CONSTITUTIONAL LAW
SPRING 2005 SEMESTER
Professor Larry Catá Backer

MEETING ROOM: 136
MEETING TIMES: 8:00 to 8:50 A.M., Monday, Tuesday, Wednesday and Thursday

PROFESSOR: LARRY CATÁ BACKER
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FINAL EXAM: Tuesday, May 3, 2005; NOON.

COURSE INFORMATION

REQUIRED BOOKS:

1. FARBER, ESKRIDGE & FRICKY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (3rd Ed. 2003) ("Text").

2. FARBER, ESKRIDGE & FRICKY, CASES AND MATERIALS ON CONSTITUTIONAL LAW: THEMES FOR THE CONSTITUTION'S THIRD CENTURY (Supplement 2004) ("SUPP.").

RECOMMENDED BOOKS:

While the following books need not be purchased, they may serve as useful references or provide materials for review. In deciding whether or not to purchase these books remember that I will be testing you on the materials covered in class, not those covered in other materials you might consult. Constitutional formulas provided may not coincide with the ones we discuss in class.


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5. WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKER, ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION (Foundation Press, 2000). A basic text on the legislative process and the rules, sometimes binding, sometimes not, that courts and legislatures have created to interpret statutory text.

READING ASSIGNMENTS:

Reading assignments are set forth below in the syllabus. 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 Text, Supp., and any supplemental readings with you to each class.

PLEASE REMEMBER THAT THE FEDERAL CONSTITUTION IS REPRINTED FOR YOUR USE AS APPENDIX 1 OF THE TEXT, FOLLOWING PAGE 1257. WE WILL BE REFERRING TO THE DOCUMENT FROM TIME TO TIME.

Understand that there is no guarantee that we will be able to cover in class all material assigned for that class session throughout the semester. Anticipate, therefore, that there may be occasions when you will have read ahead. 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. 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 THREE HOUR final examination. The
examination will be limited open book. You will be allowed to bring into the exam only the "Required Books" listed on page 1, in which you are free to write whatever notes you are able to squeeze onto the pages of your texts. Please take note now that you will NOT be permitted to glue, attach or otherwise append any materials to the books you may bring to the exam. For example -- your outlines, typewritten and reduced, may not be glued to the back pages of the text. IF IN DOUBT CHECK WITH ME FIRST WELL AHEAD OF TIME.

In addition, grades may be adjusted upwards, at my discretion, for what in my judgment is exemplary participation throughout the semester.

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 material not in your readings and for which you will be responsible will likely be covered in class from time to time during the course of class discussion (and may find its way into the final exam).

Class attendance is required. Starting on the second day of class you will be required to sign in at each class session.

Failure to attend class is not cost free: One point 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 Makeup. Class meets three times a week, Monday, Wednesday and Thursday from 8:00 A.M through 8:50 A.M. I will be away for the first regularly scheduled week of class. Make up classes will likely be scheduled for Fridays and video taped so that if you can't make class you can view the video at your convenience. I also anticipate missing a few classes (mostly Thursdays). I am contemplating finding an alternative make up classes for these.

Class participation is required. All students are expected to be prepared for each class session (that is, to have carefully read the material assigned). That does not mean that
you are expected to 'know' any particular 'answers.' Especially in Constitutional Law, that is the wrong way of looking at things. Instead, I expect you to begin to understand the modes of analysis we will study, and the theories underlying that analysis. Those are the tools you will need to work through any constitutional law problem.

I use a modified Socratic method in class. It is my policy to call on students at random. However, at the end of each class session, I may designate one or more students to act as discussion leaders for the next class session, with primary responsibility for the materials to be covered that day. Please come see me before class if you are unprepared and you want to be excused from participation (please have a very good reason ready). Otherwise, your failure to participate on two separate class days will be treated as the equivalent of an absence from class. Please note: 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 discuss them.

Seating is assigned. To make seat selection somewhat less arbitrary, the seat you choose on the second day of class will be your assigned seat. I will circulate a seating chart on Tuesday for you to fill in.

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 as many notes as you like . . . NO RECORDING OF CLASS. Sorry.

A word on my approach to class. I hope you will develop your understanding of the materials through Socratic dialogue and class discussion. I hope to begin to teach you not only the substantive rules and approaches to problem solving in Constitutional law, but also how to think like a lawyer, and how to argue and defend a position before your peers (just like you'll have to do in court or at a meeting). To that end, you should understand several things:

1. There are few sure answers in Constitutional Law; what I will teach you and what you should attempt to derive from the course is an understanding of the various approaches to Constitutional interpretation that have guided the courts. Those of you who are looking to understand Constitutional Law by simple answers to easy questions should look elsewhere.

2. Do not expect to agree with me on everything, especially substantive conclusions. Often, I will play devil's advocate. Let your values, logic, etc. guide you to whatever substantive conclusion your heart desires.
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3. You will be spending a lot of time learning to read cases. Reading these involves approaches and skills different from those you have learned from reading cases in common law courses. Prepare to relearn what you might have thought you had mastered.

4. **You should expect to be challenged, even when you are right!** Understand that one of my goals for this year is to teach you how to defend your answers, and persuasively present your analysis, even under aggressive questioning. **Don't take it personally.** Aggressively testing your ideas and answers to questions (as well as the level of your preparation) doesn't mean that I don't respect you. Understand that you may not always have the right answer, or that I may want to use your response to take the materials in a direction different from that you had in mind. Also -- there may not be a right answer. And remember: before you panic if you had the right answer to all the questions, there would be no need for you to attend class!

5. As you get bogged down in details always go back to the big picture. As yourself: (1) why am I reading this now? (2) How is this reading related to what came before (3) In addition to the specific holding of the case (and its precise answer to a narrowly drawn question of Constitutional Law), what should I be learning from the case (what is the court teaching me about history, perspective, theory, etc.) applicable to other cases or Constitutional problems (4) how does the case highlight particular problems and solutions to issues of Constitutional Law (5) how do the notes and materials that follow the case help me frame the issues I am expected to master.

**Problems:** The TEXT is laced with problems. These are a real aid to the understanding of the complexities and processes of constitutional decision making. We will not be covering all of the problems in class. However, I may, from time to time, assign problems for discussion in class. I will expect that you will be prepared to discuss the materials in the TEXT that are helpful in approaching a solution to those problems as they are assigned.

**CONFERENCES**

I maintain an open door policy. I encourage you to see if me should you have any questions or concerns. *Please feel free to contact me by e-mail if you like. I will respond promptly.*
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SYLLABUS

For those who want to plan ahead, I provide the following syllabus. In addition to the readings in the TEXT, be sure to read the materials in the SUPP., and in any additional handouts.

The focus of this class is on the structural issues of constitutional law: federalism, separation of powers, and limits on judicial power. The individual rights materials, which tend to excite everyone who comes in contact with them, we do not cover, unless time permits. There are several courses offered in issues of individual rights that you make take in the coming two years. As a result, we will be moving around the book a bit. We will NOT be covering the materials in the order they appear in the TEXT.

OVERARCHING COURSE THEMES: JUDICIAL REVIEW AND INTERPRETIVE METHODS.

"Judicial review is the fountain of constitutional law. This is true for several reasons. First, the process of judicial review has created the body of reported decisions that we think of as comprising the law of the constitution... Second, it is the process of judicial review that renders the Constitution binding and enforceable as law." 1

A principal focus of this class will be to introduce you to the theory, methods, limitations, and debates about the ways in which judges approach the task of constitutional interpretation. We will spend a considerable amount of time learning to identify the principal approaches to constitutional interpretation championed by the justices, the ways in which these methods conflict or are consistent, their usefulness and possible limitations, and the ways in which they have been applied to develop and refine the substantive law we cover this semester. You will learn how to apply these different approaches for the benefit of your clients and to see how adoption of one or another methodological approach produces profound effects on constitutional interpretation.

The courts do not work in a vacuum. Many of the cases we will study arose amid great social, political, racial, ethnic, and class turmoil. The cases will be read in context. You will be introduced to strategic and other factors that may play a part in the

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development of constitutional jurisprudence and in the articulation of Constitutional legal standards.

Syllabus Detail:

I A Prologue on Constitutional History (Chapter 1)

(This chapter provides some context to the development of law. You would be wise to revisit this section frequently as we cover the development of constitutional interpretation of the issues we cover this semester)

2. The Marshall Court's Nationalist Vision TEXT 11-15
3. States' Rights, Slavery and Civil War TEXT 15-19
4. Reconstruction and the Ambiguous Triumph of Abolition TEXT 19-24
5. The Labor Movement, etc. TEXT 24-31
6. The New Deal, etc. TEXT 31-38
7. The Warren Court TEXT 38-44
8. The Nixon Court TEXT 44-50
9. The Post-Civil Rights Court and Recent Justices TEXT 50-58

II. An Introduction to Constitutional Decisionmaking (Chapter 2)

(This critical chapter introduces the concept of judicial review and the methods jurists have developed to aid them in the interpretation of the constitution; the rest of the semester's study is in a sense an elaboration of the materials introduced in this chapter)

1. Brown v. Board of Education: A Case Study
   A. 14th Amendment Through Plessy TEXT 59-74
   B. From Plessy to Brown TEXT 74-84
2. The Supreme Court's Role in Our Political System: Marbury TEXT 85-99
3. After Brown; Judicial Constitutionalism and Social Change TEXT 99-119
4. Theories of Constitutional Decision-Making TEXT 119-120
   A. Originalist Theories TEXT 120-138
   B. Legal Process Theory TEXT 138-152
   C. Evolutive Theories TEXT 152-175
VII. Federalism (Chapter 7)

1. Enumerated Federal Power/Reserved State Authority TEXT 821-841
2. Commerce Clause: Foundations TEXT 841-866
4. Power to Promote Civil Rights:
   A. 14th Amend. Early Cases TEXT 883-910
   B. 14th Amend. New Approaches and Limits TEXT 910-922
   C. 11th Amend. vs. 14th Amend. And Limits on Federal Power TEXT 922-937
   D. Gender Legislation TEXT 937-953; Supp. 55-63
5. Other Federal Powers: Taxing and Spending Powers TEXT 953-962
7. State Immunity to Federal Power: Direct National Regulation TEXT 967-980
9. Federal Limits on State Regulation: Dormant Commerce Clause
   A. Principles & Discrimination Against Commerce TEXT 1000-1023
   B. Principles & Burdens of Commerce TEXT 1023-1037
10. Federal Limits on State Regulation: Other Sources TEXT 1037-1049

VIII. Separation of Powers (Chapter 8)

1. Introduction TEXT 1051-1064
2. Issues of Executive Aggrandizement
   A. Domestic Action TEXT 1064-1079
   B. Foreign Relations/War Powers TEXT 1079-1092
   C. Presidential Privileges and Immunities TEXT 1092-1106
3. Issues of Legislative Overreaching
   A. Excessive Delegation TEXT 1107-1136
   B. Control of Federal Officials TEXT 1136-1146
   C. Power to Create Independent Federal Bureaucracy TEXT 1146-1163
4. Congressional Structuring of Adjudication/Judges
   A. Controlling Judges TEXT 1163-1177
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B. Congressional Control of Federal Judicial Jurisdiction TEXT 1177-1191

IX. Limits on the Judicial Power (Chapter 9)

1. The Political Question Doctrine TEXT 1191-1216
2. 'Cases' or 'Controversies' TEXT 1216-1248
3. Limits on Judicial Remedial Powers TEXT 1248-1256

IF WE HAVE TIME WE WILL COVER SOME OR ALL OF THE FOLLOWING:

V. Protecting Fundamental Rights

2. Protecting Economic Liberty and Property
   A. Liberty of Contract/Substantive Due Process TEXT 448-458
   B. Takings TEXT 458-481; Supp. 17
3. Equal Protection and 'Fundamental Interests'
   A. Voting TEXT 481-496
   B. Economic Rights TEXT 496-511
   C. Right to Travel TEXT 511-517
4. Fundamental Privacy Rights
   A. Intro/Family Life (contraception; marriage) TEXT 517-542
   B. Abortion TEXT 542-572
   C. Consensual Sexual Activity TEXT 572-582; Supp. 17-37
5. The Right to Die (Other Than By Command of the State) TEXT 582-592
6. Procedural Due Process TEXT 592-611