**LSHV 394-01**

**GEORGETOWN UNIVERSITY**

**2021 REVISE**

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

**Nine Thursdays (ZOOM) 6-8:30 PM**

**RORY QUIRK                                                            Phone: 571-286-0170 Email: roryquirk@gmail.com**

**I.  Course Precis   (**SCOTUS/Constitution/ShapingUSA)

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 soon-to conclude Fall 2020-Spring 20210 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, reinvigorated the Fourteenth Amendment and 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 Teflon (*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 Zoom 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 at-home examination will be given the week of **July 5**. The final at home examination will be given the week of **August 2**.

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 or shortly after **June 14.**

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, and the Enlightenment thinkers).  Class preparation, Zoom 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. Textbook/Supplement, Grading and Class Schedule**

Required Text: Rotunda, Modern Constitutional Law: Cases and Notes     **TWELFTH EDITION (Hardcover -- 2021).**

West Academic offers discounted prices on this book

**Rotunda's Modern Constitutional Law: Cases, Notes, and Questions 12th Edition  
Ronald D. Rotunda | Bennett L. Gershman**

**New Discount Update:**

I am happy to offer your students a 15% discount and free ground shipping off of the **print;**we are now extending this same offer off our **e-Books**. Students will need to create an account and place an order directly through us at [www.westacademic.com](http://www.westacademic.com/)  They will receive this discount by using the promo code: **HESTUDENT**

**The pricing for the book is** (does not include discount):  
<https://www.westacademic.com/Modern-Constitutional-Law-Cases-Notes-and-Questions>

**Print $250.00**

**eBook $187.50**

I have also placed a book order with GU Bookstore.  You may find other alternatives online -- for example, Amazon has new and used copies. Amazon also has a rental option. The quality of the used/rental books is uneven.

\*\*\*Caveat emptor: Rotunda publishes numerous books on constitutional law, and has myriad editions of the book. **Check title and edition (12th) carefully.**

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

Time: The class will meet from **6 to 8:30 pm** on nine **Thursdays**.

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**

**PAGE NUMBERS ARE TO the 121TH ED. WE ARE USING**

**The Constitution is at page xivii et seq. BOOKMARK!**

**Session 1 – June 3**

I. The Nature and Origins of the Supreme Court's Authority

A. The Legitimacy of Judicial Review                            The Federalist No. 78           T 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) See T 480-83 and Supp.

The Court and State Legislatures (Fletcher v. Peck)   T 23, Note 1 and Supp.

The Court and State Supreme Courts (Martin v. Hunter's Lessee) T 13-23

**Session 2 – June 10**

C. The Modern Framework of Judicial Review Marbury Reaffirmed        Cooper v. Aaron  T 9-10 and T 720, 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 127-35 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     T 23, Note 1 and Supp.                          Dartmouth College v. Woodward    Supp.                           The Taney Court's Corollary: Charles River Bridge    Supp.

**Session 3 – June 17**

D. Regulation of Economic Activities Through the Commerce Clause

The Marshall Court's Groundwork

Gibbons v. Ogden  T 147-54 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 229-32

Northern Securities Co. v. U.S.  T 232, Note 2

Swift & Co. v. U.S.  T 233, Note 3

The Shreveport Rate Case  T 234-36

A Commerce Clause Bridge Too Far: Hammer v. Dagenhart  T 239-44 and Notes 1-3

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

RR Retirement Board v. Alton  T 249, Note 1

The Sick Chicken Case (Schechter Poultry) T 250, Note 2

Carter v. Carter Coal T 244-48

Backlash: The New Deal Strikes Back

The Court Packing Plan of 1937  T 251, Note 3

The Court Backs Down: The Commerce Power Since 1937

NLRB v. Jones & Laughlin Steel Corp.  T 252-55                                                             United States v. Darby    T 255-59

Wickard v. Filburn  T 259-62 and Note 1

The Commerce Power as Police Power: Racial Discrimination

Genesis: Footnote 4 (Carolene Products)   T 291, Note 4

Civil Rights Act of 1964 ~ Congressional Deliberations     Supp.                      Heart of Atlanta Motel      T 281-85                       Katzenbach v. McClung     T 285-89

The Commerce Power Reconsidered:  Are There No Limits?

Lopez   T 293-97 and Note 1 only)                                                         Morrison T299 Note 3                                                     Gonzales v. Raich  T 301 Note 4 and Supp.

National Fed. of Independent Business v. Sibelius    T 302-top 311

**Session 4 –** **June 24**

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

Missouri v. Holland T 392-94

U.S. v. Curtiss-Wright    T 361-65 and T 367, Note 3                                    Youngstown Sheet and Tube v. Sawyer     T 367-74                                 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 376 and Supp.

WWII Saboteurs: Ex Parte Quirin   T 376-77 and Supp.

WWII Indefinite Detention of Racial/Ethnic Groups: The 12/7 Cases   T 705-11 and Supp. [3 cases]

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)   Supp.

The Subpoena of President James Monroe  et seq. See T 482

The Watergate Tapes, Executive Privilege and the Resignation of the President: U.S. v. Nixon T 448-53; and T 454, Note 4

The Pardon Power T 455 Note 7

The Ultimate Limitation on Presidential Power

The Impeachment/Removal Power (AII, 4)    Andrew Johnson, Nixon, Clinton, Trump I, II

The Disqualification Power

**Session 5: July 1**

IV. THE FIRST AMENDMENT:

THE FREE SPEECH-SEDITION ZONE OF TWILGHT

Jacob Abrams T 974-75

Elizabeth Whitney T 977-81

Father Terminiello Supp.

Carl Brandenburg T 983-84

**Week of July 5: MIDTERM AT-HOME EXAM**

**Session 6** – **July 8**

V. 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 549-55 Note 1, paragraph 2

D.  The Quick Evisceration and Arduous Resurrection of Equal Protection

Racial Discrimination and Equal Protection: The Death of Reconstruction and Rise of Jim Crow

T 705, Note 3

The Civil Rights Cases  T 637-40

Plessy  T 702-03 and 704 Note 1

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 711-15 and T 717 Notes 1-2

Brown II  T 717-20

Judge Ronald Davies Obituary   Supp.

First Day of School   Supp.                                                                                                       Little Rock 1957 Photos  Supp.

**Session 7 – July 15**

Implementing Brown

Cooper v. Aaron    T 10-11; T 721, Note 2 [Little Rock]

Subverting Brown T 721-22 Note 3

Desegregation in Dixie: The Second Reconstruction                                                                 Swann v. Mecklenburg        T 722-23 Note 4

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Keyes   T 732-33 Note 3

Milliken v. Bradley T 723-24 Note 5

Remediation of Racial Segregation in Education

The Higher Ed Cases

Gratz  T 742-44

Grutter   T 744-50 and T 753, Notes 1-3                                                                                                                                                                                          The K-12 Cases

Seattle School District-Louisville T 753-54

The Higher Ed Cases Revisited                                                                                                                                            Fisher v. University of Texas I  Supp.

Schuette   Supp.

Fisher v. University of Texas II Supp.

The Harvard Admissions Case 2019

The Yale Admissions Case 2021

Alternative Remedial Approaches to K-12 Disparities                                                                                                   Alienage, School Funding and Equal Protection

Plyler  T 767-70 (middle)

Poverty, School Funding and Equal Protection

San Antonio School District v. Rodriguez   T 805-07

Poverty, Public School Teacher Tenure and Equal Protection

Vergara v. State of California package (Superior Court 2014) (reversed on appeal)(reversal affirmed) Supp.

**Session 8 – July 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 876-77, Notes 1-2 and Supp.

Skinner       T 873-76                                                                                                      Griswold     T 877-79 (middle)                                                                               Eisenstadt     T 884, Note 1                                                                                        Roe v. Wade  T 897-903                                                                                            Casey          T  906-12(top)                                                                                          Gonzales v Carhart T 920-21 Note 2

Cline (cert. granted) (DIG - dismissed as improvidently granted)

**Session 9** – **July 29**

Governmental Control of the Body: Death and Dying

The "Right to Die"                                                  Cruzan   T 935-38 (top) and 939-40 Note 1

Terri Schiavo  Supp. And T 946-47 Note 2

Assisted Suicide -- State Bans                                                                           Washington v. Glucksberg   T 940 1-2-44

Vacco     T 944-46 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 896, Note 3

Intimate Relationships

Bowers v. Hardwick   T 929-30 Note 1

Lawrence v. Texas   T 930-35

Same Sex Marriage                                                                                                         Goodridge (Mass. Supreme Court)   Supp.

Hollingsworth Supp.

Windsor  Supp. And T 895, Notes 1 and 2

Now What?  Article IV[1]  [READ CLOSELY] Here’s What: Obergefell   T 895-95

Masterpiece Cakeshop v. Colorado Civil Rights Commn.  LECTURE.

VI. 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                Hanging Chads, Butterflies and Equal Protection: Bush v. Gore (2,912,790-2,912,636 = 154)

**Week of August 2: FINAL AT-HOME EXAM**

**RESEARCH PAPER DUE AUGUST 10**

INSTRUCTIONAL CONTINUITY DUE TO UNFORESEEN DISRUPTIONS

If weather or other events prevent scheduled instruction, we will “reconvene” TBD on another date TBD.  Details will be provided at the first class.

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.

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 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: 571-286-0170 (eves.)    [roryquirk@gmail.com](mailto:roryquirk@gmail.com)

SUPPLEMENT INDEX 2021

Introductory Materials (Stein Article; Supreme Court Justices)

The Aaron Burr Treason Trial

Fletcher v. Peck

Dartmouth College

Charles River Bridge

Interstate Commerce Act/Sherman Anti-Trust Act

CRA of 1964 – Congressional Deliberations-Excerpts

Gonzales v. Raich

American Insurance Association

Habeas Corpus

Ex Parte Milligan

Ex Parte Quirin

The 12/7 Internment Cases (Hirabayashi/Korematsu/Endo/Korematsu Article)

Terminiello

Dred Scott materials

Gaines/Sipuel/Sweatt/McLaurin

First Day of School Photo

Little Rock Photos and Article

Judge Davies Obit

Fisher v. Univ of Texas I

Schuette

Fisher v. Univ of Texas II

Vergara materials

Buck v. Bell Article

Cline Article

Terri Schiavo

Gonzales v. Oregon

Loving v. Virginia

Goodridge

Hollingsworth

Windsor

2000 Vote Recount

ABA Photo

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