

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

CONSTITUTIONAL LAW AND FREE ENTERPRISE

FALL 2018 – PROFESSOR AMY SEPINWALL, J.D., Ph.D.

OVERVIEW: This course provides a survey of issues in constitutional law. Virtually all of the issues we will study touch business or commerce in some way. But virtually no constitutional law class could be otherwise, whether or not the course makes the Supreme Court's focus on business or money explicit. Consider the following questions:

- Can the government seize private property for the public good? What counts as the public good? If a corporation will use the property in ways that benefit the public, may the government transfer an individual's property, without her consent, to the corporation?
- Can the government compel people to buy certain things and refrain from buying others? Which things? Wheat? Marijuana? Broccoli? Healthcare?
- Should there be limits on the role of money in politics?
- What is the scope of the right to free speech, including the right to stay silent? Can individuals or businesses be compelled to host speech with which they disagree? Can officiants or singers opposed to gay marriage be made to perform at same-sex couples' weddings? Can shopping mall owners be compelled to host protests against clothing manufactured in sweatshops?
- What about other forms of compelled association – e.g., paying for your employees' birth control when you oppose contraception? Including all-comers in your private club?
- When, if ever, is discrimination in employment permissible?

This course takes on these questions, devoting roughly one class session to each set of issues.

More specifically, 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 it seize private property on the ground (or perhaps mere pretext) that the public would benefit from the taking? May Congress compel people to buy health insurance in order to protect commerce?

Second, what are the rights of businesses under the Constitution? What role should corporations play in politics? May a corporation deny health insurance coverage for drugs or treatments, like contraception, 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 partake of 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: Tuesdays, 3:00-6:00 PM

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

OFFICE HOURS: By appointment

TEACHING ASSISTANT: Bill Fedullo
Email: wfedullo@pennlaw.upenn.edu
Office hours: By appointment

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

GRADING:

1. Questions on readings = $2 \times 5\% = 10\%$;
 2. Questions for our Supreme Court field trip = 5%
 3. Constitutional structure assignment = 15%;
 4. Judicial bio assignment = 5%
 5. Supreme Court brief = 35%;
 6. In-class oral argument = 15%
 7. Serving as a Justice at oral argument = 5%;
 8. Participation = 10%
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1. ***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 8 PM on the Monday night before your**

assigned class sessions. *Late assignments will receive a 0.* Please email your questions directly to me – sepin@upenn.edu.

2. ***Supreme Court Field Trip:*** I am hoping that we can attend oral argument at the Supreme Court. More information about the trip itself to follow. Each of you (whether you can attend or not), will be charged with submitting three questions based on the Petitioners' and Respondents' briefs for one of the cases we will be hearing. Your questions should be ones you would ask if you were one of the Justices hearing the case. Again, you should not answer these questions. (If the field trip does not work out, I will nonetheless identify a Supreme Court case being heard this term for which you will read the briefs and articulate questions for the parties.) You must submit your questions **via email by 8 PM on the night before the case will be heard. *Late assignments will receive a 0.***

Provisionally, the case in question is Mount Lemmon Fire District v. Guido, a case involving age discrimination in employment. The case will be argued before the Supreme Court on Monday, October 1, 2018. For purposes of completing the assignment, please read the Petitioner's and Respondent's briefs, which can be found here:

<https://www.supremecourt.gov/docket/docketfiles/html/public/17-587.html>. You want the submissions of May 7 (Petitioner's Merits Brief) and July 5 (Respondent's Merits Brief).

3. ***Constitutional structure assignment:*** You will be expected to complete an assignment that will allow you to gain mastery of important constitutional law concepts relating to separation of powers; federalism; and modes of constitutional interpretation. There are two sets of required readings for this assignment: *Murphy v. NCAA*, 584 U.S. ____ (2018), and a series of readings on constitutional structure and interpretation. These two sets of readings are at the beginning of your coursepack.

The assignment (roughly three pages) is described in Appendix 1, below. You must submit your assignment **via email by 10 PM on September 17. *Late assignments will receive a 0.***

4. ***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 one noteworthy case; and include at least one fun fact. The biography should be presented in power point form. Your presentation **may not exceed 5 minutes**. Please email your power point slides to me by **10 PM on Monday, September 24. *Late assignments will receive a 0.***
5. ***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 November 5. *Late assignments will receive a 0.*

6. ***In-class oral arguments:*** We will hold oral arguments on November 20, November 27, December 4, and on the date assigned for our final exam (TBD). Details about the format of the oral arguments can be found in Appendix 2.
7. ***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.
8. ***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.
2. **Email:** Students should check email at least daily in the event that I send a message to the class.
3. **Absences:** Please notify both your TA and me 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. 28 Intro	No readings
Week 2 – Sept. 4 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 3 – Sept. 11	No class
<i>Sunday, Sept. 17</i>	<i>Constitutional Structure Assignment due by 10 PM!</i>
Week 4 – Sept. 18 – Commerce Clause	
Cases:	ACA I – NFIB v. Sebelius
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 25— Field trip	National Constitution Center (optional dinner to follow)
<i>Brief Assignment</i>	<i>Assignment emailed to you by night of September 25</i>
<i>October 1</i>	Supreme Court Field Trip -- Mount Lemmon Fire District v. Guido
Week 6 – Oct. 2	

Campaign Finance	
Cases:	Buckley v. Valeo; McCutcheon v. FEC
Scholarly commentary:	Nicholas Stephanopoulos, Aligning Campaign Finance Law James Fishkin and Heather Gerken, The Two Trends That Matter for Campaign Finance
Judicial Bio Presentations	Judicial Bio Presentations: Justices Roberts, Alito, Thomas, Gorsuch, Kennedy
Week 7 – Oct. 9 Citizens United	
Cases:	Citizens United
Scholarly commentary:	Robert Post, Citizens Divided, Chapter 2 Russ Feingold, The Money Crisis
Judicial Bio Presentations	Justices Breyer, Ginsburg, Kagan, Sotomayor, Scalia, Stevens, Souter, Rehnquist, O'Connor
Week 8 – Oct. 16 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
Judicial Bio Presentations	Justices Brennan, T. Marshall, J. Marshall, Warren, Burger, Kavanaugh ???, Others?
Week 9 – Oct. 23 Imposed speech and compelled association	
Cases:	Excerpts from Lee Epstein -- Constitutional Law for a Changing America (pages 422-442) Masterpiece Cakeshop v. Colorado
Scholarly commentary:	Fred Schauer, The Politics and Incentives of First Amendment Coverage
	Amy Sepinwall, Free Speech and Off-Label Rights
Week 10 – Oct. 30	No readings. In-class film (TBA) and discussion
Monday, Nov. 5	Briefs due by 11:59 PM! Please email to me, your TA, and opposing counsel
Week 11 – Nov. 6	

Compelled subsidization: contraceptive mandate cases	
Cases:	Hobby Lobby v. Burwell, Zubik v. Burwell
Scholarly commentary:	Amy Sepinwall – University of Illinois Law Review Article on Zubik
	Amy Sepinwall – University of Chicago Law Review Article on Hobby Lobby (Optional)
	Amy Sepinwall -- Harvard Business Law Review article on Hobby Lobby (Optional)
Week 11 – Nov. 13 Oral Argument	
Week 12 – Nov. 20	No class
Week 13 – Nov. 27 Oral Argument	
Week 14 – Dec. 4 Oral Argument	
Date TBD – Oral Argument	Our last oral argument session will take place during the slot reserved for our final exam.

APPENDIX 1 – Constitutional Structure Assignment

This assignment is based on the Supreme Court’s 2018 decision in *Murphy v. NCAA*, available in your coursepack, along with associated readings 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. (There is a maximum of 30 points to be earned on the assignment; I will pro-rate your score to a grade out of 10, rounding to the nearest whole number.) You must submit your assignment **via email by 10 PM on September 17**. I will allow a 5-minute grace period. Assignments received after 10:05 PM will receive a ‘0.’

1. What is the holding (i.e., the outcome along with its rationale) of the case? (1-2 sentences; 2 points)
2. State the central claim of Justice Ginsburg’s dissent along with the rationale for that claim. (1-2 sentences; 2 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 four opinions (Alito's, Thomas's, Breyer's and Ginsburg's) adopts? 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; 10 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 four opinions advance? (Not more than 2 paragraphs per opinion; 16 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: 18 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 Wednesday, March 15. 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.