This version: January 29, 2023
Click here for latest version
Author: Marie-Lou Laprise (License: CC-BY-SA)

SOC499/LAW199: Law, Society, and Political Economy

SYLLABUS

COURSE OVERVIEW

This 12-week seminar will introduce students to existing scholarship and promising research methods on how legal institutions shape social and economic relations and create corporate power and social inequality, with a focus on North America in the past 200 years. It is designed for upper-level undergraduates or first semester J.D. or business school students. Undergraduates who are considering law school should particularly benefit from this course. Students will draw from classical pieces of scholarship in law and society and recent innovative and multi-disciplinary thinkers to investigate how legal doctrine and legal rules form a type of infrastructure for social, political, and economic processes and how legal change relate to social change. Through active learning and a small research project, students will gain a deeper understanding of the dynamic exchange and feedback between law, society and political economy, and insights into how to empirically examine it.

The class will meet once a week. For every week except the first week of class, two thirds of the meeting will consist of a lecture about the relevant themes and questions, as well as active participation in class-wide discussion. One third will be student-led, with rotating teams of students presenting on the week's theme. Precept time will be split between engaging in close reading of challenging texts, examining the research methods used by each author to prepare students to come up with a proposal of their own, and coaching students through their final project. Each week (except the first week; and whichever week a student is scheduled to present in class), students are asked to post a 500-word memo on the course's discussion board, the day before the lecture. Unless otherwise specified in the week's description, they should choose one of the assigned readings and write a critique of it. The final project is a 3000-word research proposal relevant to the themes discussed in class, including a research question, a brief literature review, a hypothesis, and a suggested method of inquiry. The grade breakdown will be 10% for participation, 20% for memos, 25% for the class presentation, and 45% for the final project.

LEARNING OBJECTIVES

By the end of this 12-week seminar, through active participation in the course and engagement with the material, students should be able to:

- Identify and describe the different roles legal institutions, legal rules, and legal actors play in contemporary American society.
- Understand and explain how social actors use legal rules related to contracts, property, and corporations to structure economic processes.
- Evaluate why legal infrastructure may contribute to the production and reproduction of social and economic inequality.
- Apply their knowledge to identify a relevant research question related to how law shapes society and political economy and propose a small-scale project to investigate it.

SCHEDULE AND ASSIGNED READINGS

FIRST HALF: LAW & SOCIETY
AND THE MEANING-MAKING POWER OF LAW

WEEK 1. INTRODUCTION: LAW AND CLASSICAL JURISPRUDENCE

Hart, H.L.A. 2012 [1961]. Ch. 2-6 and 8-9 (Pp. 75-180, 212-269) in *The Concept of Law*. New York: Oxford University Press.

Kennedy, Duncan. 2006. Excerpt (Pp. 19-37) from "Three Globalizations of Law and Legal Thought: 1850-2000." Pp 19-73 in *The New Law and Economic Development: A Critical Appraisal*, edited by D. M. Trubek and A. Santos. Cambridge: Cambridge University Press.

WEEK 2. LAW AND POWER: SOCIAL AND CRITICAL APPROACHES

Cover, Robert M. 1985. "Violence and the Word." *Yale Law Journal* 95(8):1601–30.

Harris, Cheryl I. 1992. "Whiteness As Property." *Harvard Law Review* 106(8):1707–91.

De Sousa Santos, Boaventura. 1987. "Law: A Map of Misreading – Toward a Postmodern Conception of Law." 14(3) *Journal of Law and Society* 279–302.

Kennedy, Duncan. 2006. Excerpt (Pp 37-73) from "Three Globalizations of Law and Legal Thought: 1850-2000." Pp 19-73 in *The New Law and Economic Development: A Critical Appraisal*, edited by D. M. Trubek and A. Santos. Cambridge: Cambridge University Press.

WEEK 3. LAW AND KNOWLEDGE: LEGAL PLURALISM AND SHARED MEANINGS IN HETEROGENEOUS, UNEQUAL SOCIETIES

Valverde, Mariana. 2003. Ch. 1: "Introduction," pp. 1-27 and Ch. 7: "'Common Knowledge must Enter the Equation Somewhere': Knowledge as Responsibility." Pp. 167-192 in *Law's Dream of a Common Knowledge.* Princeton: Princeton University Press.

Merry, Sally Engle. 1988. "Legal Pluralism." *Law & Society Review* 22(5):869–96.

Heimer, Carol A. 2014. "Competing Institutions: Law, Medicine, and Family in Neonatal Intensive Care," Pp 265-275 in Erik Larson and Patrick Schmidt, eds., *The Law and Society Reader II*. New York: NYU Press.

Mills, Aaron. 2016. "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today." *McGill Law Journal* 61(4):847–84.

WEEK 4. PERSONHOOD, CITIZENSHIP, AND THE RIGHT TO HAVE OF RIGHTS

Holmes, Stephen and Cass R. Sunstein. 1999. Ch. 1 "All Rights are Positive" and Ch. 2 "The Necessity of Government Performance". Pp. 35-58 in *The Cost of Rights: Why Liberty Depends on Taxes*. New York: W.W. Norton.

Cover, Robert M. 1982. "The Origins of Judicial Activism in the Protection of Minorities." *Yale Law Journal* 91(7):1287-1316.

Somers, Margaret R. 2008. "Theorizing Citizenship Rights and Statelessness" Pp. 1-60 in *Genealogies of Citizenship: Markets, Statelessness, and the Right to Have Rights*. New York: Cambridge University Press.

Winkler, Adam. 2018. "Introduction" and "The Triumph of Corporate Rights" in *We the Corporations*. New York: Liveright.

WEEK 5: LAW AS DISPUTE RESOLUTION: LITIGATION AND ARBITRATION

Felstiner, William, Richard Abel, Austin Sarat, 1980. "The Transformation of Disputes: Naming, Blaming, Claiming." *Law and Society Review* 15(3):631-654.

Fiss, Owen M. 1984. "Against Settlement." *Yale Law Journal* 93(6):1073–92.

Resnik, Judith. 2015. "Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights" *Yale L.J.* 124(8):2804–2939.

WEEK 6: LAW AS COMMUTATIVE JUSTICE: REPARATION AND DISTRIBUTION

Engel, David M. 1984. "The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community." *Law & Society Review* 18(4):551–82.

Debruche, Anne-Françoise. 2009. "What Is 'Equity'? Of Comparative Law, Time Travel and Judicial Cultures." *Revue Générale de Droit* 39(1):203–28.

Levitsky, Sandra R., Rachel Kahn Best, and Jessica Garrick. 2018. "'Legality with a Vengeance': Reclaiming Distribution for Sociolegal Studies." *Law & Society Review* 52(3):709–39.

SECOND HALF: LAW & POLITICAL ECONOMY
AND THE WORLD-MAKING POWER OF LAW

WEEK 7: LAW, POLITICAL ECONOMY, AND CAPITALISM

Edelman, Lauren B., and Robin Stryker. 2005. "A Sociological Approach to Law and the Economy." Pp. 527-551 in *The Handbook of Economic Sociology*. Princeton: Princeton University Press.

Harris, Angela, and James J. Varellas. 2020. "Law and Political Economy in a Time of Accelerating Crises." *Journal of Law and Political Economy* 1(1):1-27.

Grewal, David Singh. 2014. "The Laws of Capitalism." *Harvard Law Review* 128:626-667.

WEEK 8: REGULATION AND THE CHALLENGES OF TEMPERING CORPORATE POWER

Coleman, James W. 1985. "Law and Power: The Sherman Antitrust Act and Its Enforcement in the Petroleum Industry." *Social Problems* 32(3):264–74.

Galanter, Marc. 1974. "Why the 'Haves' Come out Ahead: Speculations on the Limits of Legal Change." *Law & Society Review* 9(1):95-160.

Edelman, Lauren B. 2016. "The Interplay of Law and Organizations" Pp. 1-76 in *Working Law: Courts, Corporations, and Symbolic Civil Rights*. London: The University of Chicago Press.

WEEK 9: THE CONSTITUTIVE POWER OF LAW IN THE CREATION AND DEFENSE OF WEALTH

Pistor, Katharina. 2019. Ch. 1-4 (Pp. 1-107) in *The Code of Capital: How the Law Creates Wealth and Inequality*. Princeton: Princeton University Press.

Harrington, Brooke. 2017. "Tactics and Techniques of Wealth Management." Pp. 123–92 in *Capital Without Borders: Wealth Managers and the One Percent*. Cambridge, MA: Harvard University Press.

WEEK 10: LEGAL INFRASTRUCTURE: PROPERTY AND CONTRACTS

Serkin, Christopher. 2011. "Public Entrenchment through Private Law: Binding Local Governments." *University of Chicago Law Review* 78(3):879-964.

Radin, Margaret Jane. 2013. "Boilerplate, Consumers' Rights, and the Rule of Law." Pp. 1-54 in *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law*. Princeton NJ: Princeton University Press.

WEEK 11: LEGAL INFRASTRUCTURE: CORPORATIONS

Phillips, Andrew. 2020. "Introducing the Company-State" and "The Rise of the Company-States." Pp. 1-65 in *Outsourcing Empire: How Company-States Made the Modern World*. Princeton, New Jersey: Princeton University Press.

Butler, Jay. 2019. "Corporations as Semi-States." *Columbia Journal of Transnational Law* 57(2):221–82.

Greenfield, Kent. 2008. "Reclaiming Corporate Law in a New Gilded Age." *Harvard Law & Policy Review* 2:1–32.

WEEK 12: THE DIGITAL TURN

Cohen, Julie E. 2019. "Introduction: Transforming Institutions" and Ch. 1, 2 and 3 of Part 1, "Patterns of Entitlement and Disentitlement." Pp. 1-107 in *Between Truth and Power: The Legal Constructions of Informational Capitalism*. New York, NY: Oxford University Press.

Latour, Bruno. 2010. Preface to the English edition and "How to Make a File Ripe for Use" Pp. vi-xii, pp. 70-106 in *The Making of Law: An Ethnography of the Conseil d'État*. Malden, MA: Polity Press.

COURSE GUIDE

This course encourages students to think deeply about how legal doctrine and legal rules form a type of infrastructure for social, political, and economic processes and institutions. It is designed to be equally interesting and bring new perspectives to both social-science undergraduates and law students. It prompts them to imagine how classical pieces of scholarship in law and society may be repurposed to study contemporary issues, and it leads them to discover innovative thinkers working at the intersection of disciplines and methods to investigate and conceptualize the legal foundations of society and political economy, particularly as it relates to issues of corporate power and social inequality. It also invites them to question whether and how *legal* change can foster or impede *social* change.

While the relation between law, society and political economy is one of continuous dynamic exchange and feedback, this course focuses on how law shapes social and economic relations, and only briefly touches on the—equally important—ways in which the latter shape the knowledge, attitude, and actions of legal actors. We will start from within law schools, with a survey of different modes of thinking about law in the legal field, before moving to social science and interdisciplinary studies, first with the law & society movement, and then with the law & political economy movement. While the assigned readings focus on 20th and 21st United States and Canadian societies and legal orders, the lectures and term project will push students to think beyond them in time and in space, and encourage them to reflect on how law has, does, or may shape society in the Global North and the Global South, in local and in transnational fields, across multivalent pasts, contingent presents or imagined futures.

Law-related disciplinary research in fields like law and society, sociology of law, and political science tends to focus on empirical research about concrete phenomena and behaviors, but often pays only ancillary attention to legal doctrine and the content of legal rules and regulation. Conversely, law school teaching is very focused on rules, and cases and controversies in which legal actors apply or modify the rules. It tends to eschew broader consideration of what the rules accomplish in or for society, and their impacts on relations of power and processes of social stratification. This is also true to a lesser extent of philosophy, which investigates what Law is as well as what it ought to be, but approaches it more theoretically than empirically, and of

classical law and economics, which tends to focus on a limited range of short-term outcomes. This course, because of its emphasis on how legal rules and social and economic institutions are mutually constitutive, departs from both these approaches, in an attempt to encourage students to develop a more capacious perspective that bridges the disciplinary divide between law and the social sciences.

WEEK 1: INTRODUCTION. LAW AND CLASSICAL JURISPRUDENCE

> "So long as human beings can gain sufficient co-operation from some to enable them to dominate others, they will use the forms of law as one of their instruments. Wicked men will enact wicked rules which others will enforce. What surely is most needed in order to make men clear sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience" —H.L.A. Hart

This week's objective is first for students to familiarize themselves with the syllabus and what they will accomplish during the semester, and second, to offer an overview of classical jurisprudence as it has been thought of in law schools, and for students to start asking themselves: what is law? How do we study it? For what purpose?

The lecture will start by discussing the course's goal, going through the syllabus, and explaining the term projects and grading breakdown. Moving to the content of the week, it will start by a discussion asking student to elaborate on their understanding of what law is, and what functions it serves in society, with the instructor linking their answers to different weeks of the syllabus and prompting them to think of aspects that they have not mentioned. It will then move to a discussion of the history of how law has been studied in the U.S. in the 20th and 21st century, walking through the salient points of the readings for the week and offering context and insight about the authors and the impact that their work has had in spurring the jurisprudence field in new directions. Throughout, students should be prompted to engage with what each definition of law entails regarding the impact of law and how law should be studied.

H.L.A. Hart's *The Concept of Law* is a seminal piece that influenced much of 20th century jurisprudence, in the U.S. and beyond. Most of the scholarship that followed has been shaped by it, either because it built on it, or because it was reacting to it or criticizing its paradigm. It spurred many well-known debates (Hart/Dworkin, Hart/Fuller, Hart/Raz), yet it is seen by most scholars as having won those debates, and to this day Hartian positivism remains prominent in the legal field. A large portion of the book is assigned, so that students are able to see, through later week's

readings, how it has shaped the field. Its detailed discussion of legal rules is also helpful to set the stage for a study of law and society that takes seriously the content legal rules. It will give students an entry into *what is Law* from a positivist viewpoint. This reading is dense and may be difficult for many students, so it will be discussed in precept to help students work through it.

The lecture will briefly introduce how differentiating what law is from what it ought to be already means taking a position in the natural law vs positivism debate, and the role of morality in law under both viewpoints. It will set up the Austinian positivist view of law as coercive orders from a sovereign, to which Hart was reacting. In-class discussion will then focus on chapter 5, "Law as the Union of Primary and Secondary Rules" and the useful, often relied on distinction introduced by Hart between primary rules that impose duties and secondary rules that confer powers (rule of recognition, rules of change, rules of adjudication). We will note that while Hart's account established legal rules as social facts, we will see throughout the first half of the semester that sociolegal scholars rarely studied legal rules and doctrine as a core variable of interest[1] and tended to focus on other types of social facts, with which they were more accustomed to dealing.

Duncan Kennedy's in-depth study of the history of American legal thought will help students contextualize Hart's piece and understand its location within different waves of legal thought, as well as how they shaped public policy in the U.S. and abroad. Kennedy argues that the most important shifts and debates in legal thought over the past 200 years had little to do with the so-called left-right divide. The first half of the article, discussing the globalization of classical legal thinking (CLT), will be discussed in the first week, and the second half in the second week. In the 20th century, CLT became a conservative ideology close to classical liberalism, and then neoliberalism, and it spread through relations of influence, imperialism, the institutionalization of public international law, and the development of international economic law. It replaced an earlier mode of legal thinking that relied on natural law and universal rules of reason. In so doing, however, Kennedy notes how the enactment of classical liberal categories often "simply ratif[ied], by adopting a formal, abstract idea of free will rather than a more substantive one,

[1] With the notable exception of Lempert, who, in an innovative study, draws on the legal rules of American contract law, as a formalized statement of social agreement on norms, to infer and theorize social norms around exchange: Richard Lempert, *Norm-Making in Social Exchange: A Contract Law Model*, 7 LAW & SOC'Y REV. 1 (1972).

whatever schemes of economic and social hierarchy emerged out of the play of violence and culture on the ground" (p. 36).

WEEK 2: LAW AND POWER: SOCIAL AND CRITICAL APPROACHES

"Legal interpretation takes place in a field of pain and death." –Robert Cover

"in the burgeoning landscape of urban America, anonymity was possible for a Black person with 'white' features. She was transgressing boundaries, crossing borders, spinning on margins, traveling between dualities of Manichean space, rigidly bifurcated into light/dark, good/ bad, white/Black. No longer immediately identifiable as 'Lula's daughter,' she could thus enter the white world, albeit on a false passport, not merely passing, but *tres*passing." –Cheryl Harris

This week's objective is to provide an overview of post-1960 scholarship on law and society, to start discussing the relation between law and power, and to offer students some frameworks that they may come back to throughout the semester as they dive deeper into different aspects of how social actors rely on law to support and reproduce the social, economic, and political order.

Robert Cover and Cheryl Harris's articles are foundational in critical legal studies and will provide students some crucial analytical building blocks to unmask power within legal rules and relations. Cover will help us discuss the intimate relation between law and violence, and the concrete consequences of what may seem like abstract, detached mental exercises of textual interpretation. Harris reveals the deep interconnection between property and racial identity in American law, particularly through the concept of whiteness, central to entrenched systems of domination that endure to this day. We will address the insight that "in protecting settled expectations based on white privilege, American law has recognized a property interest in whiteness" (p. 1713), and what this means for law and political economy and for contemporary debates around affirmative action. Through Harris's work, we will start discussing issues around the unequal distribution of endowments in society, and how distributional inequality is coded in law and reproduced by law.

The second half of Duncan Kennedy's article will provide extensive context on both the social jurisprudence and critical legal studies movements, through his recounting of how a second and third wave of legal thoughts emerged, evolved, and diffused globally. The second wave, which Kennedy calls the Social, was at first only a discourse or shared vocabulary, used across the political and philosophical spectrum and superimposed on classical legal thought to rescue liberalism from its own pitfalls. It corresponded with a corporatist push for implementing a

welfare state through the multiplication of laws, the restructuring of entitlements, and the bureaucratization of their implementation. In Kennedy's retelling, this led to a paternalistic kind of welfare that did not foster community empowerment or self-determination. Redistribution was to take place from the middle class to the working class, ensuring the working class would get the minimum sufficient to prevent social turmoil, while protecting the endowments of the elites who designed the system. In addition, the unpleasantness associated with the bureaucratic modes of administering the welfare state ensured that the population would not request more of it. Contradictory critiques of the Social accumulated over time and reached a critical mass by the end of the 1960s. They included a Weberian and Kelsenian critique of the is-to-ought move as disguised return to natural law, a postwar liberal (and then neoliberal) critique of the association of the Social with fascism and communism, and a 1960s-1970s civil libertarian critique. Kennedy argues that the third wave was a harsh critique of what preceded it, with no overarching unifying concept, but that it corresponded mainly to the diffusion of a language composed of "proportionality, neoformalism, rights/identity, and judicial supremacy" (p. 70).

Finally, the article by De Sousa Santos, a prominent Portuguese sociologist of law, offers a different perspective more closely associated with law and society, and the study of law from outside law schools. This will provide a bridge toward the interdisciplinary perspectives that we will be exploring in future weeks. De Sousa Santos urges us to stop conceiving of law and society as two separate entities that correspond or not, and to pay attention to both normative and non-normative dimensions of law. He suggests that law is to social reality what a map is to spatial reality: a voluntary distortion that scales, projects, and symbolises reality to better apprehend it. We will discuss what taking this metaphor seriously, as he does, means for the social scientific study of law. Ultimately, the discussion of those readings will introduce students to the constitutive power of law in creating and transforming shared meanings, as well as how abstract legal rules translate in very concrete real-life situations and define relations of power; themes that will be taken up in more detail in subsequent weeks.

WEEK 3: LAW AND KNOWLEDGE: LEGAL PLURALISM AND SHARED MEANINGS IN HETEROGENEOUS, UNEQUAL SOCIETIES

> "If knowledge is power, so, too, are power relations also knowledge relations, truth relations. … in the present day, and particularly in largely secular multicultural societies, law has become a privileged site in

which people either seek the truth themselves or comment on the truth-seeking efforts of others." – Mariana Valverde

"the concept "rule of law", taught to me as universally valid and morally unassailable, turns on an understanding of persons, of community, and of freedom situated in time and place—an understanding which is genealogical, storied, and entirely wrapped up in culture. … what we call law exists as such only within its own lifeworld." –Aaron Mills

This week's objective is to introduce students to legal pluralism, to get them to recognize two interpretations of legal pluralism (the competition of law with other normative orders, and the coexistence of multiple legal orders) and to start teasing out their impact for law and society.

Building on last week's incipient discussion of law's constitutive role in creating shared meanings, the lecture will encourage students to reflect on the existence of multiple, overlapping normative orders, some of which complement each other, and some of which dominate or try to erase others. We will discuss what legal pluralism mean for the emergence and evolution of shared meanings within and across communities as well as plural legal orders affect how different communities live together.

Mariane Valverde's book will serve to deepen the reflection on the meaning-making power of law, and what is means for a society to build common knowledge within institutions. We will discuss the relationship between law, truth and knowledge; knowledge as a resource vs knowledge as a responsibility and the duty to know; Valverde's concept of legal complexes as "ill-defined, uncoordinated, often decentralized sets of networks, institutions, rituals, texts, and relations of power and of knowledge that develop in those societies in which it has become important for people and institutions to take a position vis-a-vis law," (p. 10) and we will highlight her critique that critical legal scholars have sometimes fetishized society, and in so doing, underplayed the constitutive power of law in transforming how people conceive of themselves and of the world. We will also discuss what it means for a research agenda to follow her invitation to ignore "why" and "what" questions in favor of "how."

If the law and our interpretations of the world co-constitute each other, what does it mean for living together in heterogeneous, plural societies in which some groups have been and continue to be oppressed? Sally Engle Merry's influential article on legal pluralism will serve as a starting point for an exposition of how the idea of legal pluralism emerged in the legal research communities, and how it has transformed over time. This will lead us into a discussion of two

types of legal pluralism. Carol Heimer's article represents a vision of pluralism as the competition and overlap of law with other normative orders. We will discuss how law and other imperatives affect people's practices in everyday life. In many social contexts, law competes for influence with other institutions, and Heimer provides a case study of children healthcare in which parents, physicians, and the state all stake their claims as different institutional sources of legitimacy compete for decision-making power, which will lend itself to a discussion of how conflicting institutional logics become questions of law and policy.

Finally, we will discuss legal pluralism as the coexistence of multiple legal orders that are qualitatively different, particularly as a result of legacies of conquest and colonialism. Aaron Mills's research will lead us to discuss indigenous legal orders, the attempt to erase, assimilate or destroy them through conquest, colonialism, and various forms of oppression and discrimination, as well as their resurgence in the 21st century, and the movement across Canadian law schools to recognize the legitimacy of indigenous legal orders and integrate them into the mandatory coursework of the law degree.

WEEK 4: PERSONHOOD, CITIZENSHIP, AND THE RIGHT TO HAVE OF RIGHTS

> "rights … are *public* goods, and thus can only be sustained by an alliance of public power, political membership, and social practices of equal moral recognition. … this makes citizenship the *right to have rights*. … It entails both *de jure* and *de facto* rights to **membership** in a political community … [which] must equally include the *de facto* right to *social* **inclusion** in civil society. … it is *not* freedom and autonomy *from* all social and political entities that liberate us to be right-bearers. Bare life … in fact makes humans who are "nothing but human" as rightless as they are stateless (Arendt 1979)." –Margaret Somers

This week's objective is for students to learn about the concepts of "right" and "legal personhood" as a right to have rights, how they have been used by social actors, and with what consequences.

First, we will discuss rights, and the readings by Cover and by Holmes & Sunstein. Scholars have often distinguished between negative rights and positive rights, depending on the content of the claim on the government, to abstain from or to ensure something. Holmes & Sunstein explain that the distinction is spurious because all rights require state enforcement and are costly for the state. Taxpayer funding, monitoring, and enforcement are equally required for freedoms

and for subsidies. Cover will help us tell the story of the U.S. civil rights movement, the legal protection of minorities, and the role of the Warren Court (1953-1969). This will support a discussion of the expansion and contraction of rights throughout history, and the role that the Supreme Court has been playing and should be playing as a counter-majoritarian institution.

Then, we will discuss the right to have rights: how the social and political orders determine who is or is not worthy of rights, and the contingent, contextualized ways in which personhood is denied to some human beings and granted to some non-human entities. Somers vivid depictions of statelessness and internal exclusion will breathe life into Holmes & Sunstein's insight about the futility of a negative definition of rights. Her framework will help us reflect about the meaning of citizenship and the implications of a thin or thick conceptualization of it. We will contrast *de jure* citizenship with the real provision of membership and inclusion, and we will question what Somers means when she states that citizenship is produced by the dynamic triadic relationship between state, market, and civil society.

Winkler's book will allow us to consider how the civil right movement's expansion of rights for the powerless was paralleled by an expansion of rights for the powerful, in the form of corporate rights. We will discuss the state action doctrine, and how corporations came to be recognized as a legal person whose civil rights must be respected, but who did not necessarily need to uphold those of others. As an example, we will survey the initial uses of the 14th amendment, and how its interpretation was transformed to the benefit of corporations. Through Winkler's discussion of corporations as "constitutional leveragers" (leveraging progressive reforms that came about to ensure human flourishing and repurposing them to maximize profit) and "constitutional first movers" (spurring legal innovation through lobbying and litigation to secure rights, which may also later benefit human rights), we will also start thinking about both the legal consequences of having financial resources and the economic consequences of the right to have rights. To illustrate this interplay, we will use the *Citizens United* v. *Federal Election Commission* decision (558 U.S. 310, 2010), in which the Supreme Court decided to protect corporations right to spend money from their treasuries for political campaigns as a free speech issue.

WEEK 5: LAW AS DISPUTE RESOLUTION: LITIGATION AND ARBITRATION

> "when the parties settle, society gets less than what appears, and for a price it does not know it is paying … Civil litigation is an institutional arrangement for using state power to bring a recalcitrant reality closer to our chosen ideals." –Owen Fiss

> "Although hundreds of millions of consumers and employees are obliged to use arbitration as their remedy, almost none do so – rendering arbitration not a vindication but an unconstitutional evisceration of statutory and common law rights." –Judith Resnik

The objective of this week is to explore the role of law as a means for dispute resolution and the role of the civil lawsuit in society, a classical theme in law and society studies.

Felstiner, Abel & Sarat, in one of the most famous studies of the law and society tradition, have examined the life course of disputes, and how people do (or do not) convert real-world experiences and feelings of hurt or injustice into formal litigation. Before a dispute reaches the court system, a person who suffers an injury must go through three stages: she must become aware of the injury and *name* it as such, she must *blame* someone for it, and finally, she must *claim* compensation from them. We will discuss this process, and the students will be asked to provide various real-life examples and consider them through the lens of the framework. While Felstiner, Abel & Sarat suggest that contrary to what is often asserted, maybe *too few* disputes get litigated: we will examine this claim, and discuss its implications for the allocation and distribution of resources in society. We will further use this study as an occasion to discuss what it means to study disputes as a socially constructed process that centers disputants, and the implications of this viewpoint for quantitative projects that involve counting cases.

Sometimes, conflict is resolved not by a publicly administered justice system, but rather by a private entity whose decision will bear the same authority as a court judgment. This can happen because people involved in a dispute freely choose this option, or it can be imposed on the disputants. Fiss and Resnik will serve as one early and one contemporary account of alternative dispute resolution and arbitration as a privatization of justice, and its various consequences. Commercial actors increasingly withdraw from governmental systems of justice by inserting mandatory arbitration clauses in most contracts they enter. Courts legitimize this practice and enforce mandatory arbitration, even when provided by a standard-form or consumer contract. This means that corporations withdrawing from public legal systems bring with them not only willing business partners but also unwitting customers. Resnik provides empirical detail about

this transformation and raises concerns regarding its impacts on procedural and substantive justice and the rule of law. Through private rulemaking in contracts and private adjudication via arbitration, commercial actors who are repeatedly involved in a high number of cases manage to entrench their advantage, maintain their position of power, and perpetuate social inequality. We will come back next week to this idea of "repeat players," and we will discuss the notion of standard-form contracts or boilerplate later in the semester. In addition, Fiss hints at the fact that settlements reinforce wealth inequality, and other social inequalities; we will try to tease out why and how privatizing civil litigation generates distributional consequences.

WEEK 6: LAW AS COMMUTATIVE JUSTICE: REPARATION AND DISTRIBUTION

> "Criticism of what is seen as an overuse of law and legal institutions often reveals less about the quantity of litigation at any given time than about the interests being asserted or protected through litigation and the kinds of individuals or groups involved in cases that the courts are asked to resolve." –David Engel

This week's objective is to explore the role of law as an instrument of commutative justice, used to repair injuries, remedy unfairness, allocate entitlements, and redistribute resources.

With Engel's famous account of personal injury litigation in a rural Illinois community, we study tensions between the supposed role of civil claims to repair an injury and make one whole again, and social perceptions of greed and litigiousness. Why do communities perceive debt collectors and torts plaintiffs differently? How do local value systems impact processes of naming, blaming, and claiming, and downstream distributional outcomes? The moral evaluation of the appropriateness of mobilizing the legal system to vindicate a claim for compensation interplays with ideas about individualism and self-sufficiency, attitudes toward risk and uncertainty, and the social meaning of money. This interplay shapes the changing ways in which formal law mediates social relationships. We will close by discussing the distinction drawn by Engel between disputes within tight-knit communities and across pluralistic social setting, and their consequences on choices to rely on informal or formal dispute resolution when seeking compensation for a harm. Then, Debruche, through her six imagined encountered with important historical legal figures from France and England, will lead us into a discussion of the subjective and cultural nature of notions of fairness and equity, and the contextually specific ways in which they interact with the legal order of a given time and place. This will also be an occasion to

discuss the place of fairness in the legal order more broadly, both inside the courthouse and beyond its walls.

This week will close with a discussion of a different kind of re-allocation: distribution. Levitsky, Best and Garrick make the case that since the 1970s, along with welfare state retrenchment and its transformation into a submerged, semiprivate system operating in the shadows through tax policy and public-private partnerships, law and society has focused on regulation and has largely overlooked "distributive laws," those that allocate resources and determine who gets access to essential services like healthcare and education, to food and housing, and who gets to accumulate wealth. And when scholars have examined social welfare laws, they have generally not looked at their distributional consequences.

The interplay between law and social welfare remains undertheorized and sociolegal scholars rarely tried to explain how law produces and reproduces economic inequality. This gap extends to tax laws, social security laws, health laws, credit laws, and poverty laws. The tendency to contrast law on the books with law in action has led sociolegal researchers to forget "how legal ideologies, symbols, and categories shape the *absence* of laws on the books" (p. 710) They call for scholars to move away from only looking at unequal access to justice and the legal system, or explicit governmental response to inequality, toward examining how law itself is constitutive of political claims and creates (or could attenuate) inequality. Such endeavour may help them demonstrate how social inequality does not result from individual failures, but from governmental policy, enacted through law. This discussion will foreshadow the second half of the semester, in which we will examine more closely the relation between law and political economy.

WEEK 7: LAW, POLITICAL ECONOMY, AND CAPITALISM

> "we suggest that law and the economy be understood as overlapping social fields that are mutually constituted through two processes: institutional meaning-making processes and political power-mobilization processes … *institutional* processes that involve the production and widespread acceptance of particular constructions of law and compliance, and *political* processes that help to shape which constructions of law are produced and become institutionalized and who benefits from those constructions." –Lauren Edelman & Robin Stryker

> "any attempts to understand the roots of the numerous crises facing us, much less assemble collective projects to address them, must contend with issues of law and political economy." –Angela Harris & James Varellas

> "Piketty has fired a forceful shot in what Gramsci described as the "war of position," the slow but vital work of consciousness-raising that must precede the "war of manoeuvre," … during which distributional claims are asserted directly in political contests. … the history of capitalism in the twenty-first century remains to be written — and … politics, rather than the natural operation of the market, will finish the story." (references omitted) –David Grewal

This week's objective is to introduce students to the constitutive power of law in markets and economic processes, and to the Law and Political Economy movement taking hold in law schools across the U.S.

This week's lecture will start by providing students context about classical law and economics (L&E) and its prominence in American law schools. L&E, building on neoclassical economics, portrayed the role of law in markets as mainly allocative and facilitative. Scholars of L&E relied on methodological individualism, and they viewed markets as the result of the rational choices of actors maximizing their self-interest based on personal preferences, which, in interaction, tended toward an efficient equilibrium. Normatively, L&E scholars favored competition without regulatory intervention, except in exceptional cases of market failures.

Edelman and Stryker's article is emblematic of early critiques of L&E, coming from sociology, which emphasized the need situate economic action within society, and understand its social character. Edelman and Stryker's account thus provides context for the field in which LPE will later arise. Early sociological critiques tended to focus on L&E's exogenous conception of preferences and rational choices and on L&E's narrow definition of law. First, they attacked the assumption that efficiency, preferences, and choices were neutral and exogenous, and L&E's disregard for how they were socially, culturally, political, and legally constructed, and for how maximizing preferences may entrench discriminatory *status quos*. Second, they disputed L&E's very narrow definition of law as an object of study in favor of a broader view of law as *legality*, including *law in action*, and the *legal field* as unit of analysis. This critique sought to confront L&E on its own terrain: how well does it do what it purports to do? Are its models externally valid? While it did so very pointedly, it also set aside some broader questions about the overall relationship between law and the economy.

This first wave of critiques acted as a foundational step and precursor of the LPE movement. Edelman and Stryker's work, by emphasizing that law and the economy are mutually constitutive, overlapping fields, which co-construct each other, bore the seeds of the LPE project. Their understanding of the law's world-making power, however, was much more circumscribed than LPE's. While they highlighted the existence of constitutive legal environments beyond facilitative and regulatory ones, what they meant by 'constitutive' was the *meaning*-making power of legal concepts. LPE took their insights a few steps further. For LPE scholars, law's full creative power has tangible effects in the material world. While earlier scholars illuminated the social construction of law and the economy, LPE's insights center the other side of the equation: the legal construction of socioeconomic institutions.

Harris and Varellas's editors' introduction to the inaugural issue of the Journal of Law and Political Economy provides an intellectual genealogy of the LPE movement, as well as a reflection on the multiple crises of contemporary capitalism that urgently call for an interrogation of the role of law in shaping political economy. From there, we will discuss the birth of the LPE movement as an ambitious project with its own theoretical and empirical aims, not defined in response to L&E. LPE scholars study law as *constitutive* of economic institutions—an active element continually making and remaking markets. For the LPE movement, the crucial problem with L&E was not an unduly narrow definition of law or unresolved endogeneity in its model. It's that it misses the point that, before it regulates, law *creates* what is allocated and *gives it value* in the first place. Hence, "law is central to the creation and maintenance of structural inequalities in the state and the market" (p. 8). Grewal's account of the laws that constitute and sustain the capitalist order, particularly Part IV (Pp. 652-661) of his essay, provides an example of the type of depth and breadth of insight that an LPE approach can afford when studying economic phenomena.

WEEK 8: REGULATION AND THE CHALLENGES OF TEMPERING CORPORATE POWER

> "Whose interests does the law serve? What are the mechanisms by which those interests exercise their control? … Sociological analysis must go beyond a simple description of the groups that dominate the legal process to explain how and why they are able to do so." –James Coleman

This week's objective is to explain how the law may serve for social control through regulation, how the interplay of corporate power, litigation, and regulation may hinder governmental attempts to control organizational practices, and the challenges of targeting corporate power through regulation.

First, Coleman's study of antitrust enforcement in the petroleum industry will launch us in a discussion of how relations of power shape both the enactment and the implementation of regulation. The antitrust case is particularly interesting here, because it is a field in which regulatory action's very purpose is to prevent the illegal concentration of power in the hands of too few private entities. Notably, we will work through the four corporate strategies for control that Coleman identified—"endurance and delay; corruption and corporate largess; secrecy and deception; and threats and international manipulation" (p. 271)—and reflect on how they play out in more recent oligopolies and how they may be counteracted. We will note Coleman's references to symbolism, a notion that will come back in Edelman's work.

We will also discuss Galanter's classic study of the legal system, and the distinction he draws between one-shotters, who come infrequently in front of the courts, and repeat players, who do so repeatedly. One-shotters tend to be individuals, who care about the tangible outcome in their personal case, while repeat players tend to be organizations, who also care about how a judgment may create a useful or harmful precedent for the other cases in which they are or will be involved. Because of that concern, repeat players are rule-minded, and they have a strong interest in settling some cases out of court to avoid unfavorable precedents and going to trial in others, to change the state of the law in their favor. As they do so repeatedly, they may influence legal developments in ways that entrench their advantage even further.

With Edelman, we explore legal endogeneity theory, the interplay between workplaces and the law that regulates them, and how judicial deference to organizational policies that perform compliance with civil rights law in merely symbolic ways impedes the law's capacity to combat discrimination. Through legal endogeneity, the interpretation of the law that governs organizations is in part shaped by the organizations themselves and their compliance practices. Hence, courts, for instance, will dismiss a discrimination suit on the grounds that the policies of the plaintiff's employer forbid discriminatory behavior, regardless of the evidence about

managers actually ignoring these policies. Through the work of lawyers and managers, courts come to accept their ideas of compliance and re-interpret the law such that enacted practices of symbolic compliance, devoid of effective content, become sufficient to meet legal standards of compliance. Informal practices shape real-life outcomes, but courts mostly pay attention to formal symbolic structures. Hence, the legal system encourages mere symbolic compliance, which hinders the potential of legal reform to foster social change.

WEEK 9: THE CONSTITUTIVE POWER OF LAW: THE CREATION AND DEFENSE OF WEALTH

"law … is the very cloth from which capital is cut." –Katharina Pistor

This week's objective is to explore how law creates wealth and capital, on one hand, and allows wealth holders to protect, defend, and entrench their wealth, on the other hand. For this week's memo, the students will be asked to bring Pistor's framework to life by selecting a news article and explaining the legal actors and legal modules at play in the story.

The discussion of Pistor's recent, yet already very influential book on *The Code of Capital* will be the occasion to introduce students to how law creates wealth. We will discuss Pistor's invitation to consider how private actors use law as a tool to create, transmit, and preserve capital, and thus, private wealth. Students will be prompted to reflect on how these practices may help private actors circumvent public law constraints and modify the nature, flow, and direction of capital, in a way that cannot easily be remedied with subsequent redistribution through taxation. We will delve into Pistor's theoretical framework to explain how private actors use private law to generate and conserve wealth, with the blessing of states. Capital has two ingredients: an asset and some legal code. The assets, conceived broadly, can range from simple, physical ones to intricate legal (financial instruments or intellectual property) and digital ones. While the roster of coded assets is continuously changing, on the legal side, there is great consistence in the legal modules that lawyers use to transform them into capital. Lawyers use legal modules that bestow certain attributes to the assets, to privilege the claims of their clients. In so doing, lawyers and their clients transform legally coded assets into capital and enable them to generate wealth. We will delineate the four attributes that Pistor identifies as essential to this process to be effective:

priority, universality, durability, and convertibility, and we will brainstorm how they may apply to various real-life examples, with the help of the students' weekly memo.

To conclude this part of the discussion, we will think about the interplay between the role of the state and that of private actors in the market, which will foreshadow next week's discussion of Serkin's work. While legal coding is realized mainly through private law, the role of the state, as backer and enforcer of the legal coding is central. States support the legal coding activities of private actors by offering their coercive powers to enforce the resulting legal rights. Moreover, public redistribution policies cannot be fully understood without also elucidating on the one hand, the distribution they are working from, and on the other hand, the private creation and upward redistribution that reacts to and follows public redistribution.

Finally, this story of the coding of capital by lawyers, corporations, and high-net-worth individuals is intertwined with that of the circulation of elites and the strategic defense of income and wealth. Harrington's account of how the wealthy leverages a network of institutions to move, hide, and protect their wealth complements Pistor's account by providing the other side of the story. We will discuss how the wealthy make use of offshore financial centers, corporations, transfer pricing, trusts, foundations, complicated ownership structures, and other tools and techniques to protect their wealth, and we will emphasize the centrality of law in all these operations.

WEEK 10: LEGAL INFRASTRUCTURE: PROPERTY AND CONTRACTS

> "local governments have become increasingly adept at circumventing anti-entrenchment protections. New and creative ways of financing public goods and services, alienating property, and precommitting to land use regimes all avoid the important safeguards that apply to more traditional forms of entrenchment. … Imposing … profound limits on eminent domain and other doctrines without carefully considering the effects on entrenchment is likely to result in a pronounced shift in democratic power from the future to the present" –Christopher Serkin

This week's objective is to delineate a few important strategies by which public and private actors use property and contract rules as legal tools to further self-interested ends.

First, we will discuss Serkin's idea that local governments often use contract and property rules to bind themselves for the future and entrench policy choices in ways that undermine democratic power and accountability. The lecture will provide context by first discussing how private actors do so, in conversation with last week's discussion of Pistor's work. Then, moving to Serkin's

article, we will outline how local governments engage in four types of entrenchment (contractual, property, financial, and physical), and the politics and incentives behind why they do so. In Serkin's account, contractual entrenchment includes practices such as promising to regulate or to forbear, entering long-term procurement contracts, and enacting consent decrees, while property entrenchment describes practices such as the creation of property rights, the creation of future interests or servitudes, the alienation of crucial assets, and the dedication of public land. Importantly, Serkin's insights show how significant private law can become for issues of democratic safeguards and collective governance, and the importance of work undertaken to de-reify the illusory boundary between the public and the private. Finally, we will question if some portions of this framework may be applicable when thinking about the governance of corporations, which will be the topic of next week. After all, corporate history is intimately linked with that of public works and local governance.

Moving to a different issue altogether, with Radin, we will contrast the ideal world of contract, as imagined by classical legal theorists, and based on autonomy and freedom of choice, with the practical reality of contracting in the everyday lives of people, which often involves blindly accepting complicated terms and conditions unilaterally imposed by a powerful co-contractor. This is the 'boilerplate' world, which has little to do with liberal notions of contract. Yet, in the U.S., the law generally recognizes those agreements as contracts just the same. We will also discuss the interconnection between this trend and the privatization of adjudication discussed in week 5.

WEEK 11: LEGAL INFRASTRUCTURE: CORPORATIONS

> "Instead of being a narrow discipline with limited implications, corporate law determines the rules governing the organization, purposes, and limitations of some of the largest and most powerful institutions in the world. By establishing the obligations and priorities of companies and their management, corporate law affects everything from employees' wage rates (whether in Bakersfield or Bangalore), to whether companies will try to skirt environmental laws, to whether they will tend to look the other way when doing business with governments that violate human rights. Corporate law also determines whether corporations will look at the long term or the short term, whether they will see themselves as owing any responsibilities to stakeholders other than shareholders, and indeed whether they consider themselves to be constrained by law at all." –Kent Greenfield

This week's objective is to deepen students' insights about a type of social actor that has figured prominently in the course throughout the semester, the corporation, and to explore how corporate

laws are used to accumulate, entrench, and wield power and wealth, as well as to elucidate the socioeconomic impact of corporate laws and corporate finance.

The lecture will start by providing the students some background about corporate history, including a brief overview of the Roman *societas publicanorum*, of the joint stock companies of the age of conquest and the first modern stock market in Amsterdam, and of the sudden proliferation of corporate charters that followed the American Revolution.

Phillips's history of the company-state and its role in colonialism and empire building will lead us into a discussion of political orders in which a corporation governs, and how they have emerged historically, how they have fallen, and how they differ from other types of political orders in terms of legitimacy and concrete outcomes for the people who are governed. We will then reflect about two very different ways in which the concept of the company-state may manifest in the 21st century: the first, as a metaphor to describe the inordinate concentration of power accumulated by some giant corporations and their ability to govern large portions of our private lives and of our polities, and the other, in a more literal sense. For the latter, we will turn to Butler's account of 21st century corporations who act as semi-states in countries with low state capacity. Butler examined how for-profit corporations operating in the Global South often come to provide infrastructure, logistics, security, and to deliver other normally public services, often reaching beyond the boundaries of their workforce. This will prompt us to consider the complex policy issues around the provision of public goods when collective institutions are weak or failing, and to discuss how governmental "underreach"[2] may exacerbate corporate power.

Greenfield's contribution will help us consider why we need to rethink corporate law, how we may do so, and where such an ambitious enterprise may start. Greenfield argues that corporate law is of crucial importance for progressive reform and has outsized distributional impact across society, yet, it has long been neglected by progressive thinkers. His main suggestion is that the role and position in the corporate structure of "non-equity investors"—including customers, creditors, employees, governments, and communities—should be re-imagined, to put them on a more equal footing with shareholders. We will discuss this suggestion, and brainstorm other

[2] See David E. Pozen & Kim Lane Scheppele, *Executive Underreach, in Pandemics and Otherwise*, 114 AMERICAN JOURNAL OF INTERNATIONAL LAW 608 (2020).

ideas for the transformation of corporate law. We will further use the readings of week 8 to contextualize Greenfield's hypothesis that reform through corporate law may be easier to achieve than reform through ex-post regulation.

WEEK 12: THE DIGITAL TURN

> "Today, ownership of information-age resources and accountability for information-age harms have become pervasive sources of conflict, and different kinds of change are emerging: new claims about entitlement and accountability; new procedural devices for vindicating … those claims in litigation; new mechanisms for extrajudicial definition and enforcement of claimed legal rights; new obligations relating to financial stability, data protection, and network management; new regulatory mechanisms for defining and policing compliance …; and new transnational institutions for economic and network governance. … We are witnessing the emergence of legal institutions adapted to the information age, but their form and their substance remain undetermined." –Julie Cohen

This week's objective is to examine how all the phenomena we have covered over the semester may have changed as a result of the digital turn, and to explore the interplay of technology and law. The lecture portion of this week will be shorter, as the second half of this session will be devoted to the presentation of students' research questions and hypotheses for their final project. For this week's memo, students should first create a first version of their memo using a generative artificial intelligence (AI) model (such as Chat-GPT or the equivalent), using a prompt of their choice related to law and technology. They should then write their own memo discussing the 'AI-generated' memo, its strengths and weaknesses, and what thoughts this experiment generated about the regulation of AI.

In the lecture, we will discuss Julie Cohen's work on informational capitalism, first outlining her definition of capitalism and how it has been transformed by "informationalism" as a new mode of development focused on the processing of increasingly complex and voluminous information. The lecture will put her work into context by contrasting it with Shoshana Zuboff's account of surveillance capitalism,[3] before moving into Cohen's account of transformations of the patterns of entitlement and disentitlement in the informational field. This will include discussions of the "platform" as an organizational logic, the legitimation of data extraction under her concept of the "biopolitical public domain," the various legal immunities that protect platforms from liability, and how rapidly changing entitlements have so far characterized the digital age.

[3] SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER (2019).

Finally, we will go back to Latour, walking with him as he follows the dusty files travelling across the Palais-Royal, and ask: how has the concept of the physical 'file' shaped the construction of the digital field, and how has the digital field, in turn, forever altered the fate of the physical filing system? Where are the *matérialité* of a digital text? What does this mean for the work of future ethnographers of law and technology? What is the thread to be followed to deconstruct the unfolding of bureaucratized social processes in the digital era? We will brainstorm how the research methods used by different authors studied throughout the semester can be adapted to the study of law, society, and political economy in the age of digital information.