

SUMMER 2019 □ **POLITICAL SCIENCE 104B**

Individual Liberties / Fundamental Rights

Visiting Prof. Glenn Smith // Tuesdays & Thursdays, 2 P.M. to 4:50 P.M.
Center Hall, Room 222

COURSE APPROACH

This course introduces you to major theoretical and practical issues involving the protection of individual rights and liberties through American constitutional law and politics. In particular, the course will focus on the primary (but by no means exclusive) role of the Supreme Court and the federal judiciary in ensuring that civil liberties and fundamental rights are protected when officials at all governmental levels adopt laws and policies. An important ongoing focus of the course is the difficult tradeoffs confronting judges, other officials, and all Americans seeking to protect constitutional values while ensuring that government can achieve other important objectives.

The class is conducted “modified law-school” style, in several ways. First, most of the class readings will involve close reading of excerpts from landmark court cases and other legal materials. Second, although of necessity I will regularly lecture to provide a recap of past materials or an overview of upcoming legal doctrines and developments, I will seek to make the class more interactive than a typical all-lecture class is. Specifically, I will seek to maximize case coverage through class discussion involving volunteer participants; at times class members will discuss questions or hypothetical problems in small groups, and student volunteers may play the roles of advocates or judges. (The extent to which I am successful in this will depend significantly on how prepared and participatory class members are.) A third way in which the class is “modified law-school” style is that one part of the midterm and final exams will ask you to apply the legal doctrines and policies you have learned to a hypothetical fact pattern.

You will get maximum value from the course by doing the assigned reading for each session completely and actively, and coming to class prepared to engage in a lively discussion. Especially given the class-discussion format, it is always preferable to attend classes in person, rather than rely on listening to the course session on podcast and/or notes from others.

As befits a summer course, we will have FUN!

READINGS AND SYLLABI

The texts for the class are as follows:

1. O'Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME TWO: CIVIL RIGHTS AND CIVIL LIBERTIES (10th Ed. 2017 W. W. Norton & Co., Ltd.)* (Please note that *Volume One* of O'Brien's book, the book used for P Sc 104A, is *NOT* used for P Sc 104B.)
2. Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (Wiley & Co. 2012)
3. Other materials posted on the TED page: a) past exam questions and hypothetical problems and (b) extensive case excerpts for some class weeks.

Please bring the appropriate text(s) to each class.

There are two Assignment Syllabi for this course. The first Syllabus, covers Phases I, II & III of the course -- materials potentially testable on the midterm exam. A syllabus covering later assignments will be posted on the class webpage.

EXAMINATIONS

We will have an **in-class MIDTERM** during the first portion of the class on **THURSDAY, AUGUST 22nd, from 2 PM to 3:50 PM.** (After a post-midterm break, class will resume to cover new assigned materials.)

As noted earlier, the midterm will cover materials assigned on the first syllabus. You will also take a **FINAL examination**, occupying most of the designated exam time period, from **3 P.M. to as late as 6 P.M.** on **SATURDAY, SEPTEMBER 7TH.** The final exam will NOT be cumulative.

IMPORTANT: PLEASE LOOK AT YOUR SCHEDULE IMMEDIATELY, and ensure that you will be able to take both exams. I REGRET THAT I WILL LIKELY BE UNABLE TO ACCOMMODATE OTHER THAN EMERGENCY CONFLICTS.

Both examinations will pose short-answer essay questions, in the format illustrated through past exam questions posted on the class webpage.

Both exams will be open book / open note. (This means that, during the exam, you can use any hard-copy versions of course texts and any notes you "personally prepare," individually or as part of a study group. **YOU MAY NOT** use paper copies of AS notes

*Students often wonder whether previous editions of the O'Brien book (especially the 9th Edition, which was published in 2014 and may still be found in Used versions) can be used instead of the most recent edition. As with most legal issues "it depends." Most of the readings in the new edition can be found in older ones. However, there are a few new pages, and page numbers are different. I make periodic reference to page numbers in class, and will be referring to the latest (10th Edition) pages. Students especially motivated by cost-saving concerns may be willing to go to the trouble of comparing older and newer editions and cross-correlating page numbers. To assist students using the 9th Edition, page-number equivalents keyed to this edition will follow [*in italics and brackets*] the assignments given in 10th Edition pages.

or other independently produced documents (e.g., Wikipedia entries); if you want to include such resources in your “knowledge basis” incorporate relevant passages into your personally prepared notes.

The midterm is worth 50% of course points; the final is worth 50%. (Extra credit will also be available to students who participate in-class simulations.)

You will gain more details on examination coverage and format from separate handouts, in-class announcements, and class discussion of past exam questions.

TWO ADDITIONAL LEARNING OPPORTUNITIES

1. MEDIA REPORTS. I invite you to take on an additional practice that will significantly enhance your learning in the course: as you interact with general informational media (i.e., newspapers, magazines, newsletters, online databases, etc.) I invite you to notice media reports discussing current controversies relating to the constitutional issues and dynamics we are studying in the course. (Making the connection between class materials and the “real world out there” can be an important learning boost!)

When you identify media reports that you believe would be interesting to the class—ideally, reports that contain enough information to understand the context and legal basis of the constitutional controversy—I would very much appreciate your giving me a hard-copy version (or sending me an email with the text of the media report in the body of the email) so that I can consider sharing it with the class at an appropriate time.

2. CONSTITUTIONAL CONTEXT PODCAST. Finally, you or your colleagues may be interested in a podcast I regularly posted through November 2018 at <https://osherpodcast.sdsu.edu/> (a website of the SDSU Osher Lifelong Learning Institute (OLLI) – where I regularly teach as part of a commitment to share legal knowledge with non-lawyer members of the community). The podcast is also available via apps from standard providers.†

“CONSTITUTIONAL CONTEXT” regularly provided “*five-minute bites of background – about the Court and the Constitution.*” These compact and conversational podcasts were designed to meet the needs of today’s busy consumer of news about the U.S. Supreme Court and constitutional controversies. Rather than add more opinion and

† Here are the direct links to Constitutional Context on the main aggregators:
iTunes: <https://itunes.apple.com/us/podcast/constitutional-context/id1392675973>
Google Play: (log in required)
<https://play.google.com/music/listen?u=0#/ps/lmzatll5lrm2rombbimovolql2q>
Pocket Casts: (log in required)
<https://play.pocketcasts.com/web#/podcasts/show/9c2df560-468d-0136-fa7c-0fe84b59566d>
Tune In: <https://tunein.com/podcasts/Political-News/Constitutional-Context-p1127877/>

argument, CONSTITUTIONAL CONTEXT focused on accessible and unbiased *background information* and *context* for fully understanding the bigger picture behind the latest dispute. The aim is for listeners to

- Become more critical consumers of the reporting and opinions of others
- Appreciate more deeply the complexity and importance of constitutional questions
- Make more informed decisions as voters and active citizens

Now posted on the site are an introductory podcast elaborating on the project and several dozen podcasts on a range of subjects from the executive-power issues implicated by the Administration's travel ban to the role of amicus briefs.

MY AVAILABILITY

***For UCSD office hours:

--I will generally be available a few minutes before and after class in the classroom.

--I will be available for "coffee and conversation" about class materials or other topics of interest at **STARBUCKS IN PRICE CENTER, WEDNESDAYS, 2:15 P.M. TO 5:45 P.M.**

***For "virtual office hours," or to arrange office hours at a mutually convenient time other than regular office hours, email me at gsmith@cwsl.edu [WHEN YOU EMAIL ME, please INCLUDE A REFERENCE TO "P SC 104B" in the subject line, so that I will know your message is not spam.]

***For law-school-planning questions and recommendations: Some students taking this course are planning to attend (or thinking about attending) law school. As a full-time law professor guest teaching this course, I am happy to provide general counseling about law school and legal careers, arranging visits to law-school classes at my home institution, and writing letters of recommendation in appropriate cases. (I am not recruiting students to law school in general or my law school in particular. In fairness, I simply wish to make sure all potentially interested students know in advance of my policy on being a law-school resource.) Please also note that the one area in which I am NOT a useful resource is in answering questions about the specific procedures and current realities of law-school *admission*.

***In appropriate cases I am also willing to write recommendation letters for graduate study, internships (e.g., AIP or UCDC), foreign study, or other related opportunities.

Do not hesitate to contact me if I can be of any assistance.

SUMMER 2019
POLITICAL SCIENCE 104B
Individual Liberties–Fundamental Rights
Visiting Professor Glenn Smith

FIRST SYLLABUS FOR PHASES I, II & III
(Assignments testable on Midterm)

--References to "O'Brien" are to the TENTH Edition of VOLUME TWO of O'Brien, CONSTITUTIONAL LAW AND POLITICS (2017 W.W. Norton & Co.).

[References in brackets and in italics are to the closest equivalent assignment in the NINTH Edition (2014) of O'Brien.]

--References to "Smith & Fusco" are to G. Smith & P. Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012 John Wiley & Sons, Inc.)

--References to "Smith Reading Materials" are to handouts or case excerpts distributed by Professor Smith and/or made available on the class webpage.

[↓↓↓ READ FOR 8/6 ↓↓↓]

I. An Initial Overview: INDIVIDUAL LIBERTIES AND FUNDAMENTAL RIGHTS UNDER THE U.S. CONSTITUTION

A. An Introduction to the Scope and Approach of the Course

In class lecture; no reading assignment

B. The Constitutional Framework of Individual Liberties and Fundamental Rights, Part 1: A Brief Introduction to "State Action"; The Bill of Rights, and the Civil War Amendments

Smith & Fusco, skim pp. 13-16; read pp. 17-18, read pp. 24-29, and skim pp. 30-31

C. The Constitutional Framework of Individual Liberties and Fundamental Rights, Part 2: The "Incorporation" Controversy

O'Brien, pp. 312-321 [*pp. 336-345*]

D. The Role and Jurisdiction of the Federal Judiciary (And the Supreme Court in Particular) (an overview of materials covered in P Sc 104A)

Noting information that is new to you, Skim O'Brien, pp. 102-104; the chart on p. 105; pp. 180-183; 189-198; 1605-1608 [*pp. 107-109, the chart on p. 110, pp. 190-193, pp. 197-207; 1673-1675*]

[↓↓↓ READ FOR 8/8 ↓↓↓]

II. FREEDOM OF SPEECH: CASE STUDIES IN THE DIFFICULT BALANCING ACT BETWEEN INDIVIDUAL RIGHTS AND IMPORTANT (COMPELLING?) GOVERNMENTAL NEEDS

A. An Introduction to Freedom of Speech & the Constitution

Smith & Fusco, pp. 201-204
Skim O'Brien, pp. 408-417 [pp. 444-454]

B. The Classic Line-Drawing Question: When Can Government Penalize "Subversive" Speech?

Smith & Fusco, pp. 204-206
O'Brien, pp. 418-433 [pp. 455-470]
O'Brien, pp. 443-447 [pp. 481-484]
Smith Reading Materials, pp. SM-1 through SM-3 (the "Ron Rash" hypothetical)

C. When Government May Penalize Speech Because it is Offensive or Otherwise Harmful: The Attempt to Define Categories of Unprotected Sexual Speech and Fighting Words – and Distinguish them from Protected, but Offensive or Intolerant, Speech

Smith & Fusco, pp. 206-210; pp. 221 (starting with "Allowing more restriction when speech 'goes to school'") – 224

[↓↓↓ READ FOR 8/13 ↓↓↓]

O'Brien, pp. 455-458 (through sentence re: *Jenkins v. Georgia*, ending "was not obscene, despite lower court rulings to the contrary.")
O'Brien, pp. 468-475; 490-495
[pp. 491-494; 504-512; 527-532]
O'Brien, pp. 504-535 [pp. 540-572]
Smith Reading Materials, pp. SM-4 & SM-5 (brief highlighted excerpts from Justice Powell's and Blackmun's *Pacifica* concurrence)
Skim O'Brien, pp. 546-550 (grayed-in box, "In Comparative Perspective")
[pp. 584-588]

[↓↓↓ READ FOR 8/15 ↓↓↓]

D. The Challenge of Applying First Amendment Principles to Special Kinds of Regulation (Content-Neutral) and Special Forms of Speech ("Symbolic Speech")

Smith & Fusco, pp. 211-212; pp. 214-216
Smith Reading Materials, pp. SM-6 through SM-17 (excerpts from *Time v. Regan*)

[FREE-SPEECH-BASED IN-CLASS SIMULATION: Smith Materials, pp. SM-18 through SM-45 (materials for in-class simulation)]

Smith & Fusco, p. 220 (“Protecting conduct that ‘speaks’”)
O’Brien, pp. 635-638; 645-659 [pp. 681-684; pp. 692-709]

↓↓↓↓ READ FOR 8/20 ↓↓↓↓

III. FREEDOM *FOR* RELIGION: Modern Approaches to the Free Exercise Clauses

A. An Overview of the Free-Exercise Decision Legacy

Smith & Fusco, pp. 228-231

O’Brien, pp. 795-807 [pp. 854-867] (Read the *Sherbet* and *Yoder* decisions, and Skim the charts to get a sense of the subjects and directions of the Free-Exercise case law)

B. The Modern Meaning of Free Exercise, Part 1: Two Paradigm Cases Showing Different Responses to Governmental Policies Discriminating Against vs. Incidentally Burdening Religion

O’Brien, pp. 808-821 [pp. 867-881]

C. The Modern Meaning of Free Exercise, Part 2: The Latest Supreme Court Guidance on When Differential Treatment of Religion Triggers Strict Scrutiny

O’Brien, pp. 828-831 [890-895]

Smith Reading Materials, pp. TL-1 through TL-10 (major excerpts from *Trinity Lutheran Church v. Comer* (2017))

IN-CLASS MIDTERM = ON THURSDAY, AUGUST 22ND