SYLLABUS AND COURSE INFORMATION

In this seminar, we will address debates about judicial philosophy and legal reasoning, with a special focus on the law/politics distinction. We will examine scholarship that asks how judges might be constrained in their decision-making – i.e., through precedent, deference to the elected branches, originalism, etc. As we read work by Dworkin, Scalia, Breyer, critical legal scholars, and others, we will evaluate how the legal interpretation of the common law, statutes, and the Constitution differs from any other type of political decision, and explore what our conclusions imply for the ideology of the rule of law.

COURSE MATERIALS & REQUIREMENTS

- All assigned cases or readings will be available on Blackboard.

- See Appendix A for a description of the seminar requirements and grading criteria.

READING ASSIGNMENTS

PART ONE – THE POLITICS OF LAW

Week 1: The Supreme Court Confirmation Process & the Rule of Law

- Assigned Reading

  Justice Roberts

  - Dahlia Lithwick, "Confirmation Report," Slate, September 15, 2005
  - Ronald Dworkin, "Judge Roberts on Trial," New York Review of Books, October 20, 2005
  - Emily Bazelon, "Sorry Now?" Slate, June 28, 2007
Justice Sotomayor

- Michael Dorf, "What is Sonia Sotomayor's Judicial Philosophy?," Findlaw's Writ, June 3, 2009

Justice Kagan

- Dahlia Lithwick, "The Kagan Hearings," Slate, June 29-July 1, 2010

- **Recommended Reading: Supreme Court Appointments**


- **Recommended Reading: The Rule of Law**

  - Judith N. Sklar, *Legalism* (1964)

**PART TWO - JUDICIAL REASONING & THE LAW/POLITICS DISTINCTION**

**Week 2: An Introduction to Common Law Reasoning**

- **Assigned Reading**

- **Recommended Reading**
  - Oliver Wendell Holmes, Jr., *The Common Law* (1881)
  - Oliver Wendell Holmes, “The Path of the Law,” 10 HARV. L. REV. 61 (1897)
  - Benjamin Cardozo, *The Nature of the Judicial Process* (1921)
  - Larry Alexander, “Precedent,” in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson, ed., 1996)
Week 3: Theoretical Perspectives on Common Law Reasoning: Legal Realism & Critical Legal Studies

- **Assigned Reading**
  - Jerome Frank, selections from *Law and the Modern Mind* (1930)
  - Debra Livingston, “‘Round and ‘Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship,” 95 HArv. L. Rev. 1669 (1982)

- **Recommended Reading: Legal Realism**
  - Karl Llewellyn, *The Bramble Bush* (1930)
  - Roscoe Pound, “The Call for a Realist Jurisprudence,” 44 Harv. L. Rev. 697 (1931)
  - Karl Llewellyn, “Some Realism about Realism – Responding to Dean Pound,” 44 Harv. L. Rev. 1222 (1931)
- **Recommended Reading: Critical Legal Studies**


**Week 4: Theoretical Perspectives on Common Law Reasoning: Law & Economics**

- **Assigned Reading**

  - *United States v. Carroll Towing*, 159 F.2d 169 (1947)
- **Recommended Reading**


**Week 5: An Introduction to Statutory Construction**

- **Assigned Reading**


- **Recommended Reading**

  - Lon L. Fuller, “Positivism and Fidelity to Law: A Reply to Prof. Hart,” 71 HARV. L. REV. 630 (1958)
- Philip P. Frickey, “From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation,” 77 MINN. L. REV. 241 (1992)
- William N. Eskridge, Jr., “Interpretation of Statutes,” in A Companion to Philosophy of Law and Legal Theory (Dennis Patterson ed., 1996)

Week 6: Judicial Perspectives on Statutory Construction

- **Assigned Reading**

- **Recommended Reading**
  - Archibald Cox, “Judge Learned Hand and the Interpretation of Statutes,” 60 HARV. L. REV. 370 (1947)

Week 7: Scholarly Perspectives on Statutory Construction

- **Assigned Reading**

- **Recommended Reading**


**Week 8: The Weber Case**

- **Assigned Reading**


- **Recommended Reading**

  - William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994)
Week 9, Part I: Statutory Construction in the Administrative State

- **Assigned Reading**

- **Recommended Reading**

Week 9, Part II: An Introduction to Constitutional Interpretation

- **Assigned Reading**

- **Recommended Reading**
Week 10: Constitutional Interpretation: Original Intent v. Original Meaning

- **Assigned Reading**
  - Antonin Scalia, *A Matter of Interpretation* (selections)

- **Recommended Reading**

Week 11: Constitutional Interpretation: Fundamental Rights

- **Assigned Reading**
- **Recommended Reading**


**Week 12, Part I: Judicial Perspectives on Constitutional Interpretation**

- **Assigned Reading**

  - Antonin Scalia, *A Matter of Interpretation* (review)
  - ACS/Federalist Society Conversation with Justices Breyer and Scalia, December 5, 2006
  - [C-SPAN: America & the Courts – Justices Scalia and Breyer on the Constitution](https://www.c-span.org/video/?c=15259290), March 27, 2010

- **Recommended Reading**


**Week 12, Part II: Feminist and Critical Race Legal Theories**

- **Assigned Reading**

- **Recommended Reading**
- Richard Delgado et al., eds., Critical Race Theory: An Introduction (2001)

Week 13: The Rule of Law/ The Politics of Law

- Assigned Reading

  - Lief H. Carter and Thomas F. Burke, Reason in Law, 8th ed. Ch. 6, Appendices
    - Bush v. Gore (6th ed.)
    - The Rule of Law & the Presidency of George W. Bush (8th ed.)

- Recommended Reading

  - Terri Jennings Peretti, In Defense of A Political Court (1999)
  - Lawrence Baum, Judges and Their Audiences: A Perspective on Judicial Behavior (2008)
  - Keith Bybee, All Judges are Political –Except When They Are Not: Acceptable Hypocrisies and the Rule of Law (2010)

Appendix A: Course Requirements and Grading

The components of your final grade include the following:

1. Two Critical Response Essays: 60%

   A third essay is optional, and if the grade on the optional third essay is higher than a previous essay grade, the third essay’s grade will be used instead.

2. Attendance: Required
Please note that attendance for this class is required. All class attendance records are forwarded to the Skadden, Arps Honors Program administrators. If you are unable to attend class due to illness or other serious emergency, you should contact Professor Dodd in advance of the scheduled class and make arrangements with a classmate to obtain notes, new assignment announcements, etc.

3. **Participation: 10%**

During class discussion, volunteers are always welcomed and encouraged. Because this is a seminar, your participation is essential, and excellent participation can raise your grade.

4. **Course Final – Take-Home Essay Assignment and Exam: 30%**