

The Legitimacy of Judicial Review In Light of the American Common Law

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Abstract

This article attempts to examine the severe debate on the legitimacy of judicial review as well as the so-called countermajoritarian difficulty of the Supreme Court of the United States from the perspective of the American Common Law, which, in contrast to the Civil Law Tradition, puts emphasis on the judicial role and in this way deeply influences the separation of powers between the Supreme Court and the Legislators in light of the American constitutional law. The author argues that against the American Common Law background, the Supreme Court plays a leading role which mainly results from the important function of judicial law making in the American legal tradition; this leading role, however, seems to stand in conflict with the American constitutional principle of the separation of powers that regards the judiciary as the weakest and the least dangerous branch. Through a theoretical analysis, the article indicates that the countermajoritarian difficulty is hardly solvable in the American Common Law Tradition.

Keywords: countermajoritarian difficulty, judicial review, common law, separation of powers, stare decisis, case by case, normativity, factuality, law application, law making.