I. Course Precis
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 incontrovertibly, 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 2014 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 July 6. The final examination will be given the week of August 3 (both take-home).

Research Paper: 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.” 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 June 6.

Class Attendance and Participation: Structured argumentation is an acquired skill. You will be pushed in class to reason critically, articulate a position, and defend it. Class preparation, attendance and participation are essential. Any student who misses a class 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. Textbook/Supplement, Grading and Class Schedule
Required Text: Rotunda, Modern Constitutional Law: Cases and Notes

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 to 12:15 on the following Saturdays: 5/30, 6/6, 6/20, 6/27, 7/11, 7/18, 7/25, 8/1, and a self-guided session on 8/8 (off-site).

Grading: The grade for the course will be based upon the mid-term (30%) the research paper (35%), 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!!

T= Textbook  Supp. = Supplement
Session 1 -- May 30

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 10-11
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 11, Notes 1-4
The Court and the President (U.S. v. Burr) T 400, Note 1; Supp.
The Court and State Legislatures (Fletcher v. Peck) Supp.
The Court and State Supreme Courts (Martin v. Hunter's Lessee) T 14-24

Session 2 -- June 6

C. The Modern Framework of Judicial Review: Marbury Reaffirmed
Cooper v. Aaron   T 679 Note 2; T 9-10

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 70-77, Notes 1-4

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])

Fletcher v. Peck T 24, Note 1; Supp.
The Taney Court's Corollary: Charles River Bridge  Supp.

THERE IS NO CLASS ON JUNE 13 (My daughter is getting married in NYC)

Session 3 -- June 20

D. Regulation of Economic Activities Through the Commerce Clause
The Marshall Court's Groundwork
Gibbons v. Ogden T 82-89, Notes 1-4

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 176-78
Northern Securities Co. v. U.S. T 178, Note 2
Swift & Co. v. U.S. T 180, Note 2
The Shreveport Rate Case T 181-84

A Commerce Clause Bridge Too Far: Hammer v. Dagenhart T186-91, Notes 1-3

On the Road to Existential Perdition: The Judicial Scuttling of the New Deal
RR Retirement Board v. Alton T 195, Note 1
The Sick Chicken Case (Schechter Poultry) T 196, Note 2
Carter v. Carter Coal T 192-95

Backlash: The New Deal Strikes Back
The Court Packing Plan of 1937 T 197, Note 3

The Court Backs Down: The Commerce Power Since 1937
NLRB v. Jones & Laughlin Steel Corp. T 198-201
United States v. Darby T 201-04
Wickard v. Filburn T 205-07

The Commerce Power as Police Power: Racial Discrimination
Genesis: Footnote 4 (Carolene Products) T 235, Note 4
Heart of Atlanta Motel T 226-30
Katzenbach v. McClung T 230-33

The Commerce Power Reconsidered: Are There No Limits?
Lopez T 237-42 (majority opinion)
Morrison T 244-50 (majority opinion)
Gonzales v. Raich Supp.

Session 4 -- June 27
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 (AI, S1[1])
The Commander-in-Chief Power (AI, S2[1])
The Faithful Execution of the Laws Power (AI, S3)
The Foreign Affairs Power (AI, S2[3])
The Common Defense Power (AI, S8[11])
The War Power (AI, S8[11])
The Army-Navy Power (AI, S8[12-13])

The Foreign Affairs Power
U.S. v. Curtiss-Wright T 290-94, T 296 Note 4
Youngstown Sheet and Tube v. Sawyer T 296-303
American Insurance Association   Supp.

Presidential Power in Wartime: Curtailing Liberty
Habeas Corpus, Military Courts   Supp.
Civil War: Ex Parte Milligan   Supp.
WWII Saboteurs: Ex Parte Quirin   Supp.
WWII Indefinite Detention of Racial/Ethnic Groups: The 12/7 Cases   Supp; T 676,  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 T 400, Note 1; Supp.
The Subpoena of President James Monroe T 400, Note 1

The Ultimate Limitation on Presidential Power
The Impeachment Power  (AII, S4)
Andrew Johnson, Nixon, Clinton

THERE IS NO CLASS JULY 4
Week of July 6:  TAKE-HOME MIDTERM EXAM

Session 5 -- July 11
IV. THE FOURTEENTH AMENDMENT: EQUAL PROTECTION

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 479-84
D. The Evolution of Equal Protection

Racial Discrimination and Equal Protection: The Rise of Jim Crow
The Civil Rights Cases T 596-602
Plessy T 669-70

Racial Segregation in Public Education
From Plessy to Brown
Sipuel v. Board of Regents  Supp.

Brown I T 670-74;  T 675 Notes 1-2
Brown II T 676-78
Davies Obit Supp.
First Day of School Supp.
Little Rock 1957 Photos Supp.

Session 6 -- July 18
Implementing Brown
Cooper v. Aaron T 679, Note 2; T 9-10
Desegregation in Dixie: The Second Reconstruction
Swann v. Mecklenberg T 681-82
Desegregation in the North
Keyes T 684-87
Milliken v. Bradley T 688, Note 1

Remediation of Racial Segregation in Education
The Higher Ed Cases
Gratz T 707-10
Grutter T 712-top of 716; T 720 Notes 1-5

The K-12 Cases
Seattle School District-Louisville T 722-28

The Higher Ed Cases Revisited
Fisher v. University of Texas Supp.
Schuette Supp.
Fisher v. University of Texas (Remand)

Alienage, School Funding and Equal Protection
Plyler T 741-44

Poverty, School Funding and Equal Protection
San Antonio School District v. Rodriguez T 778-80

Session 7 -- July 25
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 845, Note; and Supp.
Skinner T 843-45
Griswold T 846-48
Eisenstadt T 852, Note 1
Roe v. Wade T 854-61
Casey T 865-71
Gonzales v Carhart (Partial Birth Abortion) Supp.
Cline (Okla.) (cert. granted) (DIG)

**Session 8 -- August 1**

Governmental Control of the Body: Death and Dying

The "Right to Die"
Cruzan T 902-06
Terri Schiavo Supp.

Assisted Suicide -- State Bans
Washington v. Glucksberg T 907-12
Vacco T 912-15

Assisted Suicide -- State Authorization
T 915, Note

Governmental Control of the Body

Intimate Relationships
Bowers v. Hardwick T 887-88 (majority opinion)
Lawrence v. Texas T 895-901

Same Sex Marriage
Goodridge Supp.; T 902, Note
Hollingsworth Supp.
Windsor Supp.
Now What? Article IV[1]
Obergefell (Argument April 2015) -- Loving+Hollingsworth+Windsor = TBD

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

**Week of AUGUST 2: TAKE-HOME FINAL EXAM**

August 8: Self-Guided Term Paper Prep Session (Off-site)
IV. Honor Code
This course is governed by the University Honor Code -- 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.

V. Disabilities Statement
If you believe you have a disability that affects academic performance, then you should contact the Academic Resource Center (arc@georgetown.edu) for further information. The Center 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.

*******************************

Chief Justice Marshall in Marbury (1803): It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each. So if a law be in opposition to the constitution: if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law: the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

President Thomas Jefferson's [imagined] reaction:  Grrrrrr.