A. Introduction

“It is emphatically the province and duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each.”


This course examines the theory and development of constitutionalism in the American political system by focusing on the concept of judicial review. Why, in a democratic system, do unelected judges possess the power to invalidate laws approved through the democratic process? Was this power implicit in the American constitution or is it the product of historical political development? Can democracy and judicial review be reconciled? And if so, what does the justification for judicial review in a democracy tell us about how we should read the constitution and what role courts should play in our society? Students will pursue these questions by reading historical, legal, philosophical, and empirical works and developing their own ideas about the role of constitutional courts in society.

B. Course Materials

- Course packet.
- Online readings.

C. Student Responsibilities, Grades, and Course Administration

Students will be evaluated based on four criteria:

- Two short response papers (15% each)
- Active participation in class discussion (20%)
- Final paper (50%)

Each week, two students will be assigned to write short papers responding to specific questions regarding the week’s reading. These papers should NOT simply summarize the readings; instead they should answer the specific question that I email to you the week before. The paper should be roughly 5-6 pages, double-spaced and must be emailed to me by 1 pm on Wednesday before
class. During class, I will ask you to present the views expressed in your written paper to begin our discussion.

Students are expected to actively participate in class discussion every week, especially on the week that they present their written work to the class.

More information regarding the final paper will be provided later in the semester. For each written assignment, pages must consist of 8.5x11 inch paper with 1 inch margins on all sides and a double-spaced, 12-point, Times New Roman font.

Dr. Hall’s office is located in McGannon 154. Office hours are on Wednesday from 1:30-4:00 p.m. and by appointment.

Of course, all students are expected to abide by the rules of the Academic Honesty Statement. See the Student Handbook for more information.

Students are expected to be honest in their academic work. The University reserves the right to penalize any student whose academic conduct at any time is, in its judgment, detrimental to the University. Such Conduct shall include cases of plagiarism, collusion, cheating, giving or receiving or offering or soliciting information in examinations, or the use of previously prepared material in examinations or quizzes. Violations should be reported to your course instructor, who will investigate and adjudicate them according to the Policy on Academic Honesty of the College of Arts and Sciences. If the charges are found to be true, the student may be liable for academic or disciplinary probation, suspension, or expulsion by the University. Students should review the College of Arts and Sciences policy on Academic Honesty, which can be accessed on-line at http://www.slu.edu/colleges/AS/ under “Quicklinks for Students” or in hard copy form in the Arts and Sciences Policy Binder in each departmental or College office.

D. Weekly Schedule

Week 1. August 24: Introduction and Course Outline
   Why judicial review?


Week 2. September 2: The Problem of Judicial Review
   Is Marshall’s defense of judicial review persuasive?

   “Brutus.” *The Anti-Federalist Papers,* XI, XII, XV.


Week 3. September 9: Judicial “Activism”
   Is judicial “activism” a useful concept? If so, is activism a bad thing?

Week 4. September 16: Neutral Principles
How can democracy and judicial review be reconciled? Perhaps courts should have the power to invalidate statutes because courts are more principled and reasonable than legislatures?

Bickel, pp. 46-72.
Ely, pp. 54-60, 71-2.

Week 5. September 23: Fundamental Values
Can judicial review be justified by the need to protect fundamental values? Should the Court protect these values by identifying rights as trumps over democratic outcomes?

Ely, pp. 48-54

Week 6. September 30: Originalism
Can judicial review be justified based on the democratic credentials of the constitution itself? Should the Court focus on interpreting the constitution by searching for the original understanding of the framers?


Week 7. October 7: Originalism, cont.
Week 8. October 14: Dynamic Dualism
Can a more dynamic understanding of originalism provide a stronger defense for its democratic credentials?


Week 9. October 21: Reinforcing Democracy
Can judicial review be justified as a democracy reinforcing process? If so, should the courts simply use judicial review to preserve well-functioning democratic institutions?


Ely, pp. 60-70

Week 11. November 4: The Countermajoritarian Myth?
Is the countermajoritarian Court a myth? Is there no democratic problem with judicial review because it is usually used to promote majority interests?


Week 12. November 11: The Nonmajoritarian Difficulty?
Rather than pose a countermajoritarian difficulty (a concern that the Court thwarts the majority will embodied by the elected branches), does the judicial review pose a non-majoritarian difficulty (a concern that the elected officials escape democratic accountability by deliberately deferring to the Court?)


**Week 13. November 18: A Constrained Court?**
How powerful is the Court? What can it accomplish? Perhaps judicial review poses no democratic concern because the Court is simply incapable of thwarting majority will?


**Week 14. November 25: NO CLASS for Thanksgiving**

**Week 15. December 2: A Constrained Court?, cont.**