

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

CONSTITUTIONAL LAW AND FREE ENTERPRISE

Fall 2015 – PROFESSOR SEPINWALL, J.D., Ph.D.

OVERVIEW: This course provides a survey of issues in constitutional law with a special emphasis on rights related to commerce and business.

The course introduces the student to fundamental concepts in constitutional law in the context of current, pressing issues at the intersection of constitutional rights and business. The course seeks to address three key issues: First, to what extent does the Constitution allow Congress to regulate the economy? May Congress compel people to buy health insurance in order to protect commerce? 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 corporation deny coverage for certain drugs or health treatments to which it objects on religious grounds?

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: Wednesdays, 3:00-6:00 PM

CONTACT INFO: 642 Jon M. Huntsman Hall
E-mail: sepin@wharton.upenn.edu

OFFICE HOURS: Thursdays, 3:30-4:30 and by appointment

MATERIALS: Coursepack available through study.net. Additional materials will be supplied in downloads from the course website.

GRADING:

1. Response piece to one scholarly reading = 10%;
2. Questions on readings = 2 x 5% = 10%;
3. *Obergefell* assignment = 10%
4. Supreme Court brief = 35%;
5. In-class oral argument = 15%
6. Serving as a Justice at oral argument = 5%;
7. Participation = 15%

1. Response piece to one scholarly reading: You will be asked to write a response piece to one scholarly reading. To that end, you will identify a central claim in the author's piece, paraphrase the argument the author adduces in support of that claim, and then advance an objection to that argument, along with an argument supporting your objection. You should be able to do this in one double-spaced page; you may not exceed two double-spaced pages. I will randomly assign each student to a particular class session. If there is more than one scholarly reading for your class session, you may choose the reading from that class session to which you will respond. You must submit your response piece to Canvas by 10 PM on the Tuesday night before your reading will be discussed in class. *Late responses will receive a 0.*

2. Submitting questions for two class sessions: For each of two class sessions, you will submit three questions that the readings prompt. You should submit no more than three questions total but you can choose whether to focus on just one, or more than one, of the readings for your assigned class session. You should not answer these questions. Instead, the questions should raise issues that you think would make for good fodder for class discussion. I will assign you to the two class sessions for which you are responsible. You must submit your questions to Canvas by 10 PM on the Tuesday night before your assigned class sessions. *Late responses will receive a 0.*

3. Obergefell Assignment: We will not have class on September 23 (Yom Kippur). Instead, you will be expected to complete an assignment related to the Supreme Court's *Obergefell* decision (the decision finding a constitutional right to gay marriage). The assignment (roughly three pages) is described in Appendix 1, below. You must submit your assignment via Canvas by 2 PM on September 30, and you must bring a hard copy of your assignment to class on September 30. *Late responses will receive a 0.*

4. Supreme Court Brief: You will be tasked with writing a legal brief (5-10 single-spaced pages) on one side or the other of a fact pattern that I will distribute during the first weeks of class. The details for this assignment are contained in Appendix 2, below. Your brief **must be submitted via email to me and the pair of students who are your opposing counsel by 11:59 PM on October 30. Your brief must also be submitted to Canvas by 11:59 PM on October 30.** *Late responses will receive a 0.*

5. ***In-class oral arguments:*** We will hold oral arguments on Nov. 11, Nov. 18, and Dec. 2. You will be randomly assigned to one of those dates. Details about the format of the oral arguments can be found in Appendix 2.

6. ***Serving as a Justice for an Oral Argument:***

You will be assigned to serve as a Supreme Court Justice for one set of oral arguments to be held on a date different from the one when you have your own oral argument. You should read the parties' briefs and come prepared to ask questions of the petitioners and respondents. At the end of oral argument, you will cast a vote in favor of the petitioner or respondent.

7. ***Participation:*** There are no tests in this class. It is nonetheless imperative that you complete the reading assignments carefully, and come to class prepared to discuss them. To provide additional incentives for you to do so, I will be cold-calling during the course of the semester. Your participation grade will be based on evidence of your preparation for class; the quality of the insights you bring to bear; and your ability to listen to and respond to the comments of your classmates.

COURSE POLICIES:

1. **Canvas:** There will be a course website on Canvas. The website will contain reference or supplemental material. **It will also be the platform to which you upload your written assignments, as per the instructions above.** Our canvas site is at <https://canvas.upenn.edu/courses/1294972>.
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:** All assignments must be submitted by the deadlines stipulated above. Late assignments will receive a 0. I will make exceptions only for extraordinary circumstances. You should not request lenience unless you feel reasonably certain that your circumstances are in fact extraordinary.
5. **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.

6. **Non-Wharton Students:** A Wharton account is required for this course. To obtain a Wharton account, please visit <http://accounts.wharton.upenn.edu>.
7. **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 meals for 3-6 students at a time. Stay tuned for further details!

LGST 221 – Reading List

Week 1 – Aug 26 Intro	No readings
Week 2 – Sept 2 Field Trip	No readings
Week 3 – Sept 9 Takings	
Cases:	Epstein, Takings readings
Scholarly commentary:	Ilya Somin -- The story behind Kelo v. City of New London
	Ilya Somin -- The case against the Kelo decision – Part I
	Ilya Somin -- The political and judicial reaction to Kelo
	Ilya Somin -- Prospects for the future of Kelo, property rights, and public use
Week 4 – Sept 16 ACA 1 (and 2) -- Individual mandate (and State Exchanges)	
Cases:	ACA I – NFIB v. Sebelius
	ACA II -- King v. Burwell, synopsis article
Scholarly commentary:	Mark Tushnet -- Activity-Inactivity Distinction
	Jack M. Balkin -- The Constitutionality of the Individual Mandate for Health Insurance
	Randy E. Barnett -- Is Health-Care Reform Constitutional?

Week 5– Sept 23 No class	Read as per below and complete assignment (contained on syllabus as Appendix I)
Cases:	Obergefell v. Hodges
Assignment:	Obergefell Assignment -- Readings on SOP, Federalism, and Modes of interpretation
Week 6 – Sept 30 Citizens United	
Cases:	Citizens United
Scholarly commentary:	Robert Post, Citizens Divided, Chapter 2
Week 7 – Oct 7 Campaign Finance	
Cases:	Buckley v. Valeo; McCutcheon v. FEC
Scholarly commentary:	Deborah Hellman, Money Talks But It Isn't Speech
Week 8 – Oct 14 Imposed speech and compelled association	
Cases:	Excerpts from Lee Epstein -- Constitutional Law for a Changing America (pages 422-442)
Scholarly commentary:	Seana Valentine Shiffrin -- What Is Really Wrong With Compelled Association?
	Seana Valentine Shiffrin -- Compelled Association, Morality, and Market Dynamics (12 law review pages)
Week 9 – Oct 21 Defamation, commercial speech, cigarette labels	
Cases:	New York Times v. Sullivan
	RJ Reynolds
Scholarly commentary:	Rebecca Tushnet -- More than a Feeling: Emotion and the First Amendment
Week 10 – Oct 28 Hobby Lobby	
Cases:	Hobby Lobby v. Burwell
Scholarly commentary:	Amy Sepinwall -- Harvard Business Law Review article on Hobby

	Lobby (Optional)
	Amy Sepinwall -- University Chicago Law Review article on Hobby Lobby (Optional)
Week 11 – Nov. 4 Employment Discrimination	
Cases: Sex discrimination:	<p>Marietta: http://caselaw.findlaw.com/us-supreme-court/400/542.html</p> <p>General Electric v. Gilbert: https://supreme.justia.com/cases/federal/us/429/125/case.html</p> <p>UPS v. Young: http://www.ca4.uscourts.gov/opinions/Published/112078.p.pdf</p> <p>Johnson Controls: https://www.law.cornell.edu/supct/html/89-1215.ZO.html</p>
Cases: Racial discrimination	<p>Griggs v. General Electric: http://caselaw.findlaw.com/us-supreme-court/401/424.html</p> <p>Washington v. Davis: http://www.princeton.edu/aci/cases-pdf/aci1.davis.pdf</p>
Week 12 – Nov 11 Oral Argument	
Week 13 – Nov 18 Oral Argument	
Week 14 – Nov 25 No Class	
Week 15 – Dec 2 Oral Argument	

APPENDIX 1 – *Obergefell* Assignment

This assignment is based on the Supreme Court’s 2014 term decision in *Obergefell v. Hodges*, (available here: http://www.supremecourt.gov/opinions/14pdf/14-556_3204.pdf) as well as readings in your Coursepack on the doctrines of *separation of powers* and *federalism*, and the *modes of constitutional interpretation*.

Please answer all of the following questions using your own words. You should complete this work on your own. The assignment is worth 10% of your final grade. You must submit your assignment **via email by 2 PM on September 30, and you must bring a hard copy of your assignment to class on September 30.**

1. What is the holding (i.e., the outcome along with its rationale) of the case? (1-2 sentences; 2 points)
2. State the thesis of each of the four dissents (i.e., the central objection each dissenting Justice advances) along with the rationale for that objection. (1-2 sentences per opinion; 8 points)
3. Read the pages in your coursepack on different modes of constitutional interpretation. Can you tell what mode of constitutional interpretation each of the five opinions embodies? Where you can, please identify the mode in question, define it in your own words, and explain why you think the opinion you are addressing embodies it. (Not more than 1 paragraph per opinion; 20 points)
4. Read the pages in your coursepack on constitutional structure. Define “separation of powers (SOP)” and “federalism” in your own words. What SOP and/or federalism arguments do each of the five opinions advance? (Not more than 1 paragraph per opinion; 20 points)

APPENDIX 2

Supreme Court Brief Assignment and Oral Argument Instructions

Here is your major (not the only) homework assignment of the semester.

To sharpen your research skills, I'm going to have you teach yourself a bit about legal research. To sharpen your analytical skills, I'm going to have you analyze the law and its implications in an important policy area. To sharpen your writing skills, I'm going to have you write a 5-10 page legal brief. To sharpen your presentation skills, I'm going to have you present an oral argument based on your brief. To sharpen your teamwork skills, I am going to randomly assign you into teams.

There are two members on each team. Each petitioner team will be paired with a respondent team. That group of four will work together, at least vaguely. (I will refine these details in the event that the total number of students in the class is not a multiple of '4'.)

You will be given the details of the case that you will be addressing in the first weeks of the semester. I will assign (randomly) one team to represent the petitioners and one to represent the respondents. However, if the two teams mutually agree to flip who represents whom, you may do so. Just let me know.

Each side will write a 5-10 page (single-spaced) brief to the Supreme Court. Then the 2-person teams in each group of four will present an oral argument against the other with yours truly as well as four of your peers sitting as the Supreme Court.

You should consult the Supreme Court's website – supremecourt.gov – to see how briefs are formatted and structured. After you read a couple of the briefs (you should read a couple of the primary petitioner and respondent briefs, the petitioners' reply briefs, and probably a couple of amicus curiae briefs), you'll get a really good feel for how they are put together. That said, I don't want your briefs to contain all the filler that the accepted form requires—tables of contents, lists of authorities and cases, etc. Skip the extraneous stuff. I want your 5-10 pages devoted to legal and policy arguments. Your major task here is to identify and articulate the key arguments, and provide legal support (i.e., precedents, statutes) for them.

You will inevitably learn something about the conventions of legal citations (e.g., citations are usually volume/reporter/page #). So, *Lemon v. Kurtzman*, 403 U.S. 602 means that *Lemon v. Kurtzman* starts on page 602 of volume 403 of the U.S. Reports (which contain only Supreme Court decisions). However, the goal of this assignment is not to make you conversant with these citation conventions and I will not be checking to see if you've dotted the i's and crossed the t's in terms of citation form. Substance is much more important than form.

Obvious sources of research, besides Google, include Lexis Academic Universe (available through Van Pelt). It has a multitude of legal sources—cases, law review articles,

news sources, etc. And when you find a citation, such as 317 U.S. 111, you can plug it in to the “Look Up a Legal Case” feature and it will take you right there. And if you find references to law review articles, many are accessible through the Academic Universe, and the database HeinOnline is also very helpful for finding law review articles.

Thirty-five percent of your final grade will come from the written brief. You will receive the same grade as your partner. Fifteen percent of your final grade will come from the oral argument. You will receive a separate grade from your partner.

In judging the briefs, I’ll be asking questions such as: 1) How accurate was the legal discussion? 2) Did this team cover the basics? 3) Did this team come up with some creative arguments that others did not have? 4) Was the brief written clearly? 5) Grammar, punctuation, etc. ok? 6) Most importantly, overall, how persuasive was the brief?

In judging the oral arguments, I’ll be asking such questions as: 1) How clearly did the student present his/her argument? 2) How persuasively were the arguments presented? 3) Was the presentation concise and powerful or rambling and unfocused? 4) How well did the student answer the questions that I asked? 5) Most importantly, how persuasive was the overall argument?

The briefs are to be in your own words. Your relationship with the other team in your group should be a love/hate relationship. Hate, because you wish to vanquish them in oral argument. Love, in that you need to cooperate with them so that you are addressing the same issues and arguments in your briefs and oral argument and are not writing and talking past one another. The more direct engagement between the two teams in written and oral arguments, the better both arguments will be.

Oral argument format:

Petitioner’s Opening: 8 min.

Respondent’s Opening: 8 min.

Petitioner’s Rebuttal: 8 min.

Respondent’s Rebuttal: 8 min.

Judge’s questions: 4 min.

In the rebuttal, you should respond to the other team’s key arguments but may naturally have some prepared arguments to further reinforce or advance your own earlier arguments. It is an excellent idea to go to YouTube and check out a couple of videos of oral arguments (in real courts or in law school moot court competitions) just to get the conventions right. Or, you can listen to audios of U.S. Supreme Court arguments on its official website.

Briefs are due before 11:59 pm on Friday, October 30. Please send them **to me as well as the two students who are your opposing counsel** as word.doc attachments to an e-mail. You will have six weeks or so before the final draft is due, but it wouldn’t hurt to start working

right away.