

JUDICIAL REVIEW AND DEMOCRACY
FALL 2008
UNIVERSITY OF OREGON
SYLLABUS

2:30 – 5:20 pm Wednesdays
Mark Graber, Instructor

“Judicial Review and Democracy” explores the legal, philosophical, historical and political issues raised by the judicial power to declare laws unconstitutional. The first part of the course focuses on the “counter-majoritarian problem,” the claim that judicial review is “a deviant institution in a democracy.” Readings explore the central principles underlying that problem and the most famous efforts to resolve that problem. The course then turns to political science literature suggesting that the classic version of the countermajoritarian problem does not describe political practice. Gillman, Frymer, Graber and others suggest that courts play very different roles in American democracy than the legal literature on judicial power suggests. Judicial supremacy provides another opportunity to explore the tension between legal and political science understandings of judicial power. Larry Kramer’s work calls on the people to take back their authority over the constitution from the courts while Keith Whittington insists that the people gave that authority to the courts and, for political reason, are unlikely to insist on a return. Ran Hirschl details how similar problems have surfaced in comparative constitutionalism. Legal theory proposes a countermajoritarian role for courts that, in practice, they either have not played or are playing in ways quite different from the ways specified by legal theory. Finally, the last week closes with an examination of judicial review of democratic politics, raising questions about whether the justices have or are capable of making our polity more democratic.

Week One: the Classics

Federalist 78. Any edition of the Federalist Papers will do. Also available on line on numerous websites. I use <http://www.foundingfathers.info/federalistpapers>.

Essays of Brutus, XI-XII, XV-XVI (almost every majority collection of Anti-Federalist writings include these selections. I use Herbert J. Storing, *The Complete Anti-Federalist* (Volume 2) (University of Chicago Press: Chicago, 1981), pp. 417-28, 437-46. The essays may be found online at <http://www.constitution.org/afp/brutus00.htm>).

Abraham Lincoln and Stephen Douglas, “Sixth Joint Debate, Quincy, October 13, 1858.” Again, any edition of the Lincoln-Douglas debates will do. I use Robert W. Johannsen, *The Lincoln-Douglas Debates* (Oxford University Press: New York, 1965), pp. 245-85. The sixth debate may be found online at <http://quod.lib.umich.edu/cgi/t/text/text-idx?c=lincoln;cc=lincoln;type=simple;rgn=div2;q1=mob;singlegenre=All;view=text;subview=detail;sort=occur;idno=lincoln3;node=lincoln3%3A32.1>

James B. Thayer, “The Origin and Scope of the American Doctrine of Constitutional Law,” 7 *Harvard Law Review* 129 (1893).

Week Two: The Classic Counter-Majoritarian Problem

Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Bobbs-Merrill: Indianapolis, 1962)

Week Three: The Classic Solution to the Countermajoritarian Problem

John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press: Cambridge, 1980).

Week Four: The Political Science Challenge to the Countermajoritarian Problem

Paul Frymer, "Acting When Elected Officials Won't: Federal Courts and Civil Rights Enforcement in U.S. Labor Unions, 1935-85," *97 American Political Science Review* 483 (2003).

Howard Gillman, "How Political Parties Can Use the Courts To Advance Their Agendas: Federal Courts in the United States, 1875-1891," *96 American Political Science Review* 511 (2002).

Mark A. Graber, "Constructing Judicial Review," *8 Annual Reviews in Political Science* 425 (2005).

Mark A. Graber, "The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary," *7 Studies in American Political Development* (1993).

Week Five: Judicial Supremacy in Law

Larry D. Kramer, *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press: New York, 2004).

Week Six: Judicial Supremacy in Political Science

Keith E. Whittington, *The Political Foundations of Judicial Supremacy: The President, the Supreme Court, and Constitutional Leadership in U.S. History* (Princeton University Press; Princeton, New Jersey, 2007)

Week Seven: Judicial Review, Democracy, and Comparative Constitutionalism

Ran Hirschl, *Toward Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press: Cambridge, 2004).

Week Eight: Judicial Review of Democratic Processes

Richard H. Pildes, "The Constitutionalization of Democratic Politics," *118 Harvard Law Review* 28 (2004)