

Constitutional Theory Seminar

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George Mason Scalia Law School

Spring 2024 • Mondays/Wednesdays • 4:00 – 5:25pm

Description:

This course is about the legitimacy and desirability of judicial review—that is, the power of judges, based on their interpretation of a constitution, to declare illegal and to void the decisions and actions of all other governmental actors, including the statutes passed by a legislature. In particular, we will examine whether judicial review is undemocratic and how it might nonetheless be justified if so. In American law, this issue is known as “the countermajoritarian difficulty.” Although a familiar chestnut of constitutional theory, the justification of judicial review involves different considerations today than it once did because of changing facts on the ground.

The changing facts are twofold. First, judicial review has spread: once an exceptional feature of American government, judicial review is now a feature of government in all of Europe, all of the former British commonwealth (including India), and large parts of Latin America, the Middle East, East Asia, and Africa. Second, within the United States, judicial review has deepened: once a largely hypothetical, rarely used power, it is now a routine part of America’s political process, such that virtually every large legal development is in a state of uncertainty until it concludes in a Supreme Court constitutional ruling. These changes in U.S. and global government date from the last thirty or eighty years, depending on how one counts. Although largely unheralded, they represent the most significant change in global government in a century.

The first part of the course will explore the theoretical justifications of judicial review offered by various scholars representing different schools of thought (living constitutionalism, originalism, etc.). We will also explore the connection between a school of thought’s response to the countermajoritarian difficulty and its approach to interpreting the Constitution.

The second part of the course will explore how judicial review is actually practiced by courts around the world to see which, if any, of the normative theories can justify judicial review as practiced. Essentially, the goal is to see whether any of the normative theories have descriptive uptake. In so doing, we will revisit the question of judicial review in a new way, asking, not whether it can be justified in the abstract, but whether it can be justified as practiced.

Learning Objectives:

- Appreciate why the power of judicial review might be open to question and doubt.
- Understand the competing theoretical arguments justifying judicial review and the connection between those arguments and approaches to constitutional interpretation.
- Develop factual knowledge of the global spread and practical functioning of judicial review in different countries.
- Explore whether the theoretical arguments justifying judicial review correspond to the way judicial review actually functions.

Logistics:

- The Blackboard site is your key to this course. All reading assignments are posted there (no casebook is required). This syllabus is big picture; the Blackboard site is class-to-class guidance.
- During class, please do not surf the net, email, virtually communicate with other students, or otherwise use your computers, phones, or other devices in ways that distract you, distract others, or undermine the spirit of the class.
- Please don't come to class if you think you might be contagious with COVID or another illness. I will never object; just let me know if that is the case.
- Office hours are on Wednesdays from 5:30-6:30pm. Office hours are *your* time: please feel welcome—not just authorized, but welcome—to stop by. Bring whatever thoughts or questions engage you, big or small, course-related or more general. You can write me to make a one-on-one appointment during office hours or, if no one has individually booked a slot, I'll hold a roundtable discussion for anyone who wants to join. I'm also happy to meet outside of office hours by appointment, though I ask that you please try to make use of office hours if you can.

Grading:

- Your grade will be determined primarily by your final paper. Participation, however, can lead to a one-increment adjustment of the overall grade (e.g., if your final paper earns a B, participation can lead to a final grade of B- or B+).

- Notes on participation:
 - Your participation grade depends on preparation, intellectual engagement, and civility.
 - **Preparation.** The reading for this course is demanding and the material resists winging it. Therefore, please expect to spend significant time on the reading and know that the one-increment grading bump for good participation is designed to reward you for doing the reading with care.
 - **Intellectual engagement.** Speaking up in class can either show genuine intellectual engagement or mere loquaciousness and grade-seeking. I'm looking for the former.
 - **Civility.** Your participation grade turns in part on treating others' views with generosity, reason, and respect, and embracing vigorous and open debate in a spirit of civility. Also relevant to this portion of your grade is what might be termed “technological civility”—that is, not surfing the net, emailing, virtually communicating with other students, or otherwise using your computers and other devices in ways that distract you, distract others, or undermine the spirit of the class.

 - Notes on the final paper:
 - **Please consult with me to plan your topic.**
 - **The final paper is due by email at 5:00pm on April 14.** This date is designed so that we can read and discuss one another's papers as a class during the final three class sessions, and to ensure that paper-writing does not interfere with your studying for exam-based courses.
 - **I have no power to grant extensions.** Under academic regulation 4-5.1(b), “instructors may not grant deadline extensions for final papers; all authority in this matter is delegated to the Associate Dean for Administration and Student Affairs. Excuses and requests for a deadline extension must be presented, with appropriate documentation, to the Associate Dean for Student Affairs and Academic Support. Except in emergencies, deadline extensions must be sought in advance of the scheduled deadline. A deadline extension may be granted only in the circumstances listed in subsection (c). Students seeking an extension shall not contact the course instructor.”
 - **Papers must be a minimum of 9,000 words (including footnotes). There is no maximum. Please submit in PDF format.**
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