Global Battle over the Future of Free Speech](#)

\*\*\*Orin Kerr and less restriction on bulk collection and more on use of data after collection (let’s talk iPhone and Tim Cook if we have the time.