

# JURISPRUDENCE

## Skadden Honors Seminar

Professor Lynda Dodd

NAC 4/133

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## 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
- Jeffrey Toobin, "[No More Mr. Nice Guy: The Supreme Court's Stealth Hard-Liner](#)," New Yorker, May 25, 2009

## Justice Sotomayor

- Dahlia Lithwick, "[The Rational Hysterics](#)," Slate, May 26, 2009
- Ed Whelen, "[Her Majesty Sonia Sotomayor v. the Rule of Law](#)," Bench Memos, National Review, May 27, 2009
- Michael Dorf, "[What is Sonia Sotomayor's Judicial Philosophy?](#)," Findlaw's Writ, June 3, 2009
- Dahlia Lithwick, "[What a Waste](#)," Slate, July 15, 2009
- Ronald Dworkin, "[Justice Sotomayor: The Unjust Hearings](#)," New York Review of Books, September 24, 2009

## Justice Kagan

- Ronald Dworkin, "[The Tempting of Elena Kagan](#)," New York Review of Books, August 19, 2010
- Dahlia Lithwick, "[The Kagan Hearings](#)," Slate, June 29-July 1, 2010 \

### - **Recommended Reading: Supreme Court Appointments**

- Mark Silverstein, *Judicious Choices: The New Politics of Supreme Court Nominations* (1994)
- John Anthony Maltese, *The Selling of Supreme Court Nominees* (1995)
- David Alistair Yalof, *Pursuit of Justices: Presidential Politics and the Selection of Supreme Court Nominees* (1999)
- Lee Epstein and Jeffrey A. Segal, *Advice and Consent: The Politics of Judicial Appointments* (2005)
- Benjamin Wittes, *Confirmation Wars: Preserving Independent Courts in Angry Times* (2006)
- Henry J. Abraham, *Justices, Senators, and Presidents: A History of the U.S. Supreme Court Appointments from Washington to Bush II*, 5<sup>th</sup> ed. (2007)
- Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* (2009)

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

- Judith N. Sklar, *Legalism* (1964)
- Ronald Dworkin, "Political Judges and the Rule of Law," 64 PROC. OF THE BRITISH ACAD. 259 (1978)
- Judith N. Sklar, "Political Theory and the Rule of Law," in *The Rule of Law: Ideal or Ideology* (Allan C. Hutchinson and Patrick Monahan, eds., 1987)
- John Hasnas, "The Myth of the Rule of Law," 1995 WIS. L. REV. 199 (1995)
- Ronald A. Cass, *The Rule of Law in America* (2001)
- Brian Z. Tamanaha, *On the Rule of Law: History, Politics, and Theory* (2004)
- Brian Z. Tamanaha, *Law as a Means to an End: Threat to the Rule of Law* (2006)

- Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (2010)

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

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

#### - Assigned Reading

- Lief H. Carter and Thomas F. Burke, *Reason in Law*, 8<sup>th</sup> ed. Chs. 1-3 (2010)

#### - 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)
- Edward H. Levi, *An Introduction to Legal Reasoning* (1949)
- Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (1960)
- Frederick Schauer, "Precedent," 39 STAN. L. REV. 571 (1987)
- Melvin A. Eisenberg, *The Nature of the Common Law* (1988)
- Larry Alexander, "Constrained by Precedent," 63 S. CAL. L. REV. 1 (1989)
- Frederick Schauer, "Is the Common Law Law?" 77 CAL. L. REV. 455 (1989)
- Richard Posner, *The Problems of Jurisprudence* 86-98 (1990)
- Larry Alexander, "Precedent," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson, ed., 1996)
- Jefferson White, "Analogical Reasoning," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson, ed., 1996)
- Gerald J. Postema, "Philosophy of the Common Law," in *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Jules Coleman and Scott Shapiro, eds., 2002)
- Lloyd Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (2005)
- Richard Posner, "Reasoning by Analogy," 91 CORNELL L. REV. 761 (2006)
- Cass Sunstein, "Reasoning by Analogy," in *Readings in the Philosophy of Law* (John Arthur et al. eds., 2006)
- C. Gordon Post, "Stare Decisis: The Use of Precedent," in *Readings in the Philosophy of Law* (John Arthur et al. eds., 2006)
- Steven J. Burton, *An Introduction to Law and Legal Reasoning*, 3d. ed. (2007)
- Neil Duxbury, *The Nature and Authority of Precedent* (2008)

### **Week 3: Theoretical Perspectives on Common Law Reasoning: Legal Realism & Critical Legal Studies**

#### **- Assigned Reading**

- Brian Leiter, "Legal Realism," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1999)
- 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)
- Robert Gordon, "Law and Ideology," Vol. 3 TIKKUN (1988)

#### **- Recommended Reading: Legal Realism**

- Karl Llewellyn, *The Bramble Bush* (1930)
- Karl Llewellyn, "Law and the Modern Mind: A Symposium," 31 COLUM. L. REV. 90 (1931)
- 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)
- Felix S. Cohen (CCNY Class of 1926), "The Ethical Basis of Legal Criticism," 41 YALE L.J. 201 (1931)
- Felix S. Cohen, "Transcendental Nonsense and the Functional Approach," 35 COLUM. L. REV. 809 (1935)
- Felix S. Cohen, "Field Theory and Judicial Logic," 59 YALE L.J. 238 (1950)
- Edward Purcell, "American Jurisprudence between the Wars: Legal Realism and the Crisis of Democratic Theory," 75 AM. HIST. REV. 424 (1969)
- G. Edward White, "From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth Century America," 58 VA. L. REV. 999 (1972)
- Edward A. Purcell, *The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value* (1973)
- William Twining, *Karl Llewellyn and the Realist Movement* (1973)
- Laura Kalman, *Legal Realism at Yale, 1927-1960* (1986)
- Morton Horwitz (CCNY Class of 1959), *Transformation of American Law, 1870-1960* (1992)
- Neil Duxbury, *Patterns of American Jurisprudence*, Chs 1-4 (1995)
- Stephen Burton ed., *The Path of the Law and Its Influence: The Legacy of Oliver Wendell Holmes, Jr.* (2000)
- Brian Leiter, "American Legal Realism," in *The Blackwell Guide to the Philosophy of Law and Legal Theory* (Martin P. Golding et. al., ed., 2004)
- Brian Bix, "American Legal Realism," Ch. 17 in *Jurisprudence: Theory and Context* (2004)

**- Recommended Reading: Critical Legal Studies**

- Duncan Kennedy, "Form and Substance in Private Law Adjudication," 89 HARV. L. REV. 1685 (1976)
- Critical Legal Studies Symposium, 36 STAN. L. REV. (1984)
- Mark Tushnet, "Critical Legal Studies: An Introduction to Its Origins and Underpinnings," 36 J. OF LEG. EDUC. 516 (1986)
- John Stick, "Can Nihilism Be Pragmatic," 100 HARV. L. REV. 332 (1986)
- Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," 36 J. OF LEG. EDUC. 518 (1986)
- Roberto Unger, *The Critical Legal Studies Movement* (1986)
- Roberto Unger, *Politics: A Work in Constructive Social Theory* Vol. I: *Social Theory: Its Situation and Task* (1987)
- Roberto Unger, *Politics: A Work in Constructive Social Theory* Vol. II: *False Necessity* (1987)
- Roberto Unger, *Politics: A Work in Constructive Social Theory* Vol. III: *Plasticity into Power* (1987)
- Mark Kelman, *A Guide to Critical Legal Studies* (1987)
- Don Herzog, "As Many as Six Impossible Things before Breakfast," 75 CAL. L. REV. 617 (1987)
- Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 54 U. CHI. L. REV. 462 (1987)
- Rogers M. Smith, "After Criticism: An Analysis of the Critical Legal Studies Movement," in *Judging the Constitution: Critical Essays on Judicial Lawmaking* (Michael McCann et al. eds., 1989).
- Andrew Altman, *Critical Legal Studies: A Liberal Critique* (1990)
- Denise Meyerson, "Fundamental Contradictions in Critical Legal Studies," 11 OXFORD J. OF LEG. STUD. 439 (1991)
- Mark Tushnet, "Critical Legal Studies: A Political History," 100 YALE L. J. 1515 (1991)
- J. Paul Oetken, "Form and Substance in Critical Legal Studies," 100 YALE L.J. 2209 (1991)
- Christopher L. Kutz, "Just Disagreement: Indeterminacy and Rationality in the Rule of Law," 103 YALE L.J. 997 (1994)
- Neil Duxbury, *Patterns of American Jurisprudence*, Ch. 6 (1995)
- Guyora Binder, "Critical Legal Studies," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1999)

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

**- Assigned Reading**

- Morton J. Horwitz (CCNY Class of 1959), "Law and Economics: Science or Politics?" 8 HOFSTRA L. REV. 905 (1980)
- *United States v. Carroll Towing*, 159 F.2d 169 (1947)

**- Recommended Reading**

- Arthur Allen Leff, "Economic Analysis of Law: Some Realism about Nominalism," 60 VA. L. REV. 451 (1974)
- Richard Posner, "The Economic Approach to Law," 53 TEX. L. REV. 757 (1975)
- Edwin C. Baker, "The Ideology of the Economic Analysis of Law," 5 PHIL. & PUB. AFF. 3 (1975)
- Jeffrie G. Murphy and Jules Coleman, "Law and Economics," in *Philosophy of Law: An Introduction to Jurisprudence* (1990)
- Russell Hardin, "The Morality of Law and Economics," 11 LAW & PHIL. 331 (1992)
- Jon D. Hanson and Melissa R. Hart, "Law and Economics," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1996)
- Robert L. Hayman, Jr., Nancy Levit, and Richard Delgado, *Jurisprudence—Classical and Contemporary: From Natural Law to Postmodernism*, 2d ed., Ch. 4 (2002)
- Richard A. Posner, *Economic Analysis of Law*, 6th ed. (2003)
- Mitchell Polinsky, *An Introduction to Law and Economics*, 3d ed. (2003)
- Brian Bix, "Economic Analysis of Law," in *Jurisprudence: Theory and Context*, 5<sup>th</sup> ed. (2009)

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

**- Assigned Reading**

- Lief H. Carter and Thomas F. Burke, *Reason in Law*, 8<sup>th</sup> ed. Ch. 4 (2010)
- Edward H. Levi, "A Case Study in Interpretation: The Mann Act," in *Readings in the Philosophy of Law* (John Arthur et al. eds., 2006)
- *Caminetti v. United States*, 249 U.S. 470 (1917), *Mortenson v. United States*, 322 U.S. 369 (1944), and *Cleveland v. United States*, 329 U.S. 14 (1946), in *Readings in the Philosophy of Law* (John Arthur et al. eds., 2006)

**- Recommended Reading**

- Roscoe Pound, "Common Law and Legislation," 21 HARV. L. REV. 383 (1908)
- Max Radin, "Statutory Interpretation," 43 HARV. L. REV. 863 (1930)
- H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 HARV. L. REV. 593 (1958)
- Lon L. Fuller, "Positivism and Fidelity to Law: A Reply to Prof. Hart," 71 HARV. L. REV. 630 (1958)
- Guido Calabresis, *A Common Law for the Age of Statutes* (1982)
- William N. Eskridge, Jr., "Spinning Legislative Supremacy," 78 GEO. L.J. 319 (1989)

- Philip P. Frickey, “From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation,” 77 MINN. L. REV. 241 (1992)
- Henry M. Hart and Albert M. Sacks, *The Legal Process* (William N. Eskridge, Jr. and Philip P. Frickey eds., 1994)
- William N. Eskridge, Jr., “Interpretation of Statutes,” in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1996)
- William N. Eskridge, Jr. et. al., *Legislation and Statutory Interpretation* (2000)

## **Week 6: Judicial Perspectives on Statutory Construction**

### **- Assigned Reading**

- Stephen Breyer, “On the Uses of Legislative History in Interpreting Statutes,” 65 S. CAL. L. REV. 845 (1992)
- Antonin Scalia, *A Matter of Interpretation* (1997) (selections)

### **- Recommended Reading**

- Harlan Fiske Stone, “The Common Law in the United States,” 50 HARV. L. REV. 4 (1936)
- Justice Felix Frankfurter (CCNY Class of 1902), “Some Reflections on the Reading of Statutes” (1947), reprinted in *Judges on Judging: Views from the Bench*, 3d ed. (David M. O’Brien ed., 2009)
- Archibald Cox, “Judge Learned Hand and the Interpretation of Statutes,” 60 HARV. L. REV. 370 (1947)
- Frank Easterbrook, “Statute’s Domains,” 50 U. CHI. L. REV. 533 (1983)
- Richard Posner, “Statutory Interpretation—In the Classroom and in the Courtroom,” 50 U. CHI. L. REV. 800 (1983)
- William Eskridge, “The New Textualism,” 37 UCLA L. REV. 621 (1990)
- Adrian Vermeule, “Legislative History and the Limits of Judicial Competence: The Untold Story of *Holy Trinity Church*,” 50 STAN. L. REV. 1833 (1998)
- Carol Chomsky, “Unlocking the Mystery of *Holy Trinity*: Spirit, Letter, and History in Statutory Interpretation,” 100 COLUM. L. REV. 901 (2000)
- Robin Kundis Craig, “The Stevens/Scalia Principle and Why It Matters: Statutory Conversations and a Cultural Critical Critique of the Strict Plain Meaning Approach,” 79 TUL. L. REV. 955 (2005)

## **Week 7: Scholarly Perspectives on Statutory Construction**

### **- Assigned Reading**

- John F. Manning, “What Divides Textualists from Purposivists?” 106 COLUM. L. REV. 70 (2006)

- Karl Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed,” 3 VAND. L. REV. 395 (1950)

**- Recommended Reading**

- Jonathan Macey, “Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model,” 86 COLUM. L. REV. 223 (1986)
- David L. Shapiro, “Continuity and Change in Statutory Interpretation,” 67 N.Y.U. L. REV. 921 (1992)
- Jerry Mashaw, *Chaos, Greed, and Governance: Using Public Choice to Improve Public Law* (1997)
- John F. Manning, “Textualism as a Non-Delegation Doctrine,” 97 COLUM. L. REV. 673 (1997)
- John F. Manning, “Textualism and the Equity of the Statute,” 101 COLUM. L. REV. 1 (2001)
- William N. Eskridge, Jr., “All about Words: Early Understandings of the ‘Judicial Power’ in Statutory Interpretation, 1776–1806,” 101 COLUM. L. REV. 990 (2001)
- Caleb Nelson, “What Is Textualism?” 91 VA. L. REV. 347 (2005)
- John F. Manning, “Textualism and Legislative Intent,” 91 VA. L. REV. 419 (2005)
- Jonathan T. Molot, “The Rise and Fall of Textualism,” 106 COLUM. L. REV. 1 (2006)
- Alexander Volokh, “Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else,” 83 N.Y.U. L. REV. 769 (2008)
- Jonathan R. Siegel, “The Inexorable Radicalism of Textualism,” 158 U. PA. L. REV. 117 (2009)

**Week 8: The *Weber* Case**

**- Assigned Reading**

- *United Steelworkers v. Weber*, 443 U.S. 193 (1979)
- Philip P. Frickey, “Wisdom on *Weber*,” 74 TUL. L. REV. 1169 (2000)

**- Recommended Reading**

- Daniel Farber, “Statutory History and Legislative Supremacy,” 78 GEO. L.J. 281 (1989)
- William N. Eskridge, Jr., *Dynamic Statutory Interpretation* (1994)



## **Week 9, Part I: Statutory Construction in the Administrative State**

### **- Assigned Reading**

- William N. Eskridge, Jr. et al., *Legislation and Statutory Interpretation* (2d. ed., 2006) (selections)

### **- Recommended Reading**

- Cynthia Farina, "Statutory Interpretation and the Balance of Power in the Administrative State," 89 COLUM. L. REV. 452 (1989)
- Cass R. Sunstein, "Law and Administration after *Chevron*," 90 COLUM. L. REV. 2071 (1990)
- Thomas W. Merrill, "Textualism and the Future of the *Chevron* Doctrine," 72 WASH. U. L. Q. 351 (1994)
- Mark Seidenfeld, "A Syncopated *Chevron*: Emphasizing Reasoned Decisionmaking in Reviewing Agency Interpretations of Statutes," 73 TEX. L. REV. 83 (1994)
- Adrian Vermeule, *Judging Under Uncertainty: An Institutional Theory of Legal Interpretation* (2006)
- Michael Herz, "Purposivism and Institutional Competence in Statutory Interpretation," 2009 MICH. ST. L. REV. 89 (2009)
- Jack M. Beermann, "End the Failed *Chevron* Experiment Now: How *Chevron* Has Failed and Why it Can and Should be Overturned," 42 CONN. L. REV. 779 (2010)

## **Week 9, Part II: An Introduction to Constitutional Interpretation**

### **- Assigned Reading**

- Lief H. Carter and Thomas F. Burke, *Reason in Law*, 8<sup>th</sup> ed. Ch. 5 (2010)

### **- Recommended Reading**

- Michael J. Gerhardt et al. eds., *Constitutional Theory: Arguments and Perspectives*, 3d ed. (2007)
- Walter F. Murphy, James E. Fleming, Sotirios A. Barber, and Stephen Macedo, *American Constitutional Interpretation*, 4<sup>th</sup> ed. (2008)

## Week 10: Constitutional Interpretation: Original Intent v. Original Meaning

### - Assigned Reading

- Paul Brest, "The Misconceived Quest for the Original Understanding," 60 B.U. L. REV. 204 (1980)
- Richard S. Kay, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses," 82 NW. U. L. REV. 226 (1988)
- Antonin Scalia, "Originalism: The Lesser Evil," 57 U. CIN. L. REV. 849 (1989)
- Antonin Scalia, *A Matter of Interpretation* (selections)

### - Recommended Reading

- Raoul Berger, *Government by Judiciary* (1977)
- Walter F. Murphy, "Constitutional Interpretation: The Art of the Historian, Magician, or Statesman," (Review of Berger's *Government by Judiciary*) 87 YALE L.J. 1752 (1978)
- Jefferson Powell, "The Original Understanding of Original Intent," 98 HARV. L. REV. 885 (1985)
- Jack N. Rakove, ed., *Interpreting the Constitution: The Debate Over Original Intent* (1990)
- Robert H. Bork, *The Tempting of America: The Political Seduction of the Law* (1991)
- Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999)
- Robert M. Howard & Jeffrey A. Segal, "An Original Look at Originalism," 36 LAW & SOC. REV. 113 (2002)
- Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004)
- Jonathan O'Neill, *Originalism in American Law and Politics: A Constitutional History* (2005)
- Mitchell N. Berman, "Originalism is Bunk," 84 N.Y.U. L. REV. 1 (2009)
- Jamal Greene, "Selling Originalism," 97 GEO. L. J. 657 (2009)
- Jamal Greene, Nathaniel Persily, and Stephen Ansolabehere, "[Profiling Originalism](#)," 111 COLUM. L. REV. 356 (2011)

## Week 11: Constitutional Interpretation: Fundamental Rights

### - Assigned Reading

- Paul Brest, "The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship," 90 YALE L.J. 1063 (1981)
- Ronald Dworkin, "The Arduous Virtue of Fidelity: Originalism, Scalia, Tribe, and Nerve," 65 FORDHAM L. REV. 1249 (1997)

- **Recommended Reading**

- Thomas C. Grey, "Do We Have an Unwritten Constitution?" 27 STAN. L. REV. 703-718. (1975)
- John Hart Ely, *Democracy and Distrust* (1980)
- Owen Fiss, "Objectivity and Interpretation," 34 STAN. L. REV. 739 (1982), and reply by Brest, 34 STAN. L. REV. 765 (1982).
- Michael J. Klarman, "The Puzzling Resistance to Political Process Theory," 77 VA. L. REV. 747 (1991)
- Laurence Tribe and Michael Dorf, *On Reading the Constitution* (1991)
- James Fleming, "Securing Deliberative Autonomy," 48 STAN. L. REV. 1(1995)
- Ronald Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (1997)
- Symposium on "Fidelity in Constitutional Theory," 65 FORDHAM L. REV. 1247-1818 (1997)
- James Fleming, *Securing Constitutional Democracy* (2006)
- Sotirios A. Barber and James E. Fleming, *Constitutional Interpretation: The Basic Questions* (2007)
- Goodwin Liu, Pamela Karlan, & Christopher H. Schroeder, *Keeping Faith with the Constitution* (2009)
- David A. Strauss, *The Living Constitution* (2010)

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

- **Assigned Reading**

- Antonin Scalia, "Originalism: The Lesser Evil," 57 U. CIN. L. REV. 849 (1989) (review)
- Antonin Scalia, *A Matter of Interpretation* (review)
- Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005) (selections)
- [ACS/Federalist Society Conversation with Justices Breyer and Scalia](#), December 5, 2006
- [C-SPAN: America & the Courts – Justices Scalia and Breyer on the Constitution](#), March 27, 2010

- **Recommended Reading**

- Hugo L. Black, *A Constitutional Faith* (1969)
- William H. Rehnquist, "The Notion of a Living Constitution," 54 TEX. L. REV. 693 (1976)
- Thurgood Marshall, "Reflections on the Bicentennial of the United States Constitution," 101 HARV. L. REV. 1 (1987)

- William J. Brennan, “The Constitution of the United States: Contemporary Ratification,” in *Interpreting Law and Literature: A Hermeneutic Reader* (Sanford Levinson & Steven Mailloux eds., 1988)
- William H. Rehnquist, *All the Laws But One: Civil Liberties in Wartime* (2000)
- William H. Rehnquist, *The Supreme Court* (rev. ed., 2002)
- “[Interviews with Supreme Court Justices](#),” 13 *The Scribes Journal of Legal Writing* 1 (Bryan Gardner ed., 2010)
- Stephen Breyer, *Making Our Democracy Work: A Judge’s View* (2010)
- John Paul Stevens, *Five Chiefs: A Supreme Court Memoir* (2011)

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

### **- Assigned Reading**

- Ann Scales, “The Emergence of a Feminist Jurisprudence: An Essay,” 95 *YALE L.J.* 1373 (1986)
- Deborah Rhode, “Feminist Critical Theories,” 42 *STAN. L. REV.* (1990)
- Richard Delgado, “The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?” 22 *HARV. C.R.-C.L. L. REV.* 304 (1987)

### **- Recommended Reading**

- Patricia Williams, “Reconstructing Ideals from Deconstructed Rights,” 22 *HARV. C.R.-C.L. L. REV.* 423 (1987)
- Mari J. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” 22 *HARV. C.R.-C.L. L. REV.* 323 (1987)
- Christine A. Littleton, “Feminist Jurisprudence: The Difference Method Makes,” 41 *STAN. L. REV.* 751 (1989)
- Martha Minow, “Beyond Universality,” *U. CHI. LEGAL F.* 115 (1989)
- Patricia Cain, “Feminist Jurisprudence: Grounding the Theories,” 4 *BERKELEY WOMEN’S L. J.* 191 (1989-90)
- Katherine Bartlett, “Feminist Legal Methods,” 103 *Harv. L. Rev.* 829 (1990)
- Angela Harris, “Race and Essentialism in Feminist Legal Theory,” 42 *STAN. L. REV.* 581 (1990)
- Gerald Torres, “Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice,” 75 *MINN. L. REV.* 993 (1991)
- Richard Delgado, “The Imperial Scholar Revisited: How to Marginalize Outsider Writing, Ten Years Later,” 140 *U. PA. L. REV.* 1349 (1992)
- Judith A. Baer, “How is Law Male? A Feminist Perspective on Constitutional Interpretation,” in *Feminist Jurisprudence: The Difference Debate* 147 (Leslie Friedman Goldstein ed., 1992)
- Richard Delgado and Jean Stefancic, “Critical Race Theory: An Annotated Bibliography,” 79 *VA. L. REV.* 461 (1993)
- Matthew Kramer, *Critical Legal Theory and the Challenge of Feminism* (1994)

- Derrick Bell, “Who’s Afraid of Critical Race Theory?” 1995 U. OF ILL. L. REV. 893 (1995)
- Kimberle Crenshaw, ed., *Critical Race Theory: The Key Writings That Informed the Movement* (1996)
- Richard Delgado et al., eds., *Critical Race Theory: The Cutting Edge* (2000)
- Richard Delgado et al., eds., *Critical Race Theory: An Introduction* (2001)
- Judith Baer, *Our Lives Before the Law: Constructing a Feminist Jurisprudence* (2001)
- Susan Moller Okin, “Justice and Gender: An Unfinished Debate,” 72 *FORDHAM L. REV.* 1537 (2004)

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

#### **- Assigned Reading**

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

#### **- Recommended Reading**

- Stephen J. Burton, *Judging in Good Faith* (1994)
- Terri Jennings Peretti, *In Defense of A Political Court* (1999)
- Thomas M. Keck, *The Most Activist Supreme Court in History* (2004)
- Kermit Roosevelt, III, *The Myth of Judicial Activism: Making Sense of Supreme Court Opinions* (2006)
- Richard Posner, *How Judges Think* (2008)
- Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (2008)
- Daniel A. Farber and Suzanne Sherry, *Judgment Calls: Principle and Politics in Constitutional Law* (2009)
- 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%**