

POLS 5380—LEGAL INTERPRETATION: PHILOSOPHY AND JUDICIAL BEHAVIOR (INDEPENDENT STUDY)

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COURSE DESCRIPTION

This course will help students understand legal interpretation and hermeneutics for the federal judiciary by engaging in a dialogue between legal philosophy and empirical political science examining judicial decision making. Students will become familiar with leading models of legal interpretation across constitutional and statutory texts within the United States federal judiciary, focusing on the Supreme Court. This course thus takes an interdisciplinary approach to legal interpretation, the philosophy of law, judicial decision making, and the rule of law.

LEARNING OUTCOMES

Over the course of the semester students will have:

- An understanding of legal interpretation from the standpoints of empirical public law and philosophical hermeneutics
- Become familiar with the arguments of prominent thinkers such as Martin Heidegger, Hans-Georg Gadamer, Ronald Dworkin, and Jacques Derrida
- Critically evaluate alternative models of legal interpretation and alternative methods
- Become familiar with empirical research on judicial decision making
- Evaluate differences in statutory and constitutional interpretations
- Generated an original research paper that would be appropriate for conference presentation or publication

COURSE REQUIREMENTS AND GRADING

Evaluation in this course will be based on the following components:

Weekly Reading Response Papers (5)	30%
Research Question and Outline	10%
Research Paper Draft	20%
Final Research Paper	40%

The grading scale is as follows:

90-100	A
80-89	B
70-79	C
60-69	D
59 and below	F

Weekly Reading Response Papers: Each week (for 5 individual weeks of their choosing) students are required to turn in a (typed, hard copy) 3-5 page paper synthesizing and evaluating the readings due that week. These papers should synthesize the week's readings to concisely discuss how the readings interact with each other and what conclusions can be drawn from these readings as well as evaluate any limitations (theoretical or empirical) in these works. These papers will be evaluated upon the depth of understanding and writing quality (such as organization, spelling, grammar, clarity, etc.). These papers are not due every week throughout the semester, rather only 5 weeks selected by the students require a paper due in class. As such, it is the student's responsibility to ensure the completion of these assignments. These 5 papers will be averaged to produce the score weighted for the final course grade.

Research Paper: Due on **December 2nd**, students must submit a typed, hard-copy, 15-20 page research paper on original research. References must be included. This paper will be evaluated on clarity and specification of the research question and theoretical argument, the synthesis of the literature review, the appropriateness of the research design and methods, the quality of the quantitative or qualitative analysis, the proper interpretation of results, the presence and quality of diagnostic analyses (if appropriate), and writing quality, such as organization, clarity, spelling, and grammar. I welcome the submission of drafts to me prior to the deadline for revisions and feedback.

*Students must submit their research question and proposal/ proposed outline by **September 26th** (or Week 6).* The student must identify an appropriate research question and address why such a question is important and relevant (i.e. why should people care?). In addition, the proposal or outline should provide a tentative structure to what the paper will encompass and its framework.

*Students must turn in (typed, hard-copy) rough draft of their paper by **November 23rd** (or week 14).* This paper will be evaluated on clarity and specification of the research question and theoretical argument, the synthesis of the literature review, the appropriateness of the research design and methods, the quality of the quantitative or qualitative analysis, the proper interpretation of results, the presence and quality of diagnostic analyses (if appropriate), and writing quality, such as organization, clarity, spelling, and grammar. As such, this draft is designed to provide feedback to students prior to their final submission.

SPECIAL NEEDS

If you have a disability and need classroom accommodations, please contact The Center for Accommodations and Support Services (CASS) at 747-5148, or by email to cass@utep.edu, or visit their office located in UTEP Union East, Room 106. For additional information, please visit the CASS website at www.sa.utep.edu/cass. *CASS' Staff are the only individuals who can validate and if need be, authorize accommodations for students with disabilities.* Additionally, students with special needs **must** contact me in order to arrange appropriate accommodations.

ACADEMIC DISHONESTY

Absolutely no form of academic dishonesty will be tolerated. The University of Texas at El Paso prides itself on its standards of academic excellence. In all matters of intellectual pursuit, UTEP faculty and students must strive to achieve excellence based on the quality of work produced by the individual. In the classroom and in all other academic activities, students are expected to uphold the highest standards of academic integrity. Any form of scholastic dishonesty is an affront to the pursuit of knowledge and jeopardizes the quality of the degree awarded to all graduates of UTEP. It is imperative, therefore, that the members of this academic community understand the regulations pertaining to academic integrity and that all faculty insist on adherence to these standards.

Any student who commits an act of scholastic dishonesty is subject to discipline. Scholastic dishonesty includes, but is not limited to, cheating, plagiarism, collusion, the submission for credit of any work or materials that are attributable in whole or in part to another person, taking an examination for another person, and any act designed to give unfair advantage to a student or the attempt to commit such acts. Proven violations of the detailed regulations, as printed in the Handbook of Operating Procedures (HOP) and available in the Office of the Dean of Students and the homepage of The Dean of Students at www.utep.edu/dos, may result in sanctions ranging from disciplinary probation, to a failing grade on the work in question, to a failing grade in the course, to suspension or dismissal, among others.

GENERAL EXPECTATIONS

I expect all students to behave professionally in this class. You will be held responsible for all material covered in the textbooks, quizzes, articles, videos, and the class discussions. If you miss a class, you are still responsible for the content of that day's information. I will not tolerate disruptive behavior, including (but not limited to) reading newspapers, talking during lectures, using cell phones or pagers, and disrespecting classmates or the instructor. Additionally, I expect all students to attend class prepared and to show up on time. It is disrespectful to the instructor and the other students when individuals show up late or are not prepared to participate in the class discussion. I allow the use of laptops and phones for note-taking, research, and class assignment purposes only; however, should laptop usage become disruptive, I reserve the right to prohibit laptops and other electronic devices.

This class is designed to provide information and challenge students with new, sometimes controversial, ideas, and arguments. This class is designed to be a safe, open environment to express ideas, arguments, and opinions for learning purposes. This class

is designed to initiate an open discussion based upon the required readings, encourage critical thinking and application to current events, and enable students to digest difficult material through these discussions. *This class DOES NOT give you knowledge—i.e. knowledge and understanding is not transfused to students by simply sitting in class. Learning is an interactive process and one that is the primary responsibility of each student.*

Late assignments will receive no credit.

All grades are earned and reflect your reflect the mastery of material through the adequate completion of assignments by their deadline. As such, they do not reflect level of effort, interest, or intention. **I will not change final grades for the course under any circumstances,** with the single exception of cases where an error occurred.

COURSE SCHEDULE

The following is a list of topics to be covered at each class meeting. I *require* you to read the appropriate material prior to the class. Articles will be provided in Blackboard or email whenever possible. The calendar is subject to change, yet any alterations to the course schedule will be clearly announced. (As a general rule the course will follow this order of topics, regardless of date changes, unless otherwise announced.)

- Week 1: Martin Heidegger - "Language"
 Fred Dallmayr - "Hermeneutics and the Rule of Law"
 Ronald Dworkin- *The Philosophy of Law*
- Week 2: Martin Heidegger - "Dialogue on Language"
 Gerald L. Bruns - "Law and Language: A Hermeneutics of the Legal Text"
 Jeffrey Segal and Howard Spaeth – *The Supreme Court and the Attitudinal Model Revisited*
- Week 3: Martin Heidegger - "The Nature of Language"
 Francis J. Mootz, III - "Law and Philosophy, Philosophy and Law"
 Lawrence Baum – “What Judges Want: Judges’ Goals and Judicial Behavior”
 Daniel Pinello – “Linking Party to Judicial Ideology in American Courts: A Meta-Analysis”
 Jack Knight and Lee Epstein – “The Norm of Stare Decisis”
 Gregory Leyh - “Toward a Constitutional Hermeneutics.”
- Week 4: Martin Heidegger - "Words"
 Dennis J. Schmidt - "Can Law Survive? On Incommensurability and the Rule of Law"

- Mark Richards and Herbert Kritzer – “Jurisprudential Regimes in Supreme Court Decision Making”
 Kirk Randazzo and Richard Waterman – “The U.S. Supreme Court and the Model of Contingent Discretion”
 C.R. Sunstein, “On Analogical Reasoning”
- Week 5: Martin Heidegger - "The Way to Language"
 Michael J. Clark - "Foucault, Gadamer, and the Law: Hermeneutics in Postmodern Legal Thought"
 Donald Songer and Stefanie Lindquist – “Not the Whole Story: The Impact of the Justices’ Values on Supreme Court Decision Making”
 Frank Cross – “Political Science and the New Legal Realism”
 Howard Gillman – “What’s Law Got to Do with It?”
 K.M. Gebbia-Pinetti - “Statutory Interpretation, Democratic Legitimacy and Legal-system”
- Week 6: Hans-Georg Gadamer - *Truth and Method*, Ch. 3 (172-266)
 James Farr - "The Americanization of Hermeneutics: Francis Lieber’s Legal and Political Hermeneutics"
 Stephen Feldman – “The Rule of Law of the Rule of Politics?”
 J. Habermas - *Between Facts and Norms*
- Week 7: Hans-Georg Gadamer - *Truth and Method*, Ch. 4 (267-383)
 Terence Ball - "Constitutional Interpretation and Conceptual Change"
 Robert Howard and Jeffrey Segal – “An Original Look at Originalism”
 Herbert Kritzer and Mark Richards – “Jurisprudential Regimes and Supreme Court Decision Making”
 K. Werbach - “Looking It Up: The Supreme Court’s Use of Dictionaries in Statutory and Constitutional Interpretation”
 G.H. Taylor - “Structural Textualism”
- Week 8: Hans-Georg Gadamer - *Truth and Method*, Ch. 5 (384-492)
 David Couzens Hoy - "Intentions and the Law: Defending Hermeneutics"
 Lee Epstein ad Jack Knight – *The Choices Justices Make*
- Week 9: Jacques Derrida - *Of Grammatology*, Part I
 Mark Kelman - "Interpretive Construction in the Substantive Criminal Law"
 Antonin Scalia - *A Matter of Interpretation. Federal Courts and the Law*
- Week 10: Jacques Derrida - *Of Grammatology*, Part II (95-194)
 Stanley Fish - "Fish V. Fiss"
 Dan Simon – “A Psychological Model of Judicial Decision Making”
 S. Soames - “Interpreting Legal Texts: What is, and What is not, Special about the Law.” In *Philosophical Essays*, Vol. 1
 R. Alexy, “The Construction of Constitutional Rights.”

M.B.E. Smith, "Is There a Prima Facie Obligation to Obey the Law?,"

- Week 11: Jacques Derrida - *Of Grammatology*, Part II (195-316)
Jack Balkin - "Deconstructive Practice and Legal Theory"
J.F. Manning, "Textualism and Legislative Intent."
P. Brest, "Misconceived Quest for Original Understanding."
S. Vogenauer, "What Is the Proper Role of Legislative Intention in Judicial Interpretation?"
J. Goldsworthy, "Legislative Intentions, Legislative Supremacy, and Legal Positivism."
- Week 12: Jacques Derrida - "Structure, Sign, and Play in the Discourse of the Human Sciences"; "The Force of Law"
Drucilla Cornell - "Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation" (1-39)
W.N. Eskridge Jr., "Dynamic Statutory Interpretation."
C.R. Sunstein, "Interpreting Statutes in the Regulatory State."
- Week 13: Jacques Derrida - "Force and Significance"; "The Theater of Cruelty and the Closure of Representation"
Drucilla Cornell - "Institutionalization of Meaning " (40-95)
Ronald Dworkin, *Freedom's Law*
- Week 14: Jacques Derrida - "Violence and Metaphysics"
Duncan Kennedy - "A Semiotics of Critique"
Philip Bobbitt - *Constitutional Interpretation*
- Week 15: Jacques Derrida - "Plato's Pharmacy"
Pierre Schlag - "A Brief Survey of Deconstruction"
Michel Rosenfeld - *Just Interpretations*

Appendix: Additional Readings

- Aquinas, Thomas (1998) *On Law, Morality, and Politics*. Ed. William P. Baumgarth and Richard J. Regan Indianapolis: Hackett Publishing Co.
- Aristotle (350 B.C.E./ 2000) *On Interpretation*. Trans. E.M. Edghill. Adelaide: University of Adelaide Library.
- Balkin, J.M. (2011) *Living Originalism*. Cambridge: Belknap Press of Harvard University Press.
- Balkin, J.M. (2010) "Deconstruction" in *A Companion to Philosophy of Law and Legal Theory (Second Edition)*, Dennis Patterson, ed., Malden: Wiley-Blackwell.
- Balkin, J.M. (1993) "Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence," 103 *Yale Law Journal* 105.
- Binder, Guyora (1996/1999) "Critical Legal Studies," in *A Companion to Philosophy of Law and Legal Theory*. Ed. Dennis Patterson, Malden: Blackwell Publishing, 280-290.
- Bleicher, J. (1980) *Contemporary Hermeneutics: Hermeneutics as Method, Philosophy and Critique*. London, Boston: Routledge & Kegan Paul.
- Bobbit, Phillip (1982) "A Typology of Constitutional Arguments." *Constitutional Fate: Theory of the Constitution*. Oxford: Oxford University Press.
- Brest, Paul (1980) "The Misconceived Quest for the Original Understanding," 60 *B.U. L. Rev.* 204.
- Brink, David (2001) "Legal Interpretation and Morality," in B. Leiter (ed.), *Objectivity in Law and Morals*. Cambridge: Cambridge University Press.
- Bruns, Gerald L. (1992) "Law and Language: A Hermeneutics of the Legal Text," in *Legal Hermeneutics: History, Theory, and Practice*, ed. Gregory Leyh, Berkeley: University of California Press, 23-40.
- Burley, Justine (ed.) (2004) *Dworkin and His Critics: With Replies by Dworkin*. Oxford: Blackwell.
- Calabresi, Steven (2007) *Originalism: A Quarter-Century of Debate*. Washington, D.C.: Regnery Pub.
- Campos, Paul (1992) "Against Constitutional Theory," *Yale Journal of Law and the Humanities* 4.
- Campos, Paul (1993) "That Obscure Object of Desire: Hermeneutics and the

- Autonomous Legal Text,” *Minnesota Law Review* 77.
- (Di) Cesare, Donatella (2005) “Reinterpreting Hermeneutics,” *Philosophy Today*, 49(4): 325-332.
- Chamallas, Martha (2003) *Introduction to Feminist Legal Theory*. 2nd Ed. New York: Aspen Publishers.
- Cross, Frank B. (2013) *The Failed Promise of Originalism*. Stanford: Stanford Law Books, an imprint of Stanford University Press.
- Derrida, Jacques (1978) *Writing and Difference*. Trans. A. Bass. London: Routledge & Kegan Paul.
- Derrida, Jacques (1992) "Before the Law" in *Acts of Literature*. Ed. Derek Attridge. New York and London: Routledge, 181-220.
- Dickson, Julie (2001) *Evaluation and Legal Theory*. Oxford: Hart Publishing.
- Douzinas, Costas, Ronnie Warrington and Shaun McVeigh (1991) *Postmodern Jurisprudence: The Law of Text in the Texts of Law*. London, New York: Routledge.
- Dworkin, Ronald (1983) “My Reply to Stanley Fish (and Walter Benn Michaels): Please Don’t Talk about Objectivity Any More,” in Mitchell, W.J.T., ed., *The Politics of Interpretation*. Chicago: University of Chicago Press, 287-313.
- Dworkin, Ronald (1985) *A Matter of Principle*. Cambridge: Harvard University Press.
- Dworkin, Ronald (1986) *Law’s Empire*. Cambridge: Harvard University Press.
- Dworkin, Ronald (1996) “Objectivity and Truth: You’d Better Believe It,” *Philosophy and Public Affairs*, 25:88.
- Dworkin, Ronald (2011) *Justice for Hedgehogs*. Cambridge: Harvard University Press.
- Feldman, Stephen Matthew (1991) “The New Metaphysics: The Interpretive Turn in Jurisprudence,” *Iowa Law Review*, Vol. 76, 1991.
- Figal, Günter (2010) *Objectivity: The Hermeneutical and Philosophy*. Albany: State University of New York Press.
- Finnis, John (1980) *Natural Law and Natural Rights*. Oxford: Clarendon Press.
- Finnis, John (1969) *The Morality of Law*. New Haven: *Yale University Press, rev. edn.*
- Fiss, Owen (1982) “Objectivity and Interpretation,” *Stanford Law Review*, 34: 739-763.

- Fish, Stanley (1999) *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies*. Durham, London: Duke University Press.
- Fricker, M. (2007) *Epistemic Injustice: Power and Ethics of Knowing*, Oxford: Oxford University Press.
- Fuller, Lon (1958) "Positivism and fidelity to law—a response to Professor Hart." *Harvard Law Review*, 71: 630-72.
- Gadamer, Hans-George (1975) *Truth and Method*. London: *Sheed & Ward*.
- Gardner, John (2001) "Legal Positivism: 5 ½ Myths," 46 *American Journal of Jurisprudence*, 199.
- Geniusas, Saulius (2015) "Between Phenomenology and Hermeneutics: Paul Ricoeur's Philosophy of Imagination," *Human Studies: A Journal for Philosophy and the Social Sciences*, 38: 2, 223-241.
- Gibbons, Michael T. (2006) "Hermeneutics, Political Inquiry, and Practical Reason: An Evolving Challenge to Political Science," *The American Political Science Review*, 100(4): 563-571.
- Goodwin, Liu (2010) *Keeping Faith with the Constitution*. *Oxford: Oxford University Press*.
- Greenberg, Mark (2004) "How Facts Make Law," *Legal Theory*, 10: 157-98.
- Habermas, Jürgen (1971) "Der Universalitätsanspruch der Hermeneutik" (The Hermeneutic Claim to Universality) in Karl- Otto Apel et al., eds., *Hermeneutik und Ideologiekritik (Hermeneutics and Ideology)* Frankfurt: Suhrkamp, 120-158.
- Hart, H.L.A. (1961) *The Concept of Law* Oxford. Oxford: Oxford University Press.
- Hart, H.L.A. (1958) "Positivism and the Separation of law and Morals." *Harvard Law Review* 71: 593- 629.
- Heidegger, Martin (2008) *Being and Time*. Trans. John Macquarrie and Edward Robinson. New York: HarperPerennial/Modern Thought. (Translation of *Sein und Zeit*. Reprint. Originally published: Harper & Row, 1962).
- Hekman, Susan (1986) *Hermeneutics and the Sociology of Knowledge*. Notre Dame: University of Notre Dame Press.
- Hershovitz, Scott (ed.) (2006) *Exploring Law's Empire*. Oxford: Oxford University Press.

- Hiley, David R. et al. (eds.) (1991) *The Interpretive Turn: Philosophy, Science, Culture*. Ithaca: Cornell University Press.
- Hoy, David Couzens (1992) "Intentions and the Law: Defending Hermeneutics," in *Legal Hermeneutics: History, Theory, and Practice*. Ed. Gregory Leyh. Berkeley, Los Angeles, Oxford: University of California Press.
- Hoy, David Couzens (1987) "Dworkin's Constructive Optimism v. Deconstructive Legal Nihilism," *Law and Philosophy* 6: 321-56.
- Hoy, David Couzens (1985) "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," *Southern California Law Review* 58: 136-76.
- Hunt, Alan (1996, 1999) "Marxist Theory of Law". In *A Companion to Philosophy of Law and Legal Theory*. Ed. Dennis Patterson, Malden: Blackwell Publishing, 355-366.
- Levinson, Sanford and Steven Mailloux (1988) *Interpreting Law and Literature: A Hermeneutic Reader*. Evanston: Northwestern University Press.
- Levit, Nancy and Robert R.M. Verchick, *Feminist Legal Theory*, New York, London: New York University Press.
- Leyh, Gregory (ed.) (1992) *Legal Hermeneutics: History, Theory, and Practice*. Berkeley, Los Angeles, Oxford: University of California Press.
- Lieber, Francis (2010/1880) *Legal and Political Hermeneutics*. Lawbook Exchange, Ltd. Malpas, Jeff and Hans-Helmuth Gander (eds.) (2014) *The Routledge Companion to Hermeneutics*. London, New York: Routledge, Taylor & Francis Group.
- Malpas, Jeff and Hans-Helmuth Gander (1992) "Analysis and Hermeneutics," *Philosophy & Rhetoric*, 25(2): 93-123.
- Minda, Gary (1995) *Postmodern Legal Movements*. New York, London: New York University Press.
- Monaghan, Henry Paul (2004) "Doing Originalism," *Columbia Law Review*, 104(1): 32-38.
- Mootz, Francis J., III (1994) "The New Legal Hermeneutics," 47 Vand. L. Rev. 116.
- Mootz, Francis J., III (1988) "The Ontological Basis of Legal Hermeneutics: A Proposed Model of Inquiry Based on the Work of Gadamer, Habermas, and Ricoeur," 68 B.U.L. Rev. 523.
- Murphy, Mark C. (2006) *Natural Law in Jurisprudence & Politics*. Cambridge:

Cambridge University Press.

- Nenon, Tom (1995) "Hermeneutical Truth and the Structure of Human Experience: Gadamer's Critique of Dilthey," in *The Specter of Relativism: Truth, Dialogue, and Phronesis in Philosophical Hermeneutics*, ed. Schmidt, Lawrence. Evanston: Northwestern University Press. 39-55.
- Palmer, Richard E. (1969) *Hermeneutics: Interpretation Theory in Schleiermacher, Dilthey, Heidegger, and Gadamer*. Evanston: Northwestern University Press.
- Pashukanis, Evgeny (1924/2002) *The General Theory of Law and Marxism*. New Brunswick: Transaction Publishers.
- Patterson, Dennis (ed.) (2003) *Philosophy of Law and Legal Theory*. Malden: Blackwell Publishing.
- Patterson, Dennis (1996/1999) "Postmodernism." In *A Companion to Philosophy of Law and Legal Theory*. Ed. Dennis Patterson, Malden: Blackwell Publishing, 375-384.
- Patterson, Dennis (1996) *Law and Truth*. Oxford, New York: Oxford University Press.
- Pérez-Gómez, Alberto (1999) "Hermeneutics as Discourse in Design," *Design Issues*, 15(2) Design Research: 71-79.
- Raz, Joseph (2009) *Between Authority and Interpretation: On the Theory of Law & Practical Reason*, Oxford: Oxford University Press.
- Ricoeur, P. (1974) *The Conflict of Interpretations*. Evanston: Northwestern University Press.
- Rorty, Richard (2007) *Philosophy as Cultural Politics*. Cambridge: Cambridge University Press.
- Scalia, Antonin and Bryan Garner (2010) *Reading Law: The Interpretation of Legal Texts*. St. Paul: Thomson/West.
- Schmidt, Lawrence (2006) *Understanding Hermeneutics*. Stocksfield: Acumen Publishing Ltd.
- Taylor, George H. (2000) "Hermeneutics and Critique in Legal Practice: Critical Hermeneutics: The Intertwining of Explanation and Understanding as Exemplified in Legal Analysis," 76 Chi.-Kent L. Rev. 1101.
- Valauri, John T. (2010) "As Time Goes By: Hermeneutics and Originalism," *Nevada Law Review*, August 23, 2010.
- Valauri, John T. (1991) "Constitutional Hermeneutics" in *The Interpretive Turn:*

Philosophy, Science, Culture, David R. Hiley, James F. Bohman, and Richard Shusterman, eds. Ithaca: Cornell University Press.

Vedder, Ben (2002) "Religion and Hermeneutic Philosophy," *International Journal for Philosophy and Religion*, 51(1): 39-54.

Wachterhauser, Brice R (ed.) (1994) *Hermeneutics and Truth*. Evanston: Northwestern University Press.

Warner, Richard (1996, 1999) "Legal Pragmatism" In *A Companion to Philosophy of Law and Legal Theory*. ed. Dennis Patterson, Malden: Blackwell Publishing, 385-393.

Warnke, Georgia (1993) *Justice and Interpretation*. Cambridge: MIT Press.

West, Robin L. (2000) "Commentary: Are There Nothing but Texts in this Class? Interpreting the Interpretive turns in Legal Thought," *Chicago-Kent College of Law Chicago-Kent Law Review*, 76 Chi.-Kent L. Rev. 1125, 19547.