THE POLITICS OF JUSTICE (PSC3192W)
SYLLABUS

Fall Semester, 2016
Tuesdays 11:10 AM – 1:00 PM
OM 208A

INSTRUCTOR:
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COURSE DESCRIPTION:
The course is designed to serve a twofold purpose. First, it will examine various theories of justice – including utilitarianism, possessive and choice-based libertarianism, and John Rawls’ theory of “justice-as-fairness”. The political theories contained in the readings express diverse (and in some cases highly controversial) concepts; these readings will comprise the first half of the course. In the second portion of the course, attention will shift from theory of justice to justice in application, with a focus on rule of law and dispute resolution in practice. After a brief examination of empirical studies on psychological responses various structures for dispute resolution, the course will explore the process by which appellate judges in common-law systems decide cases – as described by two federal court judges – Jerome Frank and Richard Posner. Finally, the course will compare the two judges’ views on the drafting of judicial opinions with the legal reasoning employed by the United States Supreme Court in an opinion in a recent politically controversial case.

TEXTS: The books for the course include:


These books should be available at the campus bookstore – with the exception of the book by Jerome Frank, which is available as a “print-on-demand item” directly from the publisher. (As we will not begin reading Frank’s Law and the Modern Mind until late in the semester, it should allow for ample time to place the orders.) Other readings – including scholarly articles and selections from other books - will be made available in digital form on Blackboard. “Supplemental Readings” listed on the syllabus are not required, but may be useful for students’ writing projects. These will be made available on reserve in the library or on Blackboard.

[While all of the books are available in print in relatively inexpensive paperback editions – which will be available at the campus bookstore – all have been in print for many years. Thus used copies are relatively easy to find. Students wishing to economize by purchasing used copies may consult either bookfinder.com or addall.com – both of which consolidate on-line advertisements by individual booksellers - providing a useful means for comparative-shopping.]

LEARNING OUTCOMES:
The purpose of this course is:

1) To provide students with an overview of various theoretical approaches to the concept of justice;
2) To examine the impact of these theories of justice in modern politics;
3) To provide students with the opportunity to hone their analytical and writing skills by completing two papers on topics of their own choice related to the subject-matter discussed in class.
REQUIREMENTS AND GRADING:
As this is a “Writing in the Disciplines Course”, students’ grades will be based on completion of writing assignments, in addition to a class-participation grade.

The first writing assignment will be a paper that critically examines some aspect of one of the theories of justice in the assigned readings. This essay should not exceed 10 pages in length. The paper should address the a priori assumptions of the theory, its internal consistency, its strengths and weaknesses, and its potential efficacy in addressing political and social issues commonly encountered in the real world. The first draft of this paper will be at noon on Thursday, February 11, five days before class meets in Week 6 – in order for other students to read the papers before the next class-meeting – February 16. Each student will make a brief presentation on her/his topic and have the opportunity to receive comments from their colleagues. The presentations and the comments will count toward the class participation grade. The final draft will be due in class in Week 7 - Tuesday, February 23.

For the second writing assignment, students will be asked to draft a longer paper (not exceeding 25 pages in length) which assesses the applicability of one or more of the theories of justice presented in the readings to particular social issues or ongoing political controversies. Students may critique the efficacy of a theory of justice in a particular political context, or compare two or more theories of justice in the manner in which each would address a social or political issue. Students also may opt to design an empirical study (such as those presented in the readings in Week 8) that will investigate the ramifications of a particular theory of justice in a specific context.

The first draft of the second paper will be due by noon on April 7 – five days before the class meets on April 12 in Week 13. This will enable your colleagues to read your papers, ask questions, and make suggestions during your presentations when the class meets. Your final drafts will be due on Tuesday, April 26 – after the final class meeting.

CLASS POLICIES:
Students should notify me by the second week of classes in the event that they need to be absent from class for religious observances. If absence from class for religious observances on one of the days on which a written assignment is due, the student should notify me in advance so that we can arrange another time for delivering the written assignment. I am free to talk with students during my office hours (or by telephone at a pre-arranged time for a teleconference) regarding a class missed during an absence for religious services, illness, or family emergency.

Students requiring an accommodation for disability pursuant to the Americans with Disabilities Act, applicable local law, or standing University policy should contact the Disability Support Services at (202) 994-8250 to establish eligibility and to coordinate reasonable accommodations.
PART I
THEORIES OF JUSTICE

WEEK 1: INTRODUCTION
The first session will address the general goals of the course, summarize the writing requirements, and provide a brief introduction to theories of justice through a brief lecture on Jeremy Bentham and utilitarianism.

One of the earliest proponents of utilitarianism, Jeremy Bentham did much to develop the concepts that later utilitarians employed as the foundations of their theories. An avid advocate for legal reform, he recognized that “maximum aggregate happiness” as an excessively lofty (and vague) concept. In response, Bentham sought to derive middle-range principles from “the greatest happiness principle”, which in turn would provide the source for substantive rules of law. Though his proposals for drafting a comprehensive code to replace the common law were rejected, his utilitarian theory has remained influential – as a model to be emulated or a pernicious conception to be challenged – for two centuries.

WEEK 2: JOHN STUART MILL AND UTILITARIANISM
While strongly influenced by Bentham, John Stuart Mill added some refinements to Bentham’s formulation of “the greatest happiness principle” – including the tension between individualism and the role of social conditioning to ensure that the latter (in its role of providing middle-range principles) did not promote rules or conduct detrimental to aggregate utility. In this session, we will examine how Mill grounded justice in utility – and how his theory links rights to the need for predictability and security.

Readings:

John Stuart Mill, On Liberty, Chapters 1-3

WEEK 3: JOHN RAWLS: JUSTICE AS FAIRNESS
Rawls’ “Justice as Fairness – a Restatement” reflects his mature conception of justice, developed in response to criticisms of his “Theory of Justice” (1971) and “Political
Liberalism” (1993). In this first session on Rawls, the focus will be on the fundamental philosophical concepts in Rawls’ thought – including his reworking of the idea of “social contract”, his “two principles of justice”, and the “argument from the original position”.

Readings:
John Rawls, Justice as Fairness: A Restatement, Parts 1-3: pages 1-134

Supplemental readings:


Week 4: JOHN RAWLS: JUSTICE AS FAIRNESS
In this second session on Rawls, the focus moves from the abstract to more concrete notions in “Justice as Fairness”. Having abandoned his earlier notion of a comprehensive (liberal) moral doctrine, Rawls turns toward a more limited “political conception of justice” – which people holding somewhat divergent comprehensive moral doctrines could endorse as the basis of a just society. The emphasis in this session will be upon the idea of an overlapping consensus and the question of stability.

Readings:
John Rawls, Justice as Fairness: A Restatement, Parts 4-5” pages 135-202

Supplemental readings:


WEEK 5: Discussion of Essays

PART II
PROPERTY RIGHTS AND DISTRIBUTIVE JUSTICE
WEEK 6: PROPERTY RIGHTS, POSSESSIVE LIBERTARIANISM, AND LABOR MARKET REGULATION

Beginning with John Locke’s theory that people obtain property rights through mingling their own labor with unclaimed natural resources, political theorist Robert Nozick grounds his discussion of justice wholly in the concept of individual autonomy and property rights. In addition to Nozick’s book, this class will examine three Supreme Court decisions that grapple with one issue that Nozick raises – namely the legitimacy of government regulation of private citizens’ right to enter into contracts. In reading Nozick’s controversial theory, it may be helpful to ask yourselves questions about how Nozick would respond to issues raised by the political theorists we read earlier in the semester. While not entirely convincing their critics, the utilitarians (Bentham and Mill) provided a series of answers to the question of why individual members of a society would support a political system grounded in utilitarianism. Does Nozick provide an explanation for why individuals would adopt his theory for organizing their society? In examining the case law assigned for this session, does the Supreme Court’s retreat from recognition of substantive due process in labor-contract cases (involving property) coupled with the continued recognition of substantive due process in civil rights cases indicate an implicit endorsement of Rawls’ serial ranking of rights? Would Nozick’s conception of property rights satisfy the criteria for “stability” that Rawls sought to incorporate into his revised view of “justice as fairness” as outlined in “Justice as Fairness: A Restatement”?

Readings:

Robert Nozick, Anarchy, State and Utopia, pages xi-xiv, 10-17, 22-53, 149-164167-182, 232-238

Lochner v. New York, 198 U.S. 35

Coppage v. Kansas, 236 U.S. 1 (1915)

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937)

Supplemental Readings:

Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (December 13, 1968)

Pierson v. Post 3 Cai. R. 175 (N. Y. Sup. Ct. 1805)

WEEK 7: CHOICE-BASED LIBERTARIANISM
While Nozick’s brand of libertarianism focuses chiefly on property rights, Friedman takes as his starting-point the individual’s liberty to choose – to shape her/his life in accordance with personal values and to regulate her/his conduct to pursue individual goals or ends. Thus for the state to override individual choice, the state has a burden of showing a compelling reason for a restriction on individual liberty – and that its action constitutes the least restrictive means of accomplishing its goal. Thus the state can justify proscribing murder and theft of private property – as to allow people the liberty to engage in such activities would interfere with the liberty of other citizens. Friedman’s conception of justice fits neatly into social system based on a free market, where the laws of classical microeconomics determine distribution of goods. Friedman’s system largely endorses laissez faire capitalism in the name of “free choice” – with a few exceptions for market-failures.

**Readings:**
Milton Friedman, Capitalism and Freedom (Chicago: University of Chicago Press, 1962), Chapters 1, 2, 6, 10, 12, Conclusion: pages 7-36, 85-107, 162-189, 190-202


**Supplemental Reading:**


**PART III:**
**JUSTICE IN PRACTICE: RULE OF LAW AND JUDICIAL DECISION-MAKING**

The common-law system is one which law is created incrementally by judges through a process of legal reasoning by “analogy and distinction” through comparing the facts of the case at bar with the facts in cases decided previously. In theory, this inductive reasoning-process leads to general rules of law – which become binding precedents for subsequent cases under the doctrine of “stare decisis”. The process – at least in theory – applies equally to statutory law. As statutes are not self-interpreting; judges look to previous cases in which a particular statute was applied for guidance in construing the statute’s meaning. Judges’ role in creating law was well established in English jurisprudence the seventeenth century by jurists such as Sir Edward Coke and Sir Matthew Hale. By the late eighteenth century, however, the conservative William Blackstone maintained that rules of law were not created but pre-existing – emerging as judges “found” the correct rules by the process of “analogy-and-distinction” when confronted with novel fact-patterns (a position also endorsed by Alexander Hamilton). By the late nineteenth century, Blackstone’s concept was co-opted by “positivist” theorists. The result was “Legal Science” – the theory that law could be studied as the physical sciences are studied. Legal Science – often derided by its critics as “legal formalism” – has come under assault from opponents on both the left and the right. The
two critiques that follow are from two competing approaches to jurisprudence – “Legal Realism” and “Law-and Economics”. The former – inspired by Oliver Wendell Holmes’ remark “The life of the law has not been logic; it has been experience” – challenged Legal Science in the early decades of the twentieth century. Emphasizing the social-policy implications of legal rules and eschewing the “reductionist” approach of the Legal Scientists, the movement was dominated by legal scholars who embraced social reform – including Roosevelt’s New Deal. By contrast, Law-and-Economics, a late twentieth-century movement – revived reductionist approaches but rejected the Legal Scientists’ methodology – concentrating instead upon microeconomic principles - such as economic efficiency and wealth maximization. The movement consists of two branches. In its “positive” or “descriptive” branch, it claims that legal rules evolve over time to produce wealth-maximizing results; knowledge of microeconomic principles should enable attorneys to predict more accurately the outcome of cases. The normative branch, by contrast, treats wealth-maximization as a normative goal; legal rules should promote these outcomes (in the same was that utilitarians favored designing laws to maximize utility). In contrast to Legal Realism, Law-and-Economics is often (though not exclusively) embraced by political conservatives on account of its use of “classical” microeconomic principles as expounded by economists such as Adam Smith, Alfred Marshall, and Milton Friedman.

WEEK 8: SOCIAL PSYCHOLOGY AND PROCEDURAL JUSTICE
Rawls maintained that his theory of “justice as fairness” promoted stability. Can citizens’ subjective perceptions of the fairness of dispute-resolution structures be quantified, and if so, can empirical studies provide useful suggestions on how a state can organize its court-system to meet its citizens’ desire for “fairness”? The readings in this session address this issue.

Readings:


WEEKS 9-10: LEGAL REALISM AND THE PROCESS OF DECIDING CASES
A successful Wall Street lawyer, supporter of Roosevelt’s New Deal, and subsequently a federal judge, Jerome Frank challenged the Legal Scientists’ contention that judges could approach law as a biologist approaches biology. Taking inspiration from Oliver Wendell Holmes’ observation that when judges disagreed it was not because one of them was not doing his sums correctly, Frank rejected the notion that a case has only one scientifically pre-ordained “correct” outcome awaiting judicial discovery. For Frank, Legal Science in practice collapsed into formalism, with judges’ unconscious biases influencing the outcome of cases by limiting their ability to see the full panoply of possible - and equally logical – outcomes that could be defended by reference to the
process of reasoning by analogy-and-distinction. To overcome this problem, Frank suggested that the legal profession look to the other social sciences to promote both judges’ self-awareness of their own unconscious biases and more far-sighted views of the public-policy implications of substantive rules of law.

**Readings:**

**WEEK 11: Discussion of papers (first draft).**

**WEEK 12-13: IS THE PROCESS OF JUDICIAL DECISION-MAKING INEVITABLY POLITICAL (OR IF NOT, SHOULD IT BE)?**
Richard Posner, former law professor and current federal appellate judge, takes aim at the notion that the process of judging can generate ‘correct’ (or even predictable) rules of substantive simply by the process of analogy and distinction without inevitably considering social policy. While Posner’s brand of “Law-and-Economics” jurisprudence is often applauded by political conservatives for its emphasis on economic efficiency and market-solutions to social problems, his arguments include scathing criticisms of both “originalism” and “textualism” – theories generally associated with conservatism in American political discourse. While fundamentally different both in his political outlook and in his methodology from Jerome Frank, in many respects Posner’s critique bears striking resemblance to Frank’s in its rejection of the notion that judging can be (or should be) free from consideration of social policy. He expressly rejects, however, Frank’s confidence in improving judicial decision-making through additional training in or experience gleaned from the social sciences (particularly psychoanalysis). Judging is inevitably a pragmatic exercise that cannot be entirely separated from normative policy-judgments.

**Readings:**
Richard A. Posner, How Judges Think (Cambridge, MA: Harvard University Press, 2008): [Week 12] Introduction & Chapters 1, 3, 4, 5, 7; [Week 13]: Chapters 9, 10, 11, 12, Conclusion

**WEEK 14: JUDICIAL REASONING AND THE POLITICAL PROCESS: CAMPAIGN FINANCE REFORM**
The right to vote is fundamental for a democratic society. At the heart of campaign finance legislation is an effort by the people - through their elected representatives – to ensure that the basic concept of democratic rule through “one citizen-one vote” is preserved. In Citizens United v. Federal Elections Commission, the Supreme Court addressed the constitutionality of an act of Congress that regulated one form of political advertising by corporations – potentially pitting one fundamental constitutional right (the
right to vote) against another (the right of free speech). As you read the opinion of the Court, the concurring opinions, and the dissenting opinions, consider them in light of the comments by Jerome Frank and Richard Posner on judicial reasoning. Starting with the same facts in the record, how do the various justices come to such different opinions on the disposition of the case? Is it ironic that the dissent by Justice Stevens draws support for its analysis from a commonly-characterized “conservative” approach to constitutional interpretation, “originalism”? Is it also ironic that Justice Thomas pits one “conservative” approach – textualism – against another “conservative” approach – originalism – in critiquing Justice Stevens’ dissent? How do Justices Roberts and Alito differ in their views of precedent and the doctrine of “stare decisis” from the position taken in the dissenting opinion (specifically with regard to reliance on rules laid down in prior cases)? How does the opinion by Justice Kennedy differ from that of Justice Stevens in defining the proper scope of review given the procedural posture?

Readings: