Final Exam Questions

1991

1991 QUESTION ONE

[Students were to pick one of these four questions.]

For some time now, one of the big debates among legal historians, legal theorists, and legal sociologists has been the debate over whether what goes on in the legal system -- legal norms, rules, procedures, institutions, etc. -- is more or less "autonomous" from or influenced by political, economic, or cultural forces and events originating in the society "outside" the legal system. In the interpretation of American legal history, for example, Roscoe Pound and Lawrence Friedman have taken up opposite sides of the issue. Pound wrote:

> Tenacity of taught tradition is much more significant in our legal history than the economic conditions of time and place. These conditions have by no means been uniform, while the course of decision has been characteristically steady and uniform, hewing to common-law lines through five generations or rapid political, economic, and social change, and bringing about a *communis opinion* over the country as a whole on the overwhelming majority of legal questions, despite the most divergent geographical, political, economic, social, and even racial conditions. . . . Economic and political conditions of time and place have led to legislative abrogations and alterations or rules and even at times to attempts to alter the course of the taught tradition. But such changes are fitted into the traditional system in their interpretation and application, and affect slowly or very little the principles, conceptions and doctrines which are the enduring law. The outstanding phenomenon is the extent to which a taught tradition, in the hands of judges drawn from any class one will, and chosen as one will, so they have been trained in the tradition, has stood out against all manner of economically or politically powerful interests.

Friedman, by contrast, takes the following approach:

> This book treats American law . . . not as a kingdom unto itself, not as a set of rules and concepts, not as the province of lawyers alone, but as a mirror of society. It takes nothing as historical accident, nothing as autonomous, everything as relative and molded by economy and society. . . . The [legal] system works like a blind, insensate machine. It does the bidding of those whose hands are on the controls. . . . [T]he strongest ingredient in American law, at any given time, is the present: current emotions, real economic interests, concrete political groups.

Does your understanding of the History of American law tend to conform to either that of Pound or that of Friedman? If neither, formulate and defend a third position on the "autonomy" issue that you believe the historical evidence plausibly supports.

END OF QUESTION ONE

1991 QUESTION TWO

In *Calder v. Bull* (1798), Justice Iredell made the point that judges were not philosophers, but lawyers:

> If . . . the legislature . . . shall pass a law, within the general scope of their constitutional power, the court cannot pronounce it to be void, merely because it is, in their judgment, contrary to the principles of natural justice. The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed on the subject; and all that the court could properly say, in such an event, would be, that the legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. . . . We must be content to limit power where we can, and where we cannot, consistently with its use, we must be content to repose a salutary confidence.

Yet, as Alexis de Tocqueville pointed out in 1835, in the United States, judges are called to decide political, philosophical, or otherwise value-laden questions all the time:

> An American judge, armed with the power to declare laws unconstitutional, is constantly intervening in political affairs. He cannot compel the people to make laws, but at least he can constrain them to be faithful to their own laws and remain in harmony with themselves. . . . There is hardly a political question in the United States which does not sooner or later turn into a judicial one. . . . There are cases, and they are often the most important ones, in which the American judge has the right to pronounce alone. He is, then, for the time being in the position which is usual for a French judge, but his moral authority is much greater . . . and his voice has almost as much authority as that of the society. . . ."
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> In 1972, Christopher Stone turned Tocqueville's description into prescription:
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> [O]ur highest court is but a frail and feeble -- a distinctly human -- institution. Yet the Court may be at its best not in its work of handing down decrees, but that the very task that is called for: of summoning up from the human spirit the kindest and most generous and worthy ideas that abound there, giving them shape and reality and legitimacy. Witness the School Desegregation Cases which, more importantly than to integrate the schools (assuming they did), awakened us to moral needs which, when made visible, could not be denied.

What do you think? Comment from the perspective of the course.

END OF QUESTION TWO

1991 QUESTION THREE

Discuss the role played by historical analysis in the following:

Johnson v. McIntosh, 21 U.S. (4 Wheat.) 542 (1823)

Commonwealth v. Alger, 7 Cush. 53 (Mass. 1853)

Dred Scott v. Sandford, 60 U.S. (19 How.) 393 (1857)

The Slaughterhouse Cases, 83 U.S. (16 Wall.) 36 (1873)

Brown v. Board of Education, 347 U.S. 483 (1954)

You should deal with these cases at a minimum; you might wish to bring to bear additional examples from the course material (and not just appellate opinions, either), in order to further substantiate points you make with regard to the listed cases or in order to make wholly separate points the listed cases do not support.

Possible points to consider include differing views expressed in these documents about the nature of historical change, they function of explicit or implicit historical conclusions in legitimating legal conclusions, what difference it makes whether or not the history used is "correct" or not and, of course, the mutually constitutive nature of doctrinal and social change. In any event, be sure to subordinate your discussion to a single, synthetic thesis point.

END OF QUESTION THREE

1991 QUESTION FOUR

Compare and contrast the historical and doctrinal development of substantive due process as it appeared in the decisions of *Lochner v. New York*, 198 U.S. 45 (1905) and *Roe v. Wade*, 410 U.S. 179 (1973). (Note that *Roe v. Wade* was not part of the reading assignments for this course, but it is a case with which you may perhaps have some familiarity.)

You should pay particular attention to the issue of the relationship between social and legal change. You might consider, for example, how it is that the nineteenth-century version of the doctrine appeared in the guise of *Lochner*ism and the twentieth-century version in *Griswold*ism. Perhaps the differences in the doctrine's content in its nineteenth- and twentieth-century manifestations tell us something about the doctrine itself, or about certain even more basic questions about the nature of U.S. legal culture.

You may pursue this problem from any direction you choose. Be sure, however, to make some concrete, synthetic point about the comparison/contrast and to support your position

thickly with materials from the course, including but of course not limited to the principal cases themselves and their doctrinal predecessors.

END OF QUESTION FOUR

END OF EXAM