



Democracy v Fundamental Rights: The Counter-majoritarian Difficulty

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Scenario 1: throw a hand grenade into a classroom!

- picture of first year class from multicultural neighbourhood in Teplice published in local newspapers
- many (stupid) people reacted on Facebook and elsewhere
- is their behaviour covered by freedom of speech?



Who should decide about fundamental rights and their meaning?

- God etc. = natural rights
 - innate to all humans
- each person by herself = self-conscious decision
 - morality?
- majority of the people = parliaments
 - by law (statute)
- supermajority of the people = parliaments / referendums
 - by constitutional law (Bill of Rights)
- judges = courts
 - by (binding) case-law



Scenario 2: could you burn a flag?

- desecration of US flag was a crime in 48 out of 50 US states
- Mr. Johnson burned US flag and was sentenced to a year in prison
- Supreme Court (*Texas v Johnson*, 1989)
 - burning of a flag covered by freedom of speech
 - 5 to 4 majority



Scenario 3: obligatory public works



- **Law 367/2011 Coll.**
 - long-term unemployed must participate in a public work in order to maintain financial support
 - adopted in the House of Deputies by 108 votes (69 against)
- **opposition asked for a review by the Constitutional Court**
- **PI. ÚS 1/12**
 - law invalidated for a breach of Art. 9 para 1 of Czech Charter of FR (forced labour)
 - many dissenting opinions

The dilemma of counter-majoritarian difficulty

- judicial review = courts could strike down statutes adopted by parliaments (a body elected directly by the people) for its unconstitutionality
 - concrete judicial review = statute invalidated on the background of a concrete case (injury to an applicant)
 - abstract judicial review = statute invalidated without concrete case
- CMD coined by Alexander Bickel (*The Least Dangerous Branch*, 1962)

„The central function, and it is at the same time the central problem, of judicial review: a body that is not elected or otherwise politically responsible in any significant way is telling the people’s elected representatives that they cannot govern as they would like“ (John Hart Ely)

„The counter-majoritarian difficulty refers to the supposedly anti-democratic nature of judicial review, since it allows courts to overturn the handiwork of elected officials“ (Daniel Farber)

(Abstract) answer: Why judiciary shall have this power

- allegory of Ulysses and the Sirens

People (Ulysses) are aware of the **temptations of short-term preferences** (song of the Sirens) on their **long-term constitutional commitments** (ship's course), so they bind themselves to the **Constitution** (mast) and even if Ulysses protests (**legislators accepting current opinions**), **courts** (ropes) save him from losing his mind



Value of different fundamental rights

- supporters of JR: some rights (equality, human dignity etc.) must be protected from majoritarian decisions
- critics: democracy is crucial, based on one man – one vote principle (legitimacy)
 - assumptions: open elections, fair legislative process
- threat: tyranny of the majority
 - critics: in any case about a right there is a tyranny involved (someone wins or loses)
 - but supporters: the case of „discrete and insular minorities“ (*United States v Carolene Products*, 1938)

Scenario 4: separate but equal doctrine

- all US citizens are equal but it is possible to separate according to race
- separation obligatory in 17 US states
- Supreme Court (*Brown v Board of Education of Topeca*, 1954)
 - „separate educational facilities are inherently unequal“
 - unanimous decision



Value of different fundamental rights

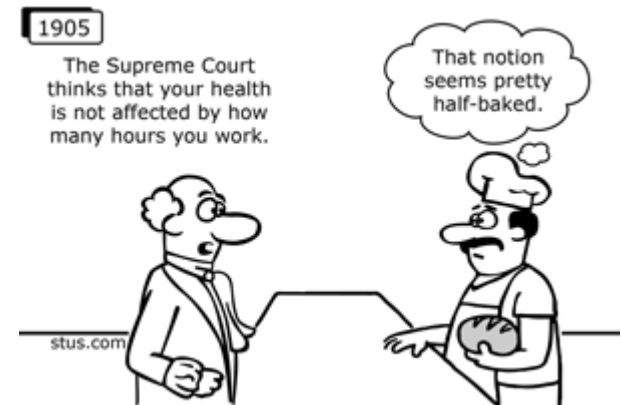
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 - but: do the topical and decisional minorities overlap?
(affirmative action un/supported by both blacks or whites)

Rights and institutional (dis)advantages

- **members of parliament v judges**
 - directly elected members v appointed
 - dependency v insulation from public opinion
- **decision-making rules**
 - majority rule in parliaments (representation)
 - safeguards against dominance of the majority
 - majority rule in courts
 - sometimes also safeguards (Czech CC: 9 out of 15 judges to invalidate statute)
 - but what is the justification of voting?
- **intermezzo: do the courts always provide „more rights“?**
 - *Plessy v Ferguson* (1896): establishment of the separate but equal doctrine

Scenario 5: working conditions of bakers

- New York adopted a regulation setting the max working hours of bakers to 10 hours/day (60 h/week)
- Supreme Court (*Lochner v New York*, 1905)
 - breach of a freedom of contract (right to sell or purchase labour)
 - followed by an era in which the SC stroke down many laws regulating „economic liberty“



What is the meaning of rights?

- **supporters of JR**
 - interpretation requires expertise (undetermined texts)
 - instruments such as proportionality test applied
 - detailed reasoning of the outcome provided
 - decision based on a concrete case
- **opponents of JR**
 - members of parliament also justify their decisions
 - is the meaning of certain right really a legal issue?
 - concrete case unimportant in the end
 - some decisions rather have moral dimension?

Scenario 6: right to abortion

- abortion forbidden in many countries around the world
- right of a women to decide about her body or right to life of an unborn child?
- US Supreme Court (*Roe v Wade*, 1973)
 - woman´s right to privacy under due process clause prevailed
- European Court of Justice (*A, B and C v Ireland*, 2010)
 - Art. 8 ECHR (right to privacy) does not guarantee right to abortion
 - Ireland may keep the ban on abortion
- Antonin Scalia: „*Do we decide on texts and their interpretation or about value judgments?*“
 - maybe the latter are better left to the common man?

Dissolving counter-majoritarian difficulty

- what if courts generally do not act against political majorities?
 - supported by empirical evidence (e.g. in the US); reasons:
 - judges appointed by democratically elected bodies
 - fear of backlash (constitutional changes), no compliance from other powers
 - judges with similar values as common man?
- people generally have trust in courts
 - democratic legitimacy only part of the (whole) picture
- but how far could courts go in order not to lose support?

Ideological development of the US Supreme Court

Ideological spectrum of Supreme Court justices, 1937-2010



Mother Jones

Justices' ideological ratings measured as Martin-Quinn scores. 1937, 1938, 1956, and 2005 counted twice due to justices being replaced mid-term. Source: Andrew D. Martin (Washington University School of Law) and Kevin M. Quinn (UC Berkeley School of Law)



Support for the US Supreme Court

Percentage with "a great deal" or "quite a lot" of confidence in the institution

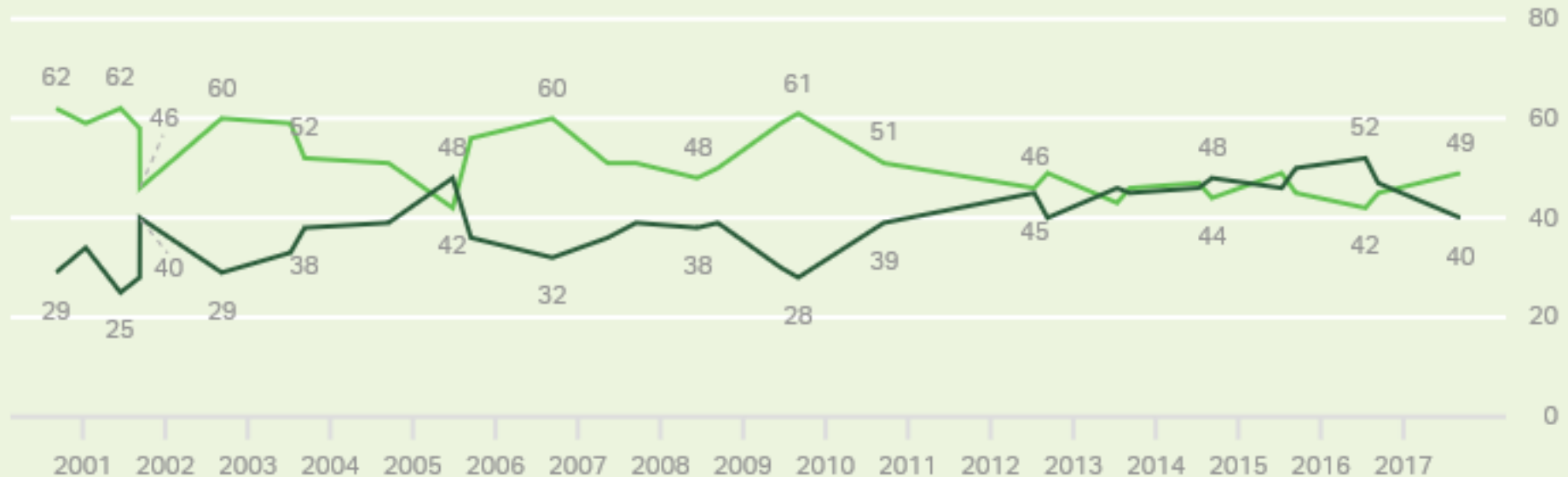
	June 2006	June 2016	Difference, 2006 to 2016
	%	%	pct. pts.
Military	73	73	0
Police	58	56	-2
Church or organized religion	52	41	-11
Medical system	38	39	+1
Presidency	33	36	+3
U.S. Supreme Court	40	36	-4
Public schools	37	30	-7
Banks	49	27	-22
Organized labor	24	23	-1
Criminal justice system	25	23	-2
Television news	31	21	-10
Newspapers	30	20	-10
Big business	18	18	0
Congress	19	9	-10

GALLUP POLLS, JUNE 1-4, 2006, AND JUNE 1-5, 2016

Support for the US Supreme Court

Do you approve or disapprove of the way the Supreme Court is handling its job?

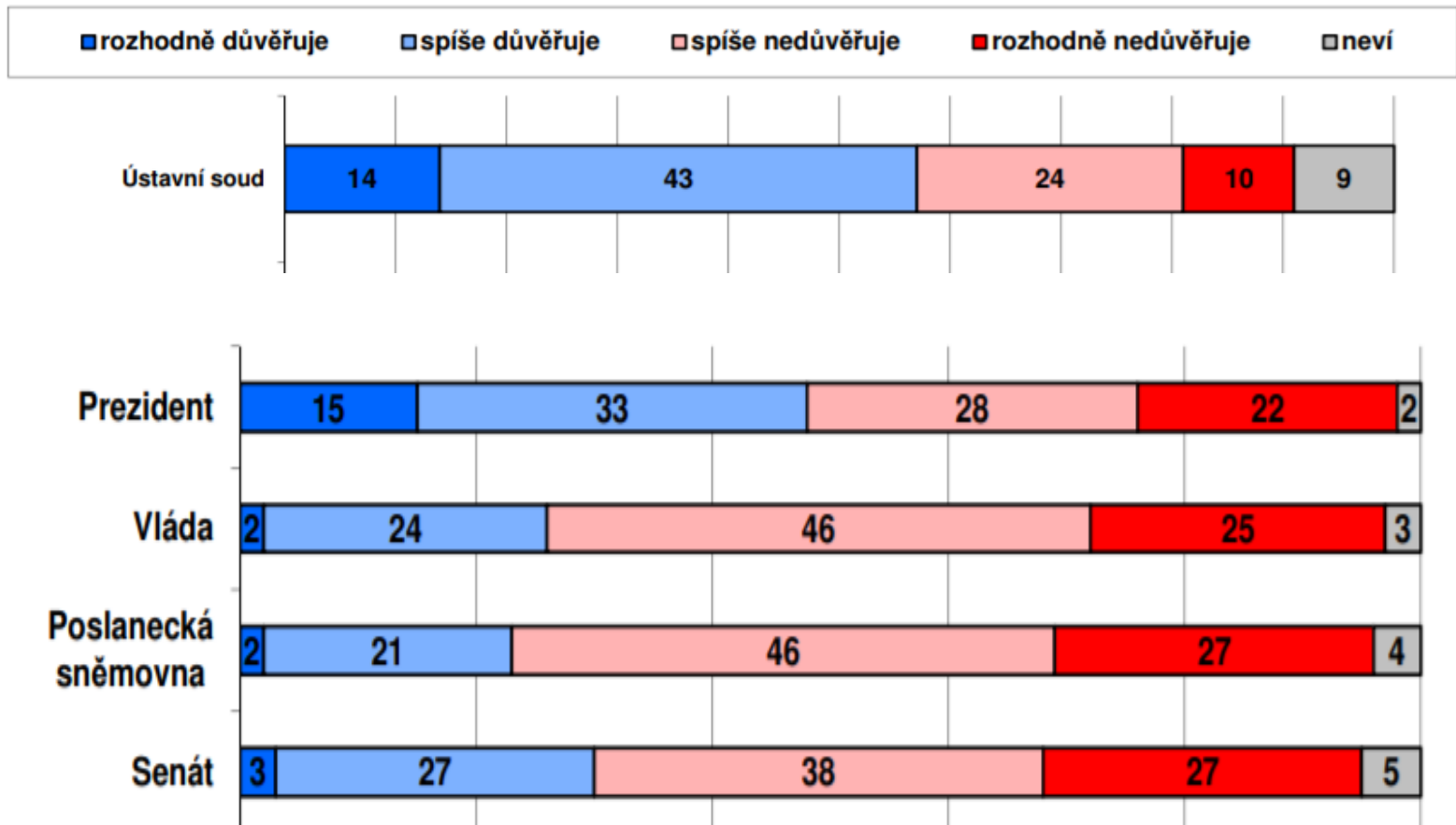
■ % Approve
 ■ % Disapprove



GALLUP

Trust in Czech Constitutional Court

Graf 4: Důvěra/nedůvěra obyvatel vybraným institucím (%)



Conclusion

- **is judicial review good or bad?**
 - depends on perspective and concrete situations
 - disclaimer: our framework apply only to functioning democratic societies
- **allegory of judiciary as a bungee cord (Friedman)**
 - courts could stray from the public opinion but eventually get back in line
- **weak judicial review as a solution?**
 - court signals breach, then up to a parliament to remedy
 - e.g. the UK, Canada

