

FALL 2018 □ **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 significant class discussion of excerpts from landmark cases, other assigned readings, and discussion questions I have specifically prepared for this course. I will regularly 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, November 12th;
Alternative Live or Podcast “Attendance”

Due to the UCSD Veterans Day holiday, we will not have a live class session on Monday, November 12th. In lieu of that class, you will be assigned to either attend one or two makeup classes or listen to the audio podcasts of the makeup(s), made available through the UCSD podcast website. 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 5** from **5 P.M. to 6:20 PM**.

Sixty percent (60%) of your course grade is based on a **final examination**, held from **7 P.M. to 10 P.M.** on **THURSDAY, FRIDAY, DECEMBER 13th** (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.

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 104A: 1) to promote student-to-student interaction about class materials and 2) to illustrate how the judicial-politics issues you are studying in P Sc 104A relate directly to the abundant controversies and developments in the larger "real world."²

For EACH CLASS WEEK starting with the second week (October 8-14) and continuing through the ninth week (November 26-December 2) – *except* for 1) the week including the midterm exam (November 5-November 11) and 2) another week you elect, at your convenience, not to post -- 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 a 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 104A, and invite others to comment.

IMPORTANT: For maximum potential credit, AT LEAST THREE OF YOUR WEEKLY POSTINGS of the Category (B) type must be postings of the kind defined in (B)(ii).

² Although TED has a free "bulletin board" feature, my experience and conversations with Packback staff show that there are at least five advantages to Packback not shared by TED's bulletin board, as follows: "1. Packback has an AI that moderates posts, so content that is posted meets thresholds, and moderates poor content. plagiarism, offensive material, etc. Essentially it allows the professor and the students to know that the content being posted meets a minimum, and can be safely counted for credit. 2. Packback has grading tools that allow the professor or TA to easily grade student participation, while other boards do not. 3. Packback has feedback tools that expose material class-wide, making professor feedback scalable. 4. Packback provides a service, as well as a platform, with Experience Managers working with professors to modify the class structure and teaching methods in a way that encourages discussion and critical thinking, maximizing the learning outcomes of each student. 5. Packback provides students instant feedback on their posts, so they do not need to wait for grading to see how well composed their content is."

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

(You will receive a separate email from Packback about how to sign up for the service, which costs \$25 for new registrants or \$22 if you previously signed up and use the same sign-up information for P Sc 104A. If you do not receive this email, or have difficulties with registration, please email holla@packback.co.)

AN ADDITIONAL RESOURCE: “Constitutional Context” Podcasts

Finally, you or others you know may be interested in my “Constitutional Context” podcast project -- available 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) and available by app from I-Tunes and other major service providers.

Since December 2016, **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 two dozen podcasts – including an introductory podcast elaborating on the project – are now available about a range of topics. New podcasts are generally posted on the first Monday of every month.

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, **Wednesdays, 2:00 P.M. to 4:30 P.M.** (except no OH on Wednesday, November 21).

***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 10/1 ▼▼▼]

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)

[▼▼▼ READ FOR 10/8; WILL BE DISCUSSED SOME OF 10/15 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 10/15 ▼▼▼]

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 10/22 ▼▼▼]

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. Doctrines 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)

▼▼▼ READ FOR 10/29 ▼▼▼

B. Doctrines Relating to the ISSUES and PARTIES Asserting Them

O'Brien, pp. 125-128 [*pp. 129-133*] ("Political Questions"); pp. 157-168; 507-509; 168-171 [*pp. 162-173; 535-537; 173-178*] (*ignoring sidebar on "The Pledge of Allegiance"*)
Smith, SM-11.1 through 11.3 (excerpts from concurring opinions in *Nixon v. U.S.*)
Smith, SM-12 through SM-28 (excerpts from portions of DOMA opinions, re: standing and justiciability)]

🔍🔍🔍 IN-CLASS MIDTERM ON PHASE I & ALL PHASE II MATERIALS COVERED BY THE END OF CLASS ON 10/29 = MONDAY, NOVEMBER 5, 5 PM TO 6:20 PM

[THESE RELATED MATERIALS WILL BE COVERED IN A LECTURE AFTER THE IN-CLASS MIDTERM AND A 15-MINUTE BREAK:
Smith, SM-28 through SM-42 (excerpts from portions of Proposition 8 opinions, re: standing and justiciability)
Defining and Limiting the Federal Government's Enumerated Powers: The Classic View of Chief Justice Marshall in McCulloch v. Maryland
Smith & Fusco, pp. 84-88
O'Brien, pp. 520-528 [*pp. 552-565*] (up to "2. Whether the state of Maryland may...")]