

SPRING 2017

Quirk

LSHV 394-01

Saturday Morning 9:00am-12:15pm Room: TBD

**THE COURT, THE CONSTITUTION AND  
THE SHAPING OF THE AMERICAN NATION**

**RORY QUIRK** Phone: 202-237-7897

Email: roryquirk@gmail.com

**MALS FOUNDATION COURSE**

**I. Course Precipis**

Alexander Hamilton, in making his pitch for ratification of the Constitution, wrote in *The Federalist* No.78: *"Whoever attentively considers the different departments of power must perceive that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in a capacity to annoy or injure them.... It proves incontestably, that the judiciary is beyond comparison the weakest of the three departments of power."*

Hamilton's soothing minimalist assurances notwithstanding, Chief Justice John Marshall proved not only to be a major annoyance to President Jefferson (and Congress, as well as State governors, legislatures and judges); he established the until-then quiescent Supreme Court as a power center. On and on it went.

This course takes a contra-Rushmorean approach to the exercise of power in the United States. Tracing the development of the nation through key Supreme Court decisions from *Marbury v. Madison* to the ongoing Fall 2015 Term of the Court, it focuses on the unelected power center at the other end of Pennsylvania Avenue from the White House.

Consider: Marshall, not Jefferson, laid the groundwork for the modern American nation by articulating decidedly non-Jeffersonian concepts in *Marbury* and *McCulloch*. Earl Warren, not Congress or the President, implemented the Second Reconstruction through *Brown v. Board of Education*. And Warren Burger toppled a vast criminal enterprise operated out of the Oval Office, saying in essence, the emperor is not clothed in executive privilege clothes (*United States v. Nixon*). So much for "the weakest branch." On and on it goes.

**II. Course Goals/Aims and Requirements**

These cases and others will serve as grist for the analytical mill as we assess whether the rule of law is a bulwark of constitutional government, or an impediment to majority rule; or perhaps both.

Teaching Method: Class is a fast-paced mix of lecture, case analysis, discussion, and the Socratic method of teaching based on textbook and case assignments.

We place a premium on interdisciplinary inquiry, close reasoning and cogent exposition (oral and written).

- **Interdisciplinary Inquiry:** You will be pushed to develop the ability to examine issues through kaleidoscopic inquiry. History, economics, and political theory and practice all weigh heavily in a contextual understanding of the Court and the Constitution.
- **Close/Critical Reasoning:** We are of course interested in WHAT the Court decides-- the Court's answer to the question posed is our analytical destination.

Our paramount interests lie elsewhere: we must identify the basis for the Court's decision -- the WHY (the analytical journey); only then can we assess whether the decision is compelling and persuasive.

- Written and Oral Exposition

Examinations: The examinations will consist of essay questions in which you will be asked to analyze and discuss the constitutional implications of current issues and/or hypothetical scenarios. A mid-term examination will be given the **week of February 26 (take-home)**. The final examination will be given the **week of May 7 (take-home)**.

Research Paper: Each student will be assigned a particular Supreme Court Justice. The student will produce a scholarly research paper (not an A&E biography) of 16-20 pages (double-spaced) assessing the jurisprudence of that Justice in terms of the impact on the Court, the Constitution and the shaping of the American nation. Assignments will be made on **February 4**. See the Foundation Course requirement below.

Class Attendance and Participation: Rote regurgitation is not to be confused with critical reasoning. Google can regurgitate random bits of information. In contrast, structured argumentation – the art of making connections between these bits of information and then drawing conclusions based on those connections – is an acquired skill. The latter is what we aspire to. You will be pushed in class to reason critically, articulate a position, and defend it. Do not equate rant and cant (as practiced by TV talking-heads) with critical reasoning (as practiced by, say, Madison, Hamilton, the Enlightenment thinkers). Class preparation, attendance and participation are essential. Any student who misses a class without a compelling explanation is in jeopardy of expulsion. Students who know that they must miss a class must notify the professor in advance. Two absences = mandatory withdrawal.

### **III. Foundation Course Workshop (Saturday TBD – I will adjust Syllabus meeting dates to accommodate this)**

The writer and essayist Flannery O'Connor famously noted: *"People are always asking me if the university stifles authors. I reply that it hasn't stifled enough of them. There's many a bestseller that could have been prevented by a good writing teacher."*

Apropos good writing: As part of the requirements of the MALS Foundation Courses, you are required to attend a day-long Workshop that is designed to foster research, writing and methodological skills that are part of a Georgetown graduate degree education. The Workshop will be held on a Saturday TBD in lieu of class. The Workshop is **MANDATORY** (and replaces two class sessions).

### **IV. Textbook/Supplement, Grading and Class Schedule**

Required Text: Rotunda, Modern Constitutional Law: Cases and Notes

**ELEVENTH EDITION (Hardcover -- April 2015)**. I have placed a book order with GU Bookstore. You may find cheaper alternatives online. Amazon also has a rental option which is lower cost but you must return the book unmarked. \*\*\*Caveat emptor: Rotunda publishes numerous books on constitutional law, and has myriad editions of the book. **Check title and edition (11th)**

**carefully.**

Required Course Supplement: Will be provided to students at no charge **BUT YOU MUST OBTAIN THROUGH DEAN RIDDER'S OFFICE IN ADVANCE OF FIRST CLASS!**

Time: The class will meet from 9 am to 12:15 pm (with the Foundation Workshop on a Saturday date TBD – see III above). Saturdays: 1/28, 2/4, 2/11, 2/25, 3/4, 3/18, 4/22, 4/29, and 5/6.. I have purposefully set-aside two Saturdays for self-research for your semester Paper – April 1 and April 8. I have also adjusted Syllabus to accommodate University holidays/breaks.

Grading: The grade for the course will be based upon the mid-term (30%), the research paper (35%), and the final examination (30%). The quality of class preparation and classroom presentation will be factored into the final grade (5%).

**NO TAPING OR RECORDING OF CLASSES!!**

**THE COURT, THE CONSTITUTION AND THE SHAPING OF  
THE AMERICAN NATION**  
T= Textbook Supp. = Supplement The Constitution starts at p. liii

### **Session 1 - January 28**

#### **I. FEDERAL JUDICIAL POWER**

The Nature and Origins of the Supreme Court's Authority

##### **A. The Legitimacy of Judicial Review**

The Federalist No. 78 T 11-12

The Constitution (A III)

##### **B. Genesis: Chief Justice John Marshall and the Shaping of Judicial Federalism**

The Court and Congress (Marbury v. Madison) T 1-9; T 12, Notes 1-4

The Court and the President (U.S. v. Burr) T 421, Note 1 and Supp.

The Court and State Legislatures (Fletcher v. Peck) Supp.

The Court and State Supreme Courts (Martin v. Hunter's Lessee) T 15-25

### **Session 2 – February 4**

#### **C. The Modern Framework of Judicial Review: Marbury Reaffirmed**

Cooper v. Aaron T 10-11 and T 729, Note 2 [Little Rock]

#### **II. THE COURT'S ALLOCATION OF POWER ALONG THE VERTICAL AXIS**

##### **A. The Doctrine of Implied Federal Power**

The Necessary and Proper Clause (AI, S8[18])

The Supreme Law of the Land: (McCulloch v. Maryland) T 75-83 and Notes 1-3

B. Federalism-Based Limits on State and Local Power:

The Contract Clause, the Commerce Clause, and the American Common Market

The Contract Clause (AI, S10[1])

The Commerce Clause (AI, S8[3])

C. The Sanctity of Contract: The Marshall Court's Groundwork

Fletcher v. Peck Supp.

Dartmouth College v. Woodward Supp.

The Taney Court's Corollary: Charles River Bridge Supp.

### Session 3 - February 11

D. Regulation of Economic Activities Through the Commerce Clause

The Marshall Court's Groundwork

Gibbons v. Ogden T 89-96 and Note 1

The Beginnings of Modern Economic Regulation (1887-1937)

The Commerce Power and the Trusts

National Regulation of Local Activities

Interstate Commerce Act Supp.

Sherman Anti-Trust Act Supp.

U.S. v. E.G. Knight T 187-90

Northern Securities Co. v. U.S. T 190, Note 2

Swift & Co. v. U.S. T 190, Note 3

The Shreveport Rate Case T 193-95

A Commerce Clause Bridge Too Far: Hammer v. Dagenhart T 198-203 and Notes 1-3

On the Road to Existential Perdition: The Judicial Scuttling of the New Deal

RR Retirement Board v. Alton T 207, Note 1

The Sick Chicken Case (Schechter Poultry) T 207, Note 2

Carter v. Carter Coal T 203-07

Backlash: The New Deal Strikes Back

The Court Packing Plan of 1937 T 209, Note 3

The Court Backs Down: The Commerce Power Since 1937

NLRB v. Jones & Laughlin Steel Corp. T 210-13

United States v. Darby T 213-17

Wickard v. Filburn T 217-20 and Note 1

The Commerce Power as Police Power: Racial Discrimination

Genesis: Footnote 4 (Carolene Products) T 250, Note 4

Civil Rights Act of 1964 ~ Congressional Deliberations Supp.

Heart of Atlanta Motel T 240-44  
Katzenbach v. McClung T 244-47

The Commerce Power Reconsidered: Are There No Limits?  
Lopez T 252-57 (majority opinion only)  
Morrison T 259-65 (majority opinion only)  
Gonzales v. Raich Supp.  
National Fed. of Independent Business v. Sibelius Supp.

### Session 4 -- February 25

## III. THE COURT'S ALLOCATION OF POWER ALONG THE HORIZONTAL AXIS

### A. Through A Glass Darkly: War, Foreign Affairs and the Making of Foreign Policy

The Murky Division of Power Between the President and Congress  
The Executive Power (AII, S1[1])  
The Commander-in-Chief Power (AII, S2[1])  
The Faithful Execution of the Laws Power (AII, S3)  
The Foreign Affairs Power (AII, S2[3])  
The Common Defense Power (AI, S8)[1])  
The War Power (AI, S8[11])  
The Army-Navy Power (AI, S8[12-13])

The Foreign Affairs Power  
U.S. v. Curtiss-Wright T 337-42 and T 344, Note 4  
Youngstown Sheet and Tube v. Sawyer T 344-51  
American Insurance Association Supp.

Presidential Power in Wartime: Curtailing Liberty and Court Access  
Habeas Corpus: The Great Writ Supp.  
Civil War: Ex Parte Milligan T 353 and Supp.  
WWII Saboteurs: Ex Parte Quirin T 353-54 and Supp.  
WWII Indefinite Detention of Racial/Ethnic Groups: The 12/7 Cases Supp. [3 cases] and T 726, Note 3

Presidential Power in Non-War Settings  
Executive Autonomy and Executive Privilege  
President Washington's Refusal to Turn Over Jay Treaty Papers  
U.S. v. Burr (redux) T 421, Note 1 and Supp.  
The Subpoena of President James Monroe  
The Watergate Tapes, Executive Privilege and the Resignation of the President: U.S. v. Nixon T 414-20; and T 423, Note 7

The Ultimate Limitation on Presidential Power

The Impeachment Power (AII, S4)  
Andrew Johnson, Nixon, Clinton

**WEEK OF February 27: MIDTERM EXAM (TAKE-HOME)**

**Session 5 - March 4**

**IV. THE FOURTEENTH AMENDMENT: EQUAL PROTECTION AND DUE PROCESS**

The Privileges and Immunities Clause (AIV, S2[1]; XIV Amendment [1])  
The Liberty Clause ( V Amendment; XIV Amendment[1])  
The Due Process Clause (V Amendment; XIV Amendment[1])  
The Equal Protection Clause (XIV Amendment[1])

- A. Antebellum Albatross: Dred Scott    Supp.
- B. The American Spring -- Appomattox and the Civil War Amendments
- C. Postbellum Albatross: The Slaughter-House Cases    T 521-27
- D. The Quick Evisceration and Arduous Resurrection of Equal Protection

Racial Discrimination and Equal Protection: The Rise of Jim Crow  
The Civil Rights Cases    T 639-45  
Plessy    T 717-20

Racial Segregation in Public Education  
From Plessy to Brown

Missouri ex rel. Gaines v. Canada    Supp.  
Sipuel v. Board of Regents    Supp.  
Sweatt v. Painter    Supp.  
McLaurin v. Oklahoma Regents.    Supp.

Brown I    T 720-24 and T 725 Notes 1-2  
Brown II    T 726-28  
Judge Ronald Davies Obituary    Supp.  
First Day of School    Supp.  
Little Rock 1957 Photos    Supp.

No Class March 11 or April 15  
Independent Two-Hour Research Sessions

**Session 6 – March 18**

Implementing Brown  
Cooper v. Aaron    T 10-11; T 729, Note 2 [Little Rock]

Desegregation in Dixie: The Second Reconstruction

Swann v. Mecklenburg T 731-32

Desegregation in the North

Keyes T 734-37

Milliken v. Bradley T 738, Note 1

Remediation of Racial Segregation in Education

The Higher Ed Cases

Gratz T 756-59

Grutter T 759-64 and T 768, Notes 1-4

The K-12 Cases

Seattle School District-Louisville T 770-76

The Higher Ed Cases Revisited

Fisher v. University of Texas I T 769, Note 6

Schuette T 689, Note

Fisher v. University of Texas II

Alternative Remedial Approaches

Alienage, School Funding and Equal Protection

Plyler T 789-92

Poverty, School Funding and Equal Protection

San Antonio School District v. Rodriguez T 828-31

Poverty, Public School Teacher Tenure and Equal Protection

*Vergara v. State of California (Superior Court 2014) (affirmed) Supp.*

NO CLASS ON APRIL 1 OR APRIL 8 – RESEARCH SESSIONS

### **Session 7 – April 22**

E. The Expansion of Equal Protection, Due Process and Liberty to "Fundamental Rights and Interests": Autonomy and Privacy

The Liberty Clause (XIV Amendment[1])

The Privileges and Immunities Clause (XIV Amendment[1])

The Ninth Amendment

Governmental Control of the Body: Conception, Contraception, and Abortion

Buck v. Bell T 895, Note and Supp.

Skinner T 896-98

Griswold T 898-900

Eisenstadt T 905, Note 1

Roe v. Wade T 907-14

Casey T 918-23  
Gonzales v Carhart T 932, Note 3 [4 pages]  
Cline (cert. granted) (DIG - dismissed as improvidently granted)

### Session 8 – April 29

Governmental Control of the Body: Death and Dying

The "Right to Die"  
Cruzan T 960-64 and Note  
Terri Schiavo Supp.

Assisted Suicide -- State Bans  
Washington v. Glucksberg T 964-68  
Vacco T 968-70 and Notes

Assisted Suicide -- State Authorization  
Gonzales v. Oregon Supp.

Governmental Control of the Body: Privacy and Sexual Autonomy

Marriage  
Loving v. Virginia Supp. and T 906, Note 2

Intimate Relationships  
Bowers v. Hardwick T 936-37 (majority opinion)  
Lawrence v. Texas T 944-49

Same Sex Marriage  
Goodridge (Mass. Supreme Court) Supp.  
Hollingsworth Supp. And T 1506, Note 2  
Windsor Supp. And T 1507, Note 3  
Now What? Article IV[1] [READ CLOSELY]  
Here's What: Obergefell Supp.

### V. THE ENFORCEMENT CONUNDRUM

Defying the Court: Jackson, Marshall and the Cherokee Cases  
Defying the Court: Massive Resistance —The South's Response to Brown  
Defying the Court: Judge Davies and the Little Rock School Desegregation Crisis  
Chads, Butterflies and Equal Protection: Bush v. Gore

**SATURDAY, MAY 6 HAS BEEN SET ASIDE AS A  
MAKEUP DATE [TO ACCOMMODATE FOUNDATION  
WORKSHOP IF NEEDED]**

**WEEK OF MAY 7: FINAL EXAM (TAKE-HOME)**



**RESEARCH PAPER DUE MAY 15 [EARLIER IF YOU ARE A MAY GRADUATE]**

**VI. INSTRUCTIONAL CONTINUITY DUE TO UNFORESEEN DISRUPTIONS**

If weather or other events prevent on-site classroom instruction, we will “convene” by telephone on the affected Saturday. Details will be provided at the first class.

**VII. HONOR CODE**

This course is governed by the University Honor Code – In the pursuit of the high ideals and rigorous standards of academic life, I commit myself to respect and uphold the Georgetown University Honor System: To be honest in my academic endeavor; and to conduct myself honorably, as a responsible member of the Georgetown Community, as we live and work together.

**VII. DISABILITIES STATEMENT**

If you believe you have a disability that affects academic performance, then you should contact the Academic Resource Center ([arc@georgetown.edu](mailto:arc@georgetown.edu)) for further information. The Center is located in the Leavey Center, Suite 335. The Academic Resource Center is the campus office responsible for reviewing documentation provided by students with disabilities and for determining reasonable accommodations in accordance with the Americans with Disabilities Act (ADA) and University policies. Discussion with the ARC is to be completed in advance of the first class.

.....  
Professor Quirk Contact Info: 202-237-7897 (eves.)    [roryquirk@gmail.com](mailto:roryquirk@gmail.com)