

Fall 2016 -- **POLITICAL SCIENCE 104I**
Law and Politics: Courts and Political Controversy
Visiting Professor Glenn Smith

FIRST SYLLABUS FOR PHASES I & II

(Assignments for Weeks 1-6)

**References to "Smith Materials" are to the reading and discussion questions, case excerpts, and other materials posed on the class TED page

**References to "2013 Midterm" and "2009 Midterm" are to separate documents, posted on the class TED page, containing past exam questions from P Sc 104I midterms

**References to "Scorpions" are to the new paperback version of the book SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES, by Noah Feldman. This book is available from the UCSD Book Store and other places.

I. An Initial Overview: THE APPROACH AND SCOPE of the Course and SOME BASIC FOUNDATIONAL CONCEPTS

[↓↓↓ DISCUSSED IN CLASS #1, 9/22 ↓↓↓]

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, CONSTITUTIONAL LAW & POLITICS, VOLUME ONE (in 9th Edition (2014): pp. 108 & 109; Figure 2.1 on p. 110; 190-193; 197-207)]

2. The Law & Politics of "Constitutional Law"; Sources and Difficulties of Constitutional Interpretation

[For additional discussion of these subjects, see Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012), 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))]

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 discussion of these subjects see Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012), p. 148 (selective incorporation) and pp. 202-205; 210-212 (free-speech subjects)]

[↓↓↓ READING ASSIGNMENT FOR CLASS #2, 9/29 ↓↓↓]

C. 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

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

Smith Materials, pp. 1-38

2013 Midterm, Question A2

Scorpions, Chapters 35-37 (pp. 337-353)

[For a summary of key doctrines discussed in the above materials, see Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012), pp. 205-206 (“Denying protection to incitement of imminent lawlessness”)]

[↓↓↓ READING ASSIGNMENT FOR CLASS #3, 10/5 ↓↓↓]

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

Smith Materials, pp. 39-76

Scorpions, Chapter 33 (pp. 319-328)

2013 Midterm, Question B/Statement 2

2009 Midterm, Questions E3 & B/Statement 2

2013 Midterm, Question B/Statement 1

[For a summary of key doctrines discussed in the above materials, see Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012), pp 206-207 ("Refusing to protect speech provoking antagonists to public disorder")]

[↓↓↓ READING ASSIGNMENT FOR CLASS #4, 10/12 ↓↓↓]

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

Smith Materials, pp. 77-119

Smith Materials, pp. 119A & 119B ("Adaptation of Past Exam Question")

2009 Midterm, Questions B/Statement 1 & E2

[For a summary of key doctrines discussed in the above materials, see Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012), p. 210 ("Denying protection to incitement of imminent lawlessness")]

[↓↓↓ READING ASSIGNMENT FOR CLASS #5, 10/19 ↓↓↓]

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

Smith Materials, pp. 121-156

2009 Midterm, Question E1

2013 Midterm, Question A1

[↓↓↓ READING ASSIGNMENT FOR CLASS #6, 10/26 ↓↓↓]

E. When Tort Law Must Bend to Constitutional Law: Intentional Infliction of Emotional Distress vs. the First Amendment

Smith Materials, pp. 157-____ (excerpts from the Supreme Court decision in *Snyder v. Phelps*)

[→→→FYI: **IN-CLASS MIDTERM ON THE ABOVE MATERIALS = 11/3**]

Additional Assignment for 10/26 (*not tested on midterm; tested on final; repeated and placed in context on course 2nd Syllabus, to be posted separately*):

--Scorpions, pp. 234-253

--Smith, pp. KO-1 through KO-13 (excerpts from *Hirabayashi & Korematsu v. United States*)

--Scorpions, pp. 354-368

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POLITICAL SCIENCE 104I
LAW AND POLITICS -- Courts and Political Controversy

Visiting Professor Glenn Smith
Thursdays, 5 P.M. to 7:50 P.M.
Center Hall, Room 212

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) (if time permits) another controversial and current constitutional issue about executive power. For each setting, the course will focus on both the legal doctrines and approaches employed in the cases under study AND broader questions about politics, policy, the judicial role and judicial legitimacy.

An additional focus for this 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 (SCORPIONS) 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 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 I will cover some related cases not assigned in those other classes. For example, P Sc 104B students have studied subversive-advocacy cases from *Schenck* to *Brandenburg* in one class session; in P Sc 104I we will read lengthier versions of these cases and devote substantially more time to them. We will also

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 ONE (9th Ed. 2014) 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. We will do one or two simulated oral arguments.

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!

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.
2. Noah Feldman, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010) (available in inexpensive paperback)

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 two syllabi for the course. The first Syllabus is now posted on the class TED page. The second syllabus will be posted later on the class TED page.

IN-CLASS MIDTERM AND FINAL EXAMINATION

In-Class Midterm Examination: Thursday, November 3rd. We will have an in-class midterm, consisting of six questions, on Thursday, November 3, starting at 5 P.M. and completing at 7:30 P.M.

The midterm will basically follow the question format of the Fall 2013 midterm for this course (posted on the course TED page) Two “Part I” questions will require you to identify key course concepts, explain their significance, and illustrate them through an example drawn from course materials. Two “Part II” questions will test your ability to use course materials to argue for or against various positions about the materials we have studied. Two “Part III” questions will 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/handouts available from the class website. 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 cannot 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 five-and-a-half class sessions and contribute **60%** to your course grade. (More information about format/coverage will be provided through in-class discussion and in documents posted on the class webpage.)

Final Exam (Friday, December 9, 7 P.M. to 8:45 P.M.). The other graded component for the class will be a shorter and less weighty final exam held during the designated final-exam time slot. The exam will be largely cumulative, in that materials testable on the midterm will also be testable on the “Part II” and “Part III” questions on the final.

The final exam will contribute **40%** 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 Thursday, Nov. 3 and the final exam on Friday, Dec. 9. I MAY HAVE LIMITED ABILITY TO RESOLVE CONFLICTS THAT ARE IDENTIFIED NOW.

INFORMATION ON MY AVAILABILITY

***For UCSD office hours:

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

--In addition, I will be available for "coffee and conversation" about class materials or other topics of interest at the Starbucks in Price Center, Thursdays, from 2 P.M. to 4:30 P.M. (*except* on Thursday, October 13th, when the office hours will start at 3 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@cwsf.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 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.