

Winter 2018 □ **POLITICAL SCIENCE 104B**

Individual Liberties / Fundamental Rights

Visiting Prof. Glenn Smith // Tuesdays & Thursdays, 6:30 P.M. to 7:50 P.M.
Center Hall, Room 113

COURSE APPROACH

This course introduces you to 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 primary (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 “modified law-school” style, in several ways. First, most of the class readings will involve close reading of excerpts from landmark court cases and other legal materials. Second, although of necessity I will regularly lecture to provide a recap of past materials or an overview of upcoming legal doctrines and developments, I will seek to make the class more interactive than a typical all-lecture class is. Specifically, I will seek to maximize case coverage through class discussion involving volunteer participants; at times class members will discuss questions or hypothetical problems in small groups, and student volunteers may play the roles of advocates or judges. (The extent to which I am successful in this will depend significantly on how prepared and participatory class members are.) A third way in which the class is “modified law-school” style is that one part of the midterm and final exams will ask you to apply the legal doctrines and policies you have learned to a hypothetical fact pattern.

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 listening to the course session on podcast and/or notes from others. **IMPORTANT EXCEPTION:** Especially in this cold and flu season, **DO NOT COME TO CLASS IF YOU THINK YOU ARE ILL.** Advance your wellbeing and that of your colleagues and me by staying home, resting, and listening to the podcast.☺ I will be happy to assist you in getting caught up when you are well!)

We will have FUN!

READINGS AND SYLLABI

The texts for the class – which you will probably want to buy in hard copy, so that you can refer to them during open-book course exams -- are as follows:

1. O'Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME TWO: CIVIL RIGHTS AND CIVIL LIBERTIES (10th Ed. 2017 W. W. Norton & Co., Ltd.)* (Please note that *Volume One* of O'Brien's book, the book used for P Sc 104A, is *NOT* used for P Sc 104B.)
2. Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (Wiley & Co. 2012)
3. Other materials posted on the TED page: a) past exam questions and hypothetical problems and (b) extensive case excerpts for some class weeks.

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

And, **please note that to use any of the course texts during the open-book midterm and final YOU WILL NEED TO HAVE A HARD-COPY VERSION OF THE TEXTS. (Unfortunately, electronic versions of these texts cannot be accessed during exams.)**

There are two Assignment Syllabi for this course. The first Syllabus, covers Phases I, II & III of the course -- materials potentially testable on the midterm exam. A syllabus covering later assignments will be posted on the class webpage.

EXAMINATIONS

We will have an **in-class MIDTERM** during the entire class on **THURSDAY, FEBRUARY 8th**. The midterm will be the only class-related activity that day.

As noted earlier, the midterm will cover materials assigned on the first syllabus. You will also take a **FINAL examination**, occupying most of the designated exam time period, from **7 P.M. to no later than 9:30 P.M.** on **TUESDAY, MARCH 20th**. The final exam will NOT be cumulative.

IMPORTANT: In the (hopefully unlikely ☺) event that you do not feel well enough to take the midterm or final exam, please communicate with Prof. Smith asap *in advance* of the exam start time, to work out an accommodation. Unfortunately, **ONCE YOU BEGIN AN EXAM, YOU NEED TO COMPLETE IT** (except in a true emergency situation).

*Students often wonder whether previous editions of the O'Brien book (especially the 9th Edition, which was published in 2014 and may still be found in Used versions) can be used instead of the most recent edition. As with most legal issues "it depends." Most of the readings in the new edition can be found in older ones. However, there are a few new pages, and page numbers are different. I make periodic reference to page numbers in class, and will be referring to the latest (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 italics and brackets*] the assignments given in 10th Edition pages.

Both examinations will pose short-answer essay questions, in the format illustrated through past exam questions posted on the class webpage.

Both exams will be open book / open note. (This means that, during the exam, you can use any hard-copy versions of course texts and any notes you “personally prepare,” individually or as part of a study group. YOU MAY NOT use paper copies of AS notes or other independently produced documents (e.g., Wikipedia entries); if you want to include such resources in your “knowledge basis” incorporate relevant passages into your personally prepared notes.

The midterm is worth 30% of course points; the final is worth 60%. (Extra credit will also be available to students who participate in-class simulations.)

You will gain more details on examination coverage and format from separate handouts, in-class announcements, and class discussion of past exam questions.

PACKBACK POSTING REQUIREMENTS

The remaining 10% of your course grade will be based on the quality and consistency of your postings on the Packback™ educational site associated with this course. An integral part of the course, the Packback Questions platform will be used for online discussion about class topics. It is an innovative technology seemingly especially well suited to enhance two key educational goals I have long pursued in P Sc 104B: 1) to promote student-to-student interaction about class materials and 2) to illustrate how the issues you are studying in P Sc 104B relate directly to controversies and developments in the larger "real world."

For EACH CLASS WEEK starting with the second week (January 15-19) and continuing through the tenth week (March 12-16) – *except* for the week including the midterm exam (February 5-9), you are assigned to post 3 different items, as follows:

- (A) 2 postings must respond to postings by me, the TAs or other class members
- (B) 1 posting must either (i) raise a question for others to discuss[†] or (ii) explain how a current legal challenge or controversy happening in a non-judicial forum (and covered in a general or specialized media source which you cite or link to in your posting)[‡] involves a topic covered in P Sc 104B, and invite others to comment.

IMPORTANT: For maximum potential credit, **AT LEAST FOUR OF YOUR WEEKLY**

[†] For example, you could pose the question whether the American approach to hate speech (in which hate speakers have a protected first-amendment right *unless* the speech falls into one or more narrow unprotected categories) is preferable to the European approach, in which the right of the hate speaker is balanced against the needs of other members of the community.

[‡] Examples would be a news account of a dispute among several state legislators about the importance of protecting extremist speech or a lawsuit brought to challenge a state law restricting access to abortion.

POSTINGS of the Category (B) type must be current-media postings as defined in (B)(ii)

EACH WEEK'S POSTINGS MUST BE COMPLETED NO LATER THAN 11:59 PM ON SUNDAY NIGHT OF THAT WEEK.

Here is information from Packback about how to start posting on the site:

Before you start posting, be sure to read the [Community Guidelines](#) found in the tutorial on Packback. If your post doesn't follow the Packback Community Guidelines, there is a chance it will be removed and you won't receive points for that post.

- 1) Navigate to <https://Packback.co/questions> and click "Register as a new student". (The one-time registration fee is \$18) Note: If you already have an account on Packback you can login with your credentials.
2. Make sure to register with your SCHOOL email address and real first name and last name.
3. Enter our class community's access code -- 9E7FDAFE-51E8-0B85-D47A-257995FCF2EE -- into the "Join a new Community" module on your dashboard.
4. Follow the instructions on your screen to finish your registration.

For a brief introduction to Packback Questions and why we are using this exciting new feature in class, access the 9-slide PowerPoint presentation posted on the course TED page.

CLASS WEBPAGE

You will access course readings and other curricular materials (e.g., discussion questions; practice exams) from the TED class webpage.

Please note that if you want to have access to materials posted on the webpage during the open-note exams, you will need to download hard copies of them.

MY AVAILABILITY

*****For regular UCSD office hours:**

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

--In addition, I will be available for office hours on **TUESDAYS**, from **3 PM to 6 PM** (starting on Tuesday, January 9th) at Peet's Coffee Shop, just north of RIMAC on Scholar's Walk.

*****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”](mailto:gsmith@cwsl.edu). [WHEN YOU EMAIL ME, please INCLUDE A REFERENCE TO “P SC 104B” in the subject line, so that I will know your message is not spam.]

[Please note that I am teaching at California Western School of Law (225 Cedar St., in downtown San Diego) this quarter, and so you are welcome to call me, email me, or by prior arrangement visit me, during my regular office hours: Mondays & Wednesdays (other than January 15th and February 19th), 11:30 AM to 12:30 PM & 2:30 PM to 3:30 PM.]

*****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.)

*****For assistance with other academic programs:** 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.

AN ADDITIONAL RESOURCE: “Constitutional Context” Podcasts

Finally, you or others you know may be interested in the debut of 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)

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

Twenty-one podcasts are now posted on the site, on 1) the law behind current controversies being decided by the Supreme Court, other courts, or in non-judicial for a

or 2) major processes and dynamics of Constitutional interpretation and Supreme Court practice. On the first Monday of every month, new podcasts will be posted.

WINTER 2018 -- **POLITICAL SCIENCE 104B**
Individual Liberties–Fundamental Rights
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FIRST SYLLABUS FOR PHASES I, II & III
(Assignments testable on Midterm)

--References to "O'Brien" are to the TENTH Edition of VOLUME TWO of O'Brien, CONSTITUTIONAL LAW AND POLITICS (2014 W.W. Norton & Co.).

[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 G. Smith & P. Fusco, CONSTITUTIONAL LAW FOR DUMMIES (2012 John Wiley & Sons, Inc.)

--References to "Smith Materials" are to handouts or case excerpts distributed by Professor Smith and/or made available on the class webpage.

[↓↓↓ READ FOR 1/9 ↓↓↓]

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

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

In class lecture; no reading assignment

B. The Constitutional Framework of Individual Liberties and Fundamental Rights, Part 1: A Brief Introduction to "State Action"; The Bill of Rights, and the Civil War Amendments

Smith & Fusco, skim pp. 13-16; read pp. 17-18, read pp. 24-29, and skim pp. 30-31

[↓↓↓ READ FOR 1/11 ↓↓↓]

C. The Constitutional Framework of Individual Liberties and Fundamental Rights, Part 2: The "Incorporation" Controversy

O'Brien, pp. 312-321 *[pp. 336-345]*

D. The Role and Jurisdiction of the Federal Judiciary (And the Supreme Court in Particular) (an overview of materials covered in P Sc 104A)

Noting information that is new to you, skim O'Brien, pp. 102-104; the chart on p. 105; pp. 180-183; 189-198; 1605-1608 *[pp. 107-109, the chart on p. 110, pp. 190-193, pp. 197-207; 1673-1675]*

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

Smith & Fusco, pp. 201-204
Skim O'Brien, pp. 408-417 [pp. 444-454]

[↓↓↓ READ FOR 1/16 ↓↓↓]

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

Smith & Fusco, pp. 204-206
O'Brien, pp. 418-433 [pp. 455-470]
O'Brien, pp. 443-447 [pp. 481-484]
Smith, pp. HO-1 & HO-2 (the “Ron Rash” problem; posted on course TritonEd (TED) page)

[↓↓↓ READ FOR 1/18 ↓↓↓]

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

Smith & Fusco, pp. 206-210; pp. 221 (starting with “Allowing more restriction when speech ‘goes to school’”) - 224
O'Brien, pp. 455-458 (through sentence re: *Jenkins v. Georgia*, ending “was not obscene, despite lower court rulings to the contrary.”)
O'Brien, pp. 468-475; 490-495
[pp. 491-494; 504-512; 527-532]

[↓↓↓ READ FOR 1/23 ↓↓↓]

O'Brien, pp. 504-535 [pp. 540-572]
Skim O'Brien, pp. 546-550 (grayed-in box, “In Comparative Perspective”)
[pp. 584-588]

[↓↓↓ READ FOR 1/25 ↓↓↓]

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

Smith & Fusco, pp. 211-212; pp. 214-216
Smith Materials, pp. TI-1 through TI-10 (excerpts from *Time v. Regan*;
available on class website)

[↓↓↓ READ FOR 1/30 ↓↓↓]

[FREE-SPEECH-BASED SIMULATION: Smith Materials, pp. SI-1 & SI-__ (materials
for in-class simulation, available on class website)

Smith & Fusco, p. 220 (“Protecting conduct that ‘speaks’”)
O’Brien, pp. 635-638; 645-659 [pp. 681-684; pp. 692-709]

[↓↓↓ READ FOR 2/1 ↓↓↓]

III. FREEDOM FOR RELIGION: Modern Approaches to the Free Exercise Clauses

A. An Overview of the Free-Exercise Decision Legacy

Smith & Fusco, pp. 228-231

O’Brien, pp. 795-807 [pp. 854-867] (read the *Sherbet* and *Yoder* decisions, and “skim read” the charts to get a sense of the subjects and directions of the Free-Exercise case law)

B. The Modern Meaning of Free Exercise, Part 1: Two Paradigm Cases Showing Different Responses to Governmental Policies Discriminating Against vs. Incidentally Burdening Religion

O’Brien, pp. 808-821 [pp. 867-881]

[↓↓↓ READ FOR 2/6 ↓↓↓]

C. The Modern Meaning of Free Exercise, Part 2: The Latest Supreme Court Guidance on When Differential Treatment of Religion Triggers Strict Scrutiny

O’Brien, pp. 828-831 [890-895]

Smith Materials, pp. TL-1 through TL-__ (major excerpts from *Trinity Lutheran Church v. Comer* (2017))

IN-CLASS MIDTERM = ON THURSDAY, FEBRUARY 8TH