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PHL 502.01: Philosophy of Law

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Spring 2012
Philosophy of Law

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Schedule

Books:

J. Rawls, A Theory of Justice (TJ)
J. Rawls, Political Liberalism (PL)
R. Dworkin, Taking Rights Seriously (TRS)
D. O'Brien (ed.), Judges on Judging (JJ)

On Moodle=[M];
Handouts=[H]
Materials on Reserve=[R]
Materials available online (WESTLAW or HeinOnline)=[O]

(To get articles on HeinOnline, first go to the law school library webpage
(www.umt.edu/law/library). Once on this webpage, go to AResearch Tools, @
and then to AElectronic Resources. @ HeinOnline is listed as one of the
Electronic Resources and contains the full text of law review articles in PDF
format.)

Any problems getting materials, email Tom at tom.huff@umontana.edu
Part I. Theory: Legal Liberalism & Interpreting our Constitution

January 27 Introduction

In this first class, we will review the idea of the rule of law from the ancients to the moderns with a focus on legal liberalism. What is legal liberalism’s conception of the rule of law? Why is the normative foundation (or structure) of a legal system important to the rule of law?

Lawrence Solum, *Legal Theory Lexicon 017: The Rule of Law*[^1][M]

February 2 -- Legal Liberalism’s Rule of Law A Sophisticated Version of the Noble Dream

Ronald Dworkin, *Hard Cases* [80-94 101-107], TRS, Chapter 4
Ronald Dworkin, TRS, pp. 338-345
*Cohen v. California*[^3][Harlan opinion] [M][O]

February 9 -- Legal Liberalism B Basic Normative Theory I

John Rawls, PL, Introduction [xvii-xxix]
John Rawls, TJ, [Sections 1-6]
Richard Rorty, *The Priority of Democracy to Philosophy*[^4][H][R]

[^4]: THE VIRGINIA STATUTE FOR RELIGIOUS FREEDOM, Chapter 10 (1988).
February 16

Legal Liberalism

Application of Normative Theory

John Rawls, TJ, [Sections 33-35]
John Rawls, PL, [pp. 173-176, 190-200, 212-216, 224-227]

Christian Legal Society v. Martinez\(^5\) [Ginsburg and Stevens opinions][M][O].

Stanley Fish, Being Neutral Is Oh So Hard To Do\(^6\)[H][Optional]
Stanley Fish, Is Religion Special?\(^7\)[H][Optional]
Stanley Fish, Serving Two Masters: Shariah Law and the Secular State\(^8\)[H][Optional]
Stanley Fish, Religion and the Liberal State Once Again\(^9\)[H][Optional]
Burleigh Wilkins, A Third Principle of Justice\(^10\)[H][Optional]

\(^5\)130 S.Ct. 2971 (2010).
\(^7\)N.Y. Times, July 26, 2010.
\(^8\)N.Y. Times, October 25, 2010.
\(^9\)N.Y. Times, November 1, 2010.
February 23

Legal Liberalism—Originalism as Constitutional Interpretation.

Justice Antonin Scalia, *Originalism: The Lesser Evil*, JJ, Chapter 21
Randy Barnett, *Scalia=s Infidelity: A Critique of Faint-Hearted Originalism*\(^{11}\)[O]
Lawrence B. Solum, *What is Originalism? The Evolution of Contemporary Originalism Theory*\(^{12}\)[O]

Robert Post and Reva Siegel, *Originalism as a Political Practice: The Right=s Living Constitution*\(^{13}\)[O][Recommended]
Ronald Dworkin, *The Constitutional Drama*\(^{14}\) [R] [Recommended]
Ronald Dworkin, *Constitutional Cases*, TRS, Chapter 5 [Optional]
Eric Schnapper, *Affirmative Action and the Legal History of the Fourteenth Amendment*\(^{15}\) [O] [Optional]
H. Jefferson Powell, *The Original Understanding of Original Intent*\(^{16}\) [O] [Optional]

March 1

The New Originalism: An Example

Jack Balkin, *Framework Originalism and the Living Constitution*\(^{17}\)[O]
*McDonald v. City of Chicago*\(^{18}\)[O] [excerpts]

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\(^{11}\) 75 U. Cin. L. Rev. 7 (2006).
\(^{12}\) http://ssrn.com/abstract=1825543
\(^{13}\) 75 Fordham L. Rev. 545 (2006).
\(^{14}\) *LIFE=s DOMINION*, Chapter 5.
\(^{16}\) 98 Harv. L. Rev. 885 (1985).
\(^{17}\) 103 Nw. U. L. Rev. 549 (2009).
\(^{18}\) 130 Sup. Ct. 3020 (2010).
Part II. Critical Legal Studies

March 8 Critical Legal Studies: The Rule of Law and Critical Theory

David Luban, *Legal Modernism* 19 [O]

J. M. Balkin, *Ideology as Constraint* 20 [1133-1145] [O][Optional]

Judge Alex Kozinski, *What I Ate for Breakfast and Other Mysteries of Judicial Decision Making*, JJ, Chapter 7 [Optional]

Paul Carrington, *Law and the River* 21 [O] [Optional]

Patricia Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights* 22 [O] [Optional]

*RA.V. v. City of St. Paul* 23 [2541-2561] [O][M] [Optional]

*Virginia v. Black* 24 [1-17][O][M] [Optional]


March 15 Critical Race Theory

Mari Matsuda, *When the First Quail Calls: Multiple Consciousness as Jurisprudential Method* 26 [O]


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Part III. Topics in the Rule of Law

March 22


Catharine MacKinnon, Pornography: On Morality and Politics28 [R]
American Booksellers v. Hudnut29 [Easterbrook opinion][O][M]

Excerpts from:
New York v. Ferber30 [753-766][O][M]
Osborne v. Ohio31 [106-111][O][M]
United States v. Hilton32 [67-73][O][M]
United States v. Acheson33 [648-653][O][M]
The Free Speech Coalition v. Reno34 [1086-1097][O][M]
Ashcroft v. Free Speech Coalition35 [1-21][O][M]
18 USCA ' 2256 [O][M]

New Jersey Acultural defense® Case[TBA][Optional]

28 Toward A Feminist Theory of the State, Chapter 11.
29 771 F.2d 323 (7th Cir. 1985).
32 167 F.3d 61 (1st Cir. 1999).
33 195 F.3d 645 (11th Cir. 1999).
34 198 F.3d 1083 (9th Cir. 1999).
March 29 BLiberty and Harmless Immoralities

Poe v. Ullman [Harlan opinion]36 [O][M]
Griswold v. Connecticut37 [Douglas and Harlan opinions][O][M]
Transcript of Oral Argument in Lawrence v. Texas38 [M]
Lawrence v. Texas39 [majority opinion][O][M]

April 5 BSpring Break

April 12 BRole of Professionalism in the Rule of Law

Jeremy Waldron, The Concept and the Rule of Law40 [H]
Justice Robert H. Jackson, The Federal Prosecutor [H]
Postmistress Case [H]
United States v. Larson41 [O][M]
Jack Goldsmith, THE TERROR PRESIDENCY, Chapters 1 & 5 [H]
Lucie White, Subordination, Rhetorical Survival Skills, and Sunday Shoes,42 [O][M]

Regina Austin, Sapphire Bound43 [O] [Optional]

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37 381 U.S. 479 (1965).
38 Oyez Website.
43 1989 WIS. L. REV 539.
April 19

Interpreting Statutes: The Myth (and Truth) of Following the Law

Ronald Dworkin, *Hard Cases* [107-110], TRS, Chapter 4

*U.S. v. Barragan-Mendoza* [44][O][M]

*Coalition of Montanans Concerned v. Gallatin* [45][O][M]

*Montana Wilderness v. U.S. Forest Service* [46][O][M]

Briefs and Order in *U.S. v. Howick* [M]

Justice Felix Frankfurter, *Some Reflections on the Reading of Statutes*, JJ, Chapter 29 [Optional]

Judge Frank Easterbrook, *What Does Legislative History Tell Us?*, JJ, Chapter 30 [Optional]

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[44] 1999 WL 221857 (9th Cir. (Mont.)).


April 26

Hard and Soft Politics in the Interpretation of Tort Law and the Normative Structure of Tort Law

Ronald Dworkin, *Hard Cases* [110-123], TRS, Chapter 4

*State Ex. Rel. Oatl v. Sheward*\(^\text{47}\) [O][M]

Charles Fried and David Rosenberg, *Presentation*\(^\text{48}\) [O]

David Vladick, *Defending Courts: A Brief Rejoinder*\(^\text{49}\) [O]

Robert Peck, *In Defense of Fundamental Principles: The Unconstitutionality of Tort Reform*\(^\text{50}\) [O]

Harry Philo, *Problems and Potentialities of Safety Standards in Tort Litigation Codes and Practices* [M]

*Estate of Strever v. Cline*\(^\text{51}\) [O][M]

*Lakin v. Senco Products, Inc.*\(^\text{52}\) [O][M][Optional]

*Hern v. Safeco Ins. Co. Of Illinois*\(^\text{53}\) [Court=s discussion of Issue 3. and Justice Gray=s dissent][O][M] [Optional]

Erwin Chemerinsky, *When Do Legislative Actions Threaten Judicial Independence?*\(^\text{54}\) [Optional]

\(^{47}\) 715 N.E.2d 1062 (Ohio 1999).

\(^{48}\) 31 Seton Hall L. Rev. 625 (2001).

\(^{49}\) 31 Seton Hall L. Rev. 631 (2001).

\(^{50}\) 31 Seton Hall L. Rev. 672 (2001).

\(^{51}\) 278 Mont. 165 (1996).

\(^{52}\) 987 P.2d 463 (Or. 1999).
