

**Constitutional Law II—Spring, 2010****Professor Lynne Henderson**[Lynne.Henderson@unlv.edu](mailto:Lynne.Henderson@unlv.edu)

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Office Hours: to be arranged in consultation with class re: scheduling (On campus most days)

**I. GENERAL INFORMATION**

Welcome to “Con Law II”! The assigned text is Stone, Seidman, et. al., **Constitutional Law (6<sup>th</sup> ed., 2009)**. I also highly recommend as a reader/explanatory text Erwin Chemerinsky, **Constitutional Law: Principles and Policies** (3d ed.)(Aspen paper), as it is quite clear and thorough and almost up-to-date. The library has copies, and you need not purchase a copy if you don’t have one already. The West Hornbook by Nowak and Rotunda is now dated (a lot has happened since 2000), but clear on many things; the library has copies of this book as well. (The multi-volume treatise by Nowak & Rotunda is up-to-date; use the library copies for this very expensive set).

There are many websites and sources online discussing current issues. One has to be careful and critical, of course, but several websites are useful if you remember to be careful and selective: Scotusblog discusses cases currently before the courts, has links to arguments, briefs, and cases, and is a useful resource. The “Balkinization” blog has very good posts on issues from a liberal/progressive scholarly point of view and “The Volokh Conspiracy” has very good blogs, etc., usually from a more libertarian and conservative point of view. The Federalist Society and the American Constitution Society also have useful websites (as well as active Boyd student chapters). Use Wikipedia selectively, if at all, same for other websites.

**Note:** If you are unfamiliar with the Stone, Seidman text, you may find it challenging because major cases wind up in notes, although the authors are careful to provide excerpts and to emphasize the importance of the cases. The Notes, in other words, can be rich with doctrine and nuance. In any event, it is essential that you read the Notes/pay attention to the Note cases following the “major” cases in the book. I will try to indicate below which ones to pay special attention to, and will do so in class as well. Some of the Notes are fairly self-explanatory and lucid, while others have long lists of articles. You certainly are not responsible for reading every Law Review article or author cited, although you need to know the themes from the text and questions identified in the text and in class.

**Additional materials:** There will also be handouts and/or internet references given out/assigned throughout the semester.

## II. INFORMATION ABOUT THE COURSE

**General:** Constitutional Law II covers the Equal Protection Clause and the First Amendment, topics you may have associated with “Constitutional Law” all along before coming to law school. The case law on Equal Protection alone is a vast area ranging from such questions as whether Wal-Mart must be made to carry health insurance for all its employees to the internment of Japanese-Americans to racial segregation in prisons to discrimination against Lesbian, Gay, Bisexual and Transgendered persons to California’s property tax system. There are also overlaps with Civil Rights laws enacted by Congress (and states). There is a whole issue of “state action” that we will not have time to cover in detail, but rest assured, I will mention it in class.

The First Amendment is also a major subject, covering a complex number of issues involving freedom of speech, speech, the press, and religion. In three units, we can only hope to cover the major themes and must leave many parts of the First Amendment to upper-division courses. (There are some excellent seminars on these topics). Nevertheless, you should have a good understanding of the major doctrines and themes of Equal Protection and Freedom of Speech by the end of the course.

**Objectives for Students:** At the end of this course, you should have a firm grasp of the Equal Protection law textually, historically, contextually, and doctrinally; a grounding in current Equal Protection law and tensions in that law; an understanding of the history, background, and purposes of the Freedom of Speech clause of the First Amendment; and the basics of First Amendment history and judicial methodology, particularly in the areas of speech and expression.

**Grading:** Your grade will be based on one final examination and classroom participation/performance. We will have a few in-class, ungraded, practice questions and exercises along the way. Whatever in-class exercises there are, they are required, and I reserve the right to reduce your grade by one-half if you do not participate in the exercise(s) or are not prepared to discuss them. I also reserve the right to reward outstanding classroom contributions by a “half”-grade for a final grade: That is, a person earning a “B” on the final can raise their grade to a “B+” through outstanding participation and contributions. “Outstanding classroom participation” has both a quantitative and qualitative dimension: A person who **consistently** contributes **substantively** to discussion throughout the semester is most likely to receive the additional credit. Consistent lack of preparedness or failing to meet my minimal attendance requirements (see policy below) can result in a **reduction** of your grade by “one half” or a failing grade.

**Attendance and Preparation:** It behooves you to attend class, even if you are not entirely prepared. For one thing, it really does “pay off” on my exams, as I do not want to be/am not likely to be “tricky” and class emphasis is a good clue to the subject matter of the exams. Second, it is your responsibility as a prospective lawyer to meet your obligations to be prepared and able to discuss topics with those who rely upon you. Finally, Constitutional Law II is a required course, and covers subjects that are on the Bar

and MBE, and therefore it is important for you to attend and do the readings to prepare for the Bar so questions don't come as a total surprise to you.

To keep track of attendance, I will circulate a sign-in sheet at the beginning of each class and have a seating chart. The seating chart is mostly so I can learn your names/get to know you, but it also is important for keeping attendance records.

I realize it may not be possible for some of you to attend every class for important reasons, such as serious health problems or family emergencies. Please let me know if such things come up for you. A last minute "my boss made me stay late" will only work once; a last minute serious illness is another thing. I reserve discretion in deciding what excuses an absence; but I do know life happens and will accommodate where I can.

**If** you miss more than 6 classes during the 13-week/26-class semester, I reserve the right to refuse to let you take the final examination and/or to give you a failing grade.

**Participation:** My usual method with upper-division courses is to begin the class by calling on people, then switch to taking volunteers to answer questions and discuss cases. I call on people by rows, so that you will have notice of when you are likely to be called upon. The cases and issues are sufficiently interesting, and you are far enough along in your law school careers, so that participation shouldn't be a problem. If I find that not enough people are speaking/volunteering, or that only a few people volunteer on a regular basis, I will begin calling on people who have not volunteered throughout the class hour. There will be lectures and in-class exercises as well (see above).

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### III. ASSIGNMENTS

Below is a tentative outline of assigned readings for the course. I say tentative, because it is impossible to know what pace we will achieve, given the subjects and pace of class discussion at various points. I may wish to add or subtract from certain topics depending on time and important developments in the law during the term, but I will be sure to give you advance notice of any changes.

The assignments are grouped conceptually, rather than by day, as again, it is difficult to know in advance what pace we will achieve. But a rule of thumb in my classes is that an assignment will be for at least one class, with perhaps part spilling over into the following class. I will tell you the assignments for the following week every Wednesday at the end of class. All pages are in Stone, Seidman, text, unless otherwise noted.

#### I. EQUAL PROTECTION: INTRODUCTION:

A. Introduction to Equality and the Constitution: The Thirteenth, Fourteenth and Fifteenth Amendments, pp. liii-liv; *Dred Scott*, The Reconstruction Congress and Judicial Reaction, Cases and notes, pp. 441-462

B. Introduction: Equality and the Constitution: *Plessy v. Ferguson*, Separate But Equal, The Road to Brown: pp. 456-465.

C. *Brown v. Board of Education (I)* and notes, pp. 465-472; *Brown v. Board of Education (II)* and Notes, pp. 473-488; *Letter from Birmingham City Jail* (on line; url in First Assignments post)

D. The De Jure/De Facto Distinction and Remedial Powers, pp. 479-488

#### II. EQUAL PROTECTION: RATIONAL BASIS/ RATIONAL RELATIONSHIP (standard method)

A. Background, pp. 489-490; *Beazer*, pp. 490-492, Notes, pp. 492-495; "Rational Relationship with 'Bite'/closer looks: pp. 495-501 (*Moreno*, *City of Cleburne*, *Romer*), Deferential review: pp. 500-512 (*Clover Leaf Creamery*, *Nordlinger*, *Railway Express*, *Lee Optical*).

### III. HEIGHTENED SCRUTINY AND THE PROBLEM OF RACE

A. “Strict scrutiny:” Background cases: *Strauder*, *Korematsu*, pp. 512-518; Adoption of the Current Standard: *Loving*, pp. 512-526; Structure and Function of “Strict Scrutiny”, pp. 526-531. Title VII, Civil Rights Act of 1964, as amended (handout)

B. “Facially Neutral Classifications/” aka “Disparate Impact/Discriminatory Effects”: *Washington v Davis*, pp. 531-535; “proving purpose/intent”: *Feeney*, *Arlington Heights*, *Yick Wo*, *Gomillion*, *Hernandez*, *Palmer*, pp. 535-542; The Distinctive Problem of Criminal Justice: *Batson*, *J.E.B.*, *McClesky v. Kemp*, pp. 542-553.

C. “Benign” Classifications/ Classifications to Benefit Racial Minorities/”Affirmative Action:” Background: pp. 553-555; *Croson*, pp. 555-558; *Adarand (I)*, pp. 558-571. In Education: *Grutter*, *Gratz*, pp. 571-589. WITH *Grutter/Gratz*: Exercise, Whom Would you admit? Web site: Frontline, “Secrets of the SAT: [www.pbs.org/wghb/pages/frontline/sats](http://www.pbs.org/wghb/pages/frontline/sats). Click on “Who was good enough? “ (to get into Cal-Berkeley). NO PEEKING AT LINK TO RESULTS. **You** all think about whom you would admit and why. To be discussed/worked on in class.

D. Affirmative Action, Education, and *Brown*: What’s Left If Anything? *Parents United*, pp. 600-619, maybe *Ricci* (handout); see also Welfare and Education, below.

### IV. THE “PROBLEM” OF GENDER

A. Introduction: The Nineteenth Amendment, p. iv; The Equal rights Amendment (handout); pp. 619-627; The development of “Intermediate Scrutiny:” *Craig v. Boren*, pp.627-636; *Michael M.* footnote (handout); Is Gender a “Problem?”;handout on Feminist Jurisprudence.

B. “Real Differences”: *U.S. v. Virginia*, pp. 636-644, handout on *Rotsker v. Goldberg*; pp. 644-648; *Nguyen*, pp 648-652; pp. 652-656. Trivial vs. “Real” Differences and “Benign/” compensatory vs. unconstitutional “discrimination”: pp. 656-664.

### V. SEXUAL ORIENTAT ION

A. Is “Sexual Orientation” a ‘Class’/Group for Equal Protection purposes? Pp. 664-665; *Romer*, pp. 666-675; state courts and *Lawrence*, pp. 675-682; “What Level of ‘Scrutiny’?”, pp. 682-686. (What difference does the federal “Don’t Ask/Don’t Tell” legislation make? What difference should the “Defense of Marriage Act” make?)

VI. OTHER GROUPS (selected cases)

- A. “Alienage”/non-citizens: pp. 686-697; Equal Protection and wealth, pp. 697-704; the Disabled, *Cleburne*, 704-709
- B. Access to Public Goods: Welfare and Education. *Shapiro*, pp. 803-817, *San Antonio School Dist.*, pp. 818-824, *Plyler*, pp. 825-831.

THE FIRST AMENDMENT:

- I. The First Amendment, p. li. Introduction: pp. 1017-1028; Content-Based Restrictions—Dangerous Ideas: pp. 1028-1050.
- II. CONTENT-BASED RESTRICTIONS: INCITEMENT/DANGEROUS IDEAS—CURRENT LAW: *Dennis*, *Brandenburg*, pp. 1050-1066; “True Threats”, pp. 1071-1076.
- III. CONTENT-BASED DISCRIMINATION: TRUE THREATS: *atts*, *Paladin Press*, *American Coalition*, pp. 1071-1076.
- IV. HOSTILE AUDIENCES, INCITEMENT, FIGHTING WORDS: *Cantwell*, *Feiner*, *Edwards*, *Gregory*, *Chaplinsky*, *Gooding*, *Rosenfeld*, *Collin (Skokie)*, pp. 1076-1091, *Cohen*, pp. 1201-1207.
- V. PRIOR RESTRAINT: *Near v. Minnesota*, pp. 1123-1126, *NY Times v US*, *The Progressive*, pp. 1094-1109
- VI. Overbreadth and Vagueness: pp. 1109-1128
- VII. Symbolic Conduct as Speech—Explicit “Balancing”: *O’Brien*, *Johnson*, *Eichman*, pp. 1325-1340; *Barnes*, pp. 1340-1343.
- VIII. Unprotected Speech: Defamation, *NY Times v. Sullivan*, pp. 1128-1147; Child Pornography: *Ferber*, pp. 1192-1201
- IX. Content Discrimination and Hate Speech: Equal Protection Meets the First Amendment: *R.A.V.*, *Virginia v. Black*, pp. 1223-1249.
- X. Content Neutrality: pp. 1255-1266.

The End! Whew!