POLITICAL SCIENCE 104I
LAW AND POLITICS -- Courts and Political Controversy
Visiting Professor Glenn Smith
Tuesdays & Thursdays, 11 A.M. to 1:50 P.M. //
HHS Building, Room 232

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) Presidential power over immigration and entry into the United States (e.g., the “Trump Travel Ban”). 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 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, P Sc 104B students have studied subversive-advocacy cases
from Schenck to Brandenburg in one class session; in P Sc 104I we will usually read lengthier versions of the cases summarized in P Sc 104B, 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 TWO (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. To take full advantage of the more intimate Summer class size, class members will frequently discuss questions or hypothetical problems in small groups. We may do one or two simulated 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. As befits a summer course, 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.


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 posted on the class TED page. Subsequent syllabi will be distributed separately or posted on the class webpage.
IN-CLASS MIDTERM AND FINAL EXAMINATION

In-Class Midterm Examination (First part of Class on Thursday, July 20th). We will have an in-class mini-midterm, consisting of four questions, on Thursday, July 20th, starting at 11:00 A.M. and completing at around 12:30 P.M.

The midterm will basically follow the question format of the Fall 2013 midterm for this course (posted on the course website); however, instead of six questions, there will be four. “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/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 40% 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 (Saturday, August 5th, 11:30 A.M. to 2:00 P.M.). The other graded component for the class will be a longer and weightier 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 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.)

IMPORTANT: PLEASE LOOK AT YOUR SCHEDULE IMMEDIATELY, and ensure that you are able to take the in-class midterm on July 20th. I MAY HAVE LIMITED ABILITY TO RESOLVE CONFLICTS THAT ARE IDENTIFIED NOW.

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 post 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).

“CONSTITUTIONAL CONTEXT” regularly provides “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

Now posted on the site are an introductory podcast elaborating on the project and a 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 in Supreme Court litigation. On the first Monday of every month, new podcasts are 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 the Starbucks in Price Center West on **THURSDAYS**, from 2:30 P.M. to 5 P.M.***
***For California Western School of Law office hours (225 Cedar St., Rm. 314, Downtown San Diego; 619-525-1495):
--Tuesdays, from 2:30 P.M. to 3:30 P.M. –Wednesdays, from 2:30 P.M. to 5 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 104I” 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.
FIRST SYLLABUS FOR PHASES I & II
(Assignments for Weeks 1-3)

**References to "Smith" are to the reading and discussion questions, case excerpts, and other materials posed on the class website.

**References to “Past Midterms” are to separate documents 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.

[References to optional supplementary sources, as presented in italics, are as follows:


[References in brackets and in italics are to the closest equivalent assignment in the SEVENTH Edition (2008) of O’Brien].

--References to “Smith & Fusco” are to pages CONSTITUTIONAL LAW FOR DUMMIES (John Wiley & Sons 2012)

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

[READING ASSIGNMENT FOR CLASS, 7/6]

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,
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)]

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

   [¶¶¶ READING ASSIGNMENT FOR CLASS, 7/11 ¶¶¶]

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

   Smith, pp. 1-38
   Past Midterms: 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, 7/13 ¶¶¶]
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)
Past Midterms: 2009 Midterm, Questions E3, B3, 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 discorder”)]

READING ASSIGNMENT FOR CLASS, 7/18

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”)
Past Midterms: 2009 Midterm, Questions B1 & E2
[For a summary of key doctrines discussed in the above materials, see Smith & Fusco, p. 210 (“Denying protection to incitement of imminent lawlessness’’)]

IN-CLASS MIDTERM: HELD DURING FIRST HOUR-AND-A-HALF OF CLASS ON 7/20

READING ASSIGNMENT FOR LAST HOUR OF CLASS, 7/20

D. Laws Regulating, but not Banning, Provocative Speech

Smith, pp. 121-141
Past Midterms: 2009 Midterm, Question E1