

Spring 2007 # **POLITICAL SCIENCE 104B**

Civil Liberties & Fundamental Rights

Visiting Professor Glenn Smith (gsmith@cwsu.edu)

Thursdays, 5 P.M. to 7:50 P.M. # Peterson Hall, Room 110

BASIC COURSE INFORMATION

OVERALL COURSE APPROACH

This course introduces you to many of the 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 lead (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 in a modified law school style; sessions will usually focus on class discussion of questions based on assigned materials. I will often 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 fully and actively and coming to class prepared to engage in a lively discussion. We will have FUN!

READINGS AND SYLLABI

The text for the class is O'Brien, Constitutional Law and Politics, Volume Two (i.e., *not the same volume used for P Sc 104A*) (SIXTH Ed. 2005 W. W. Norton & Co., Ltd.)

You will also download the following from the class Website: (1) past exam questions we will use as hypothetical problems throughout the course and (2) excerpts from very recent decisions not in your O'Brien book.

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

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There are two Assignment Syllabi for this course. The first Syllabus is distributed in class the first day. The second syllabus will be distributed separately. All syllabi and any other class handouts will be posted on the class webpage.

EXAMINATIONS

You will take an in-class midterm exam during the first portion (lasting between one and a half and two hours) of the class on Thursday, May 17th. (This midterm will not be the only class-related activity that day; after the exam is completed and a break is taken, I will provide an overview lecture on materials to be covered in detail in the last three classes.) Note that the potential coverage of the midterm will include the materials from the guest lecture that my CWSL colleague, Prof. Laurence Benner, will teach in the second portion of the class on April 26th.

You will also take a final exam during the designated time slot for this course: Monday, June 11th, 7 to 10 P.M. The final exam may not take the entire three hour period. The exact time frame will be announced on the last class day.

IMPORTANT: PLEASE CHECK NOW to ensure that you do not have a conflict with this final exam time. Conflicts identified early can usually be accommodated by makeup exams.

[NOTE: We will resolve the conflict with the P Sc 102L final exam, also scheduled for Monday evening, June 11th, by offering an alternative makeup time for the P Sc 104B exam. (The time of this makeup final will be set early in the quarter, after consultation with affected students in both classes.)]

More information about the format and coverage of the examinations will be provided through in-class discussion and in documents posted on the Class WebPage. Both exams will be open book / open note. The midterm is 40% of total course points; the final is worth 60%. The final examination will be cumulative.

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

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“real world out there” can be an important learning opportunity.)

When you identify media reports that you believe would be interesting to the class—ideally, reports will 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 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.

CLASS WEBPAGE ACCESS INSTRUCTIONS

- (1) Visit the California Western Law School Website (“www.cwsl.edu”).
- (2) Click on “FACULTY” (one of several categories in big red capital letters on top left).
- (3) On the alphabetical faculty list, click “Glenn C. Smith”.
- (4) On my 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 104B (Civil Liberties/Fundamental Rights)”

INFORMATION ON MY AVAILABILITY

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

***For UCSD office hours: *Wednesdays, 3 PM to 5:30 PM*, in SSB 363.

***Additionally, you are welcome to meet with me during the following law-school office hours, BEGINNING TUESDAY, MAY 1:

–*Tuesdays and Thursdays, 11:15 AM to Noon*

–*Wednesdays, 10 AM to 1:30 PM*

NOTE: It is always a good idea to verify these arrangements via email or an advance phone call to my Law School office: (619) 525-1495.

My law school office is located at 225 Cedar St., Room 314 (Directions: I-5 South; Take “Front St./Civic Center” exit; take left fork, which will exit on Cedar St. at 2nd Avenue. 225 Cedar is on the right, between 2nd and 3rd Avenues.)

***For law-school-planning questions and recommendations: Past experience indicates that a substantial portion 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 committed to being a resource to such students by providing general

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counseling about law school and legal careers, arranging visits to law school classes taught by others at my home institution, and writing letters of recommendation in appropriate cases. (Note that 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 this. Please also note that the one area in which I am NOT a useful resource is in answering questions about the procedures and realities of law-school *admission*).

****In appropriate cases I am also willing to write recommendation letters for graduate study, UCSD internships, foreign study, or other related opportunities.**

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

Spring 2007 -- **POLITICAL SCIENCE 104B**
Individual Liberties--Fundamental Rights
Visiting Professor Glenn Smith

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FIRST SYLLABUS FOR PHASES I through IV
(Assignments for first six weeks of classes)

All references in this typeface to "O'Brien" are to the SIXTH Edition of VOLUME TWO (2005) of O'Brien, Constitutional Law and Politics (W. W. Norton & Co.).

All references to "Smith" are to handouts distributed by Professor Smith and/or made available on the Class Website.

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

[]]] DISCUSSED IN CLASS, 4/5...]

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

B. The Sources and Difficulty of Interpreting Relevant Constitutional Provisions: Interpretivism vs. Non-Interpretivism

Students not familiar with the subjects discussed in the first class can find a useful discussion and elaboration in O'Brien, pp. 76-96

C. The Role and Jurisdiction of the Federal Judiciary (And the Supreme Court in Particular)

Students not familiar with the subjects discussed in the first class can find a useful discussion and elaboration in O'Brien, pp. 103-105 (and Figure 2.1 on p. 106) & 171-172 & 175

[]]] ASSIGNMENTS FOR CLASS, 4/12...]

D. The Constitutional Framework of Individual Liberties and Fundamental Rights

A Brief Introduction to "State Action"; The Bill of Rights, the Civil War Amendments and the "Incorporation" Controversy
O'Brien, pp. 304-318

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

O'Brien, pp. 386-396

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

O'Brien, pp. 397-426

Smith, pp. HO-1 & HO-2 (the "Ron Rash" problem; distributed in class and posted on the class website)

[□□□ ASSIGNMENTS FOR 4/19 □□□]

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

O'Brien, pp. 430-436; 444-449; 455-459; 465-479; 522-526

O'Brien, pp. 485-499

O'Brien, pp. 499-517

[□□□ ASSIGNMENTS FOR 4/26 □□□]

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

Smith, pp. TI-1 through TI-10 (excerpts from *Time v. Regan*, available from Class Website)

O'Brien, pp. 638-659

III. CURRENT CASE STUDIES IN CRIMINAL CONSTITUTIONAL LAW: A Comparison (Guest Lecture in second portion of 4/26 class by CWSL Prof. Laurence Benner)

[Additional reading assignments will be provided in advance of this class]

IV. FREEDOM FOR AND FROM RELIGION: Modern Approaches to the Establishment and Free Exercise Clauses

[□□□ ASSIGNMENTS FOR 5/3 □□□]

A. The Establishment Clause: The Controversy over How to Ensure Government “Neutrality” with Respect to Religion

1. An Overview of The Constitutional Understanding, and the Varied and Contradictory Case Law Interpreting It

O'Brien, pp. 688-709

O'Brien, pp. 710-716 (“skim read” this chart to get a sense of the subjects and directions of the Establishment Clause cases)

2. The Establishment Clause Goes to School, Part I: Prayers and Religious Teachings in the Public Schools

O'Brien, pp. 723-733; 740-744 (majority opinion and O'Connor concurrence); 749-756

3. The Establishment Clause Goes to School, Part II: Government Funding for Private Religious Education

O'Brien, pp. 733-740; 756-760; 787-798

[□□□ ASSIGNMENTS FOR 5/10 □□□]

4. The Place of Religion on Public Property Other Than Schools: Controversy over The Ten Commandments Monuments

Smith, pp. PP-1 through PP-___ (excerpts from the *Van Orden* and *McCreary County* decisions; available from class website)

B. The Free Exercise of Religion: Varying Definitions for When Government Must Accommodate the Religious Practices of Americans

1. An Overview of The Constitutional Understanding, and the Varied and Contradictory Case Law Interpreting It

O'Brien, pp. 798-803

O'Brien, pp. 803-816 (read the *Sherbet* and *Yoder* cases, and “skim read” charts to get a sense of the subjects and directions of the Free Exercise case law)

2. Two Recent Cases (and one Failed Statute) interpreting the Modern Meaning of Free Exercise

O'Brien, pp. 816-845

SECOND SYLLABUS: PHASE V
(assignments for last three class sessions)

All references in this typeface to "O'Brien" are to the NEW SIXTH Edition of VOLUME TWO (2005) of O'Brien, Constitutional Law and Politics (W. W. Norton & Co.).

All references to "Smith" are to handouts distributed by Professor Smith and/or made available on the Class Website.

**IV. SUBSTANTIVE DUE PROCESS AND THE PROTECTION OF
FUNDAMENTAL (AND "QUASI-FUNDAMENTAL"?) PRIVACY
RIGHTS**

[▼▼▼ PLEASE READ THE FOLLOWING FOR May 24th ▼▼▼]

**A. The Due Process Clause: Source of Strong Procedural Protections,
as well as Implied "Fundamental" Substantive Rights**

O'Brien, pp. 354-363

B. Due Process and Reproductive-Privacy Rights

**1. The Rise of Substantive Due Process as the Basis for Strong
Protection of the Rights to Contraception and Abortion**

O'Brien, pp. 1222-1225 (introduction)
O'Brien, pp. 339-347

[▼▼▼ PLEASE READ THE FOLLOWING FOR May 31st ▼▼▼]

O'Brien, pp. 1226-1235; 1242-1251; 1255-1258 ("skim read" this
chart to get a sense of the varied, contradictory directions in
abortion cases)

**2. Partial Retreats from (and the Resurgence of) Strong
Protection for Abortion Rights**

O'Brien, pp. 1251-1254; 1259-1284 [NOTE: The assignment to

read excerpts from *Stenberg* may be shortened or eliminated, depending upon the length and comprehensiveness of the following Smith assignment...]

Smith, pp. GO-1 through GO-____ excerpts from the recently decided *Gonzales* case)

[▼▼▼ PLEASE READ THE FOLLOWING FOR OUR LAST CLASS ON SEPT. 7TH ▼▼▼]

C. The *Incomplete* Embrace of Substantive-Due-Process-Based Privacy Rights Outside of the Reproductive-Rights Context: Family Rights and the “Right to Die”

O’Brien, pp. 1285-1288

O’Brien, pp. 1305-1324

D. Alternative Options for Strong Scrutiny of “Quasi-Fundamental” Privacy Rights: Gay Rights and Gay Marriage as a Case Study

1. Enhanced Protection of Gay Rights under “Hyper-Rational-Basis” Review

O’Brien, pp. 1290-1305

2. *[If Time Permits]* Enhanced Protection for Gay Rights Marriage under State Constitutional Provisions (and Intermediate Equal-Protection Scrutiny??)

Brief Lecture; no additional reading assignment