

**PHIL 171: Topics in Philosophy of Law**  
**Spring 2024; MWF 9-9:50am; RWAC 0426**  
**Topic: Law, Interpretation, and Judicial Review**  
**Professor David O. Brink**

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## **CONTENT**

This is the first offering of PHIL 171, and the course has variable content. This quarter we will focus on issues in analytical and constitutional jurisprudence. Within analytical jurisprudence, we will discuss issues about the nature of law and legal interpretation. Within constitutional jurisprudence, we will discuss general issues about constitutional interpretation and judicial review in a constitutional democracy, substantive due process and its legacy, and selected controversies about particular constitutional rights (e.g. abortion, freedom of association and anti-discrimination norms, voting rights, administrative deference, and second amendment rights).

We'll emphasize the interaction between issues in analytical and constitutional jurisprudence. In particular, we'll use landmark constitutional cases and principles to test rival conceptions of interpretation, and we'll see what different interpretive theories imply about the adequacy of different constitutional decisions and rationales. We'll discuss the recent *originalist* turn in the legal academy and on the Supreme Court and the striking rightward shift the Court has made on a variety of issues about the constitutional rights, examining both the rationale for the Court's decisions and the implications of these decisions.

Part of the inspiration for this course was an Ezra Klein podcast interview (July 1, 2022) with Professor Kate Shaw, who teaches constitutional law at Cardozo Law School (<https://podcasts.apple.com/us/podcast/the-ezra-klein-show/id1548604447?i=1000568416880>). I recommend listening to the podcast, both as a trailer for the second half of this course and as a secondary source when we get there. Shaw runs her own podcast with Professors Leah Litman and Melissa Murray called Strict Scrutiny (<https://crooked.com/podcast-series/strict-scrutiny>), which analyzes SCOTUS developments.

## **FORMAT**

Class meetings will involve lecture, seasoned with discussion. The lectures provide philosophical background and structure to the issues raised by the readings and will present and assess these issues in a systematic way. I hope and expect that students will be engaged by the material and ask questions and make comments. I'll use PowerPoint slides during class and will post those slides to the course website on Canvas after class.

Students are expected to come to lecture regularly and be prepared. Students who attend lectures and participate in discussion do better on class assignments, and attendance and participation play a role in one's overall grade.

## **REQUIREMENTS & GRADING**

Work for the course will consist of five bi-weekly quizzes and two papers. There will be no final exam. Attendance and participation will also be a component of a student's overall grade.

- **Quizzes.** Five bi-weekly quizzes will be administered online, through the Canvas website. They will take no more than 10 minutes and consist of true/false and multiple-choice questions. The quizzes test basic comprehension of the readings and lectures. Quizzes can be taken within a 48-hour window between Friday 3pm and Sunday 3pm. They are timed. Students are expected to prepare in advance. The quizzes are not open-book, and students may not collaborate in taking them. The quizzes will be (begin) Friday, April 11; Friday, April 25; Friday, May 9; Friday, May 23; and Friday, June 6. Your quiz

grade will be calculated based on your four best quiz scores (throwing out your lowest score). Collectively, the quizzes will be worth 35% of your overall grade.

- **Missed Quizzes.** There is more than adequate notice and opportunity for students to take the quizzes, and students can take the quizzes at their convenience during a 48-hour period. Since the lowest quiz score will be dropped, opportunities to make-up a missed quiz will be limited and exceptional. They are limited to unavoidable conflicts; they must be justified in writing with suitable documentation in advance or, where that is not possible, immediately after the administration of the quiz in question. Do not ask if you can make-up a quiz you forgot to take.
- **The First Paper.** The first paper should be about 1K words (+/-). It will be due by 5pm, Monday, May 6 (week #6) but can be submitted earlier. Paper topics will be distributed well in advance of the due date. The first paper will be worth 20% of your overall grade.
- **The Second Paper.** The second paper should be 1.5-2K words (+/-). It will be due by 5pm on Wednesday, June 12 but can be submitted earlier. Paper topics will be distributed well in advance of the due date. The second paper will be worth 30% of your overall grade.
- **Submission of Papers.** Students will be expected to submit papers electronically, via turnitin.com on the Canvas website.
- **Late Papers.** If students require an extension on the (first) paper, they must request and justify an extension in advance via email. Late papers (for which an extension was not approved in advance) will lose one full grade for every day (24-hour period) late. For instance, a paper that would have received an A- if handed in on time will receive a C- if handed in two days (more than 24 hours and not more than 48 hours) late. So, if you hand in an A- paper 25 hours late, that counts as two days late, and the paper will get a C-.
- **Plagiarism.** Students should note that plagiarism is a violation of the Principles of Academic Integrity (<http://senate.ucsd.edu/manual/appendices/app2.htm>). Anyone determined to have violated these principles will fail the assignment and the course and will be reported to the Office of Academic Integrity. Use of ChatGPT or other LMM to write your papers counts as plagiarism for purposes of this course. If you have any doubts about what constitutes plagiarism or other academic misconduct, please consult with your TA *in advance*.
- **Attendance and Participation.** Students are expected to attend class and participate on a regular basis, and I'll take note of frequent absences. Attendance and participation will count for 15% of your grade. If you have a medical reason or unavoidable conflict that prevents you from attending one or more classes, it would be prudent to explain your absence to me by email.
- **Grade Breakdown.** As percentages of your total grade: the quizzes collectively = 35%; the first paper = 20%; the second paper = 30%; and attendance and participation = 15%.

## BOOKS

All the readings for the course are available as PDFs on the Canvas course website. However, I have also ordered paperback copies of three of the texts we will be discussing in some detail from the university bookstore for those who prefer to read these texts in hard copy.

- H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961/2012).
- John Hart Ely, *Democracy & Distrust* (Cambridge: Harvard University Press, 1980).
- Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).

The paperback editions in the bookstore should be pretty inexpensive, but you could also find new or used paperback copies online (e.g. at Amazon). Additional required readings and constitutional cases will be posted on the course website.

## READINGS

The reading assignments are listed on the Syllabus. It is important to read the assignments on time.

**WEBSITE**

All course materials and handouts will be posted on the course website, available through Canvas on Course Finder (<https://coursefinder.ucsd.edu>). Students enrolled in the course should have automatic access to the website. You should check periodically to make sure that you have current versions of all the handouts, which are revised or updated periodically.

**STUDENT RESPONSIBILITIES**

In addition to doing the readings and completing the assignments, students need to know and comply with the course policies and requirements described here. Exceptions to these policies and requirements will be made only in cases where the student had an unavoidable conflict, beyond their control, which they document in a timely manner. Exceptions will not be granted to accommodate student negligence.

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**Syllabus**

This is a new course, and a new course for me. Some issues I haven't taught for a while, and others I haven't taught before. So I'm a little unsure about what sort of schedule and pace are reasonable. As a result, I've listed the topics and readings in the order in which I'd like to discuss them, but I haven't tried to tie readings to particular classes or dates. Each topic may correspond to a week in the quarter, but that's probably a rough approximation and shouldn't be taken for granted. If we proceed more slowly, we may need to modify the Syllabus. I will give regular indications of where we are in the Syllabus in class, and students should feel free to ask me if they are unclear.

The readings are either (A) required or (B) optional and recommended. Within a topic, do the readings in the order in which they are listed.

PDFs of the required and recommended readings are posted on the website. I have ordered hard copies of three books that we will discuss in some detail.

- HLA Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961/2012)
- Ronald Dworkin, *Law's Empire* (Cambridge: Harvard University Press, 1986).
- John Hart Ely, *Democracy & Distrust* (Cambridge: Harvard University Press, 1980)

They are available for purchase at the campus bookstore (or online) for students who would like hard copies.

Topic #1: Hart's Model of Rules and Legal Realism

- (A) HLA Hart, *The Concept of Law*, chs. 5-7 and 9; Oliver Wendell Holmes, "The Path of the Law;" and J.C. Gray, *The Nature and Sources of the Law* (selections).

Topic #2: Hard Cases, Judicial Discretion, and Legal Interpretation

- (A) Ronald Dworkin, "The Model of Rules" and Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law*, pp. 3-47.
- (B) *Plessy v. Ferguson* (1896) and *Brown v. Board of Education* (1954).

Topic #3: Dworkin and Constructive Interpretation

- (A) Ronald Dworkin, *Law's Empire*, chs. 1-2 and 6-7.
- (B) David O. Brink, "Originalism and Constructive Interpretation."

Topic #4: Substantive Due Process

- (A) *The United States Constitution*, esp. Article III and Amendments I-IX and XIV; *Lochner v. New York* (1905); *Griswold v. Connecticut* (1965); *Bowers v. Hardwick* (1986); *Lawrence v. Texas* (2003); and *Obergefell v. Hodges* (2015).
- (B) *Slaughter-House Cases* (1873); *Nebbia v. New York* (1934); *West Coast Hotel v. Parrish* (1937); *Williamson v. Lee Optical* (1955); and *Palko v. Connecticut* (1937).

Topic #5: Judicial Review

- (A) John Hart Ely, *Democracy & Distrust*, esp. chs. 4-5 and Jeremy Waldron, "The Core of the Case Against Judicial Review."
- (B) David O. Brink, "Legal Theory, Legal Interpretation, and Judicial Review."

Topic #6: Abortion Before and After Dobbs

- (A) *Roe v. Wade* (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey* (1992); *Dobbs v. Jackson Women's Health Organization* (2022).

Topic #7: Freedom of Association and Anti-Discrimination Norms

- (A) Heart of Atlanta Motel v. United States (1964) and Masterpiece Cakeshop v. Colorado Civil Rights Commission (2018).

Topic #8: Voting Rights

- (A) Reynolds v. Sims (1964); Shelby County v. Holder (2013); and Rucho v. Common Cause (2019).

Topic #9: Administrative Deference

- (A) Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc. (1984) and West Virginia v. EPA (2022).

Topic #10: The Second Amendment

- (A) District of Columbia v. Heller (2008) and New York State Rifle & Pistol Association, Inc. v. Bruen (2022) [= NYSRPA II].