POLITICAL SCIENCE 104I
LAW AND POLITICS -- Courts and Political Controversy
Visiting Professor Glenn Smith
Wednesdays, 5 P.M. to 7:50 P.M. / / Soliś Hall, Room 107

BASIC COURSE INFORMATION

OVERALL COURSE APPROACH

The Focus of this Course

This course examines in depth several controversial and current issues going to the heart of law, courts and politics. Specifically, the course provides a detailed examination of four legal settings in which courts have become embroiled in pitched and recurrent political controversies: (1) Constitutional protection for provocative political speech, especially during wartime; (2) Constitutional protection for provocative speech about race, gender, and religion; (3) Presidential power and the rights of civilians during time of war; and 4) Judicial involvement in voting-rights and voter-registration issues. For each setting, the course will focus on both the legal doctrines and approaches employed in the cases under study AND broader questions about judicial role and legitimacy.

An additional focus for this year’s class is a highly regarded history covering the decisions, personalities and interactions of several key justices on the Court when some of the cases discussed in this course were decided. Selective reading assignments from this book will help to underscore the role of personality and group dynamics on collegial courts, especially about politically controversial cases.

This Course’s Relationship to other 104 Courses

Although several of these issue areas are introduced in other classes (especially, P Sc 104B), this course will aim to neither bore students who have taken these classes by repeating coverage nor disadvantage students who have not.

To further the first goal (not repeating materials for students who have taken past classes) I will provide deeper coverage and new slants on judicial decisions assigned in other classes, and cover related cases ignored or summarily mentioned in those classes. For example, although P Sc 104B students have studied subversive-advocacy cases from Schenck to Brandenburg, in P Sc 104I we will usually read lengthier
versions of the cases summarized in P Sc 104B; and we will discuss a number of cases related to fighting words, hostile-audience reaction, “true threats,” flag desecration, etc., not covered in 104B.

I will pursue the second goal (not disadvantaging students who have not taken 104B or other relevant classes) by providing initial “overview lectures” on key points from those classes and by pointing students to summary discussions of relevant materials in sources available in the UCSD Library (principally, O’Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME TWO (8th Ed. 2010) and Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (Wiley & Co. 2012).

This Course’s Methodology and Approach

The class is conducted “modified law school” style; sessions will usually focus on class discussion of questions based on assigned materials. At times I will lecture to provide an overview of relevant materials. At times, class members will discuss questions or hypothetical problems in small groups.

To get maximum value from the course, you will need to do the assigned reading for each session fully and actively and come to class prepared to engage in a lively discussion. We will have FUN!

PODCASTS & THANKSGIVING-EVE CLASS

Especially given the class-discussion format of this class, it is always preferable for you to attend classes in person. However, I have arranged to have all class sessions recorded and made available via audio podcast in the usual way for students unable to attend a particular class session.

Unfortunately (and unavoidably) one of our class sessions will have to be held on Wednesday, November 27th, the evening before Thanksgiving and the start of Hannukah. If you cannot attend this class session in person, please plan time in your schedule to “attend” the class by listening to the podcast.

READINGS AND SYLLABI

The reading for this course will be drawn from two basic sources:

1. Extensive excerpts from major court decisions (with accompanying reading and discussion questions), created specifically for this course. Specifically:
I may also post discussion questions, hypothetical fact patterns, and other materials as separate documents on the class webpage.

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

There will be at least two syllabi for the course. The first Syllabus will be distributed in the second class (Oct. 5th) and posted on the class website. Subsequent syllabi will be distributed separately or posted on the class webpage.

**IN-CLASS MIDTERM, CURRENT-CONTROVERSY SHORT MEMO, AND TAKEHOME FINAL EXAMINATION**

**In-Class Midterm Examination (7th Class on Wed., November 13th).** We will have an in-class midterm for this course on Wednesday, November 13th, starting at 5 P.M. The exam may take a few minutes less than the entire three hour class period. The exact time frame will be announced before the exam date.

The midterm will basically follow the format of the Fall 2011 midterm for this course (posted on the course website) and will be based on the 3-Part format typically used for my midterms and finals in other courses. “Part I” questions require you to identify key course concepts, explain their significance, and illustrate them through an example drawn from course materials. “Part II” questions test your ability to use course materials to argue for or against various positions about the materials we have studied. “Part III” questions require you to analyze key aspects of a hypothetical fact pattern, using the doctrines, facts, and policies from leading court cases studied in the course.

The midterm exam will be open book / open note. (“Open note” materials include (1) your personally prepared handwritten or typed notes from readings and class discussions and (2) any readings and handouts made available on the class website. Any materials prepared by others (including AS notes for past classes) must be personally incorporated into your notes; that is, you may not just “paste” these materials into your notes.) NOTE that you will not be able to use laptops during the exam, which means that it will be advisable to download hard copies of individual files from the class website.

The midterm will cover the materials studied in the first six class sessions and contribute 60% to your course grade. (More information about the format and coverage of the examination will be provided through in-class discussion and in documents posted on the class webpage.)
Short Memo on Contemporary Media Report (Due no later than beginning of 10th Class on Wed., December 4th). The second graded requirement for the course (worth 10% of your grade, and graded by me on a Check-plus/Check/Check-minus/Fail basis) is a “short memo” you will write, based on a “contemporary media report” of your choosing which raises course themes in the context of a proposal or controversy about one of the four numbered subjects listed in the first paragraph under “The Focus of this Course” above or about some other equally controversial topic in which courts are involved or asked to become involved (e.g., same-sex marriage; informational privacy). As explained more fully in a separate handout, you will find a general-informational media report (i.e., a story in a newspaper, magazine, newsletter, online database, etc.) and write a brief analysis, in response to specific prompts, of the legal and political dimensions of judicial involvement in the political controversy covered in the report.

The short paper can be turned in (1) in person during any class session up to the beginning of the tenth-week class on Wednesday, December 4th or (2) in person during my office hours, up to 4:30 P.M. on Wednesday, December 4th.

Shorter, Less Weighty Take-home Final Exam (due no later than the beginning of designated final exam time for the course: Thursday night, December 12th, 7 PM). The other graded component for the class will be a (largely non-cumulative) take-home final exam made available at the end of the tenth-week class and due not later than the start of the official final-exam time. (You are welcome to turn the take-home exam in earlier, if that fits better with your other final-exam demands.)

The take-home final exam will focus on materials covered in the three post-midterm class sessions – although a portion of the exam may ask you to contrast pre-midterm materials in terms of basic course themes.

The take-home final exam will contribute 30% to your course grade. (More information about the format and coverage of the examination will be provided through in-class discussion and in documents posted on the class webpage.)

IMPORTANT: PLEASE LOOK AT YOUR SCHEDULE IMMEDIATELY, and ensure that you are able to take the in-class midterm on November 13th. I MAY HAVE LIMITED ABILITY TO RESOLVE CONFLICTS THAT ARE IDENTIFIED NOW.

CLASS WEBPAGE ACCESS INSTRUCTIONS

(1) Visit the California Western Law School Website (“www.cwsl.edu”).
(2) Click on “FACULTY” (one of the available sub-categories accessible at the top of the page).
(3) On the alphabetical faculty list, click “Glenn C. Smith”.
(4) On my faculty webpage – you’ll know it from the very handsome picture of me –
Click on “Class WebPages” (to top right of page).
(5) Click on “P Sc 104I (Courts and Political Controversy)”

**INFORMATION ON MY AVAILABILITY**

***For UCSD office hours:
--I will generally be available a few minutes before and after class.
--In addition, I will be available in person (Room 444, SSB) and by real-time email
(gsmith@cwsl.edu) on WEDNESDAYS from 2 PM to 4:30 PM.

***For additional consultations during my California Western School of Law office hours:
You are welcome to call me (at 619-525-1495), email me (gsmith@cwsl.edu) for a real-
time reply, or visit me in person (Room 314, 225 Cedar St. (downtown San Diego;
entrance at the intersection of Cedar St. and 3rd Ave.)) during these office hours:
**Tuesdays, 11 A.M. to 2:30 P.M.
**Thursdays, 11 A.M. to Noon; 4:15 to 5:15 P.M. (by prior arrangement)
[NOTE: Before making a special trip to my office, it is always a good idea to make sure
that nothing has happened to displace my normal hours…]

***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 104I” in the subject line, so that I will
know your message is not spam.]

***For law-school-planning questions and recommendations: A number of the 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 necessarily 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 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.
I. An Initial Overview: THE APPROACH AND SCOPE of the Course and SOME BASIC FOUNDATIONAL CONCEPTS

[DISCUSSED IN CLASS, 10/2]

A. An Introduction to the Scope and Approach of the Course
   via introductory remarks and in-class coverage of the P Sc 104I Course Information Form (available on the P Sc 104I course website)

B. Some Basic Foundational Concepts (some key concepts taught in P Sc 104A, P Sc 104B, and P Sc 104D)

   1. The Federal and State Court Systems, and how U.S. Constitutional Issues get to the Supreme Court
      [For additional discussion of these subjects, see O’Brien, pp. 100-102; Figure 2.1 on p. 103; 172-175; 179-189]

   2. The Law & Politics of “Constitutional Law”; Sources and Difficulties of Constitutional Interpretation
      [For additional summary discussion of these subjects, see Smith & Fusco, pp. 33-40; 43-48]
3. **The “Four-Factor” Model of Judicial Politics**: The Extent of Judicial Policy-Making as the Interaction of Legal Factors (precedents, justiciability doctrines, and judicial-role conceptions), Value Preferences (ideology, partisanship, and personal background), Group Dynamics (bargaining and persuasion patterns), and External Factors (influence of political actors, the media, and public opinion)

   [For additional discussion of these subjects, see Carp, Stidham & Manning, *JUDICIAL PROCESS IN AMERICA*, Chapter 15 (pp. 405-416 in 9th Ed. 2013 Sage/CQ Press]]

4. **Key Concepts in First-Amendment Analysis**: Selective Incorporation of the first amendment and its application to state and local governments via “liberty” protected by “due process”; The Reach of Free-Speech Protection; The Unprotected Speech / Protected Speech Distinction; Variable Scrutiny for Protected Speech depending upon whether government’s regulation is Content-Based or Content-Neutral

   [For additional summary discussion of these subjects see Smith & Fusco, pp. 148 (selective incorporation) and 202-205; 210-212 (free-speech subjects)]

5. **An Introduction to the Different Backgrounds and Judicial Philosophies of “FDR’s Great Justices”**: Justices Black, Frankfurter, Douglas and Jackson

   Read Scorpions, pp. 177-179 (through first paragraph); 200 (last paragraph beginning “In the meantime…” through 205

II. **COURTS AND POLITICAL CONTROVERSIES RELATING TO FREEDOM OF SPEECH**: Case Studies in Balancing the Right to Speak Controversially Against Governmental Interests in National Security, Public Safety, and Civility

   [READING ASSIGNMENT FOR CLASS, 10/9]

A. **Varying Approaches to Balancing Public Order with the Right to Dissent**

   Smith, pp. 1-38
   2009 Midterm, Question A2
   Scorpions, Chapters 35-37 (pp. 337-353)

   [For a summary of key doctrines discussed in the above materials, see Smith & Fusco, pp 205-206 (“Denying protection to incitement of imminent lawlessness”)]

   [READING ASSIGNMENT FOR CLASS, 10/16]

B. **When the Speaker can be Punished Because of the Reaction of Opponents or**
Targets of the Speech

Smith, pp. 39-76
Scorpions, Chapter 33 (pp. 319-328)
2009 Midterm, Questions E3, B1, and A1

[For a summary of key doctrines discussed in the above materials, see Smith & Fusco, pp 206-207 (“Refusing to protect speech provoking antagonists to public disorder”)]

[READING ASSIGNMENT FOR CLASS, 10/23]

C. “True Threats” and the R.A.V. Limit on Regulation of Unprotected Speech

Smith, pp. 77-119
Smith, pp. 119A & 119B (“Adaptation of Past Exam Question”)
2009 Midterm, Questions B1 & E1

[For a summary of key doctrines discussed in the above materials, see Smith & Fusco, p. 210 (“Denying protection to incitement of imminent lawlessness”)]

[READING ASSIGNMENT FOR CLASS, 10/30]

D. Government Regulation Allowing, but not Seeking to Prevent, Provocative Speech

Smith, pp. 121-156
Smith, pp. SvP-1 through SvP-__ (excerpts from the recent Supreme Court decision in Snyder v. Phelps; to be posted in a separate file on the P Sc 104I course website)
2009 Midterm, Question E2

[READING ASSIGNMENT FOR CLASS, 11/6]

E. Reconsidering the Appropriateness of Current Judicial Approaches

Smith, pp. 157-178 (Note 2 re Regina v. Keegstra, and Keegstra excerpts; IMPORTANT: You are NOT assigned to read the Schauer article referenced in Note 1 on p. 157; instead I will lecture on the highlights of this article…)

[NOTE: There will be an additional reading assignment for class on 11/6. However, this assignment will be listed on the second syllabus, and will not be within the potential coverage of the midterm on 11/13…]

[IN-CLASS MIDTERM ON 11/13; NO ADDITIONAL READING ASSIGNMENT]