

Tsin Yen Koh

Week 4: Courts and Rights

(1) Rights and the constitution

- Under what circumstances can/should individual rights be restricted for the greater good?
 - E.g. Snowden/NSA case
- Is the Constitution still [relevant](#)?
 - Is it necessary to have a Constitution to protect individual rights?
 - Should new rights (e.g. right to privacy) be spelled out clearly in the Constitution?
 - Are there occasions on which constitutional protection of rights deforms public debate? E.g. on gun rights (might be a better debate without having to consider the interpretation of the Second Amendment), abortion rights (might be a better debate without having to locate a right of privacy in the Constitution and relate abortion to it). See Waldron on this.
 - Possible e.g.: *R. A. V. v City of St Paul, Minnesota (1992)*: A 14-year-old constructed a cross from broken chairs and burned it on a black family's lawn. Charged, inter alia, under the St Paul, Minnesota Bias Motivated Crime Ordinance, which prohibited the display of a symbol which one knows or has reason to know "arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." The trial court said it was overbroad and impermissibly content-based. The State Supreme Court said these were "fighting words", and so not constitutionally protected. The Supreme Court (with Scalia writing for the majority), reversed and said the ordinance violated the First Amendment protection of free speech. The idea was that states couldn't prohibit the content of "fighting words" (though they could prohibit "fighting words") – couldn't regulate their content based on nonproscribable categories. So thoughts and intentions cannot be regulated – though the actions based on these can, if there is direct harm or direct incitement to violence (therefore "fighting words" can be prohibited).

(2) Is judicial review anti-democratic?

- Yes it's anti-democratic:
 - Counter-majoritarian: judges are not elected and not accountable. (Although counter-majoritarian doesn't necessarily mean anti-democratic.) Judges are often partisan too.
 - In cases of genuine disagreement over rights, the best (fairest, most equitable) decision procedure to use is some kind of majoritarian decision rule. (Waldron)
- No it's not
 - Judicial review necessary to protect individual rights.
 - Courts a "forum of principle", justices insulated from immediate political pressures and popular needs, better at taking the long view, better at arguing over principle. (Madison, Dworkin, Bickel)
 - Courts an important check on the legislature.

Discussion questions (sent ahead of time):
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1. Is judicial review (as practiced in the US) anti-democratic?
2. Is judicial review necessary to safeguard individual rights?
3. Is the Supreme Court a political institution? Does it make political decisions?
4. Under what circumstances would you approve of/allow the restriction of individual rights for the greater good? (e.g. hate speech? gun rights?)