

Summer Session I 2019

POLITICAL SCIENCE 104I
LAW AND POLITICS -- Courts and Political Controversy

Visiting Professor Glenn Smith
Mondays & Wednesdays, 11 A.M. to 1:50 P.M. //
Center Hall, Room 109

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 three 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; and (3) Presidential power and the rights of civilians during time of war. 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.

The course makes significant use of 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 classes covering some of the materials on which this course focuses) 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 read lengthier versions of those cases and devote substantially more time to them. We will also discuss a number of cases related to fighting words, hostile-audience reaction, “true threats,” regulating provocative protests, etc. not covered in 104B. Similarly, although P Sc 104A introduces students to separation of powers and presidential authority issues, the coverage will be deeper and will cover presidential-power cases not discussed in that course.

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 (10th Ed. 2017) 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 smaller Summer class size, class members will frequently discuss questions or hypothetical problems in small groups. We may do a simulated argument.

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.
2. Noah Feldman, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES (2010) (available in inexpensive paperback)

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 Wednesday, July 17th). We will have an in-class mini-midterm, consisting of four questions, on Thursday, July 17th, starting at 11:00 A.M. and completing at around 12:50 P.M.

With one exception discussed below, the midterm will follow the question format of the Fall 2017 midterm for this course (posted on the course website). “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 connect the different opinion in the Court decisions we study to broader positions/points of view about judicial decision-making and methodology. NOTE that, as I will illustrate in a separate handout, I will adapt the format of “Part II” questions to be more directive in how the questions should be approached. “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 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 (Friday, August 2nd, 11:30 A.M. to 1:50 P.M.). The other graded component for the class will be a slightly longer (5 question) 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 potentially 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 17th. 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. You or your colleagues may be interested in a podcast I periodically post at <https://osherpodcast.sdsu.edu/> (a website of the 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). The podcast is also available via apps from standard providers.¹

“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.

Now posted on the site are an introductory podcast elaborating on the project and several 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. The project has been on hiatus, but will recommence in July, and offer two monthly-posted podcasts.

¹ Here are the direct links to Constitutional Context on the main aggregators:

iTunes: <https://itunes.apple.com/us/podcast/constitutional-context/id1392675973>

Google Play: (log in required)

<https://play.google.com/music/listen?u=0#/ps/lmzatll5lrm2rombbimovolq12q>

Pocket Casts: (log in required)

<https://play.pocketcasts.com/web#/podcasts/show/9c2df560-468d-0136-fa7c-0fe84b59566d>

Tune In: <https://tunein.com/podcasts/Political-News/Constitutional-Context-p1127877/>

First SUMMER Session 2019 -- **POLITICAL SCIENCE 104I**
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FIRST SYLLABUS FOR PHASES I & II

(Assignments for Classes 1-5)

**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:

***"O'Brien" refers to O'Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME ONE OR VOLUME TWO (W. W. Norton & Co., Ltd. 10th Eds. 2017)*

***"Smith & Fusco" refers to CONSTITUTIONAL LAW FOR DUMMIES (John Wiley & Sons 2012)*

***"Carp" refers to Carp, Stidham, Manning & Holmes, JUDICIAL PROCESS IN AMERICA (Sage/CQ Press 10th Ed. 2017)*

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

↓↓↓ READING ASSIGNMENT FOR CLASS, 7/1 ↓↓↓

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. 102-104; Figure 2.1 on p. 105; 181-175; 179-199]

2. The Law & Politics of "Constitutional Law"; Sources and Difficulties of Constitutional Interpretation

[For additional summary discussion of these subjects, see Smith & Fusco, pp. 33-40; 43-48]

- 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, Chapter 15 (pp. 389-399)]

- 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, 7/3 ↓↓↓]

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, 7/8 ↓↓↓]

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 disorder”)]

[↓↓↓ READING ASSIGNMENT FOR CLASS, 7/10 ↓↓↓]

C. “True Threats” and the *R.A.V.* Limit on Regulation of Unprotected Speech

Smith, pp. 77-120
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”)]
Smith, pp. EL-1 through EL-8 (materials on *Elonis v. U.S.*)

[↓↓↓ READING ASSIGNMENT FOR CLASS, 7/15 ↓↓↓]

D. When Tort Law Must Bend to Constitutional Law: Intentional Infliction of Emotional Distress vs. the First Amendment

Smith, pp. SvP-1 through SvP-15 (excerpts from *Snyder v. Phelps*)

E. Laws Regulating, but not Banning, Provocative Speech

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

**[→→→IN-CLASS MIDTERM: HELD DURING FIRST HOUR-AND-THREE-
QUARTERS OF CLASS ON 7/17]**