

PSC 3500: CONSTITUTIONAL INTERPRETATION
Department of Political Science • George Washington University
Fall 2023 • WF, 11:10-12:25 • Tompkins 204

Professor Brandon Bartels
bartels@gwu.edu

Office: Monroe 477

Office hours: Fridays, 1:30-3:00 or by appointment (in person or Zoom)

Course Description

What does the Constitution mean? What is the correct way to derive its meaning? Who has the final say, over time, on what it means? The course will delve into compelling debates and theories of constitutional interpretation (e.g., originalism v. living constitutionalism), judicial review, judicial supremacy, popular constitutionalism, precedent and legal doctrine, unitary executive theory, and federalism. Importantly, we will apply these theories, insights, and arguments to constitutional issues, cases, and controversies that form the basis of important debates in American politics. Students will engage in simulations of oral arguments arguing their favored theory as applied to legal issues and areas.

Learning Outcomes

As a result of completing this course, students will:

- possess an in-depth and well-rounded understanding of competing theories of how the Constitution should be interpreted.
- have a greater understanding of how judges engage in constitutional construction to fill in the gaps of vague constitutional meaning.
- apply these theoretical debates to actual Supreme Court issues and cases.

Readings

There are *no textbooks that students need to purchase*. Students will read journal/law review articles and book chapters that can be downloaded for free via GW's library subscriptions.

Amount of Out-of-class, Independent Learning Expected Per Week

For each credit, students are expected to spend a minimum of 100 minutes in independent learning for every 50 minutes of direct instruction for a minimum total of 2.5 hours per week or 37.5 hours for the semester. A 3-credit course, for example, would include 2.5 hours of direct instruction and a minimum of 5 hours of independent learning per week for a combined minimum total of 7.5 hours per week or 112.5 hours per semester. See [Assignment of Credit Hour Policy](#) for more information

Assignments

1. **Class participation and attendance (10%):** Students are expected to come to class having read and thought intently about the required reading. Students should be prepared to engage in rigorous in-class discussion of the readings. Many of the readings will be challenging, but you should work through the hard parts and bring your questions to class (or to me before class). Moreover, since we will be engaging in simulation (discussed below), coming to class every week is particularly important for the ultimate success of the simulation.

2. **Weekly Reading Quizzes (Weeks 2 through 11)** (20%): We will have weekly quizzes covering the readings for the week. These will be brief quizzes: 10 questions, either multiple choice or a mix of multiple choice and very short answer. Students will have 15 minutes to complete each quiz.
- Students will take the quiz via Blackboard on **Fridays** at the end of class (12:10-12:25). Quizzes will be open-book and open-notes. Each quiz will cover readings and class discussions from that week (the Wed. and Fri. readings and discussions).
 - At the beginning of each week, I will give you a list of potential questions for the quiz. These questions will help structure how you read the articles (particularly since some readings can be on the dense side), commit the ideas to memory, and prepare you for the quiz, of course. It is also a crucial mechanism for you to be prepared for active class discussion and participation.
 - There will be 10 total quizzes taken weekly between Fri., Sept. 1 (Week 2) and Friday, Nov. 3 (Week 11). I will drop your lowest quiz score, so the total quiz score will be based on your **9 best quiz scores**. In the event that a student misses a quiz for some reason, that would be your one free quiz that will not count against you.

You may be curious – *why so many quizzes?* My PSC colleagues and I have discussed this topic a great deal over the years. Research shows that periodic quizzes/assessments improve student learning. In one study, frequent quizzes improved student performance in multiple ways.¹ The “quiz model” also had spillover effects, with students doing better in their other courses that semester *and* in future courses. The mechanism underlying these effects? *Regular assessments help students develop good, sound study habits that benefit them in general.* They learn key tools and methods for how to absorb material effectively and at a deeper level. More regular quizzes also help the instructor understand how well students are grasping certain topics so that adjustments can be made.

3. **Simulation** (50% total): The simulation centers on: (1) choosing one theory from class that you think is best for deciding key legal issues in constitutional law, (2) applying that theory to a particular legal issue as a demonstration of why your theory is best, (3) discussing the pros and cons of your theory as applied to that issue, and (4) identifying an alternative theory (or theories) that you believe is the strongest contender to your chosen theory (and why) but why your theory is ultimately superior. Acting the part of a “lawyer-scholar,” you will produce both a written argument (your legal brief) and an oral argument in front of mock justices. You will also participate as a justice in a few cases.

I will group students in their lawyer roles based on shared interests. There will be 4 to 6 students in each group, though students will eventually write their own written brief and prepare their own oral argument. Once students are assigned, groups will have time in class to discuss their theories and legal issues/areas in the context of the readings from class. During the course, each student will be working toward developing an argument in the mold of a lawyer preparing to argue before the Supreme Court. The core of the argument will involve taking positions on the four aforementioned points.

¹ <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0079774>

Here are the four key assignments for simulation:

- a. **“Pre-brief” (10%): Due Mon., Oct. 9.** This will be a preliminary version of your lawyer brief. It comes halfway through the semester, so you will mostly reflect the first half of the class (though you should preview some of the forthcoming topics). This will involve your preliminary thoughts on the topic. Your pre-brief should be about 1,000 words long. You will post your pre-brief on Blackboard.
 - b. **Lawyer written brief of argument (20%): Due Friday, Nov. 17.** This will be the written argument persuading the Supreme Court to adopt your theory as applied to a legal issue/area (related to the four aforementioned points). Students will post their lawyer briefs on Blackboard so that the justices (the other students not involved in your argument) can prepare for oral argument questions. Briefs should be about 10-12 pages double-spaced, 12 point font (Times New Roman), 1” margins all around. That’s approximately **3,500 words**. I will give more details and a rubric for this paper early in the semester.
 - c. **Lawyer oral argument/presentation (10%):** As lawyer, each of you will engage with the justices in a 10-12 minute oral argument that expands and elaborates on the written brief. Lawyers will give a very brief 2 minute summary and highlight of their argument. After that, the justices will question the lawyer and a Q&A session and conversation ensues. Oral arguments will be held over four class sessions during last two weeks of class. See course schedule below.
 - d. **Participation as a justice (10%):** Each student will be assigned to participate as a justice in a few cases (number to be determined). Justices will have read the lawyer brief and viewed the oral argument video before oral argument days.
4. **Final Exam (20%):** The final exam will be cumulative and will be taken on our designated final exam day. The exam will include a mix of multiple choice, short answer, and essay. The essay will include a ruling (as a justice) on one of the simulation arguments you were justice on. You will use the core theories and readings from the class to respond to one of lawyer’s arguments. Though the final exam is not open book, I will allow each student to bring two pages of notes to the exam. You can write whatever you’d like on the front and back of each page.

Grading Scheme

93-100%: A	90-92.9: A-	
87-89.9: B+	83-86.9: B	80-82.9: B-
77-79.9: C+	73-76.9: C	70-72.9: C-
67-69.9: D+	60-66.9: D	
<60: F		

Course Schedule (*subject to minor changes*)

Note: Readings listed are required reading (unless stated otherwise). All readings are available for download for free via the GW's library subscriptions. In brackets, you will see shortcuts providing the quickest route to downloading the reading. I will discuss finding these articles in class and also on Blackboard.

Week 1: Course Introduction

- Fri., August 25: Course Introduction

Week 2: Originalism and Living Constitutionalism, Part 1

- Wed., Aug. 30:
 - Chapter 1 from: Bennett, Robert W., and Lawrence B. Solum. 2011. *Constitutional Originalism: A Debate*. Ithaca, NY: Cornell University Press. [GW library]
- Fri., Sept. 1:
 - Balkin, Jack M. 2007. "Abortion and Original Meaning." *Constitutional Commentary* 24(2): 291–352. [HeinOnline]

Week 3: Originalism and Living Constitutionalism, Part 2

- Wed., Sept. 6:
 - Siegel, Reva. 1992. "Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection." *Stanford Law Review* 44(2): 261–381. [HeinOnline]
- Fri., Sept. 8:
 - Barnett, Randy E. 2008. "Scrutiny Land." *Michigan Law Review* 106(8): 1479–1500. [HeinOnline]
 - Skim *Roe v. Wade* (1973) and *Planned Parenthood v. Casey* (1992)

Week 4: Originalism and Living Constitutionalism, Part 3

- Wed., Sept. 13:
 - Majority opinion in *Dobbs v. Jackson Women's Health Organization* (skim the dissent)
- Fri., Sept. 15:
 - Portion of Barnett, Randy E., and Evan D. Bernick. *The Original Meaning of the 14th Amendment*. Harvard University Press. [GW Library]

Week 5: "Bad Constitutionalism"

- Wed., Sept. 20:
 - Greene, Jamal. 2011. "The Anticanon." *Harvard Law Review* 125(2): 379–475. [HeinOnline]
- Fri., Sept. 22:
 - Graber, Mark A. 1997. "Desperately Ducking Slavery: Dred Scott and Contemporary Constitutional Theory." *Constitutional Commentary* 14(2): 271–318. [HeinOnline]

Week 6: “She the People” – Women and the Constitution

- Wed., Sept. 27:
 - Portions of Chs. 13 and 14 in: Epstein, Lee, Kevin T. McGuire, and Thomas G. Walker. *Constitutional Law for a Changing America*. CQ Press.
- Fri., Sept. 29:
 - Siegel, Reva B. 2002. “She the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family.” *Harvard Law Review* 115(4): 947–1046. [HeinOnline]

Week 7: Judicial Supremacy

- Wed., Oct. 4:
 - Friedman, Barry, and Erin F. Delaney. 2011. “Becoming Supreme: The Federal Foundation of Judicial Supremacy.” *Columbia Law Review* 111(6): 1137–93. [HeinOnline]
- Fri., Oct. 6:
 - Alexander, Larry, and Frederick Schauer. 1997. “On Extrajudicial Constitutional Interpretation.” *Harvard Law Review* 110(7): 1359–87. [HeinOnline]

***** Pre-Brief Due Mon., Oct. 9 ******

Week 8: Popular Constitutionalism, Part 1

- Wed, Oct. 11:
 - Kramer, Larry D. 2001. “We the Court.” *Harvard Law Review* 115(1): 5–169. [HeinOnline]
- Fri., Oct. 13: **NO CLASS, FALL BREAK**

Week 9: Popular Constitutionalism, Part 2

- Wed., Oct. 18:
 - Friedman, Barry. 2002. “Mediated Popular Constitutionalism.” *Michigan Law Review* 101(8): 2596–2636. [HeinOnline]
- Fri., Oct. 20:
 - Clark, Tom S. 2009. “The Separation of Powers, Court Curbing, and Judicial Legitimacy.” *American Journal of Political Science* 53(4): 971–89. [JSTOR]

Week 10: Precedent and Legal Doctrine; Applications to Equal Protection Law

- Wed., Oct. 25:
 - Barrett, Amy Coney. 2016. “Originalism and Stare Decisis.” *Notre Dame Law Review* 92(5): 1921–44. [HeinOnline]
 - Portions of: Winkler, Adam. 2006. “Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in the Federal Courts.” *Vanderbilt Law Review* 59(3): 793–872. [HeinOnline]
- Fri., Oct. 27:
 - Carbedo, Devon W., and Kimberle W. Crenshaw. 2019. “An Intersectional Critique of Tiers of Scrutiny: Beyond ‘Either/or’ Approaches to Equal Protection.” *Yale Law Journal Forum* 129: 108–29. [HeinOnline]

Week 11: Legal Doctrine (contd.), Constitutional Construction, and Equal Protection Law

- Wed., Nov. 1:
 - Portion of Barnett, Randy E., and Evan D. Bernick. *The Original Meaning of the 14th Amendment*. Harvard University Press. [GW Library]
 - Review reading from Epstein, McGuire, and Walker from Week 6.
- Fri., Nov. 3:
 - Majority opinion, *Students for Fair Admission v. Harvard* (2022).

Week 12: Unitary Executive Theory

- Wed., Nov. 8:
 - Part 1, pp. 1-36: Calabresi, Steven G., and Christopher S. Yoo. 2008. *The Unitary Executive: Presidential Power from Washington to Bush*. New Haven, CT: Yale University Press. [GW library]
- Fri., Nov. 10: Simulation and Lawyer Brief Prep, Oral Argument Practice, Small Groups

Week 13: Simulation Prep

- Wed., Nov. 15: Simulation and Lawyer Brief Prep, Oral Argument Practice, Small Groups
- Fri., Nov. 17: Oral Argument Prep, Small Groups; **Lawyer Brief Due**

**** Lawyer brief due Friday, Nov. 17 ****

Thanksgiving Break – NO CLASS

- Wed., Nov. 22: *Thanksgiving Break, No Class*
- Fri., Nov. 24: *Thanksgiving Break, No Class*

Week 14: SIMULATION – ORAL ARGUMENTS, WEEK 1

- Wed., Nov. 29: Oral Arguments
- Fri., Dec. 1: Oral Arguments

Week 15: SIMULATION – ORAL ARGUMENTS, WEEK 2

- Wed., Dec. 6: Oral Arguments
- Fri., Dec. 8: Oral Arguments

**** FINAL EXAM DURING FINALS WEEK**

University Policies

Academic Integrity Code

Academic integrity is an essential part of the educational process, and all members of the GW community take these matters very seriously. As the instructor of record for this course, my role is to provide clear expectations and uphold them in all assessments. Violations of academic integrity occur when students fail to cite research sources properly, engage in unauthorized collaboration, falsify data, and otherwise violate the [Code of Academic Integrity](#). If you have any questions about whether or not particular academic practices or resources are permitted, you should ask me for clarification. If you are reported for an academic integrity violation, you should contact Student Rights and Responsibilities (SRR) to learn more about your rights and options in the process. Consequences can range from failure of assignment to expulsion from the University and may include a transcript notation. For more information, please refer to the SRR website at studentconduct.gwu.edu/academic-integrity, email rights@gwu.edu, or call 202-994-6757.

University policy on observance of religious holidays

Students must notify faculty during the first week of the semester in which they are enrolled in the course, or as early as possible, but no later than three weeks prior to the absence, of their intention to be absent from class on their day(s) of religious observance. If the holiday falls within the first three weeks of class, the student must inform faculty in the first week of the semester. For details and policy, see “Religious Holidays” at provost.gwu.edu/policies-procedures-and-guidelines.

Use of Electronic Course Materials and Class Recordings

Students are encouraged to use electronic course materials, including recorded class sessions, for private personal use in connection with their academic program of study. Electronic course materials and recorded class sessions should not be shared or used for non-course related purposes unless express permission has been granted by the instructor. Students who impermissibly share any electronic course materials are subject to discipline under the Student Code of Conduct. Please contact the instructor if you have questions regarding what constitutes permissible or impermissible use of electronic course materials and/or recorded class sessions. Please contact Disability Support Services at disabilitysupport.gwu.edu if you have questions or need assistance in accessing electronic course materials.

Academic support

Writing Center

GW’s Writing Center cultivates confident writers in the University community by facilitating collaborative, critical, and inclusive conversations at all stages of the writing process. Working alongside peer mentors, writers develop strategies to write independently in academic and public settings. Appointments can be booked online at gwu.mywconline.

Academic Commons

Academic Commons provides tutoring and other academic support resources to students in many

courses. Students can schedule virtual one-on-one appointments or attend virtual drop-in sessions. Students may schedule an appointment, review the tutoring schedule, access other academic support resources, or obtain assistance at academiccommons.gwu.edu.

Support for students outside the classroom

Disability Support Services (DSS) 202-994-8250

Any student who may need an accommodation based on the potential impact of a disability should contact Disability Support Services at disabilitysupport.gwu.edu to establish eligibility and to coordinate reasonable accommodations.

Counseling and Psychological Services 202-994-5300

GW's Colonial Health Center offers counseling and psychological services, supporting mental health and personal development by collaborating directly with students to overcome challenges and difficulties that may interfere with academic, emotional, and personal success. healthcenter.gwu.edu/counseling-and-psychological-services.

Safety and Security

- Monitor [GW Alerts](#) and [Campus Advisories](#) to [Stay Informed](#) before and during an emergency event or situation
- In an emergency: call GWPD/EMERG 202-994-6111 or 911
- For situation-specific actions: refer to GW's [Emergency Response Handbook](#) and [Emergency Operations Plan](#)
- In the event of an armed intruder: Run. Hide. Fight.

AI Policy (written by Profs. Robert Betz and Eric Lawrence)

We are entering a new technological era with the rise of generative Artificial Intelligence (AI), such as GPT, LLaMA, laMDA and other large language models, that are driving an ongoing conversation about their academic uses. Writing aid products like Grammarly, QuillBot, Cactus.ai, etc. advertise their AI features (GrammarlyGO, etc.). We are also learning about the potential benefits and misuse of AI and how it can be applied in the classroom. Learning to use generative AI is an emerging skill, but we must use generative AI tools effectively and responsibly.

Generative AI has been discussed at length within academia, but other sectors are also grappling with its use due to its rapid rise and increased access to the tools. In the private sector, e.g., many workplaces are considering banning its use, partly due to security risks (see "Most businesses to ban ChatGPT, generative AI apps on work devices," August 8, 2023, [CSOonline](#)). We are all trying to figure out the right way to use GAI in the long and medium run, but below I have outlined the expectations in our class of its permitted and prohibited use.

Permitted:

- A student types a prompt into an AI tool and reviews the generated content to help them study for a quiz or exam (i.e., a study guide).

- A student types a prompt into an AI tool and uses the generated content to help them brainstorm ideas for a paper or research project.
- A student types a prompt into an AI tool and uses the generated content to help them create a citation for a source and/or reference list.
- A student types a prompt into an AI tool and uses the generated content to help them with small group discussion.

Citing GAI and Verifying its Accuracy:

- By submitting work for evaluation in this course, *you represent it as your own intellectual product*. If you include content (e.g., ideas, text, code, images) that was generated, in whole or in part, by generative AI tools (including, but not limited to, ChatGPT and other large language models) in work submitted for evaluation in this course, you must document and credit your source. Material generated using other tools should be cited accordingly.
- If you include material generated by a generative AI tool and it is substantively incorrect you will lose points as appropriate. You should verify the accuracy of all content you include in your work.

Sample citation:

- “ChatGPT-4. (YYYY, Month DD of query). ‘Text of your query.’ Generated using OpenAI. <https://chat.openai.com/>.
 - “ChatGPT-4 (2023, August 9) ‘What is a pressing policy issue in the District of Columbia?’ Generated using OpenAI. <https://chat.openai.com/>.

Prohibited:

- While taking an out-of-class (“take-home”) or an in-class quiz, a student types a prompt into a generative AI tool and incorporates some or all of the generated content into their submitted answer.

Be aware of the limits of GAI:

- Generative AI is a tool, but you need to cite it when you use it. Always. No exception. And you are prohibited from using it as stated above.
- It may stifle your own independent thinking, creativity, and understanding of class concepts. Minimum effort into both generative AI prompts and your assignments will produce low quality results. Effectively and correctly using AI in academic work takes time and effort.
- Don’t trust anything or everything AI says. If it gives you a number or fact, assume it is wrong unless you either know the answer or can check it with another non-AI source. This is an opportunity for you to practice your critical analysis skills. As noted above, you will be responsible for any errors of omissions provided by the tool.
- AI tools are based on data that can include biases and reflect historical or social inequities and thus the AI tool can replicate those biases and inequities. Be aware that it can also produce problematic and potentially offensive answers.