

PHIL 430: Philosophy of Law

Spring 2023

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Description

The course will cover (i), the nature of legal systems, the sources of legal legitimacy, and the factual and normative determinants of legal content, (ii) American constitutional history and the evolution of constitutional law, (iii) enumerated vs. unenumerated rights, (iv) theories of statutory and constitutional interpretation, and (v) contemporary challenges posed by the rise of the administrative state.

Books on Reserve in the Hoose Library

David Bernstein, *Rehabilitating Lochner* (University of Chicago Press) **KF228.L63 B47 2011**

Randy E. Barnett, *Restoring the Lost Constitution*, Revised Edition (Princeton 2014) **KF4541.B313 2004**

Randy E. Barnett, *Our Republican Constitution* (Harper Collins 2016) **KF 4541/B3128 2016**

Richard Fallon, *Law, Legitimacy, and the Supreme Court* (Harvard 2018) **KF8748.F34 2018**

Philip Hamburger, *Is Administrative Law Unlawful?* (U. of Chicago, 2014)

H.L.A. Hart, *The Concept of Law*, Third Edition (Oxford, 2012) **K237 .H3**

Andrew Kull, *The Colorblind Constitution* (Harvard 1992) **KF4755.5.K85 1992**

R. Shep Melnick, *The Transformation of Title IX*, The Brookings Institution 2018.

John O. McGinnis and Michael B. Rappaport, *Originalism and the Good Constitution* (Harvard 2013)

KF4552.M34 2013

Scott Soames, *The World Philosophy Made*, (Princeton, 2019)

Peter J. Wallison, *Judicial Fortitude*, (Encounter Books, 2018) **KF5425.W35 2018*Note – Available as e-**

book through the USC Law Library. Access e-book: http://lawencore.usc.edu/libproxy1.usc.edu/iii/encore/record/C_Rb292680_SJudicial%20Fortitude%20wallison_Orighresult_X2;jsessionid=97C6E3FD33887DBE1A2A28A3D95D58BA?lang=eng&suite=cobalt

Course Requirements

There will be three quizzes – one at the end of week 4, one in class at the beginning of week 9, and one on the last day of class. There will be two short papers of between 800 and 1000 words, each chosen from a range of topics specified by the instructor. The first will be due at the beginning of week 7, and the second at the end of week 12. There will be a term paper of 2,000 - 2,500 words, which can be an expansion of one of the short papers.

Credit and Grading

Students will be graded on their written work. With the exception of class participation – which, at the discretion of the instructor, may account for up to 10% “extra credit” – the final grade will be determined by grades on papers and quizzes. Each quiz will count for 15% of the final grade, and each short paper will count for 15%. *But in computing the final grade the lowest grade for either a quiz or short paper will be excluded (which means that one quiz, or one paper, may be missed without penalty.)* The term paper will thus count for 40% of the grade. Possible term paper topics will be made available by week 8. The final short paper may be a preliminary version of the student's term paper. All papers must be turned in on time, subject to penalties for lateness at the rate of 1/3 of a grade point for each 24 hours of lateness. The term paper will be due at the time and date reserved for this course in the final exam schedule. The term paper will be deemed in lieu of the final exam.

Schedule

Weeks 1-2: Positivism, Authority, Morality, and the Nature of Law

Reading: Hart: *The Concept of Law*: Chapters 2-5, section 2 of chapter 6, sections 1 and 3 of chapter 7, pp. 192-212 of chapter 9; Soames pp.303-310 *The World Philosophy Made*; Hart, “Positivism and the Separation of Law and Morals,” online; Fuller “Reply to Professor Hart, online, Dworkin, “The Model of Rules” (1967) Online.

Week 3-4: Must Legal Facts be Normative?

Reading: Mark Greenberg, Facts: How Facts Make Law” (2004), online, Scott Soames, “Originalism, Positivism, and Normativity,” 2018 draft, Soames personal web page

First quiz: end of week 4

Constitutional History, Interpretation, and Change

Week 5: The Constitution of 1791

Historical Background, Guiding Philosophy, Basic Principles, Bill of Rights, Distortions of Slavery

Reading: Barnett, Chapters 1-3 of *Our Republican Constitution* plus pp. 359-375 of *Restoring our Lost Constitution*, Locke, *Second Treatise on Government*, online PDF, chap. 2 articles 4-8, chap 8 articles 95-99, chap 9 articles 123-131, chap 11 articles 134, 135, 138, 141, chap 12 article 145, chap 14, article 159, chap 19 article 222.

Recommended: Niall Ferguson, pp. 113-132 of *Empire*; McGinnis and Rappaport, chapters 2, 4 and 5 of *Originalism and the Good Constitution*

Week 6: From the Founding to the Civil War

Privileges and Immunities, the Comity Clause, the Missouri Compromise, the Negro Seaman's Act, Dred Scott, and the run up to the Civil War

Reading: chapter 1 of Kull. *The Colorblind Constitution*

Week 7: Nationalization of Natural Rights in Post Civil War Constitutional Amendments

Reading: Chapter 4 Barnett *Our Republican Constitution*, John Harrison, "Reconstructing the Privileges or Immunities Clause" *Yale Law Journal*, 1992, available online.

First short paper due at beginning of week 7

Week 8: Retreat of Natural Rights: Post Reconstruction, Progressivism, New Deal

Key Supreme Court Cases Including (but not limited to) *Bradwell*, *Slaughterhouse*, *Plessy*, *Lochner*, *Buchanan*, *Baile*, *Muller*, *Adkins*

Reading: Barnett pp. 375-384 and Chapter 8 *Restoring our Lost Constitution* plus chapter 5 of *Our Republican Constitution*; Bernstein, chapters 1-6 of *Rehabilitating Lochner*

Recommended: Earnest A. Young, *Dying Constitutionalism and the Lost Years of the 14th Amendment*, sections 1-4 (partial book draft)

Weeks 9-10: Selective Return of Natural Rights: Further Decline of Federalism

The Return of *Lochner*-Style Reasoning Restricting Local, Public and Private, Authority in Manners, Morals, and Religion, while Embracing Federal Preeminence in Economic Matters

Second quiz: end of week 9

Key cases: *Brown*, *Bolling* (pp. 87-88 of Bernstein), *Blaisdale*, *Carolene Products*, *Williamson v. Lee Optical*, *Griswold* (113-16 of Bernstein), *Meyer v Nebraska*, *Pierce v Society of Little Sisters*, *Roe*, *Casey*, *Lawrence*

Reading: McConnell, "Originalism and The Desegregation Decisions," *Virginia Law Review*, Introduction, Sections A and Subsections 1-3 of section B of Part I, also section C of Part IV [**this is available online at https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?referer=https://duckduckgo.com/&httpsredir=1&article=12624&context=journal_articles**]; Bernstein, chapter 7 of *Rehabilitating Lochner*; McGinnis, "Reviving the Contract Clause" <https://lawliberty.org/reviving-the-contract-clause-an-acid-test-for-originalism/>; chaps 9, 10 of *The Colorblind Constitution*; Barnett, pp. 226-44 and pp. 384-89 of *Restoring Our Lost Constitution* plus chapter 9 of *Our Republican Constitution*

Recommended: Wolters, "Constitutional History, Social Science, and *Brown v. Board*," *The Occidental Quarterly*, Vol. 5. No. 1; "Plural Agents, Private Intentions, and Legal Interpretation," *The Journal of Contemporary Legal Issues*, vo. 23, 2021. pp. 151-56 (also on website)

Theories of Statutory and Constitutional Interpretation

Weeks 11-12: The Contents of Legal Texts and the Nature of Judicial Interpretation

The Scope of Judge-Made Law: To what are judges legally required be faithful? How are they legally permitted to innovate? When, if ever, are they authorized to be guided by their own moral and political

convictions? How, if at all, does the normatively optimal role of the American judiciary differ from its actual role?

Reading: Fallon chapters 1,2,3,4, and 6 of *Law, Legitimacy, and the Supreme Court*, John O. McGinnis, "The *Fulton* Opinion and the Originalist Future of Religious Freedom" *Law and Liberty* blog, June 24, 2021, <https://lawliberty.org/the-emfulton-em-opinion-and-the-originalist-future-of-religious-freedom/> Soames, "Originalism and Legitimacy" (Soames web page), Michael McConnell. "Originalism and the Desegregation Decisions" Vol 81 *Virginia Law Review* (selections), Soames "To What Should Originalists be Faithful?" (web page) McGinnis and Rappaport, chapter 10, "A Normative Theory of Precedent in *Originalism and the Good Constitution*."

Second short paper due at end of week 12

Weeks 13-15: The Constitution and the Rise of the Administrative State

Is the fusion of judicial, legislative, and executive power in contemporary federal agencies constitutional? Is it good? Is there any practical alternative to it?

Reading: Wallison, *Judicial Fortitude*, chapters 1,6; , Lawson, "The Return of the King: The Unsavory Origins of Administrative Law" <http://texaslawreview.org/wp-content/uploads/2015/08/Lawson-93-6.pdf>; Hamburger *Is Administrative Law Unlawful*, pp. 21-32, 227-281, 291-321, 350 -354, 369-374, 377-388, 412-417, 419-439, 479-492, 495-6, 498-504; Barnett, chap 8 of *Our Republican Constitution*; Gail Hariot, "Title VII Disparate Impact Liability (sections I,II,III,V,VIII, IX); Melnick, "The Strange Evolution of Title IX <https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix>, plus chapters 3, 9-11 of *The Transformation of Title IX*; Wallison chap. 7, *Judicial Fortitude*; Soames:330-340 *The World Philosophy Made*.

Third quiz: last day of class