

JURISPRUDENCE: SPRING 2008

Wednesdays, 1:00-2:50 PM (Room ___)

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Jurisprudence Tutorials - Wednesdays 3-5pm (by appointment)
General Office Hours – Thursday 11am-1pm

SYLLABUS AND COURSE INFORMATION

Course Materials

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

Course Requirements and Grading

The primary component of your course grade is your performance on the final examination, a 24 hour take-home, anonymously graded essay exam. As an alternative to the exam, you may write a paper that will fulfill your upper-level writing requirement.

Please note that attendance for this class is very important and will be recorded. If you are unable to attend class, please make arrangements with a classmate to obtain notes, new assignment announcements, etc.

During class discussion, volunteers are always welcomed and encouraged. In addition, I will also call on students at random, using a “present and prepared” system of participation. Because this is a seminar, your participation is essential, and excellent participation can raise your grade. You will be ineligible for this participation bonus if you are unprepared or absent for two or more classes during the semester.

Class Communications

My regular office hours will be held on Thursdays from 11am-1pm, and I have scheduled exclusive office hours for Jurisprudence students on Wednesday afternoons, by appointment. I encourage you to come visit me! I will also provide opportunities for informal feedback about the course. On occasion during the semester, I will ask the entire class to fill out anonymous “free write” memos. For announcements, I will rely on Blackboard’s email list function. Please make the email you listed with your Blackboard registration is current, and that you regularly check mail at that address.

Reading Assignments

PART ONE – THE NATURE OF LAW

1. Natural Law

- Assigned Reading

- Brian Bix, “Traditional Natural Law Theory,” in *Readings in the Philosophy of Law* (John Arthur et al. eds, 2006)
- Thomas Aquinas, *Summa Theologiae*, from Questions 90-97 in *The Treatise on Law* (R.J. Henle, trans. and ed. 1993)
- William Blackstone, “Of the Nature of Laws in General,” from Vol. I *Commentaries on the Laws of England* (ed. 1979)
- John Finnis, from Ch. 2 *Natural Law and Natural Rights* (1980)

- Discussion Questions

1. According to Bix, what are the central tenets of traditional natural law theory, as discussed by Cicero?
2. In Bix’s essay, he offers a summary of four different kinds of law described by Thomas Aquinas. What are these categories, and how does Aquinas explain the distinction between natural and positive law?
3. What does Bix consider to be the most reasonable interpretation of the view that an unjust law is not a law? Do you think natural law confuses what the law is with what the law should be?
4. What does Aquinas mean when he declares that “lawmaking is purposeful and rational.” Why does he believe that law cannot be arbitrary?
5. According to Blackstone what is the difference between natural law and divine law, what is their relation to “municipal law,” or “rules of civil conduct”?
6. What, according to Finnis, makes a law valid? Does Finnis believe all laws should be obeyed?

- Recommended Reading

A. Introductory

- J.W. Harris, "Natural Law," Ch. 1 in *Legal Philosophies* (1980)
- Brian Bix, "Natural Law Theory," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson ed., 1999)
- John Finnis, "Natural law," in *Routledge Encyclopedia of Philosophy*. (1998) <http://www.rep.routledge.com/article/T012>
- Mark Murphy, "The Natural Law Tradition in Ethics," in *Stanford Encyclopedia of Philosophy* (E.N. Zalta ed., 2001). <http://plato.stanford.edu/entries/natural-law-ethics/>
- Brian Bix, Natural Law Theory, Ch. 5 in *Jurisprudence: Theory and Context* (2004)

B. Advanced

- John Finnis, *Natural Law and Natural Rights* (1980)
- Robert P. George, "Recent Criticism of Natural Law Theory (book review)," 55 U. of Chi. L. Rev. 1271 (1988)
- Jeffrey Goldsworthy, "Fact and Value in the New Natural Law Theory," 41 Am. J. of Juris. 21 (1996)
- Robert P. George, "A Defense of the New Natural Law Theory," 41 Am. J. of Juris. 47 (1996).
- Robert P. George, *In Defense of Natural Law* (1999)

2. Legal Positivism & H.L.A Hart

- Assigned Reading

- Bix, Brian, "John Austin", *The Stanford Encyclopedia of Philosophy* (Spring 2005 Edition) <http://plato.stanford.edu/archives/spr2005/entries/austin-john/>
- John Austin, from *The Province of Jurisprudence Determined*, Lectures 1, 5-6
- Brian Bix, "Legal Positivism and H.L.A. Hart," Ch. 3 in *Jurisprudence: Theory and Context* (2004)
- H.L.A. Hart, "Positivism and the Separation of Law and Morals," 71 Harv. L. Rev. 593 (1958)
- H.L.A. Hart, from *The Concept of Law*
- H.L.A. Hart's Postscript from the 1994 ed. of *The Concept of Law*

- Discussion Questions

1. Austin claims law is a command by a sovereign, enforced by sanctions for noncompliance. How does Austin define a "command"? Who or what is the "sovereign"? How does the command theory support legal positivism? Why does Hart reject the "command theory of law"?

2. Can it be possible that law can be completely distinguished from morality? What is Hart's response to those who claimed that legal positivism led to the German's willingness to accept Nazism?
3. According to Hart, what is the difference between primary and secondary rules? How do they work together?
4. How does Hart's "model of rules" support legal positivism?
5. What does the model of rules suggest about the nature of judicial reasoning?

- Recommended Reading

A. Introductory

- Robert N. Moles, "John Austin," in *Routledge Encyclopedia of Philosophy* (1998) <http://www.rep.routledge.com/article/T025>
- Ross Harrison, "Jeremy Bentham," in *Routledge Encyclopedia of Philosophy* <http://www.rep.routledge.com/article/DB004SECT2>
- Jules Coleman and Brian Leiter, "Legal Positivism," in *A Companion to the Philosophy of Law and Legal Theory* (Dennis Patterson, ed. 1999)
- Wilfrid Waluchow, "Legal Positivism, Inclusive and Exclusive," in *Routledge Encyclopedia of Philosophy* (2001) <http://www.rep.routledge.com/article/T064>
- Leslie Green, "Legal Positivism," in *Stanford Encyclopedia of Philosophy* (2003) <http://plato.stanford.edu/entries/legal-positivism/>
- Brian Bix, "Hans Kelsen's Pure Theory of the Law," Ch. 4 in *Jurisprudence: Theory and Context* (2004)
- Brian Bix, "Legal Positivism," in *Blackwell Guide to Philosophy of Law and Legal Theory* (M.P. Golding et al., eds., 2004)
- Leslie Green, "Legal Obligation and Authority", in *The Stanford Encyclopedia of Philosophy* (Spring 2005 Edition) <http://plato.stanford.edu/archives/spr2005/entries/legal-obligation/>
- Andrei Marmor, "The Pure Theory of Law", in *The Stanford Encyclopedia of Philosophy* (Spring 2005 Edition) <http://plato.stanford.edu/archives/spr2005/entries/lawphil-theory/>

B. Advanced

- Hans Kelsen, *The Pure Theory of Law* (ed. 1967)
- Joseph Raz, *The Authority of Law* (1979)
- Robert P. George ed., *The Autonomy of Law: Essays on Legal Positivism* (1996)
- John Finnis, "On the Incoherence of Legal Positivism," 75 *Notre Dame L. Rev.* 1598 (1999-2000)

- Jules Coleman, *The Practice of Principle* (2001)
- Jules Coleman ed., *Hart's Postscript: Essays on the Postscript to the Concept of Law* (2001)
- John Gardner, "Legal Positivism: 5 ½ Myths," 46 Am. J. of Juris. 1999 (2001)

3. Legal Realism

- Assigned Reading

- Brian Leiter, "Legal Realism," in *A Companion to Philosophy of Law and Legal Theory* (Dennis Patterson, ed. 1999)
- Jerome Frank, from *Law and the Modern Mind* (1930)
- Karl Llewellyn, "A Realistic Jurisprudence – The Next Step," 30 Colum. L. Rev. 431 (1930), in *Jurisprudence: Texts and Readings*, 2d ed. (Christie and Martin, eds. 2004).

- Discussion Questions

1. What are the two branch of legal realism, according to Brian Leiter?
2. What is the "conventional view" of law that Frank attacks?
3. Why does Frank think precedents are "illusory"?
4. Is Llewellyn more optimistic than Frank about the ability of rules to constrain judicial reasoning? Why?
5. How *should* a judge make a decision, according to Llewellyn?

- Recommended Reading

- Oliver Wendell Holmes, "The Path of the Law," 10 Harv. L. Rev. 61 (1897)
- Benjamin Cardozo, *The Nature of the Judicial Process* (1921)
- 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, "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)
- William Twining, *Karl Llewellyn and the Realist Movement* (1973)
- 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)

4. Lon Fuller

- Assigned Reading

- Brian Bix, "Understanding Lon Fuller," Ch. 6 in *Jurisprudence: Theory and Context* (2004)
- Lon L. Fuller, from *The Morality of Law* (rev. ed. 1969)
- H.L.A. Hart, "Book Review: The Morality of Law," 78 Harv. L. Rev. 1281 (1965)
- Joseph Raz, "The Rule of Law and Its Virtues," in *Readings in the Philosophy of Law* (John Arthur et. al., eds. 2006)

- Discussion Questions

1. What, according to Fuller, is the "internal morality of law"?
2. According to Raz, what are the values that the rule of law serves? What values does it not guarantee?
3. Why does Raz reject Fuller's claim that there is a necessary connection between law and morality?

- Recommended Reading

- Lon L. Fuller, "American Legal Realism," 82 U. Pa. L. Rev. 429 (1934)
- Lon L. Fuller, "Positivism and Fidelity to Law – A Reply to Professor Hart," 71 Harv. L. Rev. 593 (1958)
- Peter P. Nicholson, "The Inner Morality of the Law: Fuller and His Critics," 84 Ethics 307 (1974)
- J.W. Harris, "The Morality of Law and the Rule of Law," Ch. 11 in *Legal Philosophies* (1980)
- Peter Read Teachout, "The Soul of the Fugue: An Essay on Reading Fuller," 70 Minn. L. Rev. 1073 (1986)

- Massimo La Torre, “Lon Louvois Fuller,” in *Routledge Encyclopedia of Philosophy* (1998) <http://www.rep.routledge.com/article/T032>
- Matthew Kramer, “Scrupulousness without Scruples: A Critique of Lon Fuller and His Defenders,” 18 *Oxford J. of Leg. Stud.* 235 (1998)

5. Dworkin

- Assigned Reading

- Brian Bix, “Ronald Dworkin’s Interpretive Approach,” Ch. 7 in *Jurisprudence: Theory and Context* (2004)
- Ronald Dworkin, “The Model of Rules” from *Taking Rights Seriously* (1977)
- Ronald Dworkin, from Ch. 7 & 11, *Law’s Empire* (1986)
- “Dworkin on Dworkin” in *The Law School: The Magazine of New York University School of Law* (Autumn 2005)

- Discussion Questions

1. What are the three key tenets of positivism, according to Dworkin? What are Dworkin’s criticisms of Hart’s model of rules and how do they affect Dworkin’s own conception of judicial reasoning?
2. What role do principles play in *Riggs v. Palmer*, according to Dworkin?
3. How do principles differ from rules? Why does Dworkin suggest that Hart cannot simply modify his view to incorporate principles?
4. What is the difference between “weak” and “strong” discretion?
5. What does the word “integrity” imply for Dworkin?

- Recommended Reading

A. Introductory

- J.W. Harris, “Dworkin’s Rights Thesis,” Ch. 14 in *Legal Philosophies* (1980)
- H.L.A. Hart, “American Jurisprudence through English Eyes: The Nightmare and the Noble Dream,” 11 *Georgia L. Rev.* (1977)
- Kenneth I. Winston, (Book Review) “Taking Dworkin Seriously,” 13 *Harv. Civ. Rights – Civ. Lib. L. Rev.* 201 (1978)
- George Christie, (Book Review) “Dworkin’s ‘Empire’,” 1987 *Duke L.J.* 157

- Richard H. Fallon, "Reflections on Dworkin and the Two Faces of Law," 67 Notre Dame L.R. 553 (1992)

B. Advanced

- Marshall Cohen, ed., *Ronald Dworkin and Contemporary Jurisprudence* (1984)
- Stephen Guest, *Ronald Dworkin* (Jurists: Profiles in Legal Theory Series, 1991)
- Scott Hershovitz, ed. *Exploring Law's Empire: The Jurisprudence of Ronald Dworkin* (2000)
- Ronald Dworkin, "Hart's Postscript and the Nature of Political Philosophy," *Oxford J. of Leg. Stud.* (2004)
- Brian Leiter, "Beyond the Hart/Dworkin Debate," 48 *Am. J. of Juris.* 17 (2003)

6. Critical Legal Studies

- Assigned Reading

- Robert Gordon, "Law and Ideology," Vol. 3 *Tikkun* (1988)
- Debra Livingston, "'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship," 95 *Harv. L. Rev.* 1669 (1982)
- Andrew Altman, "Critical Legal Studies and Dworkin" in *Readings in the Philosophy of Law* (John Arthur et. al., eds., 2006)

- Discussion Questions

1. What does the CLS method of "trashing" entail, according to Gordon?
2. How can CLS be distinguished from Legal Realism?
3. What does CLS scholarship suggest about the role of law in legitimating power?
4. What is the CLS "patchwork quilt" thesis? How does this view challenge Dworkin's theory?

- Recommended Reading

- 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. Ed.* 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. Ed. 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 Calif. L. Rev. 617 (1987)
- Lawrence Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma," 54 U. of 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 Legal Studies 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)
- 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)

7. Outsider Perspectives: Feminist and Critical Race Legal Theories

- Assigned Reading

- Ann Scales, "The Emergence of a Feminist Jurisprudence: An Essay," 95 Yale L.J. 1373 (1986)
- Robin West, "Jurisprudence and Gender," 55 U. Chi. L. Rev. 1 (1988)
- 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. Civ. Rights-Civ. Lib. L. Rev. 304 (1987)

- Discussion Questions

1. According to Scales, what is the "tyranny of objectivity" and how does it impact feminist methods of legal theorizing?

2. What is the “separation thesis”? Why does it not apply to women? Are West’s claims based on culture or biology?
2. What are some of the central criticisms of Critical Legal Studies, from a feminist/critical race theory perspective, according to Deborah Rhode and Richard Delgado?

- Recommended Reading

- Patricia Williams, “Reconstructing Ideals from Deconstructed Rights,” 22 Harv. Civ. Rights-Civ. Lib. L. Rev. 423 (1987)
- Mari J. Matsuda, “Looking to the Bottom: Critical Legal Studies and Reparations,” 22 Harv. Civ. Rights – Civ. Lib. L. Rev. 323 (1987)
- Martha Minow, “Beyond Universality,” U. Chi. Leg. Forum 115 (1989)
- Katherine Bartlett, “Feminist Legal Methods,” 103 Harvard L. Rev. 829 (1990)
- Angela Harris, “Race and Essentialism in Feminist Legal Theory,” 42 Stanford 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 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)

PART TWO - JUDICIAL REASONING & THE LAW/POLITICS DISTINCTION

8. Common Law Reasoning

- Assigned Reading

- 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)

- Discussion Questions

1. What are the four features of analogical reasoning, according to Sunstein?
2. Given the importance of stare decisis, why might it be beneficial to revise or overturn precedent?

- Recommended Reading

- Oliver Wendell Holmes, Jr., *The Common Law* (ed. 1963)
- Edward H. Levi, *An Introduction to Legal Reasoning*, (1949)
- Larry Alexander, "Constrained by Precedent," 63 S. Cal. L. Rev. 1 (1989)
- Frederick Schauer, "Precedent," 39 Stan. L. Rev. 571 (1987)
- Richard Posner, *The Problems of Jurisprudence* 86-98 (1990)

9. Statutory Interpretation

- Assigned Reading

- 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)
- Karl N. Llewellyn, "Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed," in *American Legal Realism* 228-31 (William W. Fisher III et al., eds., 1993).

- Discussion Questions

1. Why does Levi think statutory interpretation differs from interpreting case law?
2. What role should the intent of legislatures play in interpreting statutes?
3. What are “canons of construction” and what kind of constraint to they place on judges when interpreting statutes?

- Recommended Reading

- William Eskridge, “The New Textualism,” 37 UCLA L. Rev. 621 (1990)
- 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)
- Jerry Mashaw, *Chaos, Greed, and Governance: Using Public Choice to Improve Public Law* (1997)
- William Eskridge, et. al., *Legislation and Statutory Interpretation* (2000)

11. Constitutional Interpretation: Originalism

- Assigned Reading

- Paul Brest, “The Misconceived Quest for the Original Understanding,” 60 Boston 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, *A Matter of Interpretation* (1997)

- Discussion Questions

1. Why, according to Brest, is an originalist approach such a futile one?
2. How does Kay assess the final objection to originalism – that “it makes for bad government and bad law”?
3. What, according to Scalia, is the proper role of the judge? Is the role different depending on whether he/she is interpreting statutes or the Constitution?

- 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, *Interpreting the Constitution: The Debate Over Original Intent* (1990)
- Robert Bork, *The Tempting of America* (1991)
- Keith E. Whittington, *Constitutional Interpretation: Textual Meaning, Original Intent, and Judicial Review* (1999)
- Symposium on "Fidelity in Constitutional Theory," 65 Fordham 1247-1818 (1997)
- Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (2004)

12. 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)
- Stephen Breyer, *Active Liberty: Interpreting Our Democratic Constitution* (2005)
- ACS/Federalist Society Conversation with Justices Breyer and Scalia, December 5, 2006, <http://www.acslaw.org/node/3909>.

- Discussion Questions

1. What is the "countermajoritarian difficulty"? What is the difference between the "conventional morality" theorists and the "rights" theorists, according to Brest? Why do process-theorists, like John Hart Ely, criticize the rights theorists? What is the "level of abstraction" problem? Do you agree with Brest's skeptical conclusion that there is no principled way to resolve these debates?
2. Dworkin believes the constitution must be read in a way that helps realize "our" ideal of a good society. Can constitutional interpretation,

when it proceeds in this way to promote normative aspirations, still be considered “law” and not politics?

3. Does Breyer offer an appealing alternative to Dworkin, or is his approach also susceptible to the critique that it gives too much power to unelected judges?

- Recommended Reading

- Thomas C. Grey, “Do We Have an Unwritten Constitution?” 27 *Stan. Law Review* 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)
- James Fleming, “Securing Deliberative Autonomy,” 48 *Stanford Law Review* 1(1995)
- Ronald Dworkin, *Freedom’s Law: The Moral Reading of the Constitution* (1997)
- James Fleming, *Securing Constitutional Democracy* (2006)