

Phl 347 Philosophy of Law
Autumn 2012
Syllabus

Professor Tara Smith

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Office hours: Tuesday 10:30-11:30 & Thursday 12:00-1:00

Reading Material

1. Books available at the Coop: Randy Barnett, *Restoring the Lost Constitution*
Hamilton, Jay & Madison, *The Federalist Papers*
2. Packet available at Speedway Copies, in Dobie Mall
3. PDF's posted to Blackboard
4. Material available online

All links to these are included at the end of the syllabus; you should print these materials so that you are able to mark them as you read & bring to class on appropriate days

Recommended: obtain a "pocket Constitution." These are available at various sites online (sometimes free, but delivery could be slow). Try <http://www.askheritage.org/Premium.aspx> or http://www.xmission.com/~nccs/us_constitution.html

Requirements & Grading:

Exam (20%) – Thursday September 27

Exam (25%) – Tuesday November 20

Paper (20%) – Due Tuesday October 23

Paper (25%) – Due Thursday December 6

Homeworks & Participation – (10%)

(participation both in class & in discussion sections)

Paper: Each of the two papers should be approximately 5 pages, word length 1100-1400 words. Students will choose from a set of assigned topics. Guidelines for writing papers will be posted to Blackboard; additional, more extensive guidelines for writing a philosophy paper can be found at: <http://www.princeton.edu/~jimpryor/general/writing.html>

Note: Any reference to **material obtained online** must include (in a separate section at the end of the paper) an explanation of the credibility of the source. Do not rely on sources whose credibility you cannot verify.

Homework: Attendance at Free Speech Dialogue on the relationship between Free Speech & Intellectual Property, held on Thursday Sept. 20th, 7 pm in Painter 2.48 and a 200-300-word essay addressing the

question: What were the two most significant aspects of the issue that emerged in the Dialogue? And why are *these* the most important? Essay due Tuesday Sept 25th.

Additional brief homework assignments may be added throughout the term.

Nota Bene

- Deadlines are firm; late work is penalized by lowered grades. In the event that you know in advance of a conflict with a certain date, or if an emergency arises, inform the professor or TA as soon as possible.
- *All* assigned work must be completed and turned in in order for a student to pass the course.
- Any form of cheating or plagiarism will be severely punished, possibly resulting in an F for the course regardless of a student's performance on other course work.
- If a student misses class, it is entirely his or her responsibility to obtain notes as well as information pertaining to assignments, schedule changes, etc.
- Class sessions may not be technologically recorded without the professor's express permission.
- All cell phones and electronic devices (other than those used exclusively for taking notes on course material) must be shut off during class.
- Absences for the purpose of celebrating religious holidays are excused, though students should inform the professor of such absences in advance.
- The University provides upon request appropriate academic accommodations for qualified students with disabilities. For more information, contact the Office of the Dean of Students at 471-6259, 471-6441 TTY.

Course Overview

This course, intended to introduce students to certain basic issues in philosophy of law, will be organized around the question: What should a legal system be? What are the fundamental features that are vital to a proper legal system, and what are some of the competing understandings of what these are?

By reading both historical and contemporary authors, we will examine the theoretical bases of proper law as well as the appropriate practical implementation of key ideals in legal systems today. Correspondingly, along the way, we will consider the meaning of several concepts that are arguably crucial to a proper legal system, such as rights, freedom, representation, popular sovereignty, democracy, and republic.

The course is organized in **three major units**:

1. The Rule of Law

What is the basic difference between the Rule of Law and the Rule of Men? What does the Rule of Law demand and why is it superior to the Rule of Men? What are the key differences between Natural Law & Positivist conceptions of law, and what hinges on this debate? Must laws pass a certain moral test in order to be *bona fide* laws?

2. The Authority of Law

Within a proper legal system, what is the final, bedrock repository of legal authority? And what, if anything, serves as the moral authority that underwrites that legal authority? More specifically, what role should a constitution play in expressing either moral and/or legal authority?

3. Judicial Review – The Judiciary’s Oversight of the Application of Law

While nearly everyone demands that judges be faithful to the law, exactly what that requires depends on one’s answers to the issues raised in our first two units – that is, on understanding the identity of the law and the authority of the law. Our final unit will consider a few of the major competing accounts of proper methods of conducting judicial review, particularly examining the merits of “common law jurisprudence.” What is the relationship between the authority of the common law, the authority of precedent, and the authority of a constitution? And what are the implications for our understandings of what the law *is*, as well as for which account of proper judicial review is correct?

Schedule

(*approximate*)

Topics, Dates, & Readings (readings should be done in advance of the dates below)

August 30 – Overview & Basics

Unit 1. The Rule of Law

The Rule of Law versus the Rule of Men

September 4, 6 Online: Tamanaha, chapters 4, 7, 8

Natural Law versus Positivism

September 11, 13 Packet: Aquinas, Austin, Hart
Recommended: Packet: Blackstone

September 18 Packet: Hart

September 20 Guest lecturer Neal Netanel, UCLA Law Professor
Free Speech in Relation to Intellectual Property

September 25 Natural Law & Positivism – Resolution

September 27 **Exam**

Unit 2. The Authority of Law

Moral Authority: Purpose of Government; Rights, Freedom, Force; Popular Sovereignty

October 2, 4 Online: Locke, *Second Treatise*, chapters 1-4, 7-9, 10-13, 18-19

October 9, 11 Online, Rand, “Man’s Rights,” “The Nature of Government”
Recommended: Packet: Smith, chapters 6, 7 from *Moral Rights & Political Freedom*

Legal Authority: The Character of Constitutions; Appropriate Provisions of a Constitution

October 16 PDF: Thompson, “Revolutionary Origins of American Constitutionalism”
 Online: Adams, *The Revolutionary Writings of John Adams*, chapters 4 & 9
 (“The Earl of Clarendon to William Pym” & “Thoughts on Government”)

October 18 Online: *Federalist Papers*, numbers 9, 10, 30, 31, 39, 47, 48, 51
Recommended: number 37

October 23, 25 **Papers due on 23rd**
 Barnett, chapters 1, 2
Recommended: Gerber, chapter 2, Packet

Representation

October 30, Nov. 1 *Federalist Papers* numbers 51, 71

Unit 3. Judicial Review – The Judiciary’s Oversight of the Application of Law

Principal Alternative Theories

November 6, 8 Online: *Federalist Papers*, numbers 78, 80
 Online: Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws”
Recommended: Barnett, chapter 4, pp. 100-109, 109-117
Recommended: PDF: Smith, “Originalism’s Misplaced Fidelity: ‘Original’ Meaning is Not Objective”

November 13 Barnett, chapter 7
Recommended: Gerber pp. 104-125, Packet

Common Law, Precedent, Minimalism

November 15 Packet, Sunstein
Recommended: *Planned Parenthood v. Casey*, excerpts in Packet

November 20 **Exam**

November 22 Thanksgiving – *Relish!*

November 27, 29 Online: Strauss, “Common Law Constitutional Interpretation”

December 4 PDF: Smith, “Reckless Caution: The Perils of Judicial Minimalism”

December 6 Conclusions / **Papers due**

Links to readings online:

Remember in each case to read only the assigned chapters or pages. These links will typically bring you to the entirety of a book.

Brian Tamanaha, *On the Rule of Law*, online through UT Libraries:

<http://www.utxa.ebib.com.ezproxy.lib.utexas.edu/patron/FullRecord.aspx?p=283619&userid=tgA4r5ZgQ9ZVbtEw7oNK0Q%3d%3d&tstamp=1282341092&id=2A001C6C369F70A45272AC7A72E19E0D8F2373AA>

<http://reader.ebib.com.ezproxy.lib.utexas.edu/Reader.aspx?p=283619&o=429&u=tgA4r5ZgQ9ZVbtEw7oNK0Q%3d%3d&t=1282670841&h=075CD8FCDECBE44EE3B388C38A7DCF2CCB16FD37&s=8776470&ut=1296&pg=1&r=img&pat=n>

John Locke, from his *Second Treatise on Government* (be sure to read chapters from Book 2, which is here called “Of Civil Government” – chapter 2, for example, is titled “Of the State of Nature”):

http://oll.libertyfund.org/?option=com_staticxt&staticfile=show.php%3Ftitle=222&chapter=16239&layout=html&Itemid=27

Ayn Rand, “Man’s Rights”

http://www.aynrand.org/site/PageServer?pagename=arc_ayn_rand_man_rights

Ayn Rand, “The Nature of Government”

http://www.aynrand.org/site/PageServer?pagename=ari_ayn_rand_the_nature_of_government

John Adams, from *The Revolutionary Writings of John Adams*, read: chapter 9, “Thoughts on Government” (pp. 285-293); chapter 4, “The Earl of Clarendon to William Pym” (pp. 43-56)

http://oll.libertyfund.org/index.php?option=com_staticxt&staticfile=show.php%3Ftitle=592&Itemid=28

The Federalist Papers is available at several online sites. Among others:

<http://www.loc.gov/rr/program/bib/ourdocs/federalist.html>

&

<http://oll.libertyfund.org/readinglists/view/269>

Antonin Scalia, <http://www.tannerlectures.utah.edu/lectures/documents/scalia97.pdf>

Note that this version of Justice Scalia’s lectures is slightly different from that reprinted in the later book *A Matter of Interpretation*

David Strauss, “Common Law Constitutional Interpretation,” *University of Chicago Law Review* Summer 1996, vol. 63, no. 3

<http://www.jstor.org/stable/1600246>