

Syllabus.**LGST221 – Constitutional Law and Free Enterprise, Spring, 2018****Professor Hovenkamp, Penn Law and Wharton****Univ. of Pennsylvania**

The course explores United States constitutional law making, emphasizing commercial and business issues. First we will consider the early history, structure and relationship of the institutions that the Constitution establishes. We will pay special attention to the role of the Supreme Court and lower federal courts in interpreting and applying constitutional principles. Then we will examine the major economic and business implications of constitutional law in different eras of the nation's history. A core theme is how historical events and changing notions of public policy have affected and been affected by the evolution of constitutional doctrine.

You need not have any prior exposure to legal study or analysis. The readings consist mainly of primary sources (court opinions) focusing on the following topics: 1. The development of judicial Constitutional authority during the early Republic; 2) the Commerce Clause and the division of power between federal and state governments; 3) the Constitution and the business corporation; 4) the Constitution and interstate relations in a federalist system; 5) Fourteenth Amendment limitations on state regulation; 6) Constitutional limits on state and local regulation of land use; 7) the Constitutional grant of power to Congress to promote innovation; 7) Constitutional limits on federal regulation;.

No published text will be assigned. All materials will be available on Canvas as downloadable files (pdf). Students should come to class prepared to discuss and answer questions on about thirty pages of new material each class day.

Your obligations for the course will consist of 1) regular attendance and class participation (10%); 2) a midterm examination (25%); 3) a 20-page (double spaced) paper, styled as either a scholarly paper or a brief (25%); 4) a final examination (40%).

I. The Formation of the American Constitutional Republic: the development of legislative, executive and judicial power

Principal Issues: 1) what was the state of the Colonial economies on the eve of the Revolution? 2) What were the Articles of Confederation and why did they fail? 3) Why did the Constitution create such broad central power over the economy? 4) Did the Constitution authorize the Supreme Court to strike down federal laws? 5) state laws? 6) How should the Constitution be interpreted?

- a. Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)
- b. McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)
- c. Cooper v. Aaron, 358 U.S. 1 (1958)
- d. The Articles of Confederation
- e. The United States Constitution
- f. *The Federalist* (selections)

- g. Charles Beard, *An Economic Interpretation of the Constitution of the United States* (1921) (excerpt)

II. The Division Between Federal and State Regulatory Authority: the Commerce Clause and federalism

Principal Issues: 1) How did the Constitution's Commerce Clause divide economic power between the federal government on one side and the several states on the other side? 2) How did this understanding change over time? 3) what is the meaning of "commerce" in the Constitution, and the meaning of "among the several states"? 3) does the Commerce Clause justify federal regulation of things that strictly speaking are not commercial transactions, such as agricultural production, race discrimination by businesses, or gun ownership?

- a. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)
- b. *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895)
- c. *Hammer v. Dagenhart*, 247 U.S. 251 (1918)
- d. *Wickard v. Filburn*, 317 U.S. 111 (1942)
- e. *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964)
- f. *United States v. Lopez*, 514 U.S. 549 (1995)

III. The Constitutional Rights of Business Corporations

Principal Issues: 1) What is a corporation and how is it created? 2) Can a state change a corporation's powers or rights after it has been created; 3) When did the business corporation become a "person" for Constitutional purposes? 4) As a Constitutional "person," to what extent does a corporation have the same rights as biological persons do? A right to be free of unreasonable discrimination? A right to due process of law? Not to have its property taken without just compensation? A First Amendment speech right? 5) Does the Constitution impose any limits on the way that states or the federal government regulate corporations? Control their prices? Tax them?

- a. *The Contract Clause and State Control of Corporations*
 1. *Dartmouth College v. Woodward*, 17 U.S. 518 (1819)
 2. *Charles River Bridge v. Warren Bridge*, 36 U.S. 420 (1837)
 3. *Inventing the Classical Constitution*, Excerpt
 4. *Calder v. Michigan*, 218 U.S. 591 (1910)
- b. *The Corporation as a Constitutional "Person"*
 1. *Santa Clara County v. S. Pacific R.R. Co.*, 118 U.S. 394 (1886)
 2. *Enterprise and American Law*, excerpt
 3. *Reagan v. Mercantile Trust*, 154 U.S. 415 (1894)
 4. *Liggett Co., Inc. v. Lee*, 288 U.S. 517 (1933)
 5. *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983)
 6. *Citizens United v Federal Election Commission*, 130 S.Ct. 876 (2010)
 7. *Burwell v. Hobby Lobby Stores*, 134 S.Ct. 2751 (2014)

IV. The Constitution and State Judicial Power in a Federal System

Principal Issues: 1) what is the difference between “vertical” and “horizontal” federalism? 2) to what extent does the Constitution authorize courts to ensure that legal rules (commercial rules in particular) are uniform from one state to another? 3) to what extent does the Constitution limit the power of one state to control persons or activities that are located in a different state?

- a. Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842)
- b. Erie R.R., Inc. v Tompkins, 304 U.S. 64 (1938)
- c. Bristol-Meyers Squib v. Superior Court, 137 S.Ct. 1773 (2017)

V. Fourteenth Amendment Limitations on State Regulation of Business; the Regulatory Capture Problem

Principal Issues: 1) to what extent did the Fourteenth Amendment, which was ratified after the Civil War, affect the power of states to regulate business? 2) Is the Constitution’s oversight of state business regulation limited to things expressly mentioned in the Constitution, or does it extend beyond? 3) What was the impact of the New Deal on state regulatory power? 4) what is regulatory “capture,” and what tools does the Constitution provide for controlling it? 5) to what extent can other laws, such as federal antitrust law, provide additional means for controlling capture?

- a. Lochner v. New York, 198 U.S. 45 (1905)
- b. Muller v. Oregon, 208 U.S. 412 (1908)
- c. Adkins v. Childrens Hospital, 261 U.S. 525 (1923)
- d. West Coast Hotel, Inc. v. Parrish, 300 U.S. 379 (1937)
- e. United States v. Carolene Products, Inc., 304 U.S. 144 (1938)
- f. Sensational Smiles, LLC v. Mullen 793 F.3d 281 (2d Cir. 2015)
- g. North Carolina Dental Examiners v. FTC, 135 S.Ct. 1101 (2015)

VI. Constitutional Limits on State Regulation of Land Use

Principal Issues: 1) What limits does the Constitution impose on private persons’ (and corporations’) use of their own land? 2) What does the Fifth Amendment mean when it declares that private property may not be “taken” for “public use” without payment of “just compensation”? 3) What about government actions that actually force entry into someone’s private property or destroy its value? 4) what about government actions that merely make property less valuable? 5) To what extent can a state offer protection that deviates from federal protection? 6) what about assertions of the eminent domain power that force property to be taken from a land owner and transferred to a different private person?

- a. Rigney v. City of Chicago, 102 Ill. 64 (1881)

- b. *Pumpelly v. Green Bay*, 80 U.S. 166 (1871)
- c. *Pennsylvania Coal Co., Inc. v. Mahon*, 260 U.S. 393 (1922)
- d. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926)
- e. *Nectow v. Cambridge*, 277 U.S. 183 (1928) (note case)
- f. *Penn Central Transp. Co. v. New York*, 438 U.S. 104 (1978)
- g. *Murr v. Wisconsin*, 137 S.Ct. 1933 (2017)
- h. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)
- i. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)
- j. *Kelo v. City of New London*, 545 U.S. 469 (2005)

VII. The Constitution, Innovation, and Intellectual Property Rights

Principal Issues: 1) Why did the framers of the Constitution include an Intellectual Property (IP) Clause, giving Congress the power to issue patents and copyrights? 2) How has the idea of the patent changed over U.S. Constitutional history? 3) can states issue patents or copyrights? 4) Does the Constitution impose any limits on what can be patented? 5) What is the meaning of “limited times” in the IP Clause, and can Congress retroactively lengthen or shorten the term of a patent or copyright? 6) Why are trademarks not covered by the Constitution’s IP Clause? 7) Given the First Amendment, does the Constitution permit any limitations on intellectual property rights that are offensive or that cause economic harm to others?

- a. *Livingston v. Van Ingen*, 9 Johns 507 (N.Y. 1812)
- b. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824)
- c. *Sears, Roebuck & Co., Inc. v. Stiffel*, 376 U.S. 225 (1964)
- d. *O’Reilly v. Morse*, 56 U.S. 62 (1853)
- e. *Cuno Engineering Corp. v. Automatic Devices Corp.*, 314 U.S. 84 (1941)
- f. *Graham v. John Deere Co.*, 381 U.S. 1 (1966)
- g. *Mayo Collaborative Svces v. Prometheus Labs, Inc.*, 566 U.S. 66 (2012)
- h. *Eldred v. Ashcroft*, 537 U.S. 186 (2003)
- i. *Bloomer v. McQuewan*, 55 U.S. 539 (1852)
- j. *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519 (2013)
- k. *Mattel, Inc. (“Barbie”) v. Walking Mountain Productions*, 353 F.3d 792 (9th Cir. 2003)
- l. *Matal v. Tam*, 137 S.Ct. 1744 (2017)

VIII. The Constitution and Federal Regulatory Authority

Principal Issues: 1) to what extent does the United States Constitution authorize the creation of federal agencies that have both “legislative” power (to make rules) and “adjudicative” power (to punish regulated persons or firms for violations)?

- a. *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935)
- b. *Whitman v. Amer. Trucking Assn., Inc.*, 531 U.S. 457 (2001)
- c. *Chevron, Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984)
- d. *Oil States* (2018)???