

FALL 2017 □ **POLITICAL SCIENCE 104A**
The Supreme Court and the Constitution

Visiting Prof. Glenn Smith (gsmith@cwsj.edu)
Mondays, 5 P.M. to 7:50 P.M. // Center Hall 115

COURSE APPROACH

This course provides an introduction to many major theoretical and practical issues in American constitutional law and politics. In particular, the course will focus on the role of the Supreme Court in the American political and legal process – and on the distribution of power among federal-government branches and between the federal government and state governments.

The class is conducted “modified law-school” style; sessions will mainly involve class discussion of excerpts from landmark cases, other assigned readings, and discussion questions I have specifically prepared for this course. At times I will provide an overview of key legal doctrines and developments through lecture. At times class members will discuss questions or hypothetical problems in small groups, and student volunteers may play the roles of advocates or judges.

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 notes from others. However, barring unforeseen technical difficulties, class sessions will be available by podcast.

We will have FUN!

READINGS AND SYLLABI

The texts for the class are as follows:

1. O'Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME ONE (10th Ed. 2017 W. W. Norton & Co., Ltd.)¹ (Please note that *Volume Two* of O'Brien's book is *NOT* used.)

¹Students occasionally wonder whether previous editions of the O'Brien book (especially the 9th Edition, which was published in 2014 and can still be found in used versions) can be used instead of the most recent edition. As with most legal issues “it depends.” Most (but not all) of the readings in the new edition can be found in older ones. However, there are some new materials, and page numbers are different. I make regular in-class references to page numbers, and will be referring to the new (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 brackets and italics) the assignments given first in 10th Edition pages.

2. Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (Wiley & Co. 2012)
3. Throughout the course, we will use past exam questions as a basis for class preparation and discussion. In addition, I will at times assign you to read extensive case excerpts I have prepared. These readings will be available free of charge from the class TED (TritonEd) online webpage. NOTE: You will probably want to copy these materials onto hard paper pages, so that you can refer to them in class and during open-book course exams.

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

There are two Assignment Syllabi for this course. The first Syllabus, available in advance of our first class on the course TED webpage, covers Phases I & II of the course -- materials potentially testable on the midterm exam. A second Assignment Syllabus, covering later assignments emphasized on the final exam, will be posted separately on the TED page.

CANCELLED CLASS ON Monday, October 9th;
Alternative Podcast(s) or Oral-Argument "Attendance"

We will not have a live class session on Monday, October 9th. In lieu of that class, you will be assigned to watch one or two mini-lecture podcasts made available through the UCSD podcast website. (If the Supreme Court or a lower-federal court holds an oral argument on the new Administration's travel ban, part of your assignment may instead be to listen to or read a transcript of this oral argument.) The materials covered via these alternative assignments will be testable on relevant class examinations.

EXAMINATIONS

Thirty percent (30%) of your course grade is based on an **in-class midterm** held on **MONDAY, NOVEMBER 6** from **5 P.M. to 6:20 PM**.

Seventy percent (70%) of your course grade is based on a **final examination**, held from **7 P.M. to 10 P.M.** on **THURSDAY, DECEMBER 14th** (the designated final-exam period). This final exam will be cumulative -- BUT the *emphasis* will be on materials studied after the midterm (and the "Part I" questions will only test the post-midterm materials).

IMPORTANT: PLEASE LOOK AT YOUR SCHEDULE IMMEDIATELY, and ensure that you will be able to take both exams. I REGRET THAT I WILL NOT LIKELY BE ABLE TO ACCOMMODATE OTHER THAN EMERGENCY CONFLICTS.

Both examinations will pose short-answer essay questions to be answered in one paragraph per question, in the format illustrated through past exam questions posted on the class webpage and discussed in class. Both exams will be open book / open note.

More details on examination coverage and format will be given via separate handouts, elaborated through in-class announcements, and illustrated by class discussion of past exam questions.

ADDITIONAL LEARNING OPPORTUNITY

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.

AN ADDITIONAL RESOURCE: “Constitutional Context” Podcasts

Finally, you or others you know may be interested in my “Constitutional Context” podcast project at <http://ces.sdsu.edu/ollipodcast> (the website of 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)

Since last December, **CONSTITUTIONAL CONTEXT** has regularly provided “*five-minute bites of background – about the Court and the Constitution.*” These compact and conversational podcasts are 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 argument, CONSTITUTIONAL CONTEXT focuses 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

More than a dozen podcasts – including an introductory podcast elaborating on the project – are now available about a range of topics. On the first Monday of every month, new podcasts will be posted.

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 Peet’s on Scholar’s Walk near RIMAC, **Tuesdays, 2:30 P.M. to 4:30 P.M.** (except no OH on Tuesday, October 10).

***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”. [NOTE that this is NOT a “ucsd.edu” email address.] WHEN YOU EMAIL ME, please INCLUDE A REFERENCE TO “P SC 104A” in the subject line, so that I will know it’s 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.)

***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 on any matter.

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The Supreme Court and the Constitution

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FIRST SYLLABUS

(covers Parts I & most of Part II: materials testable on the midterm)

--References in this font are to "O'Brien" are to the TENTH Edition (2017) of the required text, O'Brien, Constitutional Law and Politics, Volume One (W. W. Norton & Co., Ltd. [*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 CONSTITUTIONAL LAW FOR DUMMIES (John Wiley & Sons 2012)

--References to "Smith Materials" are to professor-developed materials and case excerpts posted on the class webpage or passed out in class.

I. INTRODUCTORY MATTERS: THE CONSTITUTION AND THE SUPREME COURT

[▼▼▼ READ FOR FIRST CLASS ON 10/2 ▼▼▼]

A. The Background and Central Features of the U.S. Constitution

Smith & Fusco, Chapter 1 (with particular emphasis on pp. 12-24)

B. Key Aspects of "Constitutional Law"

Smith & Fusco, Chapter 2, pp. 33-43

C. The Procedures and Dynamics of Supreme Court Decision-Making: An Overview

1. How Cases Reach, and Are Decided by, the Court

O'Brien, pp. 102-104; Chart on p. 105; 181-183; 188-189; 184-185; 190-199
[*O'Brien 9th Ed., pp. 107-109; Chart on p. 110; 190-193; 197-206*]

2. Different Approaches to Constitutional Interpretation: Their Strengths and Limits

O'Brien, pp. 64-69; 74-76 [*O'Brien 9th Ed. pp. 68-76*]
Smith & Fusco, Chapter 2, pp. 43-48

Smith Materials, pp. SM-1 & SM-2 (including hypotheticals for class discussion)

[→→ REMINDER: NO CLASS SESSION WILL BE HELD ON 10/9]

[▼▼▼ READ FOR 10/16; WILL BE DISCUSSED SOME OF 10/23 ALSO ▼▼▼]

II. THE POWER AND ROLE OF THE FEDERAL JUDICIARY -- AND THE SUPREME COURT IN PARTICULAR -- IN THE CONSTITUTIONAL SYSTEM

[NOTE: Especially if this is your first course for reading and analyzing judicial opinions, you will gain useful guidance from O'Brien, pp. 1037-1040 [*O'Brien 9th Ed.*, pp. 1107-1112] ("The How, Why, and What to Briefing and Citing Course Cases")

A. The Power of Judicial Review: Its Justification and Continually Controversial Nature in a Majoritarian Democratic System

1. Establishing and Contesting the Judicial Review Power: An Overview of Major Issues and Disputes

O'Brien, pp. 23-38; 186-188 ("In Comparative Perspective: The 'European Model' of Constitutional Courts and Judicial Review")
[*O'Brien 9th Ed.*, pp. 23-38; 194-196]

2. How is Judicial Review Justified in a Constitutional Democracy? Chief Justice Marshall's *Marbury v. Madison* Rationale vs. Alternative Justifications

Smith & Fusco, Chapter 6, pp. 106-110
Smith Materials, pp. SM-3 through SM-8 ("Reading and Discussion Questions" on *Marbury v. Madison*)
O'Brien, pp. 45-54 [*O'Brien 9th Ed.*, pp. 45-55]

[▼▼▼ READ FOR 10/23 ▼▼▼]

Smith, pp. SM-9 through SM-11 (Alternative Justifications for Judicial Review)

3. Does Judicial Review Give the Court a *Special* (or even an "*Ultimate*") Role in Legal Interpretation?

Smith & Fusco, Chapter 6, pp. 110-111
O'Brien, re-read pp. 32-35 (re: presidents claiming independent authority to decide constitutional questions) [*same for 9th Edition...*]
O'Brien, pp. 761-765 [*O'Brien 9th Ed.*, pp. 823-826]

[▼▼▼ READ FOR 10/30 ▼▼▼]

B. Further Implications of Judicial Review

1. The Federal Courts in the Governmental System: How Can Non-Judicial Officials Legitimately Check and Balance the Judicial-Review Power?

Smith & Fusco, Chapter 6, pp. 111-113

O'Brien, pp. 57-64; 200-211; 372 ("Supreme Court Nominations Rejected..."); 510-511 ("Impeachment Trials") [*O'Brien 9th Ed.*, pp. 60-68; 207-211 & 214-220; 395; 538-539]

2. The Impact on the Judiciary Itself: Judicial Restraint Doctrines Reflecting Continued Ambivalence about the Legitimacy of Judicial Review

A. Issues Related to the TIMING of Judicial Review

Smith & Fusco, Chapter 6, pp. 113-117

O'Brien, pp. 104-106 [*O'Brien 9th Ed.*, pp. 109-111] ("Adverseness and Advisory Opinions"); pp. 118-121 & 125 [*O'Brien 9th Ed.*, pp. 122-125 & 129] ("Ripeness and Mootness" and sidebar on class-action lawsuits)

🔑 IN-CLASS MIDTERM ON PHASE I & ALL PHASE II MATERIALS COVERED BY THE END OF CLASS ON 10/30 = MONDAY, NOVEMBER 6, 5 PM TO 6:20 PM