

Corporations and Constitutions  
Richard Brooks

Spring 2017  
Fridays 12:10-1:30pm

## Corporations and Constitutions Seminar

### *Course Syllabus*

#### **Preliminaries**

**Course Meeting Time & Location:** Fridays 12:10pm-1:30pm; JGH 101

**Instructors:** Richard Brooks and Geeyoung Min

**Brooks Office hours:** Thur. 2:00pm-3:00pm & by appointment; JGH 919;  
(212) 854-3264 (not good for voice-massages); *richard.brooks@law.columbia.edu*

**Min Office hours:** Thur. 3:00pm-5:00pm & by appointment: JGH 606;  
(212) 854-1082; *geeyoung.min@law.columbia.edu*

**Course Admin. Assistant:** Khamla Pradaxay; *kprada@law.columbia.edu*

#### **Description**

This weekly Friday lunchtime seminar is devoted exploring various topics at the intersection of constitutions (state and federal, and public law more generally) with the law of associations and business organizations. The first few sessions will introduce students to the topic of corporate sovereignty beginning with medieval political theory and concluding with royal and colonial charters. We will then turn our focus to incorporation and the constitutions of states and the United States. Here we will begin historically, working through foundational early debates and cases, such as *Trustees of Dartmouth College v. Woodward* (1819) (Contract Clause), *Santa Clara Co. v. Southern Pacific Railroad* (1886) (Equal Protection Clause), and make our way to more recent cases and controversies, including *National Association for the*

*Advancement of Colored People v. Alabama* (1958) (Due Process), *Citizens United v. Federal Election Commission* (2010) (Freedom of Speech), and *Burwell v. Hobby Lobby* (2014) (Religious Freedom). In most sessions, we will have speakers who are experts on the topic.

## Readings, Grading and Requirements

**Readings** In addition to reading legal opinions, the seminar will explore theoretical and historical writings on the constitution of corporations, with emphasis on personhood and personality. Readings for each session will be posted on the Course Pages.

**Student Responsibilities** The seminar is graded credit/no credit, but students may petition for a grade, and an additional credits by completing a substantial paper on the topic. (prior approval of faculty required)

**Reaction Papers** There will be no exam. Instead, students will write a brief reaction paper every week. Each student may opt not to submit three papers for any class at their choices. However, students are still responsible for the reading for the class that they dont submit a reaction paper. A reaction paper should be no longer than one (1) double-spaced page long. Students should not focus on summarizing or describing the reading. Rather, student should pose two questions on the reading and then discuss them. Each paper should (1) be based on the assigned reading, and (2) contain student's own argument. The comment should start with a question you raise. All papers should be submitted through Course Pages by 6:00pm on the day before the class each week. In each file name and the first page of the papers, please include both your name and the class number (e.g. J. Smith, week 2) for which the paper is being submitted. Late papers will not be credited toward the course requirements.

**Class Participation** Students are expected to attend all twelve classes. It is hoped that all students will choose to participate in the discussion. Also, occasional cold calls should be expected.

## Tentative Schedule and Assignments

### Week 1. (Jan 20) Introduction and Course Plan

No Reading Assignment

### Week 2. (Jan 27) Medieval Corporate and Political Theory

1. Kantorowicz, E.H., (1957) **The King's Two Bodies: A Study in Medieval Political Theology**, Princeton University Press — selections: pages 7–16, 42–49, 139–143, 184–192, 198–203, 267–272, 302–313.
2. Gierke, O. (1990) **Political Theories of the Middle Age**, (F. Maitland, *trans.*) Cambridge University Press — selections: “The Idea of Personality,” pages 67–73.
3. Maitland, F. (1900) **The Corporation Sole**, *Law Quarterly Review*, 16: 335–354.
4. Maitland, F. (1901) **The Crown as Corporation**, *Law Quarterly Review* 17: 131–46.

### Week 3. (Feb 3) Royal and Colonial Charters

1. Ely, J. W. (2015) **The Contract Clause: Origins and Early Development**, *Brigham-Kanner Property Rights Conference Journal*, 4: 199–228
2. **Cases to Skim:** *Fletcher v. Peck*, 10 U.S. 87 (1810); *Trustees of Dartmouth College v. Woodward*, 17 U.S. 518 (1819); *Charles River Bridge v. Warren Bridge* 36 U.S. 420 (1837)
3. **Optional:** Ely, J. W. (2016) **The Contract Clause during the Civil War and Reconstruction** *Journal of Supreme Court History*, Vol. 41(3):

4. **Optional:** Epstein, R. A. (1984) **Toward a Revitalization of the Contract Clause**, University of Chicago Law Review, 51: 703–751
5. **Primary Sources:** *King’s College Royal Charter; Dartmouth College Royal Charter*; Wakelyn, J. L. (Ed., 2006) **America’s Founding Charters: Primary Documents of Colonial and Revolutionary Era Governance**, Greenwood Press — selections: preface, table of contents and short introductions to document (this is offered mostly as a reference).

**Week 4. (Feb 10) General Incorporation, Eric Hilt**

1. Hilt, E (2015) **Corporation Law and the Shift toward Open Access in the Antebellum United States**, NBER Working Paper No. 21195
2. Hamill, S. P. (1999), **From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporation**, American University Law Review, 49: 81–180 (selected pages)
3. other background materials: cases or primary docs?

**Week 5. (Feb 17) Equal Protection, Ruth Bloch & Naomi Lamoreaux**

1. **Cases:** *Santa Clara County v. Southern Pacific Railroad Company*, 118 US 394 (1886)
2. Bloch, R. and N. Lamoreaux (2017) **Corporations and the Fourteenth Amendment**
3. Horwitz, M. J. (1986) **Santa Clara Revisited: The Development of Corporate Theory**, West Virginia Law Review 88:173–224

**Week 6.** (Feb 24) **From Plessy to Progressive Era Conceptions,**  
**David Bernstein & Jeremy Kessler**

1. Bernstein, D. E. (2000) **Lochner vs. Plessy: The *Berea College* Case**, *Journal of Supreme Court History*, 25(1): 93–111
2. Kessler, J. K. (2016) **The Early Years of First Amendment Lochnerism**, *Columbia Law Review*, 116(8): 19152004
3. Hutchison, C. (2016) **Progressive Era Conceptions of the Corporation and the Failure of the Federal Chartering Movement**

**Week 7.** (Mar 3) **Nonprofit Incorporation, Norman Silber**

1. Silber, N (2001) **A Corporate Form of Freedom: The Emergence of the Modern Nonprofit Sector** Westview Press — selections: pages 1–9 (Introduction), 42–51 (Interwar Characterizations of Permissible Activity), 51–57 (Wartime Applications), 83–115 (The Corrosion of the Discretionary Conception)
2. Levy, J. (2017) **From Fiscal Triangle to Passing Through: Rise of the Nonprofit Corporation,**
3. Note (1951), **Permissible Purposes for Nonprofit Corporations,** *Columbia Law Review* 51: 889–
4. Note (1957), **State Control over Political Organizations,** *Yale Law Journal* 66: 545–

**Week 8.** (Originally Mar 10, to be reschedule as student session; see p. 8)  
**Municipal Incorporation**

**Spring Break, March 16**

**Week 9. (Mar 24) Religion, Douglas Laycock**

1. **Burwell v. Hobby Lobby** 573 U.S. (2014)
2. Bainbridge, S. (2013) **Using Reverse Veil Piercing to Vindicate the Free Exercise Rights of Incorporated Employers**, 16 Green Bag, 16(2d): 235
3. **Brief of Corporate and Criminal Law Professors as Amicus Curiae in Support of Petitioners, *Sebelius v. Hobby Lobby Stores, Inc.***, 134 S.Ct. 678 (2013)
4. Bainbridge, S. (2014) **A Critique of the Corporate Law Professor's Amicus Brief in *Hobby Lobby* and *Conestoga Wood***, Virginia Law Review Online, 100: 1-21
5. NeJaime D. and R. Siegel (2015) **Conscience Wars: Complicity-Based Conscience Claims in Religion and Politics** Yale Law Journal 124(7): 2516–2591

**Week 10. (Mar 31) Speech, Richard Briffault**

1. **Citizens United v. Federal Election Commission** 558 U.S. 310 (2010)
2. Briffault, R. (2011) **Corporations, Corruption, and Complexity: Campaign Finance after *Citizens United***, Cornell Journal of Law and Public Policy 20: 28–
3. Speir, I. (2012) **Corporations, the Original Understanding, and the Problem of Power**, Georgetown Journal of Law and Public Policy 110: 65–
4. Bebchuck, L. and R. Jackson (2013) **Shining Light on Corporate Political Spending** Georgetown Law Journal 923, 101: 923–

**Week 11. (Apr 7) Search, Self-incrimination, Double Jeopardy &c.,  
Brandon Garrett**

1. Garrett, B. (2014), **The Constitutional Standing of Corporations**, University of Pennsylvania Law Review, 163: 95–164
2. Pettit, P. (2007), **Responsibility Incorporated**, Ethics 117: 171–201

**Week 12 (April 14) Joint event with Blue Sky Lunch: Naomi Lamoreaux, William Novak, et al.**

1. CORPORATIONS AND AMERICAN DEMOCRACY, Harvard University Press (N. Lamoreaux and W. Novak, eds., forthcoming 2017)

**Make-up Session (Date TBD) Municipal Incorporation, Vicki Been**

1. Frug, G. (1980) **The City as a Legal Concept**, Harvard Law Review, 93(6): 1057–1154
2. Maitland, F. (1896) **The Origin of the Borough**, The English Historical Review, 9: 13–19
3. Graham, D. (2017) **Red State, Blue City**, Citilab from The Atlantic, Feb 2, 2017
4. Capps, K. (2016) **The Cities That Are Fighting Back Against State Intervention**, Citilab from The Atlantic, Oct 3, 2016
5. Dewan, S. (2015) **States Are Blocking Local Regulations, Often at Industrys Behest** New York Times, Feb. 23, 2015

**Optional Week 13 (Date TBD) The Court as Corporation, Speaker(s)  
TBA**

1. Kornhauser, L. and L Sager (1986), **Unpacking the Court**, Yale Law Journal, 96: 82117
2. Kantorowicz, E.H., (1957) **The King's Two Bodies: A Study in Medieval Political Theology**, Princeton University Press — selections:

**Optional Week 14 (Apr 28) Comparative Corporate Rights, Mila Versteeg**

1. Chilton, A. and M.Versteeg (2016), **Do Constitutional Rights Make a Difference?**, American Journal of Political Science, 60(3): 575–589.
2. Brooks, R. and T. W. Guinnane (2017), **The Right to Associate and the Rights of Associations: Civil-Society Organizations in Prussia, 1794–1908**