Sophomore Tutorial on Democracy:  Week on Judicial Review

*This week we’re talking not about* ***whether*** *or not we ought to have rights in a democracy, like last week, but rather* ***how*** *to implement them institutionally.  The readings are largely about the consequences of entrusting those rights to the courts and to the process of judicial review.  In that sense, the focus of this week is on the* ***institution*** *of the Supreme Court and its role in enforcing the Constitution.*

*To explore this issue, we want to think about three things: [write on board]*

* *We want to think about how this institution \*should\* work.*
* *We want to know something about how, empirically, it actually \*does\* work.*
* *We want to think through the consequences of that for other things we care about, like the quality of democracy, the protection of minority rights, etc.*

*[I've cut out Parts I and II from this lesson module, which consist of a series of more traditional discussion questions, and focused on Part III, which involves active learning]*

**PART III:  What are the consequences of judicial review for democracy?**

Debate set-up:

* We will have two debates. Each team will be assigned a position.
* Everyone must speak (this is the basis for your participation grade today)
* 10 mins:  Prep your position in 2 small groups of 4
* 5 mins:  Present your position (each team)
* 3 mins:  Prep your rebuttal
* 2 mins:  Present your rebuttal (each team)
* 10 mins:  Debrief - "Now you can take off your debate hats and put on your discussion hats. So, you're no longer defending a specific assigned position. What do you think? Who won, ultimately? Was one side easier to argue than the other? Why? *[In this discussion, raise points from list below if one side or the other missed them*]

Debate I:  Does judicial review threaten or reinforce democracy?

*Assigned positions: "Judicial review threatens democracy" or "Judicial review reinforces democracy."*

* THREATENS:
  + **It’s counter-majoritarian.**
    - JD is rule of an unelected handful of justices to adjudicate our most fundamental rights, which runs against our democratic ideals of accountability
    - JD is contrary to fundamental values of democracy, and this inconsistency is delegitimizing and bad for the system
    - JD is rule of the dead over the living.  We didn’t sign up for judicial review.
  + **It makes legislative debate worse.**  JD implies distrust of the legislature, which (Bickel argues) weakens the legislature’s commitment to exercising Constitutional restraint and worsens the quality of legislative debate (ultimately bad for the quality of democratic institutions and outcomes)
  + **Justices aren’t better than legislators at protecting rights** (this is Waldron’s argument) so there’s no justification. (the pushback here - and my critique of Waldron - is that he’s got a rosy picture of what legislative debate is likely to be like)
* REINFORCES:
  + **It’s close to “rule of the minority” and supplements majoritarianism.**  Democracy is rule of the people.  The People include the majority AND the minority.  In a system that’s mostly majoritarian, it’s democratically legitimate to include mechanisms that prevent tyranny of the majority.  Judicial review protects rights, which - if that’s not “*rule of* the minority,” it’s at least “*rule on behalf of* the minority.”  This gets us closer to “rule of the people.”  This is Ely’s “virtual representation.”
  + **It protects long-durée majoritarian values/interests.**  Courts defend the “true” interests of the majority by protecting them from whims/”passions.”  This is similar to how Madison understands the Senate, and it’s Bickel’s argument about courts protecting “enduring values.”
  + **It protects the democratic process** from being usurped for the benefit of those in power.  This is how Ely thinks it should be used.
  + **Empirically, it’s not as counter-majoritarian as critics fear.**(Dahl, Dorf)  Just because justices aren’t “responsible” (e.g. formally accountable) doesn’t mean they’re not “responsive” (Bickel’s language)
  + **Justices are appointed by elected officials.**  They’re not elected themselves, but they’re chosen by representatives of the people.  (though Waldron says we should think of democratic-ness as comparative, and the process of choosing legislators is more democratic)

Debate:  Should Supreme Court justices be elected?

*Assigned Positions: "Supreme Court justices should be elected" and "Supreme Court justices should not be elected."*

* + YES ELECTED:
    - **More democratic - authorized.**  This would correct for the counter-majoritarian difficulty, since elected judges would represent the people and be authorized by them.
    - **More democratic - accountable.**  Elected judges would not only be authorized by the people, there would be a mechanism to hold them accountable to the people, ensuring their judgements remained aligned with the will of the people.
    - **They’re not insulated anyway.**  The idea that justices are insulated from politics and public opinion and that this is important to their jobs doesn’t hold up empirically anyway (see Dahl, Epstein et al) - so why not add democratic legitimacy?
  + NO, NOT ELECTED:
    - **Minorities would suffer.**  Empirically, on some key issues the majority of the public diverges from current court rulings (e.g. death penalty)
    - **It would make the Court redundant to the legislature.**  Electing judges would make the institution pointless - why not just entrust the defense of the Constitution to the legislature, like in Britain?  Arguably (like UK Parliament - ref. Bickel) they’ll be responsible/restrained once it’s actually their job.

**Judges would become vulnerable to special interests.**  This would make justices vulnerable to the same kinds of campaign finance incentives--and therefore, interest group pressures--that we think make our current electoral system problematic.