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MEMORANDUM

Date: August 16, 2013 (rev. Aug. 22, 2014)

To: Students in Intro to Law and Legal Systems
INTAF 597E – 201 CLS

Re: Syllabus and Course Information Fall 2014

MEETING ROOM: KATZ 241

MEETING TIMES: 5:45 – 7:00 P.M.; Monday, Wednesday

FINAL EXAM: TAKE HOME EXAM.

PROFESSOR: LARRY CATÁ BACKER

CONTACT DETAILS

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COURSE INFORMATION

The materials that follow include course description, reading assignments, course objectives, final examination information and background as well as a detailed course description and syllabus. It also includes the mundane rules for class organization—attendance policies, class recordings, participation, office hours and the like. It is meant to provide a guide to the materials and a framework in aid of your studying the materials presented.

COURSE DESCRIPTION:

The brief official course description describes this course as follows:

“The course focus is on American law as system, and through a study of that system, of the context within which national law systems intersect with international law and social norms. To that end, the student would be exposed to the an understanding of the way "law" is created in the U.S. (common law, statute, administrative regulation), the relationship of these forms of law and the state (constitutional law, hierarchies of law, relationship between domestic and international legal regimes, etc.), an introduction to the ways in which law is interpreted (the role of courts, judicial interpretation of cases and statutes), and an introduction to the context in which law plays a role in policy and international affairs, by placing the US system within the world of comparative law and respective legal families, (this might as well help both the foreign and the US participants orientate themselves a bit better to the connection between law and policy). Short problems and examples would be drawn from the basic first year law curriculum (ie modern common law reasoning through tort or contract, modern statutory law through criminal statutes, administrative law through civil procedure or basic admin law, and domestic "soft law" such as NYSE listing rules and the methodologies for ranking US law schools). The last third of the course would be used to introduce materials from the core substantive legal concepts in tort, contract, procedure and constitutional law.”
http://sia.psu.edu/academics/elective_courses/descriptions#INTROLAW .

This section of the course will accomplish those objectives – legal research and reasoning through the major sources of law in the United States. The course will also focus on methodology. But it will do so within a larger framework – as part of an introduction to the law and legal systems of the United States. The principal objective is to orient students to the study of law and to make that study more coherent. To that end, the course will focus on an understanding of the organization of the pedagogy of the legal curriculum (what is the point of the law school curriculum, and its underlying ideologies) and to understand its unity, principles, constraining premises, and methodologies.

READING ASSIGNMENTS:

Reading assignments are set forth below in the syllabus. They are drawn from the manuscript, Larry Catá Backer, *Introduction to U.S. Law and Legal System – Policy, Premises, and Practice in National and International Context* (forthcoming). 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. Larry Catá Backer, *Introduction to U.S. Law and Legal Systems – Policy, Premises, and Practice in National and International COntext* (forthcoming). 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:

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.

CLASS EXPECTATIONS

This is a U.S. 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. There will be less emphasis on explaining the readings and more on discussions. The faculty member's role, then, 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. The exam will be based on the readings as examined and discussed in class.

The emphasis on class discussion does not mean that the readings are less important. Student are responsible for all of the readings whether they are discussed in class or not.

Class sessions are structured to respond to student needs. Sometimes that means that we will get through the materials more slowly; sometimes that means that we will not reference all material assigned for that class session in our class discussion. 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.

BUT UNDERSTAND, and 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 9:00 A.M. on the first day of final exams to 3:00 P.M. on the last day of the final exam period (Monday December 15, 2014 through Friday DECEMBER 19, 2014 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 FRIDAY, December 19, 2014 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.

**PENN STATE LAW’S FINAL EXAM GENERAL REGULATIONS MAY BE
ACCESSED HERE:**

<https://law.psu.edu/current-students/registrar/final-exam-information/final-exam-regulations-jd-and-llm>

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, 5:45 P.M. through 7:00 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.

UNIVERSITY DISABILITIES POLICY STATEMENT

In compliance with University policy regarding persons with disabilities, please review the following statement regarding disabilities policies for this class:

Penn State welcomes students with disabilities into the University's educational programs. If you have a disability-related need for reasonable academic adjustments in this course: UP students should contact the Office for Disability Services (ODS) at 814-863-1807 (V/TTY); Carlisle students should e-mail Holly Parrish, Director of Law School Student Services (hap15@psu.edu). For information and procedures regarding law school disability services, visit the law school Student Services website at http://law.psu.edu/office_for_student_services/disability_services. For information about ODS, please visit <http://equity.psu.edu/ods/>.

To receive consideration for course accommodations, you must provide documentation of your disability (see the documentation guidelines at <http://equity.psu.edu/ods/guidelines/documentation-guidelines>). If the documentation supports the need for academic adjustments, ODS will provide a letter identifying appropriate academic adjustments. You must contact ODS and request academic adjustment letters at the beginning of each semester.

University Statement on Plagiarism

The Penn State School of International Affairs safeguards and promotes the ideals of honor and integrity by prohibiting lying, cheating, stealing, and other dishonorable conduct. Accordingly, all students should act with personal integrity, respect other students' dignity, rights and property, and help create and maintain an environment in which all can succeed through the fruits of their efforts. Dishonesty of any kind will not be tolerated in this course. Dishonesty includes, but is not limited to, cheating, plagiarizing, fabricating information or citations, facilitating acts of academic dishonesty by others, having unauthorized possession of examinations, submitting work of another person or work previously used without informing the instructor, or tampering with the academic work of other students.

Presenting the words or ideas of others as your own is dishonest and is not acceptable in this course, whether in an outline, draft or final submission. Plagiarism includes using the ideas or text written by another person without appropriate acknowledgement of the source. It also includes allowing another person to write or alter work that you submit as your own. To make sure you understand the difference between plagiarism and appropriate use of the words and ideas

of others, take the Penn State University [Plagiarism Tutorial for Students](http://istudy.psu.edu/FirstYearModule/CopyrightPlagiarims/StudentGuide.html). If, after taking the tutorial, you are still not sure how to use or represent another person's work in your writing, contact me for advice before you submit your work. All instances of possible plagiarism in submitted work will be reported to the relevant authorities for investigation and possible disciplinary action. The minimum academic penalty for plagiarism, whether on a preliminary or final draft, is a failing grade (F grade) in the course. All acts of academic dishonesty will be dealt with and punished in accordance with applicable Penn State Law, SIA and Penn State University Graduate School policies on plagiarism. For further information see also <http://istudy.psu.edu/FirstYearModule/CopyrightPlagiarims/StudentGuide.html>.

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

Introduction Derived From Larry Catá Backer, Introduction To The Law And Legal System Of The United States: Policy, Premises, And Practice In National And International Context (Chapter 1, forthcoming 2015)

This course, “Introduction to the Law and Legal Systems of the United States,” is meant to provide a general foundation for your law or policy studies. It is meant to provide you with an introduction to the basic issues and the basic approaches to a successful understanding of the general nature of law within the context of the legal system of the United States. 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.” The course is meant to orient students by grounding them 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, this course 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. By *substance*, we will mean its substantive elements and its procedural mechanics. By *form*, we will mean the institutions through which law can be authoritatively made. 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. It also suggests what sorts of commands that can compel obedience and the institutions that can serve as the compelling force. 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.

It follows, then, that the question “what is law?” is to some extent intimately connected with the question “where was law made?” to understand law, then, one has to understand the institutional context in which it is produced, and the extent to which particular institutions have been accorded power to “make” or “pronounce” law. That investigation is also far more complex in the United States than a look at the organization of its government might suggest. 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 and the institutions that produces each. 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. Lastly, the section introduces remedies—the consequences of the operation of the law against individuals and sometimes the state.

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 an 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 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.

Institutional Architecture of Law and Governance: The United States and Lawmaking 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 the United States 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.

By the 21st century, though, the traditional division of the American federal government no longer accurately described the functional operation of the general government. To get a clearer picture, it is necessary to examine the role of the administrative architecture of U.S. government. That requires an introduction to the non-delegation doctrine, the bundle of premises through which the three branch formal organization of the General Government can accommodate, at least functionally, an additional branch, and to manage that relationship without breaching the formal constraints of federal constitutional organization.

We then briefly consider subsidiary units of government in the United States and its relationship to federal power. First we consider the relationship between the federal and

state governments. This relationship is drawn through the principles of “federalism”. Those principles, themselves, suggest the elasticity of American law. Second, we consider the residuary power of the people. The object of study is the extent of the power of popular referenda to “make” law in states and within the federal system.

Lastly we consider the place of the U.S. government within the community of nations. We will introduce this area of study not through the usual avenue—the principles of international law—but rather will consider this relationship from out of the sovereign capacity of the United States itself. To that end the student will be introduced to the nexus of U.S. and international law from the U.S.’s perspective. The Restatement of the Foreign Relations Law of the United States will serve as our guide.

The Role of the Courts: Juridical Review, Interpretive Techniques, and Legitimacy. With this section the student arrives at the heart of the course materials. The preceding materials have suggested the central role of the judiciary within the U.S. legal and governmental system. If that is the case, then an understanding of the way in which judges approach their tasks, and the institutional boundaries of that task, are critical elements of the study of the U.S. legal and political system. On an operational level, and for most students of law in the United States, the study of the practices and approaches of judges is important for another reason. 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. It also suggests the extent of the uniqueness of the premises that mark the boundaries of judicial power and their role in government and with law.

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 to 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 in 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 from 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.

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 14th 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 14th Amendment—from idea to law—by briefly considering historical materials. We then look at the construction of the initial interpretation of the 14th 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 14th Amendment.

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*.
- (7) A substantial knowledge of the substantive law of the 14th Amendment as it evolved from the 19th century and applied to racial segregation of public schools, including the constitutional limits of the remedial power of courts.
- (8) Working knowledge of issues of statutory interpretation in its legal, political, and methodological aspects.

Syllabus

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(Law, Policy, the State and the U.S. System)

Part I: What is Law

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Chapter 2
(Introduction: The cast of characters, institutions and forms); Reading Justinian's Institutes

Class 3
Chapter 3
(Law Articulated by Courts: The Common Law)

Class 4
Chapter 4
(Law Articulated by Courts: Equity)

Class 5
Chapter 5
(Law Articulated by Legislatures: Statutory Law)

Class 6
Chapter 6
(Law Articulated by Regulatory Agencies--The Administrative Function)

Class 7
Chapter 7
(Law Beyond Law--Social Norms, Contract Communities, and Disclosure Regimes)

Class 8
Chapter 8
(Remedies – civil and criminal)

Part II: Hierarchies of Law and Governance; Sources and Uses

Class 9
Chapter 9
(The State and Its Apparatus)

Class 10
Chapter 10
(Ordering Government Through Law: Constitutions, Statutes, Treaties, Regulations, Judicial Decisions, and Other Sources)

Class 11

Chapter 11

(Hierarchies of Law Within the Domestic Legal Order and Between National and International Law Reflecting Governmental Order)

Class 12

Chapter 12

(The Relationship of Law and the Government of the State--Role of Law/Rule of Law)

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

Class 13

Chapter 13

(The General Government; Separation of Powers and Checks and Balances)

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Chapter 14

(The Administrative Branches: The Non-Delegation Doctrine, An Introduction)

Class 15

Chapter 15

(Judicial Administration – the Court make their own rules)

Class 16

Chapter 16

(The States and the People; Popular Referenda)

Class 17

Chapter 17

(The Federal-State Interplay, the 9th and 10th Amendments of the Federal Constitution)

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Chapter 18

(The United States in a World of law and norms)

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

Class 19

Chapter 19

(Custom versus Statute: The Norm, The Social Order, The Legal Order)

Class 20

Chapter 20

(The Doctrine of Judicial Review--Judicial Authority to "Say What the Law Is")

Class 21

Chapter 21

(The Role of the Courts: How Courts Engage With Law: Theories of Judicial Interpretation)

Class 22

Chapter 22

(The Role of the Courts: Stare Decisis in Constitutional Cases and Under State Law)

Class 23

Chapter 23

(The Role of the Courts: Constitutional Interpretation; A Special Case?)

Class 24-5

Chapter 24

(The Role of the Courts: Constitutional Interpretation; A Special Case? Contemporary Theorizing and the example of school desegregation)

Class 26-8

Chapter 25

(The extent of the judicial power; the example of school desegregation)