Constitutional Dialogues
Professor Friedman
Spring 2006

All of the course readings can be found in a two-volume coursepak available in the bookstore. The draft syllabus (below) and reading assignment for the first class is available on Blackboard and on the Law School website, under Curriculum, in Course Web Pages. We will be discussing this material on the first day, so you should definitely come prepared. I will be handing out a finalized syllabus on the first day of class.

I am aware that interest in the seminar far exceeds enrollment. All I can suggest is that if you are interested in taking the course, you attend the first class. It is possible that seats will open up thereafter. In this way you will not have missed important material.

I am looking very forward to meeting with you on the 12th of January.

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CONSTITUTIONAL DIALOGUES
SYLLABUS

Course Information

This is a seminar, the goal of which is to explore the relationship between institutional design and societal debate about fundamental (constitutional) issues. The primary focus will be on the role of judicial review in fostering such debate. The word ‘constitutional’ is in parentheses: one question will be the extent to which judicial review serves to ‘constitutionalize’ issues that otherwise would not be considered in those terms. We will explore the ways in which varying institutional arrangements for judicial review influence a broader societal debate.

Students will be graded based on class performance and a final paper. Attendance is mandatory absent exceptional circumstances, to be cleared beforehand. Performance is, of course, a function of the quality of participation as much as it is of quantity. We will discuss the final paper in class. Suffice to say that a wide range of possible formats and topics is permissible, so long as they relate to the general theme of the seminar. Length will depend on the nature of the topic, but in general the final papers should aim to be between 15 and 20 double-spaced pages. Credit will be given for quality of the ideas, thoughtfulness and rigor of analysis, as well as organization and quality of the writing. Research is not required, and will depend upon the topic selected. The papers will be due on __TBA__. There are absolutely no exceptions to this policy, absent either (a) some extraordinary set of circumstances such as a critical medical emergency; or (b) the student well in advance designates the paper as fulfilling the A paper writing requirement. As was indicated in advance notice of the seminar, no student may write an A paper that must be completed at the end of the Spring semester 2006 in order to graduate that semester.

In order to facilitate the writing of papers, one hour will be given over in each of weeks 7-10 to discuss student paper ideas. In each of those weeks, 6 students will circulate in advance their rough idea for a paper. They will receive in-class feedback on the idea, and there will be some opportunity for discussion. In this way we can, perhaps, help one another settle into writing topics well in advance of the due date. Obviously some students will have to be prepared by week 7 to circulate ideas. The idea summaries should be between 1-5 double spaced pages. They will be due to Lisa Koederitz, in Room 308, exactly 8 days before the class in which they will be discussed.
Personnel

The instructor for the course is Barry Friedman, Room 317 Vanderbilt Hall, 212.998.6293 barry.friedman@nyu.edu

Professor Friedman’s assistant is Lisa Koederitz, Room 308, Vanderbilt Hall, 212.998.6622 lisa.koederitz@nyu.edu

The grossly over-qualified Teaching Assistant, who has been of invaluable assistance in organizing this seminar, and will prove an equally invaluable resource for our conversations and papers, is Christine Bateup, a JSD student. Ms. Bateup is in Room B15, 137 MacDougal Street, 212.992.8127 christine.bateup@nyu.edu

The Assigned Readings

The readings all can be found in the supplemental materials that we have prepared for the course. As you will see, many of them are lengthy. We will, from time-to-time, give some hints about ways to tailor the reading. At the same time, we would point out the material is fairly easy to digest, and to do justice to our topic we all will have a lot of background learning to do. (Or, at least, that is true of the instructor.)

The Topics and Reading Assignment:

All page references are to the supplemental materials. Following each source there often will be some guidance as to the material or its importance to the course.

Week 1 – Introduction to course

Case study: German Crucifix decision


Week 2 – The problem of judicial review

John Hart Ely, Democracy and Distrust (1980) pp. ___-___ [Introduction to conventional theories of judicial review, and problems with these theories; you may skim everything to p. ___]

Jeremy Waldron, Law and Disagreement, Between Rights and Bills of Rights (1999) pp. ___-___ [Concerns issue of reasonable disagreement about rights, and introduces reasons why we might not want to assign controversial issues of rights to courts]

Week 3 – Introduction to dialogue theory

Christine Bateup, The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue, Brooklyn L. Rev. (forthcoming) pp. ___-___ [we have included the entire article in case you are interested]

Week 4 – Dialogue and Institutional design

Alec Stone Sweet, Governing with Judges, pp. ___-___ [Introduction to forms of constitutional review in Europe]

Jeremy Webber, Institutional Dialogue between Courts and Legislatures in the Definition of Fundamental Rights: Lessons from Canada (and elsewhere), in Constitutional Justice, East and West (Wojciech Sadurski ed., 2002) pp. ___-___ [looking at different institutional design mechanisms by which dialogue about rights can be structured in a constitutional system, focusing on Anglo-American systems]

Week 5 – United States and dialogue


Barry Friedman, The Importance of Being Positive, 72 U. Cinn. L. Rev. 1257 (2004) pp. ___-___ [we have provided the entire article though you need only read the assigned pages]

Week 6 – The United Kingdom: Parliamentary sovereignty

Susan Sterett, Judicial Review in Britain, 26 Comparative Political Studies (1994) pp. ___-___ [On the existence of judicial review in the administrative context, and interactions between the courts and the political branches of government, prior to the HRA]

Jeffrey Jowell, Administrative Law, in The British Constitution in the Twentieth Century (Vernon Bognador ed. 2003) pp. ___-___ [on how the role of the judiciary in judicial review has changed over the course of the 20th century, and examining why the judiciary may have been more prepared to intervene at some times rather than others]

Week 7 – Ex ante review: France (1 hour)


John Bell, French Constitutional Law (1992), pp. ___-___ [general background on creation of Conseil Constitutionel and its powers]; pp. ___-___ [Conclusion, examining arguments that constitutional review in France has led to government by judges, politicization of the judiciary and the legalization of politics]

John Ferejohn and Pasquale Pasquino, Constitutional Courts as Deliberative Institutions, in Sadurski, Constitutional Justice East and West (2002) pp. ___-___ [comparing American and European (particularly French) constitutional courts as deliberative forums]

Week 8 – Dialogic implications of the French system: a case study (one hour)


Excerpts from two of the decisions in: John Bell, French Constitutional Law, pp. ___-___
**Week 9 – Ex post review: Germany (one hour)**


Donald P. Kommers, The Federal Constitutional Court in the German Political System, 26 Comparative Political Studies (1994) pp. ___-___ [provides a shorter introduction to the Court and its functions, including more context]

**Week 10 – Dialogic implications of the German system: a case study (one hour)**

Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany, pp. ___-___ [German abortion decisions]


Victor Ferreres Comella, Constitutional Dialogues between Courts and Legislatu res: Some Potential Advantages of the Kelsenian Model of Judicial Review (conference paper, draft 2004) pp. ___-___ [discusses some potential dialogic advantages of the Kelsenian model over the US system of judicial review]

**Week 11 – Canadian Charter of Rights and Freedoms**


Michael Perry, Protecting Human Rights in a Democracy: What Role for the Courts?, 38 Wake Forest L. Rev., 635, pp. ___-___ only [compares the Canadian and UK systems of judicial penultimacy with the US system, focusing on section 33 override in relation to Canada. In this section of the article, Perry also spends some time discussing the UK Human Rights Act. We will discuss this topic in Week 12.]


**Week 12 – United Kingdom Human Rights Act**


for political rights review, she questions the extent to which political communities can resist the emphasis on judicial hegemony when interpreting rights]

Tom Campbell, Incorporation through Interpretation, in Skepticism about Human Rights, pp. ___-____ [arguing that the interpretive mandate in the HRA allows a great deal of judicial activism and has the potential to remove control over a host of issues from the political domain]

**Week 13 – Transnational dialogue**

Anne-Marie Slaughter, A Typology of Transjudicial Communication, 29 U. Rich. L. Rev. 99 (1994) pp. ___-____ [Slaughter examines forms of dialogue not only between national courts, but also between national and supranational courts, and between supranational courts themselves]