Government 97 – Spring 2015
Week #4: Democracy, Rights, and Courts

Background

The main question this week is how judicial review fits into a democratic political system. The readings implicate questions about constitutional structure and the balance between majoritarianism and individual rights. The main concern, as expressed by Bickel, is that the review and potential nullification of laws by an unelected body seems to violate the majoritarian nature of democratic rule.

Many justifications have been given for judicial review that attempt to overcome the "counter-majoritarian difficulty." For your own reference, here's a list of the most prominent (if discussed in this week's readings, there's a reference at the end):

1) *Fundamental values*: A democracy presupposes some fundamental values and principles beyond majority rule. By countering the majority at certain times to uphold these ideals (e.g., individual rights, equality before the law, the separation of powers), the judiciary is furthering, rather than undermining, democracy. (*Bickel*)

2) *Minority protections*: Majority rule has to be complemented by institutions that protect against majority tyranny. This is particularly the case for "discrete and insular minorities" whose interests will not be protected by a system of elected representation. (This can be viewed as a version of #1, but some proponents have argued that the Supreme Court can protect minorities not by focusing on the laws themselves and whether they violate individual rights, but by looking at whether the legislative process is tainted by prejudice.)

3) *Liberty over democracy*: The Framers were less concerned with ensuring a functioning majoritarian government than with protecting individuals and their interests *from* a federal government that could possibly become tyrannical. The idea of a countermajoritarian difficulty mistakenly supposes that the Constitution values democracy over individual liberty.

4) *Process*: For a government to be a true democracy, its institutions of majority rule have to function properly and respect limits on their power. Judicial review plays a key role in ensuring the functioning of democratic institutions, even if at times it seems counter-majoritarian. (This view can't explain a lot of what the Supreme Court does, though.)

5) *Constitutional supremacy:* The legislature represents the will of representatives, whereas the Constitution represents the will of the people. When the judiciary strikes down legislation as unconstitutional, it is *upholding*, not undermining, the true essence of democracy: rule of the people. (*Hamilton*)

6) *What counter-majoritarian difficulty?* The judiciary hews closely to majority opinion, so counter-majoritarianism isn't really a problem in practice. (*Dahl*)

7) *Legitimation:* Judicial review plays a key role in legitimating legislative decisions by showing they accord with constitutional principles. It would be impossible for the judiciary to play this role without also giving it the power to occasionally strike down legislation as violating those constitutional principles. (*Discussed in Bickel*)

8) *Functionalism*: Judicial review has evolved because it serves a useful function and the Supreme Court has carefully worked for two centuries to build its legitimacy. Nothing (such as a textual guarantee of judicial review in the Constitution) stops the other branches from eliminating judicial review if the courts abuse that power. Thus, as long as the judiciary plays a useful role and the other branches acquiesce, there is no countermajoritarian difficulty, and no extensive theoretical justification of the process is needed.

Discussion Questions

1) Bickel presents the main theoretical problem with judicial review as being that it violates the ideal of majority rule. Is majority rule the most important aspect of democracy in the U.S.? What other values are important and might even take priority?

2) Is the Supreme Court a "forum of principle" or a political institution? Or both?

3) Waldron claims that there's no reason to expect courts to do a better job than democratic legislatures in protecting individual rights. Do you agree? What real-life examples can you think of that support his argument? What examples undermine it?

4) The practice of judicial review seems firmly entrenched in the US political system: Virtually no one anymore questions whether the Supreme Court has the right to strike down a law as unconstitutional. Where did judicial review come from? How do you think it became so widely accepted?

    a. The Constitution nowhere outlines the practice of judicial review. Do you think it is implied by the text and structure of the Constitution? Or by the emphasis the Framers placed on the limited nature of the federal government (as Hamilton claims)?

5) Let's say we accept the practice of judicial review generally:

    a. Should we have "strong" or "weak" judicial review (to use Waldron's terminology)?

    b. On what basis should the courts strike down laws as unconstitutional? The plain text of the Constitution (which is often purposefully vague)? Our country's history and traditional values? How they affect minority groups whose views aren't well represented by majority rule?

        i. How should the judiciary take into account that our country's values change over time? (Think about changing conceptions of the rights of women, minorities, gays and lesbians, etc.) Does the Constitution "change" as well?

    c. Is there a concern that the judiciary would become too powerful (contrary to Hamilton's argument in *Federalist 78*)? How could you limit the practice of judicial review to prevent this?

Judicial Review Activity

The following are four parts of the Constitution that litigants in the Supreme Court often invoke to challenge legislation as unconstitutional:

1) *Equal Protection Clause of the 14th Amendment*: "No state shall… deny to any person within its jurisdiction the equal protection of the laws."

2) *Commerce Clause (Article I, §8):* "The Congress shall have power… [t]o regulate commerce with foreign nations, and among the several states, and with the Indian tribes." [Note that Congress can't otherwise regulate commerce.]

3) *Free Speech Clause of the First Amendment:* "Congress shall make no law… abridging the freedom of speech."

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

You have recently been appointed to the Supreme Court (congratulations!), and for each of the cases below,[1] you need to decide the following:

- Is this the type of case in which the Supreme Court should get involved? That is, would it be better to leave the issue to the legislative process? What values are at stake, and who should determine how to apply them?

- If you think the Supreme Court should hear the case, with which side do you agree? Will you strike down the law as unconstitutional? Why or why not?

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1. Congress has just passed a federal law banning racial discrimination in employment, housing, and public accommodations like hotels. It is well established that states have the authority to pass such laws, but not that the federal government does. A motel claims that the federal government has no constitutional authority to pass a law governing it, since it is a purely local business. The federal government counters that it has that power under the Commerce Clause.

2. The federal government has just passed a law requiring all Americans without health insurance to buy it from a private company or face a fine. A group of citizens without insurance argue that the federal government has no right to force them to buy private goods or services; the federal government responds that health care is a national problem and it has the right to regulate it—including by requiring individuals to buy insurance—under the Commerce Clause.

[1] These are all based on real cases: (1) *Heart of Atlanta Motel v. US* (1964); (2) *National Federation of Independent Business v. Sebelius* (2012); (3) *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976); (4) *Grutter v. Bollinger* (2003) and *Fisher v. University of Texas* (2013 and currently before the Supreme Court again); (5) *Citizens United v. FEC* (2010).

3. A death row inmate challenges a state law allowing for the death penalty. He claims that the death penalty, being an irreversible form of punishment in an imperfect criminal justice system, should always be viewed as "cruel and unusual," in violation of the Eighth Amendment. The state counters that its legislature has considered and firmly rejected the idea that capital punishment always amounts to cruel and unusual punishment. Moreover, capital punishment was clearly accepted as constitutional when the Constitution was written.

4. A white women rejected from a state university's law school argues that she would have been admitted had the law school not had an affirmative action program. She argues that the program discriminates against white applicants and thus violates the Equal Protection Clause. The law school counters that the affirmative action program makes extremely limited use of race as one factor among many—including educational background, test scores, letters of recommendation, extracurricular activities, etc.—in making admissions decisions, and that consideration of race is necessary to ensure a diverse student body. Commentators further argue that affirmative action is necessary to redress systemic injustices and a legacy of discrimination that prevents minority applicants from having a fair chance at admission.

5. A group of wealthy political donors claims that campaign finance laws are preventing them from having their voices heard in an upcoming election. They claim that prohibitions on their spending money through their corporations is tantamount to censorship, in violation of the Free Speech Clause. The federal government responds that the Supreme Court should defer to Congress's view that campaign finance laws are necessary to protect the integrity of the electoral process. At oral arguments, one of the lawyers defending the laws says that the laws would, under certain circumstances, allow the federal government to prohibit the publication of certain books around election time.