

PHIL 455: Advanced Philosophy of Law

Democracy, Constitutionalism, and the Rule of Law

Fall 2011

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Office Hours: Tuesday 2:00 – 4:00 PM

I will be in my office and available during office hours, but you can make appointments to see me at other times. My preference is that we make appointments by email, and have substantive discussions face-to-face.

Course Description

Democratic governance, a constitution, and the rule of law are typically regarded as good things to have. In our public and academic discourse, we frequently use them as standards for assessing both forms of governance (e.g. “country x is founded upon the rule of law”) and particular governmental acts (e.g. “policy x is unconstitutional”). However, at least two of these ideas seem to be in tension with each other: democracy and constitutionalism. Constitutions normally place limits on what majorities can do and majorities not infrequently want to do what a constitution forbids. One major problem we will be addressing in this course is how best to make sense of this apparent tension and what, if anything, might be said in favor of constitutional protection of rights and other limits on majoritarian decision-making.

In grappling with these issues, we will notice that there is a considerable amount of disagreement concerning both what democracy and the rule of law are and what makes them valuable. To some extent, it looks as though these disagreements are connected: different views about the nature of democracy appear to inform contrasting views of how legal reasoning, particularly adjudicative reasoning, ought to proceed. This is a tentative suggestion – one of the challenges of the course will be to consider to what extent and in what way democracy and the rule of law are related. We will be spending a good amount of time, then, investigating conceptions of democratic rule and responsible judicial reasoning.

The readings will consist of both classic works in political theory and contemporary writings. It should be noted, though, that the concern here is primarily philosophical rather than historical. We read the classic works because I take it that they have something to offer the present day conversation concerning the nature of the rule of law, its relationship to democratic authority and constitutionalism, and how a constitution fits into legitimate democratic governance. Our attention will be directed at resolving these issues.

Objectives

The student will:

- Be familiar with some of the important philosophical work on the topics of democracy, constitutionalism, and the rule of law
- Develop and be able to articulate cogent and defensible views on legitimate governance
- Improve ability to write analytical papers
- Develop an ability to read and critically consider difficult texts
- Improve ability to reason through and intelligently talk about complex problems generally

Readings

Students are expected to show up to class prepared to discuss, and answer questions concerning the assigned reading. This is a seminar, so there will be a focus on student to student and instructor to student dialogue. The class discussion will center on students addressing the issues raised by the texts. Successful participation in class, then, requires familiarity with the readings for the course.

The required texts for purchase are:

John Stuart Mill, *On Liberty and Other Essays* (Oxford U. Press, Any Edition)

Jeremy Waldron, *Law and Disagreement* (Oxford U. Press, 1999)

W.J. Waluchow, *A Common Law Theory of Judicial Review* (Cambridge U. Press, 2007)

In addition to these texts, many of the readings will be available on Blackboard (marked “[BB]” on reading schedule).

Requirements

Grade Breakdown:

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| Participation | 25% |
| Paper Précis | 5% |
| Paper | 45% |
| Final Exam | 25% |

Paper and Paper Précis: Students will be required to write a 20 to 25 page paper. Students have the option of either developing their own topic or selecting one of the topics distributed by me. The writing of the paper will occur in stages, and students should expect to invest considerable effort over the course of several weeks into writing the paper.

Stage One (Topic Selection): One week after possible topics have been distributed, hand in a piece of paper indicating which of the topics you are going to write on. If you are writing on your own topic, you should discuss it with me.

Stage Two (Précis): Two weeks after topics are distributed, you should provide a one-page, double-spaced summary of your position. The summary should indicate precisely what your thesis is and provide an outline of how (i.e. what arguments, evidence, and lines of reasoning) you intend to employ to support your thesis. *It is not essential that your paper follow the outline precisely as your thinking may change in the course of writing the paper. Nonetheless, your précis should indicate that you've put some serious thought into how you are going to establish your position.* This is a graded assignment. Failing to turn in the précis, or turning one in that is inadequate, will have an adverse affect on your final grade. The précis will be returned to you with comments one week before the draft is due.

Stage Three (Polished Draft): Four weeks after the assignment is distributed, you will hand in a polished and complete draft of your paper. The better the draft, the more likely it is I will be able to provide you with comments that will assist you in producing a good final version. I will return this draft with comments.

Stage Four (Revision): After the draft is returned with comments, you will have about a week and a half to revise your paper.

In general, papers will be assessed on the basis of: (1) accuracy and completeness in portraying the material in question, and (2) the development of a well-reasoned assessment of that material.

Students are required to maintain a digital backup of all submitted work until the end of the semester. I reserve the right to request a digital copy of any work submitted by the student.

Final Exam: Students are responsible for all assigned material up to the day of the exam (i.e., the final exam is cumulative).

Participation: Students will be assessed on their contributions in class. The grade will be based on the frequency with which students provide valuable verbal contributions to the class. Such contributions include informed responses to instructor questions, participation in classroom discussions and raising relevant and cogent questions.

Course Policies

Attendance: Attendance in class is mandatory. Students should arrive promptly at the beginning of class with the assigned reading for the day in hand. Students are permitted up to (2) unexcused absences without penalty. Each additional unexcused absence will result in the student's final grade being reduced by one-third a letter grade (e.g. a B becomes a B-).

Academic Honesty: Plagiarism and other forms of academic misconduct will be dealt with harshly in accordance with Harpur College policies. The **Student Academic Honesty Code** can be found at: <http://bulletin.binghamton.edu/integrity.htm>.

Schedule of Readings

The following plan is subject to revision - I will inform the class of any changes as we go. Listed on the left are the dates of the meetings, on the right are the readings that will be discussed on those dates. Items marked [BB] are available on Blackboard.

| Date | Reading |
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| 30-Aug | Introductory Lecture |
| 1-Sep | Montesquieu, <i>The Spirit of the Laws</i> , Book 11, chs 1 – 7 [BB] <i>Federalist Papers</i> : 10, 48, 51 [BB] |
| 6-Sep | <i>Federalist Papers</i> : 78-81, 84 [BB] <i>Marbury v. Madison</i> [BB] |
| 8-Sep | Samuel Freeman, “Constitutional Democracy and the Legitimacy of Judicial Review”, <i>Law and Philosophy</i> , 9 (1990) [BB] |
| 13-Sep | Jeremy Waldron, <i>Law and Disagreement</i> , 1-17, 69-87 |
| 15-Sep | Waldron, <i>Law and Disagreement</i> , 88-118 |
| 20-Sep | Waldron, <i>Law and Disagreement</i> , 255-281 |
| 22-Sep | Ronald Dworkin, “The Moral Reading and the Majoritarian Premise” in <i>Freedom’s Law</i> (1996), 7-35 [BB] |
| 27-Sep | Waldron, <i>Law and Disagreement</i> , 282-312 |
| 4-Oct | W.J. Waluchow, <i>A Common Law Theory of Judicial Review</i> , 180-215 |
| 6-Oct | Waluchow, <i>A Common Law Theory of Judicial Review</i> , 216-271 |
| 11-Oct | John Stuart Mill, "Considerations on Representative Government" in <i>On Liberty</i> , 225-234, 238-256 |
| 13-Oct | Mill, "Representative Government," 285-286, 297-325 |
| 18-Oct | Carole Pateman, “Rousseau, John Stuart Mill, and G.D.H. Cole: A Participatory Theory of Democracy” from <i>Participation and Democratic Theory</i> (1970) [BB] Paper Topics Distributed |
| 20-Oct | Joshua Cohen, “Deliberation and Democratic Legitimacy” in <i>Democracy, Politics, Democracy</i> (2009), 16-37 [BB] |
| 25-Oct | David Estlund, “Democratic Authority” in <i>Democratic Authority</i> (2008), 1-20 [BB] Select Paper Topic |
| 27-Oct | Joseph Schumpeter, "The Classical Doctrine of Democracy" in <i>Capitalism, Socialism, and Democracy</i> , 250-283 [BB] |
| 1-Nov | Richard Posner, <i>Law, Pragmatism, and Democracy</i> , 158-212 [BB] Précis Due |
| 3-Nov | Cohen and Rogers, "Structure" from <i>On Democracy</i> , 47-73 [BB] |
| 8-Nov | Richard S. Kay, "American Constitutionalism" in <i>Constitutionalism</i> , 16-50 [BB] Précis Returned |
| 10-Nov | Robert H. Bork, "The Original Understanding," 48-67 [BB] |
| 15-Nov | Paul Brest, "The Misconceived Quest for the Original Understanding" <i>Boston U. Law Review</i> (1980), 204-238 [BB] Paper Draft Due |
| 17-Nov | Ronald Dworkin, "'Natural' Law Revisited" <i>U. of Florida Law Review</i> , 34 (2) 1982, 165-188 [BB] |

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| 22-Nov | Scott J. Schapiro, "Dworkin and Distrust" in <i>Legality</i> (2011), 307-330 [BB] |
| 29-Nov | Larry Alexander, "What are Constitutions and What Should (and Can) They Do?" <i>Social Philosophy & Policy</i> 28 (1) 2011, 1-24. [BB] Paper Draft Returned |
| 1-Dec | Joseph Raz, "On the Authority and Interpretation of Constitutions: Some Preliminaries" in <i>Between Authority and Interpretation</i> (2009), 323-370 [BB] |
| 6-Dec | Martha Minow, "Engendering Justice" <i>Harvard Law Review</i> (1987), 70-95 [BB] |
| 8-Dec | Anthony Reeves, "Judicial Practical Reason: Judges in Morally Imperfect Legal Orders," <i>Law & Philosophy</i> (2011), 319-352 [BB] |
| 9-Dec | FINAL DRAFT OF THE PAPER DUE IN MY OFFICE AT 5 PM |
| | Final Exam held during Finals Week in Accordance w/ University Exam Schedule |