CONSTITUTIONAL LAW II RULES OF THE ROAD, SYLLABUS, AND EXAM INFO
Spring 2006

Rules of the Road: You must sign the seating chart, adhere to the Law School attendance policy, and be prepared to discuss the assigned materials in class. I reserve the right to consider attendance and class participation in grading. If you occasionally are unprepared for a class, that is no problem, but you must let me know that you are unprepared before the class begins. I am always happy to discuss matters with students immediately after class, during my office hours, or at another mutually convenient time.

Syllabus: The casebook is Sullivan & Gunther, Constitutional Law (15th ed.); you also must have and use the 2005 Supplement. In the syllabus that follows, I have assigned, for the most part, Supreme Court opinions and opinion abstracts. You should be aware, however, that the casebook includes a large number of excellent editorial notes and opinions that are not assigned. You may find it useful and interesting to read this material even though – in an effort to keep assignments at a manageable length – I have not assigned it.

Exam: There will be one exam in this class. It will include a substantial number of objective questions, but at least a majority of the points obtainable on the exam (as well as a majority of the time recommended for various portions of the exam) will be associated with essay questions.

1. The Takings Clause
   513-16 & Supp. 15-21 (public use) & 516-19 & 521-24 (through note 4; Penn Central, etc.) & Supp. 21-22 (regulatory takings).

2. More Takings & The Contracts Clause
   531-34 (conditions & takings; Nollan & Dolan) & 534-44 (the Contracts Clause).

3. Equal Protection, Intro
   640-41 (to end of page 641); 647-50 (Ry Express, etc.); 651-52 (Moreno & n. 3); 653-59 (Mur gia & Fritz).

4. Equal Protection, Intro Continued & Race Discrimination
   660-61 (Logan); 663-64 (Willowbrook); 667-77 (Strauder through Bolling), 679-80 (Brown II) & 698-99 (Green, Swann, Keyes).

5. Equal Protection, Discriminatory Purpose
   685-97 (race cases) & 803-06 (Feeney).

6. Equal Protection, More on Race Discrimination
   681-85 (Loving, etc.); Supp. 24-25; 707-08; 739-48 (Croson).
7. Equal Protection, Affirmative Action
   718-31 (Grutter & Gratz) & 736-37 (Wygant).

8. Equal Protection, Sex Discrimination I
   Read only once: 759-61 & 768-69 (Shaw I & Hunt) & 769-74 (intro); read
   carefully 775-78 (Craig) & 793-99 (Gedulding, Michal M, Rostker).

9. Equal Protection, Sex Discrimination II
   778-93 (VMI, etc.)

     810-23

11. Equal Protection, Age, Wealth, and Sexual Orientation
     823-32 & 835-37.

12. Equal Protection, Fundamental Rights I
     837-41 (Harper); 843-44 (Richardson, Rosario, Kusper); 846-51 (Reynolds, etc.);
     read once 852-55; read carefully 859-60 (Vieth).

13. Equal Protection, Fundamental Rights II
     860-70 (Griffin, etc.) & Supp. 24-25; read once 870-73 (Dandridge, Lindsey).

14. Equal Protection, Fundamental Rights III
     873-84 (Rodriguez, Plyler, etc.).

15. Privileges or Immunities & State Action Intro
     Read carefully 459-66 (Crandall through Saenz); read once 885-88 (intro &
     statutes) & 941 (re §1983); read carefully 894-96 (Marsh through Evans).

16. More State Action
     901-03 (Shelley); 907-09 (Burton); 911-12 (Moose Lodge) & 916-25 (Jackson,
     etc.).

17. Private Liability & The Enforcement Power
     926-27, 941-44; read once 946-52; read carefully 952-58.

18. The Modern Enforcement Power
     Read carefully 962-74 & 980-82; read once 974-80.

19. Free Expression, Intro
     Read as background 984-96. Read carefully 996-99 (Schenck); 1002-05
     (Abrams); 1016-20 (Whitney).
20. **Free Expression, More on Clear and Present Danger**
   1022-28 (Dennis); 1030 (Yates); 1033-36 (Watts & Brandenburg); 1036-37 & 1399-1402 (Hess & Claiborne Hardware); 1370-72 (Nebraska Press Assoc.).

21. **Free Expression, Fighting Words & Hostile Audiences**
   Read carefully 1038-52 (Cantwell, Chaplinsky, Gooding, Terminello, Feiner, Edwards); read once 1054-56 (Beuharnais). Read Cohen v. California with special care.

22. **Free Expression, Defamation, Privacy, etc.**
   1056-59 (N.Y. Times); 1061-71 (from note 5 through Fla. Star) & 1488-90 (Cohen).

23. **Free Expression, Obscenity & Child Pornography**
   1094-95 & 1098-1100 (intro); 1102-04 (Miller); 1111-12 (Jenkins); 1114-20 (Farber, etc.).

24. **Free Expression, Recurring Themes I**
   Read carefully 1333-34 (overbreadth intro) & 1336-39 (Broadrick & Farber) & 1345-46 (notes 6 & 7); 1347-50 (vagueness); 1350-54 & 1358-60 (to bottom of p. 1360; prior restraints & undue discretion).

25. **Free Expression, Recurring Themes II**
   1192-97 (content discrimination); 1199-2000 & 1053-54 (communicative impact); 1231-33 (Schneider & Martin); 1242-43 (Metromedia & less restrictive alternatives); 1127-29 (inclusiveness problems).

26. **Free Expression, Burning Issues**
   Read carefully 1203-06 (O'Brien); 1212-21 (Texas v. Johnson, etc.).

27. **Free Expression, Nudity and Pornography**
   1130-35 (zoning); 1221-26 (dancing); 1122-26 (pornography).

28. **Free Expression, Hate Speech**
   Read carefully 1079-94 (RAV, Mitchell, Black).

29. **Free Expression, Traditional Public Forums**
   1227-29 (Hague & Saia); 1233-36 (Kovacs & Ladue) & 1254-62 (Ward, Frisbee, Madsen, etc.).

30. **Free Expression, Nontraditional Forums**
   1264-67 (Brown, Adderly); 1274-83 (Perry, Cornelius, Kokinda, ISKCON); 1285-89 (AETC & ALA).

31. **Free Expression, Public Schools**
   1267-68 (Grayned); 1294-1302 (Tinker, Pico, Bethel); 1289-92 (Widmar, etc.).
32. Free Expression, Public Employees & Public Money
1303-10 (Pickering, Connick, Rankin, Waters); Supp. 27; 1319-26 (grants); read once 1313-16 (patronage cases).

33. Free Expression, Modern Technologies
1138-45 (Pacifica & broadcasting); 1149 (Playboy Entertainment & cable); 1149-55 (Reno & the Internet).

34. Free Expression, Compelled Speech & Association
1373-75 (Barnette, Wooley); 1383-86 (Hurley); 1406-11 (loyalty, oaths, etc.); 1417-19 (Boy Scouts).

35 Free Expression, Campaign Finance Control
1424-34 (Buckley & Nixon) & 1443-46; read once 1448-61.

36. Free Expression, Commercial Speech
1158-60 (intro); 1169-73 (lawyers); 1173-78 (Central Hudson, etc.); 1182-85 (44 Liquormart); 1190-91 (Western States Med. Ctr.).

37. Free Exercise I
Read as background 1503; 1510-12 & 1523-26 (Sherbert); read carefully 1521-23 (Reynolds, etc.); 1526-29 (Thomas, Yoder, Lee, Bob Jones); 1531-41 (Bowen, Lyng, Smith).

38. Free Exercise II & Establishment I (Accommodation & Aid)
Read as background 1514-18 (McDaniel, Lukumi); read carefully 1518-21 (Locke); 1599-06 (Zelman); Supp. 46-47 (Cutter); read once 1606-10 (Larkin through Mergens).

39. Establishment II (Prayer)
1550-59; 1561-63 & 1568-69. Also read as background 1504-09 & 1546-47.

40. Establishment III (Displays)
1575-80 (Allegheny & Capitol Square) & Supp. 31-46 (McCreary & Van Orden).
CONSTITUTIONAL LAW II
Spring Semester 2006
Professor Ball

I. Equal Protection: Heightened Scrutiny/Suspect Classifications

A. Introduction
640-44

B. Rational Basis Review
644-46 (thru chart)
647-49 **REA** (thru 1st par. of Jackson op.)
650 (thru 1st par. of n.2)
654 **NY City Transit Authority**
655-59 Fritz. (Rehnquist and Brennan ops. only)
664, 665-67 (notes 2 and 3)

C. Race
1. Strict Scrutiny
508-09 Carolene Prod. Footnote 4
667-71 Strauder, Korematsu

2. Racial Segregation
671-83 **Plessy, Brown I, Bolling. Brown II, Loving**
Supp. 24-25, Johnson

3. Intent/Impact
685-88 **Yick Wo et al**
688-92 **Washington v. Davis** (through 1st para. of Arlington Hts.)
694-96 **Rogers** (maj. op.)
698-99 **Green, Swann**
703-704 Freeman, Fordice, Jenkins

4. Affirmative Action
707-08
708-18 **Bakke** (not Note on vitality of Bakke)
718-35 **Grutter, Gratz**
737-39 (n.2)
739-48 **Croson**
744-50 **Metro Broadcasting** (maj. op.)
750-58 **Adarand**
758-69 **Shaw** and the aftermath

D. Other Classification
1. Gender
769-75 (notes)
775-78 **Craig**
778-81 **Hogan** (maj. op.); JEB
781-93 V.M.I.
793-803 (notes & note cases)
806-08 (notes & note cases)
2. Other
a. Alienage 810-14
b. Non-marital children 815-17
c. Disability, Age, Poverty
817-23 Cleburne (White’s op. for the ct.; Marshall dissent)
824-25 (notes & cases)
E. Homosexuality
825-37 Romer
704-05 Hunter, Washington

II. Equal Protection: Heightened Scrutiny/Fundamental Rights
837-38 Introduction
A. Voting
838-46 Harper, Kramer & notes
846-51 Reynolds
859-60 Vieth, Gore
B. Access to Courts
860-63 Griffin, Douglas
863-64 Ross
Supp. 25 Halbert
864-66 Boddie et al
866-70 M.L.B.
C. Food, shelter, education
870-73 Dandridge, Lindsey
873-81 Rodriguez
881-84 Plyler

III. Civil Rights Legislation: State Action; 14th Amendment, Section. 5
885-88 Introduction
A. State Action, etc.
888-92 Civil Rights Cases
892-94
894-96 (to n.4), 898-99 (n.6, Jackson maj. opinion) - Public Function
901-09 Shelley, Burton (Clark op. for the ct.) - Public Involvement
910-13; 922 (NCAA)
924-25 Deshaney (Note 7)
926-37 Guest
937 Introductory Note
B. 13th Amendment
941-45 Jones (to Runyon)
C. 14th Amendment, Section 5
946-52 Introduction and Background
952-58 Katzenbach v. Morgan
960-62 Rome
962-76 Boerne, Morrison, Garrett et al
976-83 Lane, Hibbs

IV. Freedom of Speech

984-96 Introduction

A. Advocacy of Violence and Unlawful Acts
996-99 Schenck
1002-05 Abrams (Holmes dissent)
1016-20 Whitney (Brandeis concurrence)
1033-37 (to n. 3) Brandenburg

B. Fighting Words
1038-43 Note Cases
1043-47 Cohen

C. Hostile Audiences
1048-54 Feiner, Edwards et al (omit Note 2, pp. 1052-53)

D. Libel
1054-56 Beauharnais
1056-59 New York Times
1059-62 (notes)
1062-63 Curtis Publishing Co. v. Butts, H.P. v. Walker
1064-65 Gertz (maj.op.)
1067-69 (Note 1) Hustler Magazine
1071-72 Vopper (maj.op.)

E. Hate
1074-78
1078-90 Note 4; R.A. v; Wisconsin
1192-93, 1333-36
1090-94 Virginia v. Black

F. Obscenity
1094-99 Roth
1102-04 Miller
1104-06 Slaton (maj.op.)
1111-13 Notes 3 - 6

G. Child Pornography
1114-16 Ferber (maj.op.)
1118-20 Ashcroft v. Free Speech Coalition (maj. op.)

H. Pornography
1120-22

I. None of the Above
1126-27 Introduction
1130-33 Young (Stevens and Powell ops.)
1133-34 Renton (maj. op.)
1135-38 Alameda Books
1138-41 FCC (maj.op.)
1145 Sable (first par. Note 2)
1146-48 Denver Area
1149 Playboy
1150-55 Reno
1155-58 Ashcroft v. ACLU

J. Commercial Speech
1158-73 Introduction, Virginia Pharmacy
1173-76 Central Hudson
1182-90 Rhode Island
1190-91 Thompson

K. Symbolic Acts: Burning Draft Cards, Burning Flags, Dancing Nude
1192-94 Introduction
1203-10 O'Brien
1210-21 Texas v. Johnson; Eichman
1221-22 Barnes(maj. op.)
1225-26 Papp's A.M.

L. Public Forum
1226-28 (to end of n.2)
1230-31 Cox v. N.H.
1236-38 Watchtower Bible
1238-39 Heffron v. Iskcon (1st par.)
1248-51 Clark (maj.op.)
1254-55 Ward
1255-57
1257-62
1262-68
1272-76 Notes 1-2
1280-84 ISKCON v. Lee;
1286 U.S.v.ALA. (1st Par. Only)
1289-92 Religious speech
1324-26 (Note 4)
1293-94 Shopping Malls

M. Public Employees and Government Subsidy
1303-12 Connick, et al
Supp. 27 San Diego
1326-33 (Notes 5-7)

N. Overbreadth, Vagueness, Prior Restraint
1333-36 (to n.3)
1340-41 Ashcroft, Hicks
1347-50 Coates, NEA
1350,1358-60 Near (maj.op.)
1360-61 Walker v. Birmingham
1361-68 NYT v. US (per curiam)
1368-69 Progressive
O. Ancillary Rights
   1373-78 Not speaking
   1378 (n.1) Access for others’ speech
   1381-83 Turner (I and II)

P. Association
   1386-88
   1407-09 Loyalty Oaths
   Supp. 30 (Clingman)

Q. Political Money
   1424-33 Buckley
   1447 (n. 10)-61 McCain-Feingold, McConnell

R. Press
   1461-90

S. Emerging Media
   1490-1502

T. State Constitutions

V. Religion

1503-13

A. Free Exercise
   1513-19 Lukumi Babalu Aye
   1519-21 Locke
   1521-33 Sherbert & notes
   1533-37 Smith (op. For the ct.)
   1541-43 (n.1) (Boerne)
   1545-46 (n.5)

B. Establishment
   1546 - 47 Lemon
   1547 - 49 (Zorach)

1. School Prayer
   1550 - 53 Notes (Engel, Schemp, Wallace)
   1553 - 59 Lee (Maj. Op.)
   1559 - 61 Saanta Fe Ind. School Dist., Good News Club

2. School Curriculum
   1561 - 62 Decalog (Stone) (n.1) (see below #3)
   1562 - 63 Pledge of Allegiance (Newdow) (n.2)
   1563-66 Evolution (Epperson, Edwards)(n.3 thru Edwards maj.op.)

3. Apart from Schools
   1568 - 69 Sunday Closing, Legislative Prayer (nn. 1-2)
   1570 - 77 Crèche, menorah (Lynch, ACLU)
   1577-80 Other (Pinette)
   Supp. 31-46 Decalog (McCready Co., Van Orden)

4. Financial Aid to religious Institutions
   1580 - 83 Everson
   1583 - 84 Notes
   1584 - 88 Mueller (maj. op)
   1590 - 93 Witters, Bowen, Zobrest
1324 - 26, 1593 - 95 Rosenberger
1595 - 96 Ball, Aguilar, Agostini (maj.op.)
1597 - 98 Mitchell
1599 - 1606 Zelman
5. Accommodation
   1606 - 10 Larkin, Caldor, Amos, Bulloch, Mergens
   Supp. 46-47 Cutter

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All of the above is subject to modification in order to take account of special opportunities, including visitors, Court opinions handed down this term, and the limits on time.
The First Meeting

1. Introduction details
2. A look back at Constitutional Law I, the spillover effect: Marbury, Cooper, Aaron, McCulloch, Lochner, Carolene Products footnote 4, Griswold, Roe, Casey, Bowers, Lawrence, Cruzan, Glucksberg, Commerce Clause interpretation.
3. A look ahead to Constitutional Law II
4. Assignment (Sullivan & Gunter casebook)

I. Equal Protection; Heightened Scrutiny/Suspect Classifications

A. Introduction
   640-44
B. Rational Basis Review
   644-46 (thru chart)
   647-49 REA (thru 1st par. of Jackson op.)
   650 (thru 1st par. of n.2)
   654 NY City Transit Authority
   655 (begin n.5)-59 Fritz. (Rehnquist and Brennan ops. only)
   664 (begin with Introduction)-67 (notes)

If there is time:
C. Race
   1. Strict Scrutiny
      508-09 Carolene Prod. Footnote 4
      667-71 Strauder, Korematsu