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Off. Hours: T, 10-12, F, 11-12

Spring 2013
Mezes 3.110

Government 384N

AMERICAN LEGAL PHILOSOPHY

Quite often debate over legal issues either fails to generate much intellectual interest or fails to reach any sort of satisfactory resolution. What makes this so frustrating is that discussion about law has the potential for illuminating many of the most profound questions of human existence. Much of the problem is that people talk past each other, meaning different things when they refer to law, attempting to persuade others when the grounds of their own assumptions remain cloudy and unexamined. Hence the focus of this course: to consider, within the American political context, what law has come to mean, and to understand the implications of this definition (as well as alternative conceptions) for public policy, constitutional interpretation, and citizenship.

Much of the canon of American jurisprudence includes important works falling beyond the specific concerns of this course. Thus we will have little to discuss regarding issues located in the various domains of private law. The selection of readings and topics reflect the fact this is a course in a graduate program in Public law. The jurisprudential and philosophical issues that will preoccupy us are deeply implicated in the scholarship being done in the fields of judicial behavior, constitutional development, and comparative/international law. Indeed, our goal is to discover exactly why they lie at the core of the discipline of Public Law.

Texts:

Jack Balkin, Constitutional Redemption
Benjamin Cardozo, The Nature of the Judicial Process
Ronald Dworkin, Taking Rights Seriously
Richard Posner, How Judges Think
Cass Sunstein, A Constitution of Many Minds

Course Packet (available for purchase at Paradigm Books):

Hadley Arkes, "On the Dangers of a Bill of Rights: Restating the Federalist Argument"
Robert Bork, excerpts from The Tempting of America
Ronald Dworkin, "Rawls and the Law"
John Finnis, "Virtue and the Constitution of the United States"
Lon Fuller, "The Case of the Speluncean Explorers"
Lon Fuller, "Positivism and Fidelity to Law"
Robert W. Gordon, "Law as a Vocation: Holmes and the Lawyer's Path"
Sarah Harding, "Comparative Reasoning and Judicial Review"
H.L.A. Hart, "Positivism and the Separation of Law and Morals"
Oliver Wendell Holmes, Jr., "The Path of the Law"

Allan C. Hutchinson and Patrick J. Monahan, "Law, Politics, and the
Critical Legal Scholars: The Unfolding Drama of American Legal
Thought"
Vicki C. Jackson and Jamal Greene, "Constitutional Interpretation in Comparative
Perspective: Comparing Judges or Courts?"
Gary Jacobsohn, "Rights and American Constitutional Identity"
Gary Jacobsohn, "Constitutional Values and Principles"
Abraham Lincoln & Stephen Douglas, "Debate #5"
Frank Michelman, "Law's Republic"
Walter F. Murphy, "Merlin's Memory: The Past and Future Imperfect of the Once
and Future Polity"
Henry David Thoreau, "On the Duty of Civil Disobedience"
Mark Tushnet, "Following the Rules Laid Down: A Critique of
Interpretivism and Neutral Principles"
John R. Vile, "The Case Against Implicit Limits on the Constitutional Amending
Process"
Jeremy Waldron, "Judges As Moral Reasoners"
Herbert Wechsler, "Toward Neutral Principles in Constitutional Law"

Cases:

Adamson v. California
The Antelope
Bowers v. Hardwick
Buck v. Bell
Calder v. Bull
DeShaney v. Winnebago County
District of Columbia v. Heller
Home Building & Loan Association v. Blaisdell
Lawrence v. Texas
Plessy v. Ferguson
Prigg v. Pennsylvania
Romer v. Evans
United States v. Dougherty
West Virginia v. Barnette

Course Requirements and Evaluation:

Our discussions will focus directly on the assigned items, and so careful reading of all materials is of course expected. In addition, for each class a student will be responsible for providing in advance a short list of questions and/or impressions of the readings that highlight what he or she believes to be the most important issues contained therein. These should be circulated on Blackboard at least one day in advance of the class time.

There are two written assignments, the first is a short review essay (5 pages) and the second is a research paper (20 pages) to be submitted at the end of the semester. A course grade will reflect performance on these papers (#1 – 20%, #2 – 60%) and on class participation (20%).

Schedule of Assignments:

I. Alternative Perspectives on the Nature of Law

- Jan. 15 Fuller, "The Case of the Speluncean Explorers"
Dworkin, "Rawls and the Law"
Jacobsohn, "Rights and American Constitutional Identity"
- Jan. 22 Holmes, "The Path of the Law"
Gordon, "Law as a Vocation: Holmes and the Lawyer's Path"
Buck v. Bell
Hart, "Positivism and the Separation of Law and Morals"
Fuller, "Positivism and Fidelity to Law"
- Jan. 29 Calder v. Bull
Adamson v. California
Dworkin, 1-45, 81-130
- Feb. 5 The Antelope
Prigg v. Pennsylvania
Lincoln - Douglas, "Debate #5"
Thoreau, "On the Duty of Civil Disobedience"
Dworkin, 184-222
- Feb. 12 Cardozo, The Nature of the Judicial Process
Posner, 78-121
United States v. Dougherty
Plessy v. Ferguson
- Feb. 19 Posner, 19-56, 204-323
Home Building & Loan Association v. Blaisdell
DeShaney v. Winnebago County

II. Interpretation: The Case of the Constitution

- Feb. 26 Balkin, Constitutional Redemption
- Mar. 5 Dworkin, 131-149
Waldron, "Judges As Moral Reasoners"
Bork, selections
Arkes, "On the Dangers of a Bill of Rights: Restating the
Federalist Argument"
Murphy, "Merlin's Memory: The Past and Future Imperfect of the
Once and Future Polity"
Vile, "The Case Against Implicit Limits on the Constitutional
Amending Process"

[Spring Break]

- Mar. 19 Bowers v. Hardwick
Romer v. Evans
Lawrence v. Texas
Dworkin, 240-278
Michelman, "Law's Republic"
Finnis, "Virtue and the Constitution of the United States"
- Mar. 26 Hutchinson and Monahan, "Law, Politics, and the Critical
 Legal Scholars: The Unfolding Drama of American
 Legal Thought"
Wechsler, "Toward Neutral Principles in Constitutional Law"
Tushnet, "Following the Rules Laid Down: A Critique of
 Interpretivism and Neutral Principles"
District of Columbia v. Heller
- Apr. 2 TBA
- Apr. 9 Sunstein, A Constitution of Many Minds
West Virginia v. Barnette
- Apr. 16 Harding, "Comparative Reasoning and Judicial Review"
 Jackson and Greene, "Constitutional Interpretation in Comparative
 Perspective: Comparing Judges or Courts?"
 Jacobsohn, "Constitutional Values and Principles"
 Posner, 347-368
- Apr. 23 research paper presentations
- Apr. 30 research paper presentations