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## MEMORANDUM

Date: August 15, 2013

To: Students in Elements of Law  
CORE 902-203 CLS

Re: Syllabus and Course Information Fall 2013

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**MEETING ROOM:** KATZ 116

**MEETING TIMES:** 2:30 - 3:45 P.M.; Monday, Wednesday

**FINAL EXAM:** TAKE HOME EXAM.

**PROFESSOR:** LARRY CATÁ BACKER

### CONTACT DETAILS

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## COURSE INFORMATION

Elements of Law orients students to legal research and reasoning through caselaw, statutory interpretation, and legal history, processes, and institutions. The course covers topics across many substantive areas of law, and addresses legal methodology as it arises in the legal profession.

### READING ASSIGNMENTS:

Reading assignments are set forth below in the syllabus. Specific reading assignments will also be announced from time to time in class. Additional readings and problems may be added or substituted throughout the semester. Please bring readings with you to each class.

### COURSE MATERIALS

#### REQUIRED:

1. Materials set out in the syllabus below. These materials may be accessed either through ANGEL or directly from the on-line sources specified. Please see me if you have trouble accessing the material.

#### OPTIONAL / RECOMMENDED:

1. Kent Greenawalt, *Statutory Interpretation: 20 Questions* (New York: Foundation Press, 1999). ISBN 1-56662-784-2
2. Materials may be identified from time to time in class as supplemental materials for further reading by students.

### ***This is a graduate level course. What does that mean:***

The nature of the interaction between faculty, students and the assigned readings may be different from that to which the undergraduate student might be accustomed.

The student is responsible for all of the readings whether I go over them in class or not.

The faculty member's role is not to summarize the readings (something that will not be done) but to work *from them* to lead the student to larger insights or application of the materials to the course themes. It is for this reason that class attendance is critical.

Understand that there is no guarantee that all material assigned for that class session will be covered in class. Additionally, we may not get through all the readings identified in the syllabus.

Anticipate, therefore, that there may be occasions when you will have read ahead or read material not covered in class but for which you will be responsible.

- Do not panic;
- Do not become irritated;
- Do not conclude that there is something amiss;

Humor me and assume that there is a reason for the pacing of the course and for my choice of emphasis. If in doubt, please be sure to see me.

**Please keep in mind that you will be responsible for all assigned readings whether or not discussed in class. You will also be responsible for all materials covered in class, whether or not included in your reading materials.**

## GRADING

The course grade will be based on a **take home exam. THE EXAM IS OPEN BOOK. You must work alone.** You will have 24 hours to complete the exam from the time you pick it up. Students will be given the option of choosing the time you take the exam. The exam may be picked up on any day from the first day of final exams to 5:00 P.M. on the last day of the final exams period (Friday December 6, 2013 through THURSDAY DECEMBER 19, 2013 at 3:00 P.M.).

Exams will be distributed through ANGEL and will be submitted through ANGEL. More detailed instructions will be made available later in the semester. EXAMS MUST BE SUBMITTED NO LATER THAN 24 HOURS AFTER PICK UP. The Clock in ANGEL WILL BE TREATED AS PRESUMPTIVELY ACCURATE. **I will not police you – you are on your honor to comply with final exam rules.**

**ANY EXAM DELIVERED AFTER 3 P.M. ON THURSDAY, December 19, 2013 OR MORE THAN 24 HOURS AFTER PICK UP WILL RECEIVE A GRADE OF “F”.**

The awarding of grades is based on the curve system adopted by the faculty of the Law School and is subject to the limitations of those curve rules. I am required to adhere to this system. Students interested in discussing the curve system itself, its wisdom, or making proposals with respect to the system, are advised to consult their academic dean.

## ATTENDANCE AND CLASS PARTICIPATION

Law School rules require me to notify students of my attendance policy. First year and introductory classes provide the basis for your legal education. It is important for you to attend class. Also, I remind you that though the readings form the foundation of your “learning” this semester, the essence of knowledge acquisition in this class will be based on the way in which the readings are wrestled with, refined and built on in class. Your exam will be based not so much on a raw knowledge of the readings, but on the insights developed from out of the readings developed in class discussion.

**Class attendance is required.** Starting on the second day of class you will be required to sign in at each class session. Attendance will be taken through ANGEL. *You are on your honor on attendance. Please make sure you understand your obligations under the system.*

**Failure to attend class is not cost free:** One half letter grade will be deducted from your final grade for each absence in excess of four. There will be no distinction made between excused and unexcused absences. The four 'cost free' absences should be sufficient to cover all imaginable circumstances that might arise. I understand, though, that the unimaginable may, in fact, occur. If extreme circumstances do arise, please notify me, and we will discuss whether an accommodation is appropriate.

**Class Meeting Time and Makeups.** Class meets twice a week, 2:30 P.M. through 3:45 P.M., Mondays and Wednesdays. I anticipate missing a few classes (mostly Wednesdays). I will try to tape those classes (inviting those interested to the taping sessions) that you may view them on ANGEL.

**Class participation is required.** All students are expected to be prepared for each class session (that is, to have carefully read the materials assigned). That does not mean that you are expected to 'know' any particular 'answers.' Participation does not mean having the 'right' answers to the questions we discuss. Participation requires only that you have read and thought about the materials to be discussed and that you are prepared to engage in a give and take about the ideas, problems and conundrums raised by the issues we investigate. I reserve the power to adjust your final grade to reflect what in my sole judgment will have been either outstandingly good or bad participation.

**Seating is NOT assigned.** Seating is not assigned. I will be passing out name placards at the start of class. PLEASE BRING THESE WITH YOU FOR EACH CLASS.

**Class Notes and Recording of Class.** Please feel free to get together with your classmates for studying and sharing notes. It is sometimes efficient. Take such notes as you desire. *All classes will be recorded and all of the recordings will be posted on the course ANGEL site for access by any student enrolled in the course. You are welcome to review these recordings as often as you like through the beginning of the finals period.* You are authorized to use class recordings only for your own study and review. However, you may not copy or download any class recording. Copying, downloading, dissemination, publication in any format or alternation of any class recording constitutes unauthorized use, is not permitted, and is a violation of the Honor Code.

## **NO PERSONAL RECORDING OF CLASS.**

The office of the Associate Dean for Academic Affairs has provided you with this statement; please familiarize yourself with all of its terms. In case of doubt about meaning, please contact the Office of the Associate Dean:

A. Student Access to Class Recordings; Open Access:

All Class/Open Access. All class recordings will be posted on the course

ANGEL site for access by any student enrolled in this course. Access will end the last day of the final exam period. Your Professor may not consent to or authorize access to or distribution of class recordings beyond the students enrolled in that course.

B. Student Use of Recordings and Materials:

A student may not record any part of a class by any means without prior express authorization of the faculty member. If a student receives faculty authorization to record a class, the student may not copy or download such recording to a computer or other device, distribute it to any other person, or use the recording for any purpose other than personal education and study except with the prior express authorization of the faculty member. Unauthorized recording, distribution, or use of a class recording is a violation of the Honor Code.

A student may not use course materials such as slides or other documents posted on ANGEL for any purpose other than personal education and study and may not disseminate, publish, or alter course materials without prior express authorization of the faculty member. Unauthorized use of course materials is a violation of the Honor Code.

Penn State Law Honor Code, Violation 2.1(1) covers unauthorized recording and unauthorized use of class recordings or course materials. It prohibits "Taking, using . . . or otherwise abusing the property of another, including, without limitation, books, briefs, class notes, outlines, or any other academic items, without authorization."

C. Questions, Special Requests. You should direct any questions, concerns or requests regarding classroom recordings or any classroom technology to the AV Team at [av@law.psu.edu](mailto:av@law.psu.edu).

**A word on my approach to class.** This class is designed to be challenging. It is meant to draw together themes from your first year curriculum to develop a coherent understanding of the "law" you are expected to practice. I hope you will develop your understanding of the materials through study and in class discussion. I also hope to begin to teach you about the context in which you study law and the framework within which law is developed and then used by lawyers, judges and the people and entities that are the objects of law. A central lesson of these materials is to remind law students that the materials we extract from the universe of governance and regulation and that we label "law" does not describe the entire universe of rules by which people's behavior is governed, or the sole source of rules that define the lawyer's craft. A sensitivity to social norms and to the techniques of behavior control are essential in the arsenal of both governance and the lawyer's "toolbox."

## CONFERENCES

I maintain an open door policy. I encourage you to see if me should you have any questions or concerns. Sometimes I may not be in my office. That does not mean I am unavailable. I will try to be in my office for walk-ins Mondays and Wednesdays from 4-5:30 P.M. or otherwise by appointment.

TECHNOLOGY HAS MADE IT EASY TO COMMUNICATE.

PLEASE TAKE ADVANTAGE OF IT.

*You are encouraged to contact me by e-mail. I will respond  
PROMPTLY THOUGH NOT NECESSARILY IMMEDIATELY.*

<lcb11@psu.edu>

## **SYLLABUS**

### **Preface to Materials**

This “Elements of Law” course is meant to provide a general foundation for your law studies. It is meant to provide you with an introduction to the basic issues of this field of study and the basic approaches to a successful understanding of its nature. It is designed to provide students with the basic analytical and conceptual tools necessary to understand both the more specifically focused courses they will take and to provide the “big picture.” As the course description suggests, Elements of Law “orients students”. That orientation is grounded in core questions: “what is it that lawyers concern themselves with?”; “How do lawyer’s reason?”; “what are the appropriate sources for information, reasoning, and the rules lawyers are meant to consider, and apply?”; “what is and how does a lawyer use opinions written by judges to justify a decision on a case, or statutes and regulations written by authoritative governmental bodies?”; “why should a lawyer care about legal history, processes, and institutions?” All of these questions point to the fundamental question of our field: “How does law work?”

For our purposes, Elements of Law will concentrate on four (4) topics that are meant, together, to get to the questions raised: (1) What is Law; (2) Sources of Law, Hierarchies of Law and the Role of Law; (3) Institutional architecture of law and governance: The Organization of the American Federal Union and the U.S. in a Global Context; and (4) An Introduction to Statutory and Constitutional Interpretation: The Role of the Courts. The last section of materials is meant to take this theoretical framework and apply it systematically to a substantive area of study at the core of a lawyer’s work. I have developed three alternatives: (1) the law of corporations in domestic and international law; (2) the constitution and racial discrimination; and (3) racial classifications and the policing of elections legitimacy through statutes. Together these law the conceptual framework within which all governance is undertaken within the United States domestically and in its international role. It also frames U.S. approaches to the governance issues attendant on globalization. These are organized from theory to application. The purpose is to guide the student from the premises that underlie her legal studies (and ultimately the framework of practice cultures) to the application of those premises in the ordinary course of a lawyer’s work. Students are rarely induced to consciously make these connections, or to understand how an ability to deploy these premises may substantially enrich the practice of the lawyers’ vocation.

*What is Law?* The course starts with a short introduction to the basic issues that form the undercurrent of virtually all every lawyer will undertake throughout their career—the concept of law. For students seeking to spend the rest of their professional lives engaged in law, or law related endeavors, it pays to sketch out, early on in the preparation for that sort of career, the basic parameters that will define their professional lives. The first section poses the question—What is law? The answer is more elusive than a student might first consider. And the forms that efforts take to try to find an answer can be as

important as the answer itself. The substance and form of law adopted is important, because these prove the borders of the lawyer's field. These definitions suggest those areas of effort where the work of the lawyer is authoritative and draws a line between that and other fields where the lawyer does not speak with authority. In its simplest form these definitions and border-drawing exercises determine extent of the law determines the borders of the sorts of undertakings to which a lawyer will be asked to provide services for clients. Lawyers (courts and legislators as well for that matter), for example, do not give theological advice and ought not to give authoritative pronouncements on economics or aesthetics.

For our purposes, we consider whether the answer to the question depends on the character of the institution producing "law." We will start, then, with a simple identification of the basic cast of characters, institutions and forms that mark the law as distinctive. This section then introduces students to the four most common forms of law in the United States. The first is law articulated by the courts—corresponding roughly to what remains of the common law. The second is the law articulated by the legislature, what most people have commonly come to understand as "law". The third is the law articulated by regulatory agencies, the increasingly important set of "rules" promulgated by agencies on the basis of power delegated to them by the legislature through statutory "law." Fourth, students will be introduced to the most troublesome aspect of "law"—law beyond law, that is rules articulated by non-governmental actors. These are commonly understood as social norms and have traditionally been defined as something other than law. We will consider the reasons for this distinction from a formal and functional perspective. We will also look to social norms for a related form of social control, a form used by both state and non-governmental actors—including forms commonly understood as techniques of enforcement with substantive effect, for example, surveillance, monitoring, disclosure, evaluation and governmentality. Each of these forms of law has its own distinctive character, form, and properties. Each is produced in different ways and is applied differently by different organs of government.

*Sources of Law, Hierarchies of Law and the Rule of Law.* We started by examining the concept law by reference to the places where it may be produced, and the way that the place where law is produced affects its character. In this section we place these different forms of law within a government, that is we introduce the concept of the state to the concept of law and consider the nature of the relationship between them. That is, the student should consider how these distinct forms of law relate to each other within a functioning state. Just as law is organized as a system in which distinct forms of law have superior or inferior power to affect behavior, so too the effectiveness of law, and the extent of its legitimate application is determined to some extent by the nature, character and power of the institution that produced it.

To that end, this section considers can issue that most lawyers take for granted without stopping long enough to consider—does law (and law making) have a purpose? We will



consider two principal schools of thought. The first assumes that law is an instrument of the state/government with authority to enact it. At its greatest level of generality, this view posits that law is “positive” and “instrumental.” Under this view, law is the conscious product of the national will directed toward to the attainment of a particular behavior controlling objective. From that premise, it follows that without government there can be no law. The second assumes that law is autonomous of government. Law exists whether or not there is a government. In this guise law is understood either as (1) a reflection of the common beliefs and traditions of the people (custom), or (2) the implementation of higher moral norms (natural, religious, rationalist or international customary norms).

Having considered the distinction between “law” systems and “government” institutions, the section turns toward issues of *law system coherence*. The object is to get the student to begin to think about what goes into the construction of a coherent system of law managed by a government, focusing not on an individual “law” but on law as a system. Issues of legal hierarchy and the systematization of law are the focus of this section of the course. For that purpose the class will consider hierarchies of law—is it possible to rank order these sources of law to determine which one is more authoritative than others; what is the relationship between constitutions, statutes, treaties, regulations, judicial decisions, other sources of law? The student will consider how political communities rank laws—from constitution to statute, judicial decision and regulation. She will also consider how government, principally through its courts in the United States, then develops rules for dealing with conflicts of hierarchy among legal systems when more than one appear to apply to the resolution of a dispute. That discussion serves as the basis for considering the underlying normative framework that produces these vertically arranged systems of law. The student will understand the theories used to justify hierarchy and explain why, for example, constitutional law is superior, or of a different character, from ordinary law. Likewise the consequences of the creation of these normative theories to support hierarchies are explored. Lastly, these relationships are most pronounced where an individual seeks to invoke state, national and international law. This section introduces the student to the issues of legal hierarchy in the context of the state system on which the contemporary global legal and political order is founded. The student will examine the relationship between domestic and international law in relation to the obligation of the state and the obligations of individuals.

The last part of this section then seeks to put all the materials together around the notions, now increasingly important in framing discussion about the legitimacy of law and law systems—*rule of law*. The notions of rule of law as a set of process values (thin rule of law) and normative values (thick rule of law) are explored. A comparative approach suggests the malleability of the concept of rule of law but also its importance as a sign of law system legitimacy. The idea of due process and rule of law as a human right is also explored. The focus on rule of law in the United States will introduce students to due

process as a constitutional and rule of law concept. Consideration of *Hamdi v. Rumsfeld*, 124 S Ct 2633 (2004) will serve to provide context to these notions.

*Division of Power: The Organization of the American Federal Union and the U.S. in a Global Context.* Having thus examined the nature of the object of our study—law and its systematization—we turn to a consideration of those institutions our society has created to wield law. We will briefly review the basics of the organization of the American state. We engage in this review not for purposes of a civics lesson but to acquire a more sophisticated understanding of the places where law originates and the ways in which societies can divide the power to make, apply and enforce law. We start with the General Government, considering the division of its power into three “bundles”—(a) Executive; (b) Legislative; (c) Judicial. We then consider the way in which these power divisions are policed by introducing the concepts of separation of powers and checks and balances. We then consider subsidiary units of government in the United States and its relationship to federal power. Lastly we briefly consider the authority of administrative agencies under our system of government.

*An Introduction to Statutory and Constitutional Interpretation: The Role of the Courts.* With this section the student arrives at the heart of the course materials. Because we are lawyers, and we will spend a great deal of time defending the rights of our clients before tribunals set up for that purpose, it is critical to consider the role of courts and their relationship to law. Indeed, the law-courts relationship is at the heart of our common law system, though the power of that direct relationship has been softened in recent years. It follows that a lawyer ought to be intimately acquainted with the role of courts in law and its relationship to the legislative and executive power. The section starts with the idea of judicial review and its limits, that is, the nature of the judicial authority to “say what the law is.” The focus is on institutional legitimacy and the evolution of principles of governance that have become the foundation of the American Republic.

The enhanced relationship between courts and law leads to the critical issue of law--the way in which courts engage with law. The student will consider judicial engagement with law in two broad respects. First, the student will consider the ways in which courts may serve as a site for the development or discussion about law. This is a theoretical consideration of the use of courts not merely as the formal site for the resolution of disputes arising under law, but also of the use of courts as a political, social and cultural institution. Second, and more importantly for lawyers, students will be introduced to theories of judicial interpretation—if courts have broad power to say what the law is, how do they go about that business? This is important not merely because it helps with case reading; a sensitivity to judicial interpretation is crucial to helping a lawyer anticipate how courts will approach novel issues.

Thus, the remainder of this section turns to theories of interpretation. The initial examination concentrates on *statutory* interpretation. The specific focus is on two fundamental approaches to interpreting statutes: textual and intentional. The first looks

to the text on which a dispute is grounded. The second looks to the intention of the drafters of the statute as a guide to determining how a statute ought to be interpreted. Both seek to provide a basis for creating methods of interpretation that are institutional and not personal. Textual approaches tend to be understood as *formalist*. Intentional approaches, or approaches that look to the way the statute functions in relation to the intent of the drafters, are sometimes characterized as *functionalist*. Two points will be woven into the discussion:

1. Reliable versus unreliable legislative history. We cover that as we go through the materials. But I must admit I take a rather unorthodox position. I argue that all history is both reliable and unreliable (and discuss Scalia's position in that context), and then explore why this is so with respect to different types of historical artifact. I then spend more time examining why some forms of legislative history is privileged and other forms marginalized (e.g., Thomas Jefferson versus Sally Hemmings; Federalists versus Anti-Federalists; Congressional materials versus newspaper interviews, etc.). We will discuss tools but also the class, gender, and historical bases for choosing some forms of information as authoritative and others as not, and their importance to the practicing lawyer.
2. Normative canons. Normative canons are useful interpretive devices. We touch on them, but as interpretive instruments rather than as something "true of itself." Discussion is included in this "toolbox" section of the materials. But students will not be asked to dwell on them except as important devices for "speaking" to judges in the particular language that may move them to a particular way of engaging with a case. What is emphasized is the tradition and the power of patterned thinking that are represented by these canons.

Statutory interpretation provides a gateway to a critical issue: to what extent are the court's interpretation authoritative? If interpretation is based on a focus on text and intent, and if courts have a significant voice in providing definitive interpretation of those statutes, then what is the obligation of courts to follow the interpretations made by courts in other decisions. That issue, the role of *stare decisis* in interpretation, takes three forms. The first involves the obligations of lower courts to apply the holding of superior courts within a single judicial system. Must the federal district courts follow the decisions of federal courts of appeal; must they follow only those decisions of federal appellate courts in the appellate district to which they belong? The second involves the obligation of courts in one judicial system to apply the holdings of courts in other systems. Must the federal courts follow the decisions of state courts; must state courts follow decisions of federal courts; do either federal or state courts have an obligation to apply the interpretation of international tribunals? The third involves the obligations of courts to follow their own prior interpretations. Must the Supreme Court apply its own holdings to cases it considers; may a court hear a case "fresh" without the obligation do

apply the rules it has announced in prior cases; does the answer depend on whether the issue to be decided is a matter of statutory, case law or constitutional interpretation?

The materials then consider whether there is something different or additional about *constitutional* interpretation. If statutes are the product of the legislature, a co-equal branch of government, and the constitution is an expression of popular sovereignty, then should the courts approach constitutional interpretation the same way they approach statutory interpretation, or even the interpretation of prior precedent? While formalist and functionalist frameworks dominate constitutional interpretation, additional issues, related to the character of the Constitution as a foundational instrument, are also important. This will require students to work through law in its sociological, political, philosophical, jurisprudential, cultural and other elements, all of which were critical components in the movement from segregation to desegregation in public education. Law--as constitution, statute, and cases--is woven into the larger historical, sociological, and political context. The role of philosophy, political theory, rhetoric and discursive tropes are explored examined both for their contribution to the development of "law" and to their instrumental role in that progress.

Students will be introduced to *originalist* and *evolutive* theories of constitutional interpretation. These supplement the formalist (textual) and functional (intentional) methods of statutory interpretation. The contrasts between the two approaches has significant effects on the way ion which people understand the nature of the Constitution as well as the appropriate way to “read” it. Students will spend time considering the conflict between these approaches. In that respect, “living constitution” approaches (for example the common or customary law approach of David Strauss) is juxtaposed to immutable meaning approaches (for example Justice Scalia and his civilian approach to constitutionalism). Both approaches are used to suggest the plausibility of structural approaches to constitutionalism. The point is to drive home the materials form the first section--that tradition matters--a common law sensibility may color one's approach to constitutionalism in ways that are different from a civil law (or legislative supremacy) approach. The point emphasized is that approaches like that of Justice Scalia's conservatism may actually be radical from a historical perspective; unless one accepts the premise that the adoption of the Constitution represents a break with the Common Law traditions of the U.K. The living constitution advocates might actually come closest to a conservative approach to the constitution within the context of our original common law political society. But the living constitution approach may also overstate the importance of the constitution as framing all issues of right in political society. But in the end, consistent majorities construct the legal reality that is then taught as gospel to the next generation of lawyers, political people, and the masses. . . . or there is crisis. The resolution of these issues, still highly contested, is left for the student.

*Application Option 1: Corporate Regulation in Domestic and International Law.* This section applies the principles introduced in the preceding materials to a specific field of law—the regulations of business corporations. The law of corporations was chosen for several reasons. First, in the United States, corporate regulation is essentially a creature of statute in most states. Second, while there are substantial differences in the scope of statutory coverage—the Delaware Code is substantially more porous than that of states that have adopted variations of the Model Business Corporation Act—this field of law provides substantial opportunities to consider issues of both statutory interpretation and of the interlinked operation of statute, case law, and constitutional law. Third, the last twenty years has been the aggressive development of law and governance initiatives at the international level that may substantially affect the scope of corporate regulation within and between states. These center on corporate social responsibility standards and corporate obligations to respect human rights as a set of internationally crafted norms, and international law relating to corporate governance issues. Fourth, students are introduced to emerging polycentric governance models increasingly important within the operation of globalized operations, like those of transnational economic actors. Lawyers increasingly confront governance systems that, while not law in a formal sense, have the effect of law on clients and must be considered in advising clients. This requires learning to maneuver among different but applicable systems relevant to a client’s operations. Lastly, this section provides students with the opportunity to encounter a coherent system of law beyond the conventional offerings of the first year curriculum but which may produce insights useful in those courses.

This section starts with an introduction to the modern form of American corporate code—the Model Business Corporation Act. It suggests the premises and scope of codes in U.S. law. That leads to a consideration of the relationship between code and judicial decisions in corporate law. Two examples are highlighted: first the use of equity power to interpret corporate statutes within the public policy constraints discerned as underlying corporate codes; second, the limits of the use of the equity power where the code provisions might be used strategically to eliminate or constrain public policy. The next sections touch on the mechanics of corporate formation, corporate capitalization and the framework of authority for officers, directors and shareholders. Here students learn how to interpret and apply statutes within the overall policy of the code. The issue of fiduciary duty is then introduced as a means of showing students the role of courts as gap fillers and innovators in one of the core areas of corporate law. The complexity of that interaction is explored as well. Lastly, students will be introduced to the issue of corporate social responsibility. This provides an opportunity to consider the way in which national and international law overlap in corporate governance. It is also useful for showing students the way in which governance by contract has been developing and the uses of soft law in the international arena. Students will learn that law is no longer limited to the study of the cases, statutes and administrative regulations of a domestic legal order.

*Application Option 2: An Introduction to Constitutional Interpretation.* This section of materials considers theories of constitutional interpretation in action. For that purpose students will consider constitutional interpretation through the development of the constitutional law of racial discrimination and the application of the 14<sup>th</sup> Amendment. This section has two principal purposes, first to apply the theoretical materials of the prior sections and second to introduce students to the development of an important substantive area of law.

This section starts with a consideration of the 14<sup>th</sup> Amendment—from idea to law—by briefly considering historical materials. We then look at the construction of the initial interpretation of the 14<sup>th</sup> Amendment in matters of race, and the move toward the constitutionalization of race discrimination through the development of the doctrine of “separate but equal.” We then consider the way in which “separate but equal was reconstructed over half a century and the abandonment of the “separate but equal doctrine” in school desegregation cases. We then chart the course of reform from desegregation to integration as a constitutional policy and consider the limits of judicial power to force the issue. What makes this study particularly interesting is that this century long process of interpretation, marked by substantial shifts in constitutional meaning, was accomplished without changing a word of the 14<sup>th</sup> Amendment.

*Application Option 3: An Introduction to Statutory Interpretation From Race to Presidential Elections.* This last section of materials considers issues of interpretation of statutes by courts. The substantive focus will be on two problems of interpretation. The first involves the interpretation of the definition of race. While the issue has its roots in efforts to deploy law to manage the rights deprivations schemes of slavery, it has modern application in a variety of statutes meant to protect against race based detrimental actions. The second considers the appropriate interpretation of the Florida elections statute at issue in *Bush v. Gore* and central to the settlement of the 2000 presidential election. It is anticipated that students will take an active role in these exercises.

*Overall Course Objectives.* You will be introduced to a wide variety of materials throughout this course. The purpose of the materials is to expose the student to a number of important concepts that form part of virtually all law study. In addition, the student will be expected to begin to master methods of approaching law and legal studies that ought to prove useful in their careers. More specifically, by the end of the semester the student will be expected to have a working knowledge of the following:

- (1) The differences between customary or common law, statutory or positive law, social norms, and emerging forms of governance; the sources of each; and the political theories underlying each;

(2) A working knowledge of basic sources of law (constitutions, statutes, treaties, etc.), hierarchies of law (the relationship between constitution, statutes, caselaw, treaties, etc.), and the role of law (as a function of state action or as an autonomous set of norms);

(3) A general knowledge of the legal basis for the organization of the American Federal Union and the U.S. in a global context; there will be a substantive component—the student will be expected to master the Non-delegation doctrine;

(4) A substantial knowledge of the role of the Courts in the American system—the extent of the judicial authority to say what the law is (that is the doctrine of judicial review)

(5) A working knowledge of how courts engage with the law—theories of judicial interpretation of statutory *and* constitutional law, and the similarities and differences between them.

(6) A working knowledge of the three aspects of *stare decisis*.

*Application Option 1:*

(7) a working knowledge of the framework and structure of the Model Business Corporation Act

(8) An ability to apply the Model Business corporation Act to determine issues of incorporation, capitalization, and the role of directors, officers or shareholders.

(9) to have a basic knowledge of fiduciary duty

(10) to have substantial knowledge of corporate social responsibility in its traditional approach and a basic knowledge of the emerging global approaches to corporate social responsibility.

*Application Option (2):*

(11) A substantial knowledge of the substantive law of the 14<sup>th</sup> Amendment as it evolved from the 19<sup>th</sup> century and applied to racial segregation of public schools, including the constitutional limits of the remedial power of courts.

(12) Working knowledge of issues of statutory interpretation in its legal, political, and methodological aspects.

*Application (3):*

(13) a basic knowledge of the issues and resolution of the statutory construction and application of race definitions.

(14) a basic knowledge of the legal and statutory construction issues, and their resolution touching on the 2000 U.S. presidential elections as litigated in *Bush v. Gore*.

A detailed syllabus, with readings is provided below. Additional materials may be distributed. Please refer to the Angel site for readings other than those in the required text. Specific assignments will be posted to the Angel site before each class.



## Detailed Syllabus

### I. What is Law?

#### A. Introduction: The cast of characters, institutions and forms

--Justinian, Institutes (c. 570 A.D.) READ J.1.1-1.2

available <http://amesfoundation.law.harvard.edu/digital/CJCiv/JInst.pdf>

#### B. Law Articulated by Courts: The Common Law & Equity

--LAW: Arthur R. Hogue, Origins of the Common Law (Indianapolis, Liberty Fund 1986 (1966)); Chapter 1 (3-29) and Chapter 8 (185-190).

--EQUITY: Hon. Mr. Justice P.W. Young, "Equity," The New South Wales Bar Association (August 2007). READ Pages 1-4; passim the rest optional. Available

[http://www.nswbar.asn.au/docs/professional/prof\\_dev/BPC/course\\_files/Equity%20-%20Young%20J.pdf](http://www.nswbar.asn.au/docs/professional/prof_dev/BPC/course_files/Equity%20-%20Young%20J.pdf)

--Kristin A. Collins, "A Considerable Surgical Operation": Article III,

Equity, And Judge-Made Law In The Federal Courts, 60 *Duke L.J.* 249 (2010) READ PP. 1-9 of the Westlaw Version (249-271 of the original).

#### C. Law Articulated by Legislatures: Statutory Law

--Charles E. Clark, "The Union of Law and Equity," 25 *Columbia Law Review* 1-10 (1925). Available

[http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4281&context=fss\\_papers](http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4281&context=fss_papers)

--P.S. Atiyah, "Common Law and Statute Law," *Modern Law Review* 48(1): (1985).

Available <http://onlinelibrary.wiley.com/doi/10.1111/j.1468-2230.1985.tb00823.x/pdf>.

--The U.S. – where statute and custom meet:

Montana Code Annotated 1999

**(1-2-103. Statutes in derogation of the common law -- liberal construction.** The rule of the common law that statutes in derogation thereof are to be strictly construed has no application to the statutes of the state of Montana. The statutes establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed with a view to effect their objects and to promote justice. )

<http://data.opi.mt.gov/bills/mca/1/2/1-2-103.htm>

Optional Text:

--John Henry Merryman et al., *The Civil Law Tradition: Europe, Latin America, and East Asia*. Michie 1994. READ pp. 447-454; 476-485

--HANS KELSON, PURE THEORY OF LAW (University of California Press, 1967); pp. 3-54;

([http://books.google.com/books?id=9mY4nYPu59kC&dq=%22what+is+law%22&printsec=frontcover&source=in&hl=en&ei=4VrrS6ThGY\\_98AayuNi\\_BA&sa=X&oi=book\\_result&ct=result&resnum=13&ved=0CFEQ6AEwDA](http://books.google.com/books?id=9mY4nYPu59kC&dq=%22what+is+law%22&printsec=frontcover&source=in&hl=en&ei=4VrrS6ThGY_98AayuNi_BA&sa=X&oi=book_result&ct=result&resnum=13&ved=0CFEQ6AEwDA)).

--James G. Apple & Robert P. Deyling, A Primer on the Civil Law System (1994-95). Available

[http://www.fjc.gov/public/pdf.nsf/lookup/civillaw.pdf/\\$file/civillaw.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/civillaw.pdf/$file/civillaw.pdf).

#### D. Law Articulated by Regulatory Agencies: The Administrative function.

--Edward L. Glaeser and Andrei Schleifer, *The Rise of the Regulatory State* *Journal of Economic Literature* XLI:401-425 (2003). READ ALL BUT SECTION 3. Available [http://www.economics.harvard.edu/faculty/shleifer/files/rise\\_reg\\_state.pdf](http://www.economics.harvard.edu/faculty/shleifer/files/rise_reg_state.pdf).  
-- Backer, Larry Catá, *Global Panopticism: States, Corporations and the Governance Effects of Monitoring Regimes*. *Indiana Journal of Global Legal Studies*, Vol. 15, 2008. READ PARTS I-V (pp. 101-138 in SSRN version); Available at SSRN: <http://ssrn.com/abstract=1081242>

E. Law Beyond Law: Social Norms; Surveillance, Monitoring, Disclosure.

--Melvin Eisenberg, *Corporate Law and Social Norms*, 99 *Colum. L. Rev.* 1252 (1999). READ Section I--PP. 2-7 of the WESTLAW VERSION, or 1257-1264  
-- Backer, Larry Catá, *From Moral Obligation to International Law: Disclosure Systems, Markets and the Regulation of Multinational Corporations*. *Georgetown J. International Law*, 39(4):591-653 (2008). Available <http://ssrn.com/abstract=1112882>.  
--Michael Reed, *From the 'Cage' to the 'Gaze'? The Dynamics of Organizational Control in Late Modernity*, in *REGULATION AND ORGANIZATIONS: INTERNATIONAL PERSPECTIVES* 17 (Glenn Morgan & Lars Engwall eds., 1999). READ 28-31.  
-- Foucault, Michel. 2007. *Security, Territory, Population, Lectures at the Collège de France 1977-1978*. (Graham Burchell, trans. New York: Picador Palgrove Macmillan). READ pp. 87-110; 115-120.

II. Hierarchies of Law and Governance: Sources and Uses.

A. The State and its Apparatus.

–law as an instrument of the state/government with authority to enact it; Law as the product of the national will.  
--law as autonomous of government either as (1) a reflection of the common beliefs and traditions of the people (custom), or (2) the implementation of higher moral norms (natural, religious, rationalist or international customary norms)  
--John Locke, *Second Treatise on Government* (Thomas P. Pearson, ed., New York: MacMillan 1952) Chapter XI (Of the Extent of the Legislative Power).  
--CARL SCHMITT, *LEGALITY AND LEGITIMACY* 18 (Jeffrey Seitzer trans., Duke U. Press 2004) (1932). READ pp. 17-26.  
--Larry Catá Backer, *Reifying Law: Understanding Law Beyond the State*, 26(3) *Penn State International Law Review* 521 (2008). READ PARTS I & II (pp. 521-46 of the published version); Available <http://www.backerinlaw.com/Site/wp-content/uploads/2013/02/Reifying-Law.pdf>.

B. Ordering Government Through Law: Constitutions, Statutes, Treaties, Regulations, Judicial Decisions, other sources.

--hierarchy of law in the United States

- EDWARD S. CORWIN, THE "HIGHER LAW" BACKGROUND OF AMERICAN CONSTITUTIONAL LAW (Cornell U. Press 1955). READ pp. 72-89.
- CHARLES MCILWAIN, CONSTITUTIONALISM, ANCIENT AND MODERN (Cornell U. Press, rev. ed. 1947). READ 1-22
- U.S. Constitution, Art. VI. Cl. 2. Available at <http://www.usconstitution.net/const.pdf>.
- German Basic Law, arts.20-25; 31. Available <http://www.iuscomp.org/gla/statutes/GG.htm>.
- Constitution of South Africa, arts. 2, 39, 146-150. Available <http://www.info.gov.za/documents/constitution/1996/index.htm>.
- Indiana Code 1-1-2-1
- Hierarchy of Law in Georgia; available <http://georgiainfo.galileo.usg.edu/pdf/hierarch.pdf>

Background:

"About United States Code:

The U.S. Code (USC) is the codification by subject matter of the general and permanent laws of the United States. It is divided by broad subjects into 51 titles and published by the Office of the Law Revision Counsel of the U.S. House of Representatives. The U.S. Code was first published in 1926. The next main edition was published in 1934, and subsequent main editions have been published every six years since 1934. In between editions, annual cumulative supplements are published in order to present the most current information.

FDsys contains virtual main editions of the U.S. Code. The information contained in the U.S. Code on FDsys has been provided to GPO by the Office of the Law Revision Counsel of the U.S. House of Representatives. While every effort has been made to ensure that the U.S. Code database on FDsys is accurate, those using it for legal research should verify their results against the printed version of the U.S. Code available through the Government Printing Office.

Of the 51 titles, the following titles have been enacted into positive (statutory) law: 1, 3, 4, 5, 9, 10, 11, 13, 14, 17, 18, 23, 28, 31, 32, 35, 36, 37, 38, 39, 40, 41, 44, 46, 49, and 51. When a title of the Code is enacted into positive law, the text of the title becomes legal evidence of the law. Titles that have not been enacted into positive law are only prima facie evidence of the law. In that case, the Statutes at Large still govern.

The U.S. Code does not include regulations issued by executive branch agencies, decisions of the Federal courts, treaties, or laws enacted by State or local governments. Regulations issued by executive branch agencies are available in the Code of Federal Regulations. Proposed and recently adopted regulations may be found in the Federal Register." (About the United States Code, Government Printing Office, [http://www.gpo.gov/help/index.html#about\\_public\\_and\\_private\\_laws.htm](http://www.gpo.gov/help/index.html#about_public_and_private_laws.htm)).

C. Hierarchies of Law Within the Domestic Legal Order and Between National and International Law Reflecting Governmental Order

- Medellín v. Texas, 128 S.Ct. 1346 (2008) READ MAJORITY OPINION and skim concurring and dissenting opinions). Available <http://www.law.cornell.edu/supct/html/06-984.ZS.html>.
- Pruneyard Shopping Ctr. V. Robins, 447 U. S. 74 (1980). Read pp 74-81. Available <http://supreme.justia.com/us/447/74/case.html>.
- Larry Catá Backer, *Inter-Systemic Harmonization and Its Challenges for the Legal-State*, in FICHL Publication Series No. 11 (2011): The Law of the Future and the Future of the Law 427-437 (Editors: Sam Muller, Stavros Zouridis, Morly Frishman and Laura Kistemaker; Torkel Opsahl Academic EPublisher, Oslo, 2011). Available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1789190](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1789190)

D. The Relationship of Law and the Government of the State: Role of Law/Rule of Law.

--Norhiro Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan," *Law and Contemporary Problems* 53(1):61-72 (1990). Available

<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=4023&context=lcp>.

--United Nations Rule of Law, "What is the Rule of Law. Available [http://www.unrol.org/article.aspx?article\\_id=3](http://www.unrol.org/article.aspx?article_id=3).

--David Clark, "The Many Meanings of the Rule of Law".

--Hamdi v. Rumsfeld, 124 S Ct 2633 (2004) READ PARTS I, III. Available <http://www.law.cornell.edu/supct/pdf/03-6696P.ZO>.

Optional

--Mary Crock and Daniel Ghezbash, "Due Process and Rule of Law as Human Rights: The High Court and the 'Offshore' Processing of Asylum Seekers," available <http://theredtelephone.files.wordpress.com/2011/03/due-process-and-rule-of-law-as-a-human-right.pdf>. READ 1-

III. Institutional Architecture of Law and Governance: The United States and Law Making

A. The General Government

1. Division of Power: (a) Executive; (b) Legislative; (c) Judicial

--U.S. Constitution, Arts. I-III. Available

[http://www.archives.gov/exhibits/charters/constitution\\_transcript.html](http://www.archives.gov/exhibits/charters/constitution_transcript.html)

2. Separation of Powers and Checks and Balances

--Youngstown Sheet & Tube Co. v. Sawyer (The Steel Seizure Case), 343 U.S. 579 (1952).

B. The Administrative Branches: The Non-Delegation Doctrine, An Introduction

--Mistretta v. U.S., 488 U.S. 361 (1988).

--Whitman v. American Trucking Association, 531 U.S. 457 (2001). Available <http://supreme.justia.com/cases/federal/us/531/457/case.html> READ 462-476.

--Peter Strauss, *The Place of Agencies in Government: Separation of Powers and the Fourth Branch*, 84 COLUM.L.REV. 573 (1984). READ INTRO & PART I (Pages 1-12 of the WESTLAW VERSION).

C. The States and the People; Popular referendums:

--Romer v. Evans, 517 U.S. 620 (1996) (equal protection limitations).

--City of East Lake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (due process limitations)

--K.K. DuVivier, *Out of the Bottle: The Genie of Direct Democracy*, 70 ALB. L. REV. 1045 (2007).

OPTIONAL

--Clayton Gillette, *Is Direct Democracy Anti-Democratic?*, 34 WILLAMETTE L. REV. 609 (1998). READ 620-636.

D. Constitution, 9<sup>th</sup> & 10<sup>th</sup> Amendments

--Gonzales v. Raich, 5454 U.S. 1 (2005) (medical marijuana). Full version available <http://www.law.cornell.edu/supct/html/03-1454.ZS.html>.

IV. The Role of the Courts: Judicial Review, Interpretive Techniques, and Legitimacy:

A. How Courts Engage With Law: Custom versus Statute: The Norm, The Social Order, The Legal Order

--Larry Catá Backer, *Chroniclers in the Field of Cultural Production: Interpretive Conversations Between Courts and Culture*, 20 BOSTON COLLEGE THIRD WORLD LAW JOURNAL 291 (2000). READ pp. 291-305. Available in "pdf" format at [http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work\\_files/20BCThirdWorldLJ291%282000%29Chroniclers.pdf](http://web.mac.com/lcb911/iWeb/Larry%20Cata%20Backer/My%20Published%20Work_files/20BCThirdWorldLJ291%282000%29Chroniclers.pdf).

--Berreman v. West Pub. Co., 615 N.W.2d 362, Minn.App., 2000 (edited).

--Marvin v. Marvin, 8 Cal.3d 660, 557 P.2d 106, 134 Cal.Rptr. 815, 1976 (edited).

B. The Doctrine of Judicial Review: Judicial Authority to "say what the law is"

--Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)

--McCulloch v. Maryland, 17 U.S. 316 (1819)

--Cooper v. Aaron, 358 U.S. 1 (1958)

--Edwin Meese III, *The Law of the Constitution*, 61 TUL. L. REV. 979 (1987).

C. How Courts Engage With Law: Theories of Judicial Interpretation

--Richard Posner, *Statutory Interpretation – In the Classroom and in the Courtroom*, 50 U. CHI. L. REV. 800 (1983) (READ PARTS II & III)

--Yule Kim, "Statutory Interpretation; General Principles and Recent Trends," *Congressional Research Service Report for Congress Order Code 97-589* (Aug. 31, 2008). Available <http://www.fas.org/sgp/crs/misc/97-589.pdf>

1. Theory and statutory interpretation

Philip P. Frickey, *From the Big Sleep to the Big Heat: The Revival of Theory in Statutory Interpretation*, *Minnesota Law Review* 77:241-267 (1992). Available

[http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2855&context=facpubs&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar\\_url%3Fhl%3Den%26q%3Dhttp%3A%2F%2Fscholarship.law.berkeley.edu%2Fcgi%2Fviewcontent.cgi%253Farticle%253D2855%2526context%253Dfacpubs%26sa%3DX%26scisig%3DAAGBfm39SEdJTC3FuKV2YEi1BTIHmSGZpw%26oi%3Dscolarr#search=%22http%3A%2F%2Fscholarship.law.berkeley.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D2855%26context%3Dfacpubs%22](http://scholarship.law.berkeley.edu/cgi/viewcontent.cgi?article=2855&context=facpubs&sei-redir=1&referer=http%3A%2F%2Fscholar.google.com%2Fscholar_url%3Fhl%3Den%26q%3Dhttp%3A%2F%2Fscholarship.law.berkeley.edu%2Fcgi%2Fviewcontent.cgi%253Farticle%253D2855%2526context%253Dfacpubs%26sa%3DX%26scisig%3DAAGBfm39SEdJTC3FuKV2YEi1BTIHmSGZpw%26oi%3Dscolarr#search=%22http%3A%2F%2Fscholarship.law.berkeley.edu%2Fcgi%2Fviewcontent.cgi%3Farticle%3D2855%26context%3Dfacpubs%22)

2. The Role of Text and Precedent

--John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001) (READ pp. 1, 3-7, 16-22).

3. The Controversy Over Resort to Extrinsic Sources

--Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845 (1992).

D. Stare Decisis in Constitutional Cases and Under State Law

- Planned Parenthood of SE PA v. Casey, 505 U.S. 833 (1992) (federal)
- Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450 (1962) (state).

E. Constitutional Interpretation; A Special Case?

Readings: The section applies the statutory interpretation materials already covered to constitutional context, with the addition of other readings identified below

--Larry Catá Backer, *Retaining Judicial Authority: A Preliminary Inquiry on the Dominion of Judges*, 12 WILLIAM & MARY BILL OF RIGHTS JOURNAL 117 (2003).  
READ INTRODUCTION AND PART II (pp. 117-28; 152-72). Available [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=379460](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=379460)

1. Originalist Theories: Textualism

- a. Word textualism
- b. Clause bounded textualism
- c. Holistic textualism (the document)
- d. Structural textualism (text in light of overarching principles)
  - James Bradley Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).
  - William H. Rehnquist, *The Notion of a Living Constitution*, 54 TEX. L. REV. 693 (1976)
  - Poe v. Ulman (Harlan dissent)

2. Originalist Theories: Original Understanding

- a. Social-cultural plain meaning – Intention of the Founders
- b. Original Purpose (interpretation the best reflects Framers' original purposes)
  - Antonin Scalia, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (The University Center for Human Values Series; Princeton University Press (July 27, 1998) (ISBN-9780691004006))  
READ pp. 3-18 and 23-47.

3. Legal Process Theories

- John Hart Ely, *Democracy and Judicial Review*, 28 STANFORD LAWYER 3-9 (Spr./Sum. 1982) (printed as Vol. 17(1)).

4. Evolutive Theories

- a. Republican Theories
- b. Anti-Subordination Theories (Feminist and Critical Race Theories)
- c. Customary Law Theories
  - Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599 (1989)
  - Poe v. Ullman, 367 U.S. 497 (1961) (Harlan dissent)
  - Optional: DAVID STRAUSS, *THE LIVING CONSTITUTION* (New York: Oxford University Press 2010).

**APPLICATION: I will choose one of these three alternatives as the last part of the class materials.**

V. Application: The Law of Corporations in Domestic and International Law

This section applies the principles introduced in the preceding materials to a specific field of law – the regulations of business corporations. The law of corporations was chosen for several reasons. First, in the United States, corporate regulation is essentially a creature of statute in most states. Second, while there are substantial differences in the scope of statutory coverage – the Delaware Code is substantially more porous than that of states that have adopted variations of the Model Business Corporation Act – this field of law provides substantial opportunities to consider issues of both statutory interpretation and of the interlinked operation of statute, case law, and constitutional law. Third, the last twenty years has been the aggressive development of law and governance initiatives at the international level that may substantially affect the scope of corporate regulation within and between states. These center on corporate social responsibility standards and corporate obligations to respect human rights as a set of internationally crafted norms, and international law relating to corporate governance issues. Fourth, students are introduced to emerging polycentric governance models increasingly important within the operation of globalized operations, like those of transnational economic actors. Lawyers increasingly confront governance systems that, while not law in a formal sense, have the effect of law on clients and must be considered in advising clients. This requires learning to maneuver among different but applicable systems relevant to a client's operations. Lastly, this section provides students with the opportunity to encounter a coherent system of law beyond the conventional offerings of the first year curriculum but which may produce insights useful in those courses.

A. Reading Codes: An Introduction to the Model Business Corporations Act

--Model Business Corporations Act available  
<http://users.wfu.edu/palmitar/ICBCorporations-Companion/Conexus/ModelBusinessCorporationAct.pdf>

--John F. Olson and Aaron K. Briggs, "The Model Business Corporation Act and Corporate Governance: An Enabling Statute Moves Toward Normative Standards," *Law and Contemporary Problems* 74:31-43 (2011). Available  
<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1607&context=lcp>

B. The Nexus of Statute and Common Law

1. Equitable limits on corporate action

--Schnell v. Chris Craft Industries, 285 A.2d 437 (Del Sup. 1971); facts reported below at 285 A.2d 430.

2. Rule of Independent Legal Significance

--Hariton v. Arco Electronics, 182 A.2d 22 (Del.Ch. 1962) aff'd 188 A.2d 123 (Del. 1963).

C. Forming the Corporation: interpretive issues

Problem 1: Alpha, Beta and Theta have decided to form a corporation. They want you to handle the incorporation process. Theta has no interest in running the day to day affairs of the enterprise but he wants a say in major decisions. Alpha and Beta want to run the company .

--MBCA §§2.01-2.07; 4.01-4.03

Problem 2 Assume that you have prepared the relevant corporate documents and reviewed them with Alpha and Beta. They are in proper order. You give them to Alpha to file on Friday morning. Alpha forgets to file the documents. On the same day Alpha and Beta enter into a lease for office space that they sign in the name of the “corporation.” That same day there is a fire in the office and a member of the cleaning staff was injured trying to put it out. Assume the “corporation” is unable to make lease payments or pay for the injuries. Can Alpha, Beta or Theta be held personally liable.

--MBCA 2.04 and Official Commentary

#### D. Capitalizing the Corporation

Problem: Alpha, Beta and Theta have agreed to invest the following amounts in their newly formed corporation— Acme, Inc.: Alpha \$200,000; Beta \$200,000 and Theta \$200,000. Theta has also agreed to invest an additional \$400,000 in the business. Alpha and Beta want to run the corporation. They will each serve as officers for which they will receive a salary and they are willing to have a residual right to receive any income generated by the corporation and to recover the capital they are committing as long as they have control. Theta doesn't want to be involved in the day-to-day operations of the company but wants an equal say about the management of the enterprise. He also wants a steady return on his investment of no less than \$40,000 a year for his additional investment in Acme. What are the interests of each of the parties with regard to participating in the management of Acme, receiving current income and recovering their capital? Would it be better to Theta to receive preferred stock or debt in exchange for the \$400,000 additional investment in Acme?

--MBCA §§ 6.01 - 6.28

--Equity-Linked Investors, L.P. v. Adams, 705 A.2d 1040 (Del. Ch. 1997).

#### E. Corporate Actors: Officers; Directors and Shareholders

##### 1. Officers

--MBCA §§ 8.40 – 8.44

##### 2. Directors

-- MBCA §§ 8.01 – 8.25

##### 3. Shareholders

-- MBCA §§ 7.01 – 7.29

#### F. Fiduciary Duty, at the crossroads of Statute and Common Law

--MBCA §§ 2.02(b)(4); 8.30 – 8.33

--Bayer v. Beran, 49 N.Y.S.2d 2 (Sup.Ct. 1944)

--Stone v. Ritter, 911 A.2d 362 (Del. 2006)

#### G. The Social Responsibility of Corporations: The Traditional Approach

--Larry Catá Backer, *Multinational Corporations, Transnational Law: The United Nation's Norms on the Responsibilities of Transnational Corporations as a Harbinger of Corporate Social Responsibility as International Law*, 37 Columbia Human Rights Law Review 287-389 (2006). Available

[http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=695641](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=695641)

--Dodge v. Ford Motor Co., 204 Mich. 459, 170 N.W. 668 (1919).

--Theodora Holding Corp. v. Henderson, 257 A.2d 398 (Del. Ch. 1969).

--Kahn v. Sullivan, 594 A.2d 48 (Del. 1991).



--MBCA § 3.02

H. The Social Responsibility of Corporations: Emerging Global Approaches

1. Corporate Regulation

-- Backer, Larry Catá, Multinational Corporations as Objects and Sources of Transnational Regulation. *ILSA Journal of International & Comparative Law*, Vol. 14, No. 2, 2008. Available at SSRN: <http://ssrn.com/abstract=1092167>.

2. International Standards

-- United Nations Guiding Principles on Business and Human Rights (2011) available

[http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR\\_EN.pdf](http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf)

-- Backer, Larry Catá, "Rights and Accountability in Development (Raid) V Das Air and Global Witness V Afrimex: Small Steps Toward an Autonomous Transnational Legal System for the Regulation of Multinational Corporations," *Melbourne Journal of International Law*, 10(1):258-307 (2009), Available at SSRN: <http://ssrn.com/abstract=1427883>

OR

VI. Application: The U.S. Constitution and Race Discrimination.

This long portion of the course will consider constitutional interpretation through the development of the constitutional law of racial discrimination and the application of the 14<sup>th</sup> Amendment. It introduces the student to textual interpretation and to the development of complex judicial glosses on text. This will require students to work through law in its sociological, political, philosophical, jurisprudential, cultural and other elements, all of which were critical components in the movement from segregation to desegregation in public education. Law--as constitution, statute, and cases--is woven into the larger historical, sociological, and political context. The role of philosophy, political theory, rhetoric and discursive tropes are explored examined both for their contribution to the development of "law" and to their instrumental role in that progress.

A. Historical background materials

--14<sup>th</sup> Amendment, text

--Robert Kaczorowski, *Revolutionary Constitutionalism in the Era of the Civil War and Reconstruction*, 61 *NYU L. Rev.* 863 (1986) READ HANDOUT VERSION PAGES 1-11, 19-22, 24-30.

--Eric Foner, *The Strange Career of the Reconstruction Amendments*, 108 *Yale L.J.* 2003 (1999). READ ALL 4 PAGES.

--*Poe v. Ullman*, 367 U.S. 497 (1961) (Harlan dissent)

B. Developing 14<sup>th</sup> Amendment Frameworks--Initial Meaning:

--*The Slaughter House Cases*, 83 U.S. (16 Wall.) 36 (1873)

--*Strauder v. West Virginia*, 100 U.S. 303 (1879)

--*The Civil Rights Cases*, 109 U.S. 3 (1883)

C. Constitutionalizing Race Discrimination

- Plessy v. Ferguson, 163 U.S. 537 (1896)
- Thomas Zimmerman, Background to Plessy
- The Separate Car Act:  
“all railway companies carrying passengers in their coaches in this state, shall provide equal but separate accommodations for the white and colored races, by providing two or more passenger coaches for each passenger train or by dividing the passenger coaches by a partition so as to secure separate accommodations. . . .” The penalty for violation was \$25 or 20 days in jail.

D. Reconstructing the meaning of “separate but equal.”

- McCabe v. Atchison, Topeka & Santa Fe Railway, 235 U.S. 151 (1914)
- Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938)
- Sipuel v. Board of Regents, 332 U.S. 631 (1948)
- Fisher v. Hurst, 333 U.S. 147 (1948)
- Sweatt v. Painter, 339 U.S. 629 (1950)
- McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950)

E. Abandoning “Separate but Equal” as Constitutional Doctrine

- Brown v. Board of Education, 347 U.S. 483 (1954)
- Bolling v. Sharpe, 347 U.S. 497 (1954)

F. Aftermath—From Desegregation to Integration; Race and Education

- Griffin v. County School Board, 377 U.S. 218 (1964)
- Green v. New Kent County School Board, 391 U.S. 430 (1968)
- Swann v. Charlotte-Mecklenburg Board of Educ., 402 U.S. 1 (1971)
- Milliken v. Bradley, 418 U.S. 717 (1974)
- Freeman v. Pitts, 503 U.S. 467 (1992)

G. The limits of Judicial Remedial Power

- Missouri v. Jenkins (Jenkins II), 495 U.S. 33 (1977)
- Missouri v. Jenkins (Jenkins III) 515 U.S. 70 (1995)

OR

VII. Application: Racial Classifications and the Policing of Elections Legitimacy through Statutes.

This portion of the course looks at the different approach to statutory interpretation by examining a number of statutory issues. Each of these sections is designed to serve as a class discussion problem in which students apply the materials learned to each of these different interpretive contexts.  
-- William Eskridge, *Dynamic Statutory Interpretation* 135 U. PA. L. REV. 1479 (1987) READ Part II (pp. 1497-1538 of the published text; Pages 8-23 of the Westlaw version provided).

A. What is race?

1. Applying statutes defining race to restrict marriage rights.

--State v. Treadaway, 126 La. 3000, 52 So. 500 (1910).  
--William Q. Lowe, Comment: "Understanding Race: The Evolution of the Meaning of Race in American Law and the Impact of DNBA Technology on its Meaning in the Future", *Albany Law Review* 72:1113-1143 (2009). READ PARTS I-III

2. Race and EEOC litigation

--Ali v. National Bank of Pakistan, 508 F. Supp. 611, 25 Empl. Prac. Dec. (CCH) ¶31640 (S.D. N.Y. 1981).

B. The Saga of Bush v. Gore: litigation over the outcome of the 2000 Presidential Election and the interpretation of Florida's Election Law.

*Problem* – the limits of court authority to interpret statutes: when does (lawful) interpretation become (illegitimate) legislation?

--Backer, Larry Catá, Using Law Against Itself: Bush v. Gore Applied in the Courts. *RUTGERS LAW REVIEW*, Vol. 55(4):1119 (2003) READ PART III )pp. 1125-1170). Available <http://ssrn.com/abstract=410242>.

--Backer, Larry Catá, *Race, 'the Race', and the Republic: Re-Conceiving Judicial Authority After Bush v. Gore*, 51 *CATHOLIC UNIVERSITY LAW REVIEW* 1057 (2002) READ pp. 1066-1076.

--The Cases: Bush v. Gore 531 U.S. 98 (2000). Available <http://www.law.cornell.edu/supct/html/00-949.ZPC.html>.