**CONSTITUTIONAL LAW**  
NYU School of Law  
Professor Cristina Rodríguez  
Fall 2005

**Class Periods:** Mondays & Thursdays, 2:05-3:55  
Wednesdays, 1:05-1:55  
Vanderbilt Hall 210

**Office Hours:** Tuesdays 2:00-4:00; Wednesdays 3:00-4:00; and by appointment  
Vanderbilt Hall 310C

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**Materials:** The primary text for this course is STONE, SEIDMAN, SUNSTEIN, TUSHNET, & KARLAN, CONSTITUTIONAL LAW (5th ed. 2005) (CB) and its 2005 Supplement (Supp). Other supplemental readings will be organized into a course packet (CP), which you can pick up from my assistant the week of August 29. I may occasionally post additional readings on Blackboard (BB). Please check the syllabus for page assignments and assignment locations. I will announce Monday reading assignments in class on Thursdays, and I will announce Wednesday and Thursday assignments in class on Mondays. I also will post the reading assignments and any other class-related announcements on Blackboard. You are responsible for keeping track of what has been posted.

**Course Requirements:** Your final grade will be based primarily on a 24-hour, open-book, take-home exam, which you will be able to take at any time during finals period. I also will factor your class participation into your grade. I prefer to rely on volunteers and strongly encourage all students to participate in class, though the quality of your participation is more important than the frequency. Everyone, ultimately, should expect to be on-call every day, i.e., always come to class prepared. At the beginning of each class, I will announce the six students who will be on call for the day. If you do not plan to be prepared, you must email me at least one hour before class. Unless you face serious extenuating circumstances, I do not recommend that you opt out more than twice during the semester.
PART I: THE STRUCTURE OF GOVERNMENT
Weeks 1-6 (August 31-October 6)

A. Judicial Review and Constitutional Interpretation

1. Modalities of Constitutional Interpretation
   • CB: The Constitution of the United States and Amendments 1-10 (pp. xliii-liii) (read and re-read)
   • CP: Philip Bobbitt, Modalities of Constitutional Interpretation, in CONSTITUTIONAL INTERPRETATION (1991)

2. Introduction to the Constitution
   • CP: Declaration of Independence
   • CB: Origins of the U.S. Constitution (pp. 1-22) (pp. 8-29 (focus on Federalists # 10 & 51))

   • re-read Article III of the Constitution
   • CB: Marbury v. Madison and Note (pp. 29-42)
   • CP: Philip Bobbitt, The Problem of Legitimacy, in CONSTITUTIONAL INTERPRETATION (1991)

4. Theory and Scope of Judicial Review
   • CB: Note on Constitutions, Democracy, and Judicial Review (pp. 42-51)
   • CB: Note on Judicial Exclusivity and Cooper v. Aaron (pp. 57-60)
   • CB: The Power of Political Control over the Supreme Court, Ex parte McCardle, and Notes (pp. 77-89)

5. Mc Culloch v. Maryland and Constitutional Interpretation
   • CB: McCulloch v. Maryland and Notes (pp. 61-74)
   • CP: Andrew Jackson, Veto Message, July 10, 1832

B. The Commerce Clause and the Powers of Congress

1. The Values of Federalism
   • CB: Notes (pp. 163-69)

2. Commerce Clause I: The Nineteenth Century
   • CB: Gibbons v. Ogden and Note (pp. 170-73)
3. **Commerce Clause II: Before the New Deal**
   - CB: The Evolution of the Commerce Clause and *United States v. E.C. Knight* (pp. 185-88)
   - CB: Note (pp. 188-90)
   - CB: *Champion v. Ames* and Note (pp. 190-92)
   - CB: *Hammer v. Dagenhart* (pp. 173-75)

4. **Commerce Clause III: The New Deal**
   a. Early New Deal
      - CB: Note on The New Deal Crisis (pp. 192-93)
      - CB: *A.L.A. Schechter Poultry Corp. v. United States* (pp. 193-95)
      - CB: *Carter v. Carter Coal* and Notes (pp. 195-98)
      - CB: Note on New Deal Legislation and Commerce Clause Tests in the 1930s (pp. 198-200)
   b. The Switch in Time
      - CB: *NLRB v. Jones & Laughlin Steel* (pp. 200-04)
      - CP: 1935-1937 and *West Coast Hotel v. Parish*
      - CB: *United States v. Darby* (pp. 204-06)
      - CB: *Wickard v. Filburn* (pp. 175-77)

5. **Commerce Clause IV: The Civil Rights Era**
   - CB: Note on The New Deal Legacy (pp. 206-07)
   - CB: *Heart of Atlanta Motel v. United States* (p. 208)
   - CB: *Katzenbach v. McClung* and Note (pp. 209-11)

6. **Commerce Clause V: The Rehnquist Court**
   - CB: *United States v. Lopez* (pp. 211-22)
   - CB: *United States v. Morrison* and Note (pp. 222-29)
   - Supp: *Ashcroft v. Raich* (U.S. 2005) (pp. TBA)

7. **Theories of Federalism Revisited**
   - CB: Notes (pp. 177-85)

C. **Other Dimensions of Federalism**

1. **State Regulation of Interstate Commerce** (Dormant Commerce Clause)
   - CB: Introduction and The Classical View (pp. 229-31)
   - CB: The Modern View (pp. 231-35)
   - CB: *Philadelphia v. New Jersey* and Notes (pp. 235-40)
   - CB: Facially Neutral Statutes and *Hunt v. Washington State Apple Advertising Comm.* (pp. 254-58)
   - CB: *Exxon Corp. v. Governor of Maryland* and Notes (pp. 258-65)
2. Federal Regulation of States
   - CB: Tenth Amendment to the Constitution
   - CB: Note on The Modern Revival of Tenth Amendment-Based Restraints (pp. 333-34)
   - CB: Garcia v. San Antonio Metro. Transit Authority and Note (pp. 334-37)
   - CB: New York v. United States (pp. 337-48)
   - CB: Printz v. United States and Note (pp. 348-56)
   - BB: Supreme Court merits briefs in Gonzalez v. Oregon (to be argued Oct. 2005) [tentative]

D. Other Powers of Congress

1. Taxing and Spending [tentative]
   - CB: Introduction to Taxing and Spending (p. 279)
   - CB: Note on the Taxing Power (pp. 280-83)
   - CB: United States v. Butler and Note on the Spending Power (pp. 283-88)
   - CB: Note on Conditional Spending, Coercion, and the Political Process (pp. 291-96)

E. Executive Power

1. The Distribution of National Powers
   - CB: Introduction (pp. 357-60)

2. Executive Power, Foreign Affairs, and War
   a. Foreign Affairs
      - CB: Missouri v. Holland and Notes on Congress’ treaty and war powers (pp. 330-33)
      - CB: United States v. Curtiss-Wright and Notes (pp. 375-78)
   b. War Making
      - CB: Note on the Allocation of Warmaking Authority (pp. 378-83)
      - CB: The War Powers Resolution and Note (pp. 398-403)
   c. The Executive Responds to Crisis
      - CB: Youngstown Sheet & Tube Co. v. Sawyer and Note 1 (pp. 361-72)
      - CB: Dames & Moore v. Regan (pp. 372-75)
d. The “War on Terror,” Detention, and Torture
   ▪ CP: *Ex Parte Milligan*, 71 U.S. 2 (1866)
   ▪ CP: *Ex Parte Quirin*, 317 U.S. 1 (1942)
   ▪ CB: *Hamdi v. Rumsfeld* and Notes (pp. 383-97)
   ▪ CP: Memorandum for Alberto R. Gonzalez, Counsel to the
     President (The “Bybee Memo”) (on torture)
   ▪ CP: Samuel Issacharoff & Richard Pildes, An Institutional
     Process Approach to Rights during Wartime, in THE
     CONSTITUTION IN WARTIME (Mark Tushnet, ed. 2005).

3. Executive Power over Domestic Affairs [tentative]
   a. Executive Authority
      ▪ CB: *United States v. Nixon* and Notes (pp. 405-09)
      ▪ CB: Note on Executive Privilege (pp. 410-13)
      ▪ CB: Notes on Impeachment (pp. 413-17)
   b. Legislative Authority
      ▪ CB: Note on The Nondelegation doctrine (pp. 418-23)
      ▪ CB: *INS v. Chadha* and Notes (pp. 423-32)

**PART II: EQUAL PROTECTION AND THE EMERGENCE OF RIGHTS DISCOURSE**

Weeks 7-14 (October 10-December 1)

A. Equal Protection I: Slavery and Reconstruction

1. Slavery and the Constitution
   ▪ CB: Race, the Constitution, and Equality (pp. 447-53)
   ▪ CB: *Dred Scott v. Sandford* (pp. 453-56)
   ▪ CP: *Prigg v. Pennsylvania* (1842)

2. Origins and Early Interpretations of the Fourteenth Amendment
   a. Passing the Fourteenth Amendment
      ▪ CP: Note on the Unusual Procedural History of the
        Fourteenth Amendment
      ▪ CP: Bruce Ackerman, *We The People: Transformations*
        (1999) (Chap. 6)
      ▪ CB: Reconstruction (pp. 457-60)
b. Interpreting the Fourteenth Amendment
   - CB: *Strauder v. West Virginia* (pp. 524-25)
   - CB: *The Slaughterhouse Cases* and Notes (pp. 724-33)
   - CB: Note on the Judicial Reaction to Reconstruction (pp. 460-64)

3. The Incorporation Controversy
   - CB: (pp. 734-41)

4. The Problem of State Action
   - CB: *The Civil Rights Cases* and Notes (pp. 1583-89)
   - CB: Pure Inaction and *DeShaney v. Winnebago County DSS* (pp. 1589-91)
   - Notes 1-2 on The Problem of the Passive State (pp. 1596-99)
   - CB: Judicial Action, Neutrality, and *Shelley v. Kramer* (pp. 1601-09)

B. Equal Protection II: From *Plessy* to *Brown*

1. Separate but Equal
   - CB: *Plessy v. Ferguson* and Note (pp. 464-69)
   - CB: The Attack on Jim Crow (pp. 469-70)

2. *Brown v. Board of Education*
   - CB: The Road to *Brown, Brown v. Board of Ed.*, and Notes (pp. 471-81)

3. Post-*Brown* School Desegregation
   - CB: *Brown II* and progeny (pp. 481-500)

C. Equal Protection III: Strict Scrutiny and Race

1. Setting the Stage: Rational Basis Review
   - CB: (pp. 501-23)
2. **Strict Scrutiny and the Problem of Race**
   - CB: *Strauder* (again), *Korematsu, Loving v. Virginia*, and Notes (pp. 523-46)
   - CP: *Caroline Products* footnote 4

3. **Discriminatory Intent v. Discriminatory Effects**
   - CB: *Washington v. Davis* and Note (pp. 546-49)
   - CB: *Village of Arlington Heights* (pp. 550-53)
   - CB: Note on Racially Motivated Classifications (pp. 558-66)
   - CP: *McCleskey v. Kemp* and Notes (pp. 569-76)

4. **Affirmative Action**
   - CB: From *Bakke* to *Croson* (pp. 576-81)
   - CB: *Adarand* and Notes (pp. 581-94)
   - CB: *Grutter v. Bollinger* and Note (pp. 594-608)
   - CB: *Gratz v. Bollinger* (pp. 608-11)
   - CB: Note on the Special Case of Indigenous People and *Rice v. Cayetano* (pp. 611-13)

D. **Equal Protection IV: Extending the Paradigm to Other Classifications**

1. **Gender Classifications**
   a. Intermediate Scrutiny
      - CB: Notes on the Early Cases and the Road to Intermediate Scrutiny (pp. 622-29)
      - CB: *Craig v. Boren* and Notes (pp. 629-39)
   b. “Real” Differences
      - CB: Stereotypes v. “Real” Differences and *United States v. Virginia* (pp. 639-47)
      - CB: Real Differences and Formal Quality (pp. 647-66)
      - CP: Note on Pregnancy and Differential Treatment

2. **Sexual Orientation**
   - CB: *Romer v. Evans* and Notes (pp. 666-79)
   - CB: Note 3 on Same Sex Marriage (pp. 682-85)
3. Alienage
   • CB: (pp. 689-700)

4. Other Classifications
   • CB: (pp. 710-16)

E. Fundamental Rights I: Property Rights and Welfare

1. Property Rights and the *Lochner* era
   • CB: *Lochner v. New York* and Notes (pp. 741-55)
   • CB: The *Lochner* Era (pp. 755-60)
   • CP: Constitutional Innovation in the Progressive Era: Amendments 16-19

2. Welfare Classifications (Scrutiny Revisited) and Welfare Rights
   • CB: Wealth Classifications (pp. 700-10)
   • CB: *Skinner v. Oklahoma* and Notes (pp. 768-73)
   • CB: Welfare Rights (pp. 826-44)

F. Fundamental Rights II: Privacy

1. Contraception
   • CB: Note on *Meyer* and *Pierce* (pp. 845)
   • CB: *Griswold v. Connecticut* and Notes (pp. 845-57)

2. Abortion
   a. The Abortion Right
      • CB: *Roe v. Wade* and Notes (pp. 857-73)
      • CB: *Planned Parenthood v. Casey* and Note (pp. 884-904)
      • CB: *Stenberg v. Carhart* (pp. 904-16)
      • CP: Reva Siegel, in *WHAT ROE V. WADE SHOULD HAVE SAID* (Jack Balkin, ed. 2005)
   b. Funding
      • CB: Notes on Government Funding and Unconstitutional Conditions (pp. 873-77; 1638-48)
3. **The Family and Intimate Association** [tentative]
   - CB: *Moore v. City of East Cleveland, Zablocki*, and Notes (pp. 916-30)

4. **Sexual Orientation**
   - CB: *Bowers v. Hardwick* (pp. 930-35)
   - CB: *Lawrence v. Texas* and Note (pp. 935-49)

5. **The Right to Die**
   - CB: *Cruzan v. Director, MO Health Dept.* and Note (pp. 950-57)
   - CB: *Washington v. Glucksberg* and Note (pp. 957-67)

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**PART III: JUDICIAL SUPREMACY REVISITED**
(Week 15, December 5-8)

A. **Legislative and Adjudicative Enforcement of the Fourteenth Amendment**

1. **Judicial Supremacy in the Twentieth Century**
   - CB: *Cooper v. Aaron* (again) (pp. 57-60)

2. **Congress’ Power Under § 5 of the Fourteenth Amendment**
   - CB: *Katzenbach v. Morgan, Boerne v. Flores*, and Notes (pp. 299-310)
   - CB: Note on the Eleventh Amendment and *Garrett* (pp. 310-20)
   - CB: Note on *Tennessee v. Lane* (pp. 324-27)

B. **Judicial Supremacy**

1. **Bush v. Gore and the Presidential Election of 2000**
   - CB: (pp. 144-52)

2. **Final Thoughts on Constitutional Interpretation**