

The Rule of Law: Controlling Government (Seminar in Contemporary Legal Thought)

Assignments

Professor John Norton Moore
Mon., 7:00-9:00 PM
Meeting at Professor Moore's home
824 Flordon Drive, Charlottesville

Fall 2011
University of Virginia
School of Law

Text for Reading Assignments

Readings: *Readings on the Rule of Law: Controlling Government (Seminar in Contemporary Legal Thought), Volumes 1-4* and materials on reserve—the collection of selected documents compiled for the seminar.
Volumes 1-4 of the **Readings** are available at the Law School Copy Center, and reserve materials (as indicated below) may be checked out from the Reserve section of the Law School Library.

Class Website: <http://www.faculty.virginia.edu/jnmoore/rol/>

Date	Topic
------	-------

September 5

I. Introduction

- A. The Rule of Law: An Overview. Paper presented on behalf of the United States to the seminar on the Rule of Law.
- i. Overview and Principal Focus
 - ii. The Rule of Law: Exploring the Concept
 - Law for the Purpose of Enforcing the Will of the State (or the will of the ruling elite) or Law for the Purpose of Promoting Liberty and Individual Freedom (protecting against interference with liberty from either individuals or the State)
 - Elements of the Rule of Law and a Jurisprudence of Freedom and Human Dignity

Readings, Volume 1:

1-23 J.N. Moore, "The Rule of Law: An Overview," Paper presented to the Seminar on the Rule of Law, Moscow and Leningrad, USSR, March 19-23, 1990

Readings, On Reserve:

- #1 Mancur Olson, *Dictatorship, Democracy, and Development*, in 87 AMERICAN POLITICAL SCIENCE REVIEW 3, 567-576 (1993)
- #2 FRIEDRICH A. HAYEK, *The Origins of the Rule of Law*, in THE CONSTITUTION OF LIBERTY 162-75 (1960) (ch. 11)

B. Modes of Analysis: Scholasticism vs. Scientific Method

- i. Sir Francis Bacon (*The New Organon*), the Newtonian Revolution and Scientific Method
- ii. A Word About Epistemology
 - Rationalism, Plato, and Descartes (deductive mode)
 - Empiricism, Aristotle, and Locke/Montesquieu (inductive mode)

Date	Topic
September 5 (cont.)	<p>Readings, Volume 1: 41-46 FRANCIS BACON, NOVUM ORGANUM, Preface, and Aphorisms 1, 14, 18, 19, 22, 31 & 38 (1620) (Joseph Devey, M.A. ed., 1902) 47-50 RENÉ DESCARTES, A DISCOURSE ON METHOD, excerpt from “Part II” (1637) (<i>first published in this edition in 1912</i>) 14-18</p>
	<p>C. Totalitarianism and Its Consequences: The Costs of Extreme Government Failure</p>
September 12	<p>Readings, Volume 1: 51-67 R.J. Rummel, “Power Kills; Absolute Power Kills Absolutely” (Oct. 20, 1991)</p>
	<p>Readings, On Reserve: #3 Daniel Southerland, “Uncounted Millions: Mass Death in Mao’s China,” Two Articles: <i>Repression’s Higher Toll: New Evidence Shows Famine, Violence Spared Few</i>, WASHINGTON POST, July 17, 1994, at A1, cols. 3-4; A22-A23; and <i>A Nightmare Leaves Scars, Questions</i>, WASHINGTON POST, July 18, 1994, at A1, col. 1; A12, cols. 1-5; A13, cols. 1-2. #4 BRUCE RUSSETT, GRASPING THE DEMOCRATIC PEACE: PRINCIPLES FOR A POST-COLD WAR WORLD 9-11 (1993) #5 GERALD W. SCULLY, <i>Overview</i>, in CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 3-12 (1992) (ch. 1) #6 MURRAY FESHBACH & ALFRED FRIENDLY, JR., <i>Facing Facts</i>, in ECOCIDE IN THE USSR 1-25 (1992) (ch. 1) #7 P. CRAIG ROBERTS & KAREN LAFOLLETTE, MELTDOWN: INSIDE THE SOVIET ECONOMY 1-5, 75-85, 121-44 (1990) (Introduction; ch. 4: The Original Aspirations and the Soviet Economy Today; ch. 7: Beyond Marxism) #8 HANNAH ARENDT, <i>Ideology and Terror: A Novel Form of Government</i>, in THE ORIGINS OF TOTALITARIANISM 460-79 (1948, 1973 ed.) #9 JEANE KIRKPATRICK, <i>Reflections on Totalitarianism</i>, in DICTATORSHIPS AND DOUBLE STANDARDS 96-125 (1982)</p>
September 19	<p>D. Democracy, the Growth of Leviathan, and the Costs of Moderate Government Failure</p>
	<p>Readings, On Reserve: #10 MILTON FRIEDMAN, <i>Introduction</i>, and <i>The Relation Between Economic Freedom and Political Freedom</i>, in CAPITALISM AND FREEDOM 1-21 (1962) #11 “Socialist Platform of 1928,” <i>reprinted in</i> M. FRIEDMAN & ROSE FRIEDMAN, <i>Appendix A</i>, in FREE TO CHOOSE 311-12 (1980) #12 Gary M. Anderson, <i>The US Deficit and National Debt: A Political and Economic History</i>, in DEFICITS 9-46 (J.M. Buchanan, C.K. Rowley & R.D. Tollison eds., 1987) #13 Dwight Lee, <i>Deficits, Political Myopia and the Asymmetric Dynamics of Taxing and Spending</i>, in DEFICITS 289-309 (J.M. Buchanan, C.K. Rowley & R.D. Tollison eds., 1987) #14 RICHARD E. WAGNER, <i>Contractarian State, Welfare State, and Constitutional Order</i>, in TO PROMOTE THE GENERAL WELFARE 1-19 (1989)</p>

Date	Topic
September 26	<p data-bbox="472 352 911 380">E. The Theory of Government Failure</p> <p data-bbox="537 415 748 443">Guest Participant:</p> <p data-bbox="581 447 1430 562">James M. Buchanan Center for the Study of Public Choice, George Mason University Nobel Prize in Economics, 1986 James M. Buchanan Center for Political Economy <http://www.gmu.edu/jbc/></p> <p data-bbox="537 598 773 625">Readings, Volume 1:</p> <p data-bbox="537 630 1430 716">109-119 “Chapter 2. Government and the Economy,” in ECONOMIC REPORT OF THE PRESIDENT TRANSMITTED TO THE CONGRESS FEBRUARY 1982, at 27-46 (U.S. Gov’t Printing Office, 1982)</p> <p data-bbox="537 720 1409 779">120-130 STEVEN E. RHOADS, <i>Government and the Economy</i>, in THE ECONOMIST’S VIEW OF THE WORLD 61-81 (1985) (ch. 5)</p> <p data-bbox="537 814 797 842">Readings, On Reserve:</p> <p data-bbox="537 846 1458 898">#15 STEPHEN BREYER, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 3-29 (1993)</p> <p data-bbox="537 903 1390 955">#16 Steven Kelman, “‘Public Choice’ and Public Spirit,” in 87 THE PUBLIC INTEREST 80-94 (1987)</p> <p data-bbox="537 959 1414 1012">#17 M. FRIEDMAN & R. FRIEDMAN, <i>The Tide Is Turning</i> (excerpt), in FREE TO CHOOSE 290-98 (1980)</p> <p data-bbox="537 1016 1471 1108">#18 James M. Buchanan, <i>Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications</i>, in THE THEORY OF PUBLIC CHOICE—II 11-22 (James M. Buchanan & Robert D. Tollison eds., 1984)</p> <p data-bbox="537 1113 1365 1165">#19 CHARLES WOLF, JR., <i>Conclusions: The Choice Between Markets and Governments</i>, in MARKETS OR GOVERNMENTS 151-79 (1988)</p> <p data-bbox="537 1169 1463 1318">#20 ALICE M. RIVLIN, <i>The Dream, the Reality, and Some Solutions; The Evolution of American Federalism; Rethinking Federalism; and Federalism Faces New Challenges</i>, in REVIVING THE AMERICAN DREAM: THE ECONOMY, THE STATES AND THE FEDERAL GOVERNMENT 1-19, 82-125, 177-82 (1992) (chs. 1, 6, 7, 10)</p> <p data-bbox="537 1323 1463 1375">#21 WILLIAM BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION 1-110 (1974)</p>
October 3	<p data-bbox="375 1451 1430 1503">II. Constitutionalism and the Rule of Law: Historic, Jurisprudential, and Comparative Antecedents</p> <p data-bbox="472 1539 1414 1598">A. Historic and Comparative Antecedents in Political Theory: Competing Streams of Thought</p> <p data-bbox="537 1633 1446 1686">i. Empowering the Government: The Traditions of Interventionist Government and Ruthless Power</p> <p data-bbox="581 1722 1463 1904">- Interventionist Government: Plato (<i>The Republic</i>: the “organic” theory of government and rule by “philosopher kings”), Sir Thomas More (<i>The Utopia</i>), Hobbes (<i>The Leviathan</i>), Rousseau (<i>The Social Contract</i>), Joseph de Maistre (<i>Considerations on France</i>), Hegel (<i>Elements of the Philosophy of Right</i>), Marx, Lenin, and Habermas & the Frankfurt School (though contradictory), Heidegger</p>

Date	Topic
------	-------

Readings, Volume 2 (skim):

- 1-5 PLATO, THE REPUBLIC, excerpts
- 6-8 THOMAS MORE, THE UTOPIA, Book II, excerpts
- 9-12 THOMAS HOBBS, THE LEVIATHAN, excerpt, ch. XVIII, *Of the Rights of Sovereignes by Institution* (1651)

October 3 (cont.)

Readings, On Reserve (skim):

- #22 G.W.F. HEGEL, THE ELEMENTS OF THE PHILOSOPHY OF RIGHT 275-279 (Allen. W. Wood ed., 1991)
- #23 Karl H. Marx & Friedrich Engels, *The Communist Manifesto*, Part I (1848), reprinted in ESSENTIAL WORKS OF SOCIALISM 3-17 (Irving Howe ed., 3d ed. 1986)
- #24 Vladimir I. Lenin, *What Is to Be Done?*, excerpt (1902), reprinted in ESSENTIAL WORKS OF SOCIALISM 159-63 (Irving Howe ed., 3d ed. 1986)
- #25 V.I. Lenin, *The State and Revolution*, excerpt (1918), reprinted in ESSENTIAL WORKS OF SOCIALISM 164-82 (Irving Howe ed., 3d ed. 1986)
- Ruthless Pursuit of Power: Machiavelli (*The Prince*), Nietzsche (“warrior” vs. “herd” morals), von Bernhardi, Lenin, Stalin, Hitler, Mao, Pol Pot, Guzmán & the Shining Path, and al Qaeda (*Training Manual*)

Readings, Volume 2 (skim):

- 13-18 NICCOLÒ MACHIAVELLI, THE PRINCE, ch. XVII, *Of Cruelty and Mercy*, and ch. XVIII, *In What Mode Faith Should be Kept by Princes* (1532)

Readings, On Reserve (skim):

- #26 Friedrich Wilhelm Nietzsche, selected statements reprinted in A NIETZSCHE READER (R.J. Hollingdale trans., ed., 1977)
- #27 GENERAL FRIEDRICH VON BERNHARDI, *The Right to Make War*, excerpt, in GERMANY AND THE NEXT WAR 16-19 (Allen H. Powles trans., 1914)
- #28 V.I. LENIN, “No Compromises”?, excerpts, in “LEFT-WING” COMMUNISM, AN INFANTILE DISORDER (April 1920, Inst. Marxism-Leninism trans)
- #29 JOSEPH V. STALIN, *Concerning the Policy of Eliminating the Kulaks as a Class*, in PROBLEMS OF LENINISM 477-82 (English trans. 1976 of Russian ed. 1952)
- #30 ADOLF HITLER, MEIN KAMPF, excerpts (1925, 1927) (trans. 1939)
- #31 Mao Tse-tung, *On the People’s Democratic Dictatorship* (1949), reprinted in SELECTED READINGS FROM THE WORKS OF MAO TSE-TUNG 371-88 (1971 English trans., 2d Chinese ed. 1965)
- #32 Pol Pot: excerpts from POL POT PLANS THE FUTURE: CONFIDENTIAL LEADERSHIP DOCUMENTS FROM DEMOCRATIC KAMPUCHEA, 1976-1977, at 110-15, 157-59, 182-91 (D.P. Chandler, B. Kiernan & C. Boua trans. & eds., 1988)
- #33 Abimael Guzmán: quoted in SIMON STRONG, SHINING PATH 25-26 (1992)
- #34 al Qaeda Training Manual, “Presentation,” p. 3 (2002)

ii. Empowering the Individual: Toward Human Freedom

- Aristotle (*The Politics*—with, however, the prevailing errors of his day concerning slavery and second-class status for women), Magna Carta, Locke (*Second Treatise of Civil Government*), Sidney (*Discourses Concerning Government*), Montesquieu (*The Spirit of the Laws*), Rousseau (*The Social*

Date	Topic
	<p><i>Contract</i>), the French Declaration of the Rights of Man, Adam Smith (<i>The Wealth of Nations</i>), Constitution of Massachusetts, Jefferson (U.S. Declaration of Independence), Madison (<i>U.S. Constitution</i>), Hamilton, Madison, and Jay (<i>The Federalist Papers</i>), Olympe de Gouge (<i>Declaration of the Rights of Women</i>), Benjamin Constant (<i>Political Writings</i>), Alexis de Tocqueville (<i>Democracy in America</i>), Mill (<i>On Liberty</i>), Emile Durkheim (founder of sociology, supports democracy, and rejects claim of socialism and communism to be “scientifically based”), Hayek (<i>The Constitution of Liberty</i>) & the Austrian School, Hannah Arendt, George Orwell, the CSCE Copenhagen Document and other modern human rights norms and processes</p>

October 3 (cont.)

Readings, Volume 2 (skim):

- 19-24 MONTESQUIEU, THE SPIRIT OF THE LAWS, excerpts, Book 2 and Book 5 (1748)
- 25-28 JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT, excerpts, ch. 7, *The Sovereign*, and ch. 8, *Civil Society*
- 29-36 THE FEDERALIST No. 48 (Madison) & No. 51 (Hamilton or Madison) (1788)
- 37-41 THE FEDERALIST Nos. 53, 56 & 57, excerpts (James Madison) (1788),
reprinted in PETER WOLL, AMERICAN GOVERNMENT READINGS AND CASES 419-21 (1987)
- 42-53 JOHN STUART MILL, ON LIBERTY, ch. 4, *Of the Limits to the Authority of Society Over the Individual* (1859)

Readings, On Reserve (skim):

- #35 ARISTOTLE, CONSTITUTION OF ATHENS, excerpt, " 12-13
- #36 Magna Carta, relevant chapters (June 1215)
- #37 JOHN LOCKE, SECOND TREATISE, OF CIVIL GOVERNMENT, excerpts (1690),
reprinted in PETER WOLL, AMERICAN GOVERNMENT READINGS AND CASES 48-53 (1987)
- #38 ALGERNON SIDNEY, DISCOURSES CONCERNING GOVERNMENT, foreword (Thomas G. West ed., 1990)
- #39 The French Constitution, “Declaration of the Rights of Man, and of the Citizen,” Aug. 26, 1789
- #40 ADAM SMITH, THE WEALTH OF NATIONS, excerpt (1776)
- #41 Constitution of Massachusetts, Oct. 25, 1780
- #42 [Thomas Jefferson] The Declaration of Independence, U.S., July 4, 1776
- #43 [James Madison] The Constitution of the United States, Sept. 17, 1787,
Preamble
- #44 FRIEDRICH A. HAYEK, *Liberty and Liberties*, in THE CONSTITUTION OF LIBERTY 11-21 (1960)
- #45 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990, paras. 9-10, excerpts (U.S. Commission on Security and Cooperation in Europe, Wash., DC)

iii. Recurrent Underpinnings in the Debate

- The Nature of Man: From Plato’s “Philosopher King” to Freud’s “Realism”

Readings, On Reserve (skim):

- #46 PLATO, THE REPUBLIC, excerpt
- #47 SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS, excerpt (1930)
reprinted in SIGMUND FREUD: CIVILIZATION AND ITS DISCONTENTS 48-53 (Joan Riviere trans., James Strachey ed., rev. ed. 1975)

Date	Topic
	<ul style="list-style-type: none"> - Anti-modernism (the idealization of man in a state of nature and the charge of “alienation” from modern society; “natural,” primitive needs vs. “artificial,” social needs): Rousseau, Marx (though contradictory), Nietzsche (<i>The Spirit of Modernity</i>), and Claude Lévi-Strauss <p>Readings, On Reserve (skim):</p> <p>#48 Karl H. Marx, <i>Economic and Philosophical Manuscripts of 1844</i>, excerpt, reprinted in KARL MARX: A READER</p> <ul style="list-style-type: none"> - Property and its Effects: Plato, Rousseau, and Marx vs. Aristotle, Smith, Jefferson, Madison, and Hamilton - Meaning and Language: Plato (refuting the arguments made by Gorgias and Phaedrus in <i>Gorgias</i> and <i>Phaedrus</i>), Immanuel Kant, Michael Walzer (about the politics of Michel Foucault), Jurgen Habermas (“destruction is renamed deconstruction”), Václav Havel vs. Gorgias, Phaedrus, Friedrich Nietzsche (meaning is relative and all meaning is will to power in <i>The Will to Power</i>), Michel Foucault (“truth isn’t outside power” in <i>Power/Knowledge</i>) Jacques Derrida (“Force of law: The ‘Mystical Foundation of Authority’”) Stanley Fish (<i>Doing What Comes Naturally</i>).
October 3 (cont.)	<p>Readings, Volume 2:</p> <p>54-67 PLATO, GORGIAS 29-41 (James H. Nichols trans., Cornell University Press 1998).</p> <p>68-69 PLATO, PHAEDRUS 66 (James H. Nichols trans., Cornell University Press 1998).</p> <p>70-88 MICHAEL WALZER, <i>The Politics of Michael Foucault</i> in FOUCAULT: A CRITICAL READER 51-68 (David Couzens Hoy ed., Basil Blackwell Pub. 1988)</p> <p>89-104 FRIEDRICH NIETZCHE, THE WILL TO POWER 322-325 (Walter Kaufman & R.J. Hollingdale eds., Vintage Books 1967)</p> <p>105-114 JACQUES DERRIDA, DISSEMINATION viii-xxvi (Barbara Johnson, trans., University of Chicago Press 1981).</p> <p>115-137 STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 503-524 (Duke University Press 1989).</p> <p>Readings, on Reserve:</p> <p>#48A MICHAEL FOUCAULT, <i>Truth and Power</i> in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977 109-133 (Colin Gordon ed., Colin Gordon, Leo Marshall, John Mepham & Kate Soper, trans., The Harvester Press 1980)</p> <p>#49 VÁCLAV HAVEL, <i>The Power of the Powerless</i>, skim 23-96 (1985)</p> <p>[For class discussion]</p> <ul style="list-style-type: none"> - Within the Democratic Tradition—the Appropriate Degree of “Democratic” vs. “Republican” Forms of Government <p>[Review previous readings in <i>The Federalist Papers</i>]</p>

Date	Topic
October 10	<p>B. Jurisprudential Antecedents: The Continuing Influence of the Legal Realist Movement</p> <p>Some Commentary on the Realists Readings, Volume 2: 138-171 Fuller, <i>American Legal Realism</i> 82 U. PA. L. REV. 429-62 (1934) 172-185 M.S. McDougal, <i>Fuller v. The American Legal Realists: An Intervention</i>, 50 YALE L.J. 827-40 (1941) 186-209 WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM 1-47 (1968)</p> <p>Some Classic Writings of the Realists Readings, Volume 2: 210-231 O.W. Holmes, <i>The Path of the Law</i>, 10 HARV. L. REV. 457-78 (1897) 232-272 Felix S. Cohen, <i>Transcendental Nonsense and the Functional Approach</i>, 35 COL. L. REV. 809-49 (1935) 273-314 Karl N. Llewellyn, <i>Some Realism About Realism—Responding to Dean Pound</i>, 44 HARV. L. REV. 1222-64 (1931) 315-321 Walter W. Cook, <i>Scientific Method and the Law</i>, 13 A.B.A.J. 303-309 (1927)</p> <p>C. The “New Haven” Approach: A Methodology for Appraising Alternative Theories of Jurisprudence</p> <p>Readings, Volume 2: 322-339 J.N. Moore outline: “An Introduction to the Jurisprudence of Myres McDougal and Harold Lasswell,” and attachments 340-365 J.N. Moore, <i>Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell</i>, 54 VA. L. REV. 662-88 (1968) 366-384 M.S. McDougal, <i>Jurisprudence for a Free Society</i>, 1 GEORGIA L. REV. 1-19 (1966) 385-435 Frederick S. Tipson, <i>The Lasswell-McDougal Enterprise: Toward a World Public Order of Human Dignity</i>, 60 VA. J. INT’L L. 535-85 (1974) 436-468 Harold D. Lasswell & M.S. McDougal, <i>Criteria for a Theory About Law</i>, 44 S. CALIF. L. REV. 362-94 (1971) 469-496 Fritz Scharpf, “LSP Learning Program” (on the Terminology of McDougal & Lasswell) 1-27 (1961) (work through this)</p> <p>Readings, On Reserve: #50 M.S. MCDUGAL, H.D. LASSWELL & JAMES C. MILLER, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER, at vii-xxi, 3-45 (1967)</p>
On Your Own	<p>D. A Review of Past and Present Influential Approaches (Marxist Legal Theory, Law and Economics, and Critical Legal Studies)</p> <p>Marxist Legal Theory Readings, On Reserve: #51 THE LAW OF THE SOVIET STATE 1-62, 312-22 (Andrei Y. Vyshinsky ed., Hugh W. Babb trans., 1948, reprinted 1979)</p> <p>Law and Economics Readings, On Reserve: #52 Richard A. Posner, <i>The Economic Approach to Law</i>, 53 TEX. L. REV. 757-82 (1975)</p>

Date	Topic
	<p>Book (53) <i>skim for basic approach and overview</i>: CHARLES J. GOETZ, <i>CASES AND MATERIALS ON LAW AND ECONOMICS</i> (1984)</p> <p>Critical Legal Studies</p> <p>Readings, Volume 2: 497-609 Roberto M. Unger, <i>The Critical Legal Studies Movement</i>, 96 HARV. L. REV. 563-675 (1983)</p> <p>Readings, On Reserve: #54 Duncan Kennedy, <i>Legal Education as Training for Hierarchy</i>, in <i>THE POLITICS OF LAW</i> 38-58 (David Kairys ed., 2d ed. 1990)</p> <hr/> <p>***Fall Break, October 17-19 2011***</p> <hr/>
October 24	<p data-bbox="375 787 773 814">III. Exploring the Rule of Law</p> <p data-bbox="472 848 1336 875">A. Controlling Leviathan: The Rule of Law and the Judicial Decision Process</p> <ul style="list-style-type: none"><li data-bbox="532 909 1008 936">i. “The Case of the Speluncean Explorers”<li data-bbox="532 940 902 968">ii. The Neutral Principles Debate<li data-bbox="532 972 1390 999">iii. Decision Theory: Judicial Decision-making and the Doctrine of Precedence <p data-bbox="537 1033 992 1060">“The Case of the Speluncean Explorers”</p> <p data-bbox="537 1064 773 1092">Readings, Volume 3:</p> <p data-bbox="537 1096 1455 1150">1-30 Lon L. Fuller, <i>The Case of the Speluncean Explorers</i>, 62 HARV. L. REV. 616-45 (1949)</p> <p data-bbox="537 1155 1438 1243">*Think about what an opinion in the “Case of the Speluncean Explorers” would look like if it was written from the perspective of Law and Economics, Marxist Legal Theory or Critical Legal Studies.</p> <p data-bbox="537 1247 1446 1302">31-67 H.L.A. Hart, <i>Positivism and the Separation of Law and Morals</i>, 71 HARV. L. REV. 593-629 (1958)</p> <p data-bbox="537 1306 1455 1360">68-110 Lon L. Fuller, <i>Positivism and Fidelity to Law—A Reply to Professor Hart</i>, 71 HARV. L. REV. 630-72 (1958)</p> <p data-bbox="537 1394 883 1421">The Neutral Principles Debate</p> <p data-bbox="537 1425 773 1453">Readings, Volume 3:</p> <p data-bbox="537 1457 1398 1512">111-145 Herbert Wechsler, <i>Toward Neutral Principles of Constitutional Law</i>, 73 HARV. L. REV. 1-35 (1959)</p> <p data-bbox="537 1516 1471 1570">146-180 Arthur S. Miller & Ronald F. Howell, <i>The Myth of Neutrality in Constitutional Adjudication</i>, 27 U. CHICAGO L. REV. 661-95 (1960)</p> <p data-bbox="537 1575 1455 1629">181-194 Herbert Wechsler, <i>The Courts and the Constitution</i>, 65 COL. L. REV. 1001-14 (1965)</p> <p data-bbox="537 1663 724 1690">Decision Theory</p> <p data-bbox="537 1724 773 1751">Readings, Volume 3:</p> <p data-bbox="537 1755 1446 1810">219-239 Layman E. Allen & Mary E. Caldwell, <i>Modern Logic and Judicial Decision Making: A Sketch of One View</i>, 28 L. & CONTEMP. PROB. 213-34 (1963)</p> <p data-bbox="537 1814 1203 1841">240-241 Flow Charts for the Judicial Decision-making Process</p>

Date	Topic
	<p>Readings, On Reserve:</p> <p>#55 A.L. Goodhart, <i>The Ratio Decidendi of a Case</i>, 22 MODERN L. REV. 117-24 (1959)</p> <p>#56 Julius Stone, <i>The Ratio of the Ratio Decidendi</i>, 22 MODERN L. REV. 597-620 (1959)</p>
October 31	<p>B. Controlling Leviathan: The Rule of Law and Theories of Constitutional Interpretation</p> <p>Guest Participant: Professor John Harrison UVA School of Law</p> <p>Readings, Volume 3: 268-278 ROBERT H. BORK, TRADITION AND MORALITY IN CONSTITUTIONAL LAW 1-11 (1984) 373-436 ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 139-240, 251-59 (1990)</p> <p>*Think about the role you would create for an independent judiciary if you were drafting a constitution.</p> <p>Readings, On Reserve:</p> <p>#57 LAURENCE H. TRIBE, CONSTITUTIONAL CHOICES 3-28 (1985)</p> <p>#58 JOHN HART ELY, DEMOCRACY AND DISTRUST 1-41, 101-104, 181-83 (1980)</p> <p>#59 Antonin Scalia, <i>The Rule of Law as a Law of Rules</i>, 56 U. Chi. L. Rev. 1175 (Fall 1989)</p> <p>#60 Antonin Scalia, <i>Assorted Canards of Contemporary Legal Analysis</i>, 40 CASE W. RES. L. REV. 581 (Summer 1990)</p>
November 7	<p>C. Controlling Leviathan: Policing the Criminal Justice System</p> <p>Guest Participant: RESCHEDULED TO NOVEMBER 28 Shawn Armbrust, Executive Director Mid-Atlantic Innocence Project http://www.exonerate.org/ http://www.innocenceproject.org/</p> <p>Readings, On Reserve:</p> <p>#65a Brandon L. Garrett, <i>Judging Innocence</i>, 108 COLUM. L. REV. 55 (Jan.2008)</p> <p>#65b Charles H. Whitebread, <i>Freeing Ourselves from the Prohibition Idea in the Twenty-First Century</i> 33 SUFFOLK U. L. REV. 235 (2000)</p> <p>#65c Jennifer Gonnerman, <i>Slammed</i>, MOTHER JONES (Aug. 2008), 44-47 [Looks at America's broken prison system] also online at http://www.motherjones.com/news/feature/2008/07/slammed-welcome-to-the-age-of-incarceration.html</p> <p>#66 Bruce A. Green, <i>Prosecuting Means More Than Locking Up Bad Guys</i>, 32 LITIGATION 12-16, (Fall 2005)</p> <p>book HENRY J. HYDE, FORFEITING OUR PROPERTY RIGHTS: IS YOUR PROPERTY SAFE FROM SEIZURE? (Cato Institute, 1995) SKIM</p> <p>#66a David B. Smith, <i>An Insider's View of the Civil Asset Forfeiture Reform Act of 2000</i>, 24-JUN CHAMPION 28 (June 2000)</p> <p>book RADLEY BALKO, OVERKILL: THE RISE OF PARAMILITARY POLICE RAIDS IN AMERICA (Cato Institute, 2006) SKIM Note: it is also online at</p>

Date	Topic
http://www.cato.org/pubs/wtpapers/balko_whitepaper_2006.pdf	
November 14	IV. Strengthening the Rule of Law: Toward Reform and Dissemination
	Guest Participant: Chris Edwards. Cato Institute (invited)
	A. Controlling Leviathan: The National Debt
	Readings, Volume 3: 280-319 <i>skim</i> : Lucas v. South Carolina Coastal Commission, No. 91-453, slip op. (112 S. Ct. 2886, 120 L. Ed. 2d 798) 320-343 <i>skim</i> : Dolan v. City of Tigard, No. 93-518, slip op. (114 S. Ct. 2309, 129 L. Ed. 2d 304) 344-364 <i>skim</i> Palazzolo v Rhode Island 69 U.S.L.W. 4605 (2001) 437-483 James D. Gwartney and Robert A. Lawson, <i>Economic Freedom of the World: 1997 Annual Report</i> (Vancouver, B.C.: The Fraser Institute, 1997) p.ix-36
	Readings, On Reserve: #61 Richard Pipes, <i>Property and Freedom</i> (1999), skim Ch. 1-2, pp. 1-120. #62 Freedom House, <i>World Survey of Economic Freedom: 1995-1996</i> (1996), 1-19, 49-51, 119-122, 183-185 #63 RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 1-31, 331-50 (1985) #64 GERALD W. SCULLY, <i>The Constitutional Setting and Economic Development</i> , in CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH 166-83 (1992) (ch. 7) #65 R.A. EPSTEIN, <i>Givings and Takings</i> , and <i>Land Use Restrictions and the Police Power</i> , in BARGAINING WITH THE STATE 3-16, 177-95 (1993)
	Further References: John Gray, <i>Liberalism</i> , 2d ed. 61-77 (1995) David Miller, "Introduction," in <i>Liberty</i> , David Miller, ed., 61-77(1991) Douglass C. North, "Institutions, Economic Growth and Freedom: An Historical Introduction," in <i>Freedom, Democracy and Economic Welfare</i> , Michael Walker, ed., 3-25 (1988) Hernando de Soto, <i>The Other Path: The Invisible Revolution in the Third World</i> 131-187, 246-255 (1989) Hernando de Soto, "The Missing Ingredient: What Poor Countries Will Need to Make their Markets Work," <i>Economist</i> , Sept. 11-17, 1993 World Bank, <i>From Plan to Market: World Development Report 1996</i> , 44-65, 87-97 (1996)
November 21	B. Controlling Leviathan: Case Study of Campaign Finance Reform
	Guest Participant: Bradley Smith Capital University Law School

Date	Topic
November 21 (cont'd)	<p>Readings, Volume 4: 264-272 Common Cause, <i>The Word</i> (1996) [glossary of terms] 289-291 “Lessons of Campaign Reform and the Presidential System: Less is More,” Testimony of Professor Larry J. Sabato, University of Virginia to the U.S. Senate Committee on Rules and Administration (May 14, 1997) 292-311 Bradley A. Smith, <i>Some Problems with Taxpayer-funded Political Campaigns</i>, in 148 UNIVERSITY OF PENNSYLVANIA LAW REVIEW, NO. 2 (Dec. 1999)</p> <p>Readings online: <i>Citizens United v. Federal Election Commission</i> 558 U.S. 50 (2010): the SCOTUS blog debate between Larry Tribe and Bradley Smith <u>L. Tribe:</u> http://www.scotusblog.com/blog/2010/01/24/what-should-congress-do-about-citizens-united/ <u>B. Smith I:</u> http://www.scotusblog.com/blog/2010/02/02/citizens-united-shareholder-rights-and-free-speech-restoring-the-primacy-of-politics-to-the-first-amendment/ <u>B. Smith II:</u> http://www.scotusblog.com/blog/2010/02/02/citizens-united-shareholder-rights-and-free-speech-restoring-the-primacy-of-politics-to-the-first-amendment-2/#more-15793</p> <p>Common Cause, <i>Campaign Finance Reform: A New Era</i>, January 2009 available at http://www.commoncause.org/atf/cf/%7Bfb3c17e2-cdd1-4df6-92be-bd4429893665%7D/COMMONCAUSECAMPAIGNFINANCEREFORMAGENDA2009.PDF</p> <p>Bradley Smith, <i>A Moderate, Modern Campaign Finance Reform Agenda</i>, 12 NEXUS J. Op. 3 (2007) available on Lexis, Westlaw, and Hein Online.</p> <p>Readings, On Reserve (skim): #67 James L. Buckley et al., Appellants, v. Francis R. Valeo, Secretary of the United States Senate, et al. (Two cases), Motion Granted Feb. 27, 1976 (96 Supreme Court Reporter, 612-762) #68 LARRY SABATO AND GLENN R. SIMPSON: DIRTY LITTLE SECRETS 305-339 (Times Books 1996) #68a Bradley A. Smith, <i>The John Roberts Salvage Company: After McConnell, a New Court Looks to Repair the Constitution</i>, 68 OHIO ST. L.J. 891 (2007) #68b Richard Briffault, <i>WRTL and Randall: The Roberts Court and the Unsettling of Campaign Finance Law</i>, 68 OHIO ST. L. J. 907 (2007) #68c Lillian R. BeVier, <i>First Amendment Basics Redux: Buckley v. Valeo to FEC v. Wisconsin Right to Life</i>, 2007 CATO SUP. CT. REV. 77</p>
<hr/> *** Thanksgiving Break, November 23-25, 2011 *** <hr/>	

November 28 C. Global Constitutionalism and the Rule of Law

Guest Participant: **RESCHEDULED TO NOVEMBER 7**
Professor A. E. Dick Howard
UVA School of Law

Readings, On Reserve:
#81 *skim:* Johan Norberg, *In Defense of Global Capitalism* (2003), at 20-50.

Date	Topic	
November 28 (cont'd)	<p>Readings, Volume 4: 149A-L A.E. Dick Howard, <i>Toward Constitutional Democracy: An American Perspective</i>, 19 J.L. & POL. 285 (2003). 150-172 A.E. Dick Howard, "Constitutionalism," Paper presented at the Seminar on the Rule of Law, Moscow and Leningrad, March 19-23, 1990 173-195 A.E. DICK HOWARD, THE ROAD TO CONSTITUTIONALISM 1-43 (1990) 196-208 Dennis L. Thompson & John Norton Moore, "Statement of American Constitutional Scholars on the Historic Occasion of the Framing of the Namibian Constitution," Presented on a visit sponsored by the Foundation for Democracy in Namibia, Jan. 26, 1990 209-212 United Nations Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810, at 71 (1948) 213-232 Commission on Security and Cooperation in Europe, 101st Cong. 2d Sess., The Copenhagen Meeting of the Conference on the Human Dimension of the Conference on Security and Cooperation in Europe June 5 - 29, 1990 (Report, Aug. 1990) 233-246 Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE, June 1990 247-262 "Charter of Paris for a New Europe," signed Nov. 21, 1990, Conference on Security and Cooperation in Europe (CSCE), U.N. Doc. A/45/859, at 20 (1990) 263 "Organization of American States (OAS) General Assembly Resolution 1080," U.S. Department of State Dispatch, Oct. 7, 1991 328-360 <i>skim</i> ADVANCE Democracy Act of 2005 (H.R. 1133) 361-377 John N. Moore and Fern Holland, "Promoting The African Institute for Democracy" (draft proposal).</p>	
	D. The "Arab Spring" and the Spread of Democracy	
	<p>Readings: Online David Ignatius, "What Happens When the Arab Spring Turns to Summer?" FOREIGN POLICY, April 22, 2011 http://www.foreignpolicy.com/articles/2011/04/22/what_happens_when_the_arab_spring_turns_to_summer Online Richard N. Haass, "The Arab Spring has Given Way to a Long, Hot Summer" Op-ed, FINANCIAL TIMES, July 6, 2011 http://www.cfr.org/middle-east/arab-spring-has-given-way-long-hot-summer/p25426 Online "Arab Spring Interactive Timeline" http://www.guardian.co.uk/world/interactive/2011/mar/22/middle-east-protest-interactive-timeline</p>	
	December 5	E. Controlling Leviathan: An Overview of Proposed Reforms and a Case Study of Social Security Reform
		<p>Guest Participant: Peter Ferrara Director of the Social Security Project, Free Enterprise Fund Senior Fellow, Institute for Policy Innovation</p>
	i. Overview	

Date	Topic
	<ul style="list-style-type: none"> - Reforms Related to the Modalities of Government Action (taxation and spending, regulation, takings, and creation of civil and criminal law, among other actions) - Reforms Related to the Modalities of Government Process (constitutional structure, interpretation and amendment; legislative process; executive and regulatory processes; judicial process; and voting processes)
	Readings, Volume 4:
1-10	James M. Buchanan, <i>Notes on the Liberal Constitution</i> , Vol. 14, No. 1 CATO JOURNAL, 1-9 (Spring/Summer 1994)
11-35	Draft Constitution of the Republic of Angola, Nov. 28, 1990 (informal internal draft prepared by Professor Moore)
	Readings, On Reserve:
#69	M. FRIEDMAN & R. FRIEDMAN, <i>The Tide Is Turning</i> (excerpt), in FREE TO CHOOSE 298-310 (1980)
#70	A Proposed Constitutional Amendment to Limit Federal Spending, Prepared by the Federal Amendment Drafting Committee, Jan. 30, 1979, reprinted in "Appendix B," in M. FRIEDMAN & R. FRIEDMAN, FREE TO CHOOSE 313-14 (1980)
#71	JAMES M. BUCHANAN, CHARLES K. ROWLEY & ROBERT D. TOLLISON, <i>Government by Red Ink</i> , in DEFICITS 3-8 (J.M. Buchanan, C.K. Rowley & R.D. Tollison eds., 1987)
	ii. Case Study of Social Security Reform
December 5 (cont'd)	Readings, On Reserve:
#72	Jose Pinera, <i>The Success of Chile's Privatized Social Security</i> in 18 Cato Policy Report, 1995, at 1, 10-11
#72a	<i>Chile's Candidates Agree to Agree on Pension Woes</i> , NEW YORK TIMES, January 10, 2006
#73	Henry J. Aaron & Robert D. Reischauer, <i>A Look at the Future of Social Security: Tune it Up, Don't Trade it In</i> , WASHINGTON POST, April 19, 1998 at C3
#74	Edgar K. Browning, <i>The Anatomy of Social Security and Medicare</i> , INDEPENDENT REVIEW, v. XIII, No. 1, Summer 2008, pp. 5-27
#74a	Peter Ferrara, <i>America's Ticking Bankruptcy Bomb</i> , (2011), chapter 3 (Social Security)
	iii. Case Study of the Balanced Budget Amendment (<i>Review on your own</i>)
	Readings, Volume 4:
47-51	S.J. Res. 41, 103d Cong., 1st Sess. (1993), "Joint Resolution Proposing an amendment to the Constitution of the United States to require a balanced budget"
52-62	Paul Simon, U.S. Senator, "Why We Need a Balanced Budget Amendment"
63-67	Statement of Max Richtman, Executive Vice President, National Committee to Preserve Social Security and Medicare, Submitted to the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 103d Cong., 2d Sess. (Feb. 17, 1994)
68-70	Testimony of Rep. Joe Kennedy, Constitution Subcomm., Senate Judiciary Comm., 103d Cong., 2d Sess. (Feb. 1994)

Date	Topic
71-80	BALANCED BUDGET CONSTITUTIONAL AMENDMENT: REPORT TOGETHER WITH ADDITIONAL VIEWS, S. REP. NO. 163, 103d Cong., 1st Sess. (1993)
81-84	Side-by-Side Comparison of Bi-Partisan Consensus Balanced Budget Amendment and Tax Limitation Balanced Budget Amendment (Contract with America Version)
85-86	H.J. Res. 1, Balanced Budget Constitutional Amendment (January 26, 1995)
87-90	S.J. Res. 1, 104th Cong., 1st Sess. (1995), "Proposing an amendment to the Constitution of the United States to require a balanced budget"
Online	H.R.2560 — Cut, Cap, and Balance Act of 2011- 112th Congress (2011-2012) http://thomas.loc.gov/cgi-bin/query/z?c112:H.R.2560:
Readings, On Reserve:	
#75	<i>Fact Sheet</i> , No. 104-3, DSG Publications (January 24, 1995)
#76	<i>House Action Report</i> , No. 104-1, DSG Publications (January 30, 1995)
iv. Case Study of Healthcare Reform under Barack Obama	
Readings, On Reserve	
#76a	Peter Ferrara, <i>America's Ticking Bankruptcy Bomb</i> , (2011), chapter 4 "Obamacare"
Online	http://www.whitehouse.gov/healthreform
v. Case Study of Term Limits (<i>Review on your own</i>)	
Readings, On Reserve:	
#77	Mark P. Petracca and Darci Jump, <i>Term-Limitation Express</i> , SOCIAL SCIENCE AND MODERN SOCIETY, Nov./Dec. 1993, at 61-69
#78	Cooper and Dewar, <i>Ruling Isn't End of Fight, Term Limits Backers Vow</i> , WASHINGTON POST, May 23, 1995
vi. Katrina and Emergency Management Reform	
#78a	Patrick. S. Roberts, <i>FEMA After Katrina</i> , 137 POLICY REVIEW (June & July 2006), pp. 15-33
#78b	Michael G. Faure, <i>Financial Compensation for Victims of Catastrophes: a Law and Economics Perspective</i> , 29 LAW & POLICY, No. 3, July 2007, pp. 339-367
vii. The Sub-prime Mortgage Crisis	
#78c	Heather M. Tashman, <i>The Subprime Lending Industry: An Industry in Crisis</i> 124 BANKING L. J. 407
#78d	Paul Craig Roberts, <i>How to End the Subprime Crisis</i> COUNTERPUNCH, March 11, 2008. http://www.counterpunch.org/roberts03112008.html
#78e	Daniel Gross, <i>The Mark-to-Market Melee</i> , NEWSWEEK, April 1, 2008 http://www.newsweek.com/id/130029
#78f	Terence Corcoran, <i>Mark to Market Fiasco</i> FINANCIAL POST, March 18, 2008 http://www.financialpost.com/analysis/columnists/story.html?id=6070c96c-7396-452c-b114-e236f196d5ff&k=91199
#78g	Vinod Kothari, <i>Sentimental Accounting: Is it Time to Question Mark to Market?</i> http://www.vinodkothari.com/Sentimental%20Accounting%20%20Vinod%20Kothari%20article.pdf

Date	Topic
OPTIONAL	<i>For students interested in the topic Controlling Leviathan: Proposed Reforms—Case Study: The Problem of “Rule Upon Rule” the following readings are available:</i>
	Readings, On Reserve:
	#79 <i>skim:</i> Catherine Crier, <i>The Case Against Lawyers</i> (2002), at 7-40, 209-226.
	#80 Philip K. Howard, <i>The Death of Common Sense: How Law is Suffocating America</i> (1994), read Ch. I pp. 1-53, and <i>The Collapse of the Common Good: How America’s Lawsuit Culture Undermines our Freedom</i> (2002), Ch. IV pp. 199-220.
NOTE:	The Seminar may also meet from time to time during the term with lecturers visiting at the Law School.
