Constitutional Theory

Professor Fleming

Spring 2007

Syllabus

Materials for Course

I. Required

Walter F. Murphy, James E. Fleming, Sotirios A. Barber & Stephen Macedo, American Constitutional Interpretation (3d ed. 2003) (“ACI”)
Robert H. Bork, The Tempting of America (1990)
Ronald Dworkin, Life’s Dominion (1993)

Supplemental Readings (“SR”)

These books are available in the Bookstore and on reserve in the Library. SR will be available on Blackboard. The Student User Guide to Blackboard Courses is on pp. 10-11 of this Syllabus.

II. Recommended

Bruce Ackerman, We the People: Foundations (1991) & Transformations (1998)
Sotirios A. Barber & James E. Fleming, Constitutional Interpretation (forthcoming 2007)
Christopher L. Eisgruber, Constitutional Self-Government (2001)
Antonin Scalia, A Matter of Interpretation (1997)
Robin West, Progressive Constitutionalism (1994)

All of the recommended books will be on reserve in the Library.

Administrative Details

Office: Room 229 Fax: (212) 636-6899
Phone: (212) 636-6839 Email: jfleming@law.fordham.edu
Office Hours: 2:00-3:00 Thursday or by appointment
Paper: you may write a 25-30 page seminar paper, which may be used to satisfy the School’s writing requirement
Final Examination: or you may write a take-home final examination
Reaction Papers: you are required to write three short papers reacting to the readings; the first is due by February 1, the second by March 8, and the third by April 26
General Outline

I. The Problems of Constitutional Interpretation: What is the Constitution? Who May Authoritatively Interpret It? How is It to be Interpreted? (Assignment 1)

II. General Theories of Constitutional Interpretation (Assignments 2-4)
   A. Interpretivism/Originalism (Assignment 2)
   B. Protecting Fundamental Rights: Personal Liberties (Assignment 2)
   C. Reinforcing Representative Democracy (Assignment 3)
   D. Securing Constitutional Democracy (Assignment 4)

III. Arguments For and Against Protecting Certain “Unenumerated” Fundamental Rights (Assignments 5-14)
   A. Economic Liberties (Assignment 5)
   B. Personal Liberties: Privacy, Personhood, and Equal Citizenship (Assignments 6-14)
      1. Personal Liberties: Antecedents from the Era of Lochner (Assignment 6)
      2. Fundamental Rights Equal Protection (Assignment 6)
      3. Privacy (Assignment 6)
      4. Family (Assignment 7)
      5. Abortion (Assignments 8, 9 & 10)
      6. Homosexuality (Assignments 11, 12 & 13)
      7. Euthanasia (Assignment 14)

IV. Reprise on Reinforcing Democracy and Protecting Fundamental Rights: A Call for Perfecting Constitutional Democracy (Assignment 14)
Specific Assignments

Assignment 1: January 11

I. THE PROBLEMS OF CONSTITUTIONAL INTERPRETATION:
WHAT IS THE CONSTITUTION?
WHO MAY AUTHORITYTIVELY INTERPRET IT?
HOW IS IT TO BE INTERPRETED?

A. Introduction: What, Who, and How

Interpreting a Constitution, 1-21 (recommended)
The Theoretical Context of Constitutional Interpretation, 43-74 (recommended)

B. Competing Conceptions of What, Who, and How

1. Case

Planned Parenthood v. Casey, 1404-37

2. Defenses and Critiques

Bork, Again, a Struggle for the Soul of the Court, SR 1
Dworkin, The Center Holds!, SR 2
Neuhaus, The Dred Scott of Our Time, SR 3
Sullivan, A Victory for Roe, SR 4
Holmes, The Right to Abortion Advances Quietly in State Courts, SR 5
Gewirtz & Golder, So Who Are the Activists?, SR 6

II. GENERAL THEORIES OF CONSTITUTIONAL INTERPRETATION

Assignment 2: January 18

A. Interpretivism/Originalism

1. Arguments for Interpretivism/Originalism

Bork, The Tempting of America, 133-60, 81-84
Scalia, Originalism: The Lesser Evil, 243-48

2. Case

Brown v. Board of Education, 936-41
B. Protecting Fundamental Rights: Personal Liberties

1. Arguments for Judicial Vindication of Fundamental Rights

Dworkin, *Life’s Dominion*, 118-47

2. Case

Planned Parenthood v. Casey, 1404-37 (again)

Assignment 3: January 25

C. Reinforcing Representative Democracy

1. Arguments for Judicial Deference to Representative Democracy

Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 672-79

2. Arguments for Judicial Reinforcement of Representative Democracy

Ely, *Democracy and Distrust*, 1-14, 43-104

3. Case

United States v. Carolene Products Co., 679-91

Assignment 4: February 1

D. Securing Constitutional Democracy

1. Arguments for Judicial Reinforcement of Deliberative Democracy

Sunstein, *The Partial Constitution*, 123-61 (recommended)

2. Arguments for Judicial Reinforcement of Deliberative Autonomy Together with Deliberative Democracy

III. Arguments For and Against Protecting Certain “Unenumerated” Fundamental Rights

Assignment 5: February 8

A. Economic Liberties

1. Cases

   Dred Scott v. Sandford, 207-18
   Lochner v. New York, 1199-1205
   West Coast Hotel v. Parrish, 1213-20

2. Critiques of “Lochnering”

   Bork, The Tempting of America, 36-49
   Ely, Democracy and Distrust, 14-21
   Sunstein, The Partial Constitution, 40-67
   Fleming, Securing Constitutional Democracy, 41-43 (again), 134-36

3. The New Right v. the Libertarian Right on Economic Liberties

   Bork, The Tempting of America, 223-30

B. Personal Liberties: Privacy, Personhood, and Equal Citizenship

Assignment 6: February 15


   Meyer v. Nebraska, 1369-73
   Pierce v. Society of Sisters, 1374-75

2. Fundamental Rights Equal Protection

   Skinner v. Oklahoma, 1093-97

3. Privacy

   a. Cases

      Poe v. Ullman, 149-57
      Griswold v. Connecticut, 158-69
b. Arguments for Deriving “Unenumerated” Rights Through the Ninth Amendment

Ely, Democracy and Distrust, 34-41  
Black, On Reading and Using the Ninth Amendment, SR 7  
Fleming, Securing Constitutional Democracy, 32-34 (again)

c. Critiques of Doing So

Bork, The Tempting of America, 95-100, 166-67, 178-85

**Assignment 7: February 22**

4. Family

a. Cases

Loving v. Virginia, 948-52  
Moore v. East Cleveland, 1437-44  
Michael H. v. Gerald D., 169-78

b. Critiques of Justice Scalia’s Michael H. Jurisprudence

Bork, The Tempting of America, 235-40  
Tribe & Dorf, Levels of Generality in the Definition of Rights, SR 8  
Sullivan, Foreword: The Justices of Rules and Standards, SR 9  
(recommended)

**Assignment 8: March 1**

5. Abortion I

a. Case

Roe v. Wade, 1381-94

b. Arguments for the Right to Abortion

Dworkin, Life’s Dominion, 81-117, 3-35 (recommended)

c. Critiques of the Right to Abortion

Bork, The Tempting of America, 110-16  
Noonan, *The Root and Branch of Roe v. Wade*, SR 11

**Assignment 9: March 8**

6. Abortion II

   a. Cases

      Roe v. Wade, 1381-94 (again)
      Harris v. McRae, 1394-1403
      Planned Parenthood v. Casey, 1404-37 (again)

   b. Arguments for the Right to Abortion: Privacy versus Equality

      Dworkin, *Life’s Dominion*, 148-78, 50-57
      Sunstein, *The Partial Constitution*, 257-61, 270-85

**March 15: No Class (Spring Recess)**

**Assignment 10: March 22**

7. Abortion III

   a. Cases

      Roe v. Wade, 1381-94 (again)
      Planned Parenthood v. Casey, 1404-37 (again)

   b. Calls for Taking Responsibilities as well as Rights Seriously

      Glendon, *Rights Talk*, SR 14
      Dworkin, *Life’s Dominion*, 57-67, 150-59 (again)
      McClain, *Rights and Irresponsibility*, SR 15

**Assignment 11: March 29**

8. Homosexuality I

   a. Case
Bowers v. Hardwick, 1445-61

b. Defenses of *Bowers*

Bork, *The Tempting of America*, 116-26

c. Critiques of *Bowers*

Ely, *Democracy and Distrust*, 162-64
Sunstein, *Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection*, SR 17

April 5: No Class (Holy Thursday – University Closed)

Assignment 12: April 12

9. Homosexuality II

a. Cases

Bowers v. Hardwick, 1445-61 (again)
Romer v. Evans, 1062-76
Lawrence v. Texas, 1461-81

b. Critiques of *Lawrence*

Sandel, *Epilogue*, SR 18
Sunstein, *What Did Lawrence Hold?*, SR 19

10. A Critique of the Calls for a Substantive and a Minimalist Republicanism

Fleming, *Securing Constitutional Democracy*, 141-71

Assignment 13: April 19

11. Homosexuality III

a. Cases

Baker v. State of Vermont, 1076-92
b. Critiques of Goodridge

Rosen, *Immodest Proposal*, SR 22
Sunstein, *Federal Appeal*, SR 23
McClain, *The Place of Families*, SR 24

12. Reconceiving the Due Process Inquiry: Between Scalia and Charybdis


**Assignment 14: April 26**

13. Euthanasia

a. Cases

Cruzan v. Director, Missouri Dept. of Health, 1482-93
Washington v. Glucksberg, 1494-1512

b. Critiques

Dworkin, *Assisted Suicide: What the Court Really Said*, SR 25
Fleming, *Securing Constitutional Democracy*, 120-23
Sandel, *Last Rights*, SR 27
Sunstein, *Foreword: Leaving Things Undecided*, SR 28, 6-10, 93-96

**IV. REPRISE ON REINFORCING DEMOCRACY AND PROTECTING FUNDAMENTAL RIGHTS: A CALL FOR PERFECTING CONSTITUTIONAL DEMOCRACY**

Sunstein, *Second-Order Perfectionism*, SR 29
In order to access Fordham’s Blackboard site, you must direct your web browser to the following address:

http://fordham.blackboard.com/

Note: There is no “www” in this address.

Then:

1. Click on the Login button located at the left of the screen.
2. After you press the Login button, the Welcome Screen will appear requesting your Username and Password.
3. Your username is your Lotus Notes E-mail username, or everything before the @ sign. For example, if your email address is jsmith@fordham.edu, your username is jsmith.
4. Your password is your four digit Oasis pin number. If you have forgotten your password click on the “Forgotten Password” link and follow the instructions.
5. After you have filled in the correct username and password click Login.

Your Lotus Notes Email and Your Oasis Pin Number have already been established. If you have any questions, please contact the CIMS Help Desk at 718-817-3999 (or 1-3999 from any Lincoln Center Campus phone).

Welcome Page

Once you have logged into Fordham University’s Blackboard site, you will be greeted with a Welcome Page. It will identify you by your first name and the Course(s) in which you are participating. Choose from one of the courses listed on the right of the screen so that you can begin participating in that course.

Enrollment

Because the inputting of class rosters is done before the add/drop period is over, you may not see a course for which you have registered through the Registrar’s Office or Oasis. You can browse the Law School section of the Course Catalog to find the course you need. Follow the prompts to enroll yourself in the Blackboard Course.

NOTE: Remember that if you enroll in a Blackboard course, you must also be officially registered in that course to receive course credit. If you are not sure if you are officially registered please go to our online registration system (http://oasis.fordham.edu) or contact the Registrar’s Office.
Editing Personal Information

The Edit Personal Information option allows you to control the information that appears in your account's profile. You can change the values in fields, populate empty fields, or remove information from fields. The fields with a red asterisk must be included. **Note: Please change your e-mail address to the one you use most regularly.** This will ensure timely communication.

Changing your Email address

If you would like to change your default email address, which is your Fordham email address, to one you check more frequently, please do the following:

1) Log on to Blackboard;
2) Go to the "TOOLS" area of your Welcome Page;
3) Go to "PERSONAL INFORMATION;"
4) Click "EDIT PERSONAL INFORMATION;"
5) Your Fordham email address will be there already. Replace it with the one you use regularly.

The Change Password option manages your account password in Blackboard ONLY and not in Lotus Email, etc.

The Set Privacy Options option manages your profile in the User Directory. Individuals may choose to make information available through the User Directory/Class roster, and controls what information will be displayed.

If you have any other questions, please contact the Law School’s Instructional Technologist, Daniel Auld at 212-636-6895 or by email: dauld@law.fordham.edu You may also call the University’s Faculty Resource Center at 718-817-4706 or (1) 4706 if dialing from campus.