

**UNIVERSITY OF PENNSYLVANIA  
THE WHARTON SCHOOL  
LEGAL STUDIES 221-001**

***CONSTITUTIONAL LAW AND FREE ENTERPRISE***

**Spring 2014 – PROFESSOR SEPINWALL**

**OVERVIEW:** This course provides a survey of issues in constitutional law with a special emphasis on commerce, corporate constitutional rights, and economic liberty.

The course begins with a couple of introductory sessions addressing the U.S. Constitution and the structure and relationship of the governmental entities it establishes. From there, the course seeks to address three key issues: First, to what extent does the Constitution allow Congress to regulate the economy? May Congress place limits on gun use, or violence against women, in the name of protecting commerce? May it compel people to buy health insurance in order to do so? May it seize private property on the ground (or perhaps mere pretext) that the public would benefit from the taking?

Second, what are the rights of businesses under the Constitution? What role should corporations play in politics? May a healthcare company deny certain medical services – e.g., abortions or end-of-life treatments – on the ground that it has constitutionally-protected rights guaranteeing its freedom of (religious) belief? Must the owner of private property at which people gather – e.g., a shopping mall – host speech with which the owner disagrees?

Third, where does the notion of free enterprise come from, and what does it entail? How far should personal and economic liberties extend? How much control should the government have over working conditions or other terms of employment? How much control should individuals enjoy over their bodies? Should individuals be permitted to buy guns or recreational drugs? Or sell or consume material – pornography, dogfighting – that many find objectionable?

By engaging these questions, we will develop an appreciation of the interplay of the Constitution and our interests in commerce, property, liberty and fundamental political rights.

**CLASS MEETS:**      Thursdays, 3:00-6:00 PM

**PROFESSOR:**        Amy Sepinwall

**CONTACT INFO:**   642 Jon M. Huntsman Hall  
E-mail: [sepin@wharton.upenn.edu](mailto:sepin@wharton.upenn.edu)

**OFFICE HOURS:**    By appointment

**MATERIALS:** *CONSTITUTIONAL LAW FOR A CHANGING AMERICA: A SHORT COURSE, 5th Edition*, by Lee Epstein & Thomas Walker (Congressional Quarterly, Inc., 2005). This book is available at the **Penn Bookstore**. Additional materials will be supplied in downloads from the course website.

**GRADING:**

1. Foundational materials questionnaire = 5%;
2. Judicial bio presentation = 10%;
3. Film assignment = 5%;
4. In-class oral argument = 30%
5. Final exam = 40%;
6. Participation = 10%

**1. Foundational Materials Questionnaire:** I will not be covering most of the material in Chapters 1-3. To ensure that you have read them, I will ask that you complete a short questionnaire and return it to me by **3 PM on January, 23, 2014**.

**2. Judicial Bio Presentation:** Each of you will be assigned a Supreme Court Justice (current or past). You will be responsible for creating a biography of your Justice and presenting that biography in class. The biography should describe the Justice's educational and professional history; judicial philosophy; the Justice's role in two noteworthy cases; and include at least one fun fact. The biography should be presented in power point form. Your presentation **may not exceed 7 minutes**. Please email your power point slides to me by **10 PM on Tuesday, January 28, 2014**.

**3. Film Assignment:** We will watch several films over the course of the semester, including *We Steal Secrets: The Story of Wikileaks*, which we will view in class on February 27. The film assignment requires that you send me, via email, three questions raised by the film that would be suitable for spurring a class discussion on March 6, 2014. The questions should invite us to reflect on constitutional issues raised by the film. These issues may connect with class materials, but they need not do so. Do not answer the questions; the purpose of these questions is to inform our class discussion. I must receive your email by **10 PM on March 3, 2014**. ***Please send your film assignment in the body of an email, and not as an attachment.***

**4. In-class oral arguments:** We will have four in-class oral arguments over the course of the semester. A sign-up sheet will be posted to Canvas by February 1, 2014, and each of you must sign up by **February 10, 2014**.

The oral argument format is as follows:

(Caution: This format has been invented by the instructor and is not intended to bear any resemblance to standard debates that you may have experienced in the past, or to the way that oral argument operates before the Supreme Court.)

Pro Team Opening Statement .....	10 minutes
Con Team Opening Statement.....	10 minutes
Pause for Team Members to Confer, and for Justices (i.e., other students) to consider questions .....	5 minutes
Pro Team fields questions from Justices .....	10 minutes
Con Team fields questions from Justices .....	10 minutes
Pro Team Closing Statement.....	2 minutes
Con Team Closing Statement.....	2 minutes
Justices vote and issue opinions .....	10 minutes

Those students not signed up for that session's oral argument will function as active Justices. The oral argument will be assessed based on your ability to construct and present a compelling argument for your position, and to persuasively respond to the Justices' questions. To that end, you should seek to defend your position by invoking relevant legal authorities and developing responses/rebuttals to possible objections to your position. In your opening statement, you should present your position clearly, coherently, and in an engaging way to your audience of classmates; you should also educate the Justices about the merits of your position by describing the legal authorities that support it. You may divide the opening statement, question periods and closing statement among the members of your team in whatever way you think makes most sense. Each of you must have a turn speaking. Your classmates will have an opportunity to "judge" the debate and will have input into the grading of the debate:

Legal authority .....	10 points
Clarity and logic of position .....	10 points
Peruasiveness (based on statements and answers to Justices' questions):	
Class vote .....	2 points
Instructor decision .....	8 points

**5. Final Exam:** The final exam will be held during the final exam period, on **the date the Registrar assigns for our class**. The final exam will cover material from the entire course. It is intended to determine that you have assimilated, and thought critically about, course material and concepts.

**6. Participation:** Your participation grade will reflect your attendance, contributions to class discussions, and fulfillment of your role as a Justice in our in-class oral arguments.

## IMPORTANT DATES/DEADLINES:

1. January 23, 2014 at 3 PM: Foundational materials questionnaire due
2. January 28, 2014 at 10 PM: Power point of judicial bio due
3. February 1, 2014: Oral argument sign-up sheets posted on Canvas
4. February 10, 2014: Sign up for oral arguments
5. March 3, 2014 at 10 PM: Film assignment due
6. Oral arguments:
  - a. April 3, 2014: **Sebelius v. Hobby Lobby**: Do corporations have constitutionally protected “consciences,” on the basis of which they may refuse to offer health insurance that includes contraceptive coverage?
  - b. April 10, 2014:
    - i. **Westboro Baptist Church**: Should protesters be permitted to picket at a funeral gravesite with signs that attack the character of the deceased?
    - ii. **Cigarette Advertising cases**: Should cigarette companies be compelled to post graphic images of the adverse consequences of smoking on cigarette packages?
  - c. April 17, 2014: **McKutcheon**: Should there be caps on the total amount an individual can contribute for each election cycle?
  - d. April 24, 2014: **United States v. Stevens**: Should the government be permitted to ban sales of videos depicting dogfighting and other acts of animal cruelty?

## COURSE POLICIES:

1. **Canvas**: There will be a course website on Canvas, available at <https://wharton.instructure.com/courses/1233045>. The website will contain readings outside of the textbooks as well as other reference or supplemental material. Further details to follow.
2. **Email**: Students should check email at least daily in the event that I send a message to the class.
3. **Absences**: Please notify the instructor in advance if you expect to miss a class. Properly justified absences will be excused but, depending on the circumstance, a short writing assignment may be required.
4. **Late assignments**: There is a 15-minute grace period for your judicial bio assignment and your film assignment. Absent a legitimate excuse, for which you have received prior approval from me, the following penalties will be assessed against late assignments: Assignments submitted within the first 24 hours following the grace period will receive a 2-point deduction; assignments submitted more than 24 hours after the grace period will receive a zero.

5. **Make-up exam or oral argument:** A make-up final exam will be offered only if you provide me with a doctor's note stating that you were too ill to write the exam at the appointed time. In exceptional circumstances, a make-up final exam will be offered for other reasons (e.g., a death in the family). Circumstances preventing your participation in your oral argument session will be handled on a case-by-case basis but, in general, only the most dire of reasons will excuse these absences.
6. **In-class conduct:** In order to ensure your full engagement, you may not use any electronic device during class (no laptops, no tablets, no cell phones). I welcome disagreement in our class discussions but I nonetheless expect that these will proceed with a tone of civility and respect for one another.
7. **Non-Wharton Students:** A Wharton account is required for this course. To obtain a Wharton account, please visit <http://accounts.wharton.upenn.edu>.
8. **Interacting outside of class:** In the past, I have found it very worthwhile to interact informally with small groups of students outside of class. I will look forward to doing so this semester with any and all who are interested. To that end, I will schedule a series of lunches for 3-6 students at a time. Stay tuned for further details!

## **COURSE OUTLINE & READING ASSIGNMENTS**

### **LGST 221 (SEPINWALL) -- Spring Term 2014**

*Calendar of readings may shift, depending on the rate of our progress through the material.*

*All readings designated with a \* can be found on Canvas. All others are drawn from the textbook.*

#### **INTRODUCTION TO THE CONSTITUTION AND CONSTITUTIONAL STRUCTURE**

##### **1/16 Part I: The U.S. Constitution**

Introduction: course overview

In-class exercises:

- Constitutional power grab game
- Brown v. Board of Education
- Marbury v. Madison

##### **1/23 Foundational materials questionnaire due by 3 PM.**

#### **PART I: CONGRESSIONAL POWER AND THE ECONOMY**

##### **1/23 In-class film: *The Battle for Brooklyn* (93 min)**

Discussion of film

##### **1/30 The Takings Clause: Under what circumstances, and for what ends, may Congress use its power to dispossess citizens of private property?**

Reading:

- Takings -- pp. 319-338

Presentations: The Supreme Court Justices (historical): Personnel and Philosophy

Research for presentation: Internet bios for current Justices, at

<http://www.oyez.org/courts/robt6> and

<http://www.law.cornell.edu/supct/justices/fullcourt.html>

##### **2/6 The Commerce Clause: May Congress use its power to regulate commerce to further social policy or engage in social engineering?**

Reading:

- Modes of constitutional interpretation – pp. 31-51

- Sources of legislative power -- pp. 101-109
- The Commerce Power – pp. 211-251

Presentations: The Supreme Court Justices (recent and current): Personnel and Philosophy  
 Research for presentation: Internet bios for current Justices, at  
<http://www.oyez.org/courts/robt6> and  
<http://www.law.cornell.edu/supct/justices/fullcourt.html>

2/13 The Commerce Clause and the Power To Tax: May Congress compel individuals to buy health insurance?  
 Reading:

- The Power to Tax, pp. 257-266 (until “Intergovernmental Tax Immunity”)
- The Affordable Care Act case\* (i.e., Obamacare)
- Michael Rosen, The New Textualists Finest Hour?, *The American*, Jun. 28, 2012, at <http://www.american.com/archive/2012/june/the-new-textualists-finest-hour>\*

2/20 Field Trip: National Constitution Center  
 We will meet in class and make our way together, by subway, to the NCC, at 6<sup>th</sup> and Arch Streets. Your travel expenses and admission fees will be covered.

## **PART II: INDIVIDUAL AND CORPORATE RIGHTS**

2/27 Freedom of the Press  
 Reading:

- Civil Liberties – pp. 341-343
- Freedom of the press -- pp. 443-478

**In-class film:** *We Steal Secrets: The Story of Wikileaks* (131 min)

3/3 **Film Assignment Due by 10 PM.**

3/6 Freedom of the Press  
 Discussion: *Wikileaks*, Freedom of the press readings

Freedom of Speech -- Introduction

Reading:

- General free speech doctrine – pp. 379-436

3/20 Corporations and personhood

Reading:

- Peter French, The Corporation As a Moral Person\*

Campaign Finance and Corporate Political Activity

Reading:

- Election campaign regulation -- pp. 659-666
- Citizens United\*

3/27 **TBD** (Part or all of our class session on this date may be cancelled; in that event, class to be rescheduled).

4/3 The right not to speak: When may private entities be compelled to host speech with which they disagree?

Reading:

- Rights of association: pp. 436 (“Expressive association”)-442;
- Synopsis: Pruneyard Shopping Center v. Robins\*

***Oral Argument: Sebelius v. Hobby Lobby: Do corporations have constitutionally protected “consciences,” on the basis of which they may refuse to offer health insurance that includes contraceptive coverage?***

Readings:

- Justiciability: pp. 74-84
- Free exercise: pp. 345-364
- *Hobby Lobby* and Establishment Clause,  
[http://www.slate.com/articles/news\\_and\\_politics/jurisprudence/2013/11/obamacare\\_birth\\_control\\_mandate\\_lawsuit\\_how\\_a\\_radical\\_argument\\_went\\_mainstream.2.html](http://www.slate.com/articles/news_and_politics/jurisprudence/2013/11/obamacare_birth_control_mandate_lawsuit_how_a_radical_argument_went_mainstream.2.html)\*
- Decisions below\*

Additional readings for litigators:

- Petitioners’ and Respondents’ briefs\*

4/10 The right not to speak (cont’d)

***Oral Argument: Westboro Baptist Church: Should protesters be permitted to picket at***



**a funeral gravesite with signs that attack the character of the deceased?**

Readings:

- Snyder v. Phelps,\* <http://www.supremecourt.gov/opinions/10pdf/09-751.pdf>

Additional readings for litigators:

- Decision below\* and Petitioners' and respondents' briefs\*

The right not to speak and commercial speech: (cont'd)

**Oral Argument: Cigarette Advertising cases: Should cigarette companies be compelled to post graphic images of the adverse consequences of smoking on cigarette packages?**

Readings:

- Discount Tobacco City v. United States (2012)\*
- R. J. Reynolds v. FDA (2012)\*

Additional readings for litigators:

- Petition for Certiorari in *Discount Tobacco City*

### **PART III: ECONOMIC LIBERTIES AND CIVIL RIGHTS**

4/17 Substantive Due Process and Laissez-Faire Policies

Readings:

- Economic Substantive Due Process -- pp. 297-316
- Laissez-faire economics -- pp. 195-210

**Oral Argument: McKutcheon: Should there be caps on the total amount an individual can contribute for each election cycle?**

Readings:

- Decision below\*

Additional readings for litigators:

- Petitioners' and respondents' briefs\*

4/24 The Right to Do "Wrong"

Readings:

- Gun control – pp. 479-487
- Birth control – pp. 489-513
- Sodomy, drugs, physician-assisted suicide – pp. 513-527

***Oral Argument: United States v. Stevens: Should the government be permitted to ban sales of videos depicting dogfighting and other acts of animal cruelty?***

Reading:

- Supreme Court opinion and Justice Alito's dissent:  
<http://www.law.cornell.edu/supremecourt/text/08-769>

Additional readings for litigators:

- Decision below\* and Petitioners' and respondents' briefs\*

**In the event that class on 3/27 is cancelled --make-up class: The Right to Do "Wrong" – Pornography**

Reading:

- Ronald Dworkin\*
- Catharine MacKinnon\*

**In-class film:** The People v. Larry Flynt (129 min.)

Course Review