

PHIL 455: Advanced Philosophy of Law

Democracy, Constitutionalism, and the Rule of Law

Fall 2009

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Office Hours: Tues. 10:00 AM – Noon; Wed. 1:00 PM – 2:00 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:

Larry Alexander(ed.), *Constitutionalism: Philosophical Foundations* (Cambridge U. Press, 2001)

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

Richard Posner, *Law, Pragmatism, and Democracy* (Harvard U. Press, 2003)

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

In addition to these texts, many of the readings will be available on Electronic Reserves [ER], Library Reserves [LR], or Online [O]. Links to [ER] and [O] sources are available on Blackboard. Items marked [LR] are available at the reserve desk in the library.

Requirements

Grade Breakdown:

Short Paper (5 – 7 pages)	20%
Long Paper (15 – 20 pages)	40%
Final Exam	25%
Participation	15%

Papers: Students will be required to write one short and one longer paper. Paper topics for the short papers will be distributed at least two weeks before the due date. Possible paper topics for the longer paper will be distributed at least three weeks before the initial due date. Students are permitted to develop their own topic for the longer paper – though any topic *must* be approved by me. If you are interested in developing your own topic, we should meet outside of class to discuss it. In any case, you must declare your topic in writing and turn in a polished draft of your long paper according to the schedule below. *The paper will be returned to you with comments for revision.* I encourage you to meet with me to discuss these comments and how to proceed

with revisions, though this is not mandatory. You will have about ten days to complete revisions and turn in your final 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 lectures, on the right are the readings that will be discussed on those dates.

Date:	Reading:
Sep. 1	Introductory Lecture
Sep. 3	Montesquieu, <i>The Spirit of the Laws</i> , Book 11, chs 1 – 7 [O] <i>Federalist Papers</i> : 10, 48, 51 [O]
Sep. 8	<i>Federalist Papers</i> : 78-81, 84 [O] <i>Marbury v. Madison</i> [ER]
Sep. 10	Richard S. Kay, "American Constitutionalism" in <i>Constitutionalism</i> , 16-63
Sep. 15	Robert H. Bork, "The Original Understanding," 48-67 [ER]
Sep. 17	Frank I. Michelman, "Constitutional Authorship" in <i>Constitutionalism</i> , 64-98
Sep. 22	Paul Brest, "The Misconceived Quest for the Original Understanding" <i>Boston U.</i>

	<i>Law Review</i> (1980), 204-238 [ER] Short Paper Assigned
Sep. 24	Ronald Dworkin, "'Natural' Law Revisited" <i>U. of Florida Law Review</i> , 34 (2) 1982, 165-188 [ER]
Sep. 29	Dworkin, "Equality, Democracy, and Constitution" <i>Alberta Law Review</i> (1989), 324-346 [ER]
Oct. 1	Joseph Raz, "Authority, Law, and Morality" <i>The Monist</i> (1985), 295-322 [ER]
Oct. 6	Raz, "On the Authority and Interpretation of Constitutions" in <i>Constitutionalism</i> Short Paper Due
Oct. 8	David Lyons, "Basic Rights and Constitutional Interpretation" from <i>Moral Aspects of Legal Theory</i> , 185-201 [ER]
Oct. 13	Martha Minow, "Engendering Justice" <i>Harvard Law Review</i> (1987), 70-95 [ER] John Stuart Mill, "On Liberty" in <i>On Liberty</i> , 5-19
Oct. 15	Mill, "On Liberty," 20-61
Oct. 20	Mill, "On Liberty," 62-93
Oct. 22	Mill, "Considerations on Representative Government" in <i>On Liberty</i> , 225-234, 238-256
Oct. 27	Mill, "Representative Government," 285-286, 297-325
Oct. 29	Joseph Schumpeter, "The Classical Doctrine of Democracy" in <i>Capitalism, Socialism, and Democracy</i> , 250-268 [ER] Schumpeter, "Another Theory of Democracy" in <i>Capitalism, Socialism, and Democracy</i> , 269-283 [LR] Long Paper Assigned
Nov. 3	Richard Posner, <i>Law, Pragmatism, and Democracy</i> , 59-80, 130-157
Nov. 5	Posner, 158-188 Long Paper Topic Due
Nov. 10	Posner, 188-212, 218-226
Nov. 12	Posner, 322-356
Nov. 17	Ronald Dworkin, "Darwin's New Bulldog" from <i>Justice in Robes</i> , 75-104 [ER]
Nov. 19	Cohen and Rogers, "Structure" from <i>On Democracy</i> , 47-73 [ER] Long Paper Draft Due
Nov. 24	Jeremy Waldron, <i>Law and Disagreement</i> , 1-17, 69-87
Dec. 1	Waldron, 88-118 Long Paper Draft Returned with Comments for Revision
Dec. 3	Waldron, 255-281
Dec. 8	Waldron, 282-312
Dec. 10	Joshua Mildenberger, "Waldron, Waluchow and the Merits of Constitutionalism" <i>Oxford Journal of Legal Studies</i> 29 (1) 2009, 71-90 Long Paper Final Draft Due
Dec. 15	Final Exam, 8:30 - 10:30 AM