

Second SUMMER Session 2019 □ **POLITICAL SCIENCE 104A**
The Supreme Court and the Constitution

Visiting Prof. Glenn Smith // Mondays & Wednesdays, 11 A.M. to 1:50 P.M.
CENTER HALL // Room 217B

COURSE APPROACH

This course provides an introduction to 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 involve class discussion of excerpts from landmark cases, other assigned readings, and discussion questions I have specifically prepared for this course. At times I will provide an overview of key legal doctrines and developments through lecture. Especially given the intimate class size of the Summer class, class members will have significant opportunities 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 and small size of this class, it is always preferable to attend classes in person, rather than rely on notes from others.)

As befits a summer course, we will have FUN!

READINGS AND SYLLABI

The texts for the class are as follows:

1. O'Brien, CONSTITUTIONAL LAW AND POLITICS, VOLUME ONE (Tenth 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 2010 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 some new materials, and page numbers are different. I make periodic reference to page numbers in class, 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 italics) the assignments given in 10th Edition pages.

2. Smith & Fusco, CONSTITUTIONAL LAW FOR DUMMIES (Wiley & Co. 2012)

You will also read -- and will probably want to copy onto hard copies, so that you can refer to them in class and during open-book course exams -- (1) past exam questions and (2) extensive case excerpts for several class sessions. These readings will be available free from an online webpage. (A later section of this document gives instructions for accessing the class webpage...)

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

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

NO CLASS ON MONDAY, SEPTEMBER 2ND

Our next-to-the-last class is cancelled due to the Labor Day holiday, and in the tight time frame of a 5-week Summer course it is not viable to attempt a makeup. However, I hope to work out arrangements for students desiring more content relevant to P Sc 104A to access a podcast of a lecture I taped in July for the UCSD Osher Lifelong Learning Institute, on key decisions from the 2018-2019 Supreme Court Term.

EXAMINATIONS

We will have an **in-class midterm** during the first portion starting at 11 A.M and lasting 1 hour and 25 minutes of the class on **WEDNESDAY, AUGUST 21ST**. (The midterm will not be the only class-related activity that day; after the midterm is over and we take a break, we will reconvene for a lecture on next materials.)

As noted earlier, the midterm will cover materials assigned on the first syllabus. You will also take a **final examination**, occupying most of the entire designated exam period (**11:30 A.M. to 2:30 P.M.**) on **FRIDAY, SEPTEMBER 6TH**. This final exam will be cumulative.

IMPORTANT: PLEASE LOOK AT YOUR SCHEDULE IMMEDIATELY, and ensure that you will be able to take both exams. I REGRET THAT I WILL LIKELY BE UNABLE TO ACCOMMODATE OTHER THAN EMERGENCY CONFLICTS.

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. The midterm is worth 1/3 of course points; the final is worth 2/3.

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.

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 posted through November 2018 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.²

“CONSTITUTIONAL CONTEXT” regularly provided “*five-minute bites of background – about the Court and the Constitution.*” These compact and conversational podcasts were 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 focused 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

² 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/lmzatll5lrm2rombbimovolql2q>

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/>

- 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 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.

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 **STARBUCKS IN PRICE CENTER, WEDNESDAYS, 2:15 P.M. TO 5:45 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 104A" 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.

FALL 2019/Summer Session II -- **POLITICAL SCIENCE 104A**
The Supreme Court and the Constitution

Visiting Professor Glenn Smith

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

[▼▼▼ POTENTIAL COVERAGE OF FIRST CLASS ON 8/5; READ BEFORE 8/21 MIDTERM ▼▼▼]

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 8/7; WILL BE DISCUSSED SOME OF 8/12 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 8/12 ▼▼▼]

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 8/14; WILL BE DISCUSSED SOME OF 8/19 ALSO ▼▼▼]

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. Issues 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)

B. Issues 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.*)

[▼▼▼ READ FOR 8/19 ▼▼▼]

Smith, SM-12 through SM-42 (excerpts from portions of DOMA and Proposition 8 opinions, re: standing and justiciability)]

C. The Justiciability Issues Come Together in a High-Profile Controversy: The Standing and Justiciability issues in the recent Travel Ban decision

Smith, pp. TB-1 through TB-__

 **IN-CLASS MIDTERM ON PHASE I & ALL PHASE II MATERIALS COVERED BY THE END OF CLASS ON 8/19 = WEDNESDAY, AUGUST 21, 11 AM TO 12:45ish PM**