



Scholar Exchange: Constitutional Conversations and Civil Dialogue

Resource Guide

TUNE IN

Constitutional Conversations and Civil Dialogue

In this session, students will examine the structure and function of the U.S. Constitution, and the methods scholars use to interpret it. Students will be trained in the practice of historical thinking skills as they examine primary sources and hone their constitutional thinking skills by asking “*What may the government do?*” The session will conclude with the ideas behind the practice of civil dialogue skills where we channel our inner Louis Brandeis who famously remarked, “Come let us reason together!”

- [Register for Middle School Session](#) Aug. 31 and Sept. 2 at 12 p.m. EDT
- [Register for High School and College Session](#) Aug 31 and Sept. 2 at 2 p.m. EDT
- [Register for All Ages Session](#) Sept. 4 at 1 p.m. EDT

WATCH

The following videos are great resources to watch while preparing for Scholar Exchange on Constitutional Conversations:

- Video: [Justice Breyer on how the Supreme Court reaches decisions](#)
- Video: [A deep dive into *Brown v. Board of Education of Topeka*, a Supreme Court case decided in 1954](#)

LISTEN

Listen to these podcasts for more insight into how Supreme Court justices have Constitutional Conversations through Civil Dialogue:

- Podcast: [Justice Gorsuch discusses civics and civility](#)
- Podcast: [Host Jeffrey Rosen’s newest book, *Conversations with RBG: Ruth Bader Ginsburg on Life, Love, Liberty, and Law*](#)

READ

- [Download our Civil Dialogue Toolkit](#)
- [Download the “How to think like a Constitutional Scholar” Activity Sheet](#)





Scholar Exchange: Constitutional Conversations and Civil Dialogue

Briefing Document

INTRODUCTION: A BRIEF WALKING TOUR THROUGH THE CONSTITUTION'S TEXT

Our goal in this session is to introduce you to the skills necessary to engage in constitutional conversations.

Broadly speaking, our approach has *three* main components: (1) building a historical foundation through storytelling; (2) learning how to interpret the Constitution like a constitutional lawyer; and (3) developing the skills of civil dialogue and reflection.

- *First*, we build a strong foundation by telling the Constitution's founding stories, studying the Constitution's text, and exploring how courts have interpreted the Constitution over time.
- *Second*, we teach learners of all ages to separate their *political* views from their *constitutional* views—asking not what the government *should* do, but what it constitutionally *may* do.
- And *third*, we give students the resources that they need to think like constitutional scholars—by presenting the best arguments on *all* sides of each constitutional issue, providing helpful educational resources, and offering platforms to support civil discourse within the classroom and across the county.

Let's begin—as we always do when interpreting the Constitution—with the Constitution's text itself. The Constitution is composed of a preamble, seven articles, and 27 amendments.

The Preamble:

- Beginning with the phrase—“**We the People**”—the preamble expresses one of the Constitution's core principles, *popular sovereignty*. (This language channeled the vision of forgotten Founding Fathers like James Wilson and Gouverneur Morris.)
- This is a just a fancy way of saying that the Constitution establishes a government that's driven by *us*—not a monarch, not the elites, not an aristocracy—but by us, the American people.
- As with most things, Abraham Lincoln may have said it best in the Gettysburg Address: popular sovereignty means “**government of the people, by the people, for the people.**”

Articles I through III: Basic structure of the national government.

- Article I establishes the national government's legislative branch—Congress.
 - Within the national government, Congress is responsible for **making the laws**.
 - The Constitution separates Congress into two Houses. (We call this “bicameralism.”):
 - A House of Representatives (with its representatives elected by the American people under the principle of popular sovereignty)



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- A Senate (with its senators originally selected by the state legislatures under the principle of equal representation). (Today, the Senate is elected by the American people—following the ratification of the 17th Amendment in 1913.)
 - Article I also sets out the powers of Congress and lists certain limits to those powers. (And certain limits on the powers of the states.)
- Article II establishes the national government’s executive branch—headed by a single president.
 - Within the national government, the executive branch is responsible for **enforcing the laws**.
 - With the new president, the founding generation set out to establish an executive head stronger than the weak governors in charge of the states at the time, but weaker than a king. (It’s little wonder that supporters and critics alike sometimes characterized the presidency as an **“elected monarch.”**)
 - Article II **“vest[s]” the “executive Power . . . of the United States”** in a single president. (Scholars refer to this as the **“Vesting Clause.”**)
 - It sets out the details for how we elect a president (namely, through the Electoral College) and how we might remove one from office (namely, through the impeachment process).
 - And it lists some of the president’s core powers and responsibilities like her role as **“Commander in Chief of the Army and Navy of the United States.”**
- Article III establishes the national government’s judicial branch—the federal judiciary.
 - Within the national government, the judicial branch is responsible for **interpreting the laws**.
 - Article III is a short provision—leaving many of the details of the nation’s court system to later laws passed by Congress.
 - It also promotes judicial independence—granting federal judges life tenure (meaning that they serve until they die, resign, or are impeached and removed from office) and protecting their salaries from political attacks by the elected branches. (This is an important feature of the original Constitution’s separation of powers.)
 - Finally, even before the Bill of Rights, Article III protected the right to a jury trial.

Articles IV through VII: The rest of the original Constitution tackles a range of other issues.

- Article IV addresses the relationship between the states and their citizens, how to handle the admission of new states, and how to govern federal territories. (It also includes the infamous Fugitive Slave Clause.)
- Article V sets out the process for amending the Constitution.
 - The founding generation didn’t believe that they had a monopoly on constitutional wisdom.
 - Therefore, the founders set out a formal amendment process that allowed later generations to revise our nation’s charter without the need to resort to violence or revolution.
 - But the founders limited new amendments to those that could actually secure broad support from the American people—support that transcended factional (and, later, party) interests.
 - There are a few different processes for amending the Constitution under Article V, but nearly every amendment was approved by (at least) a 2/3 vote in each House of Congress and then by the legislatures of (at least) 3/4 of the states.



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- Article VI establishes the supremacy of national law over the laws of the states, and it bans religious tests for national office.
- Article VII sets out the process for ratifying the Constitution.
 - Each state would elect delegates to its own ratifying convention.
 - From there, each ratifying convention would then debate the Constitution and decide whether to support it (or not). (And the ratification vote was *very* close in many key states.)
 - The Constitution would go into effect when 3/4 of the state ratifying conventions voted in favor of it.
 - Remember, at the time, the United States already had a national government—the Articles of Confederation.
 - The new Constitution was the framers’ proposal for replacing that government. But it was only a *proposal*.
 - Only the American people—through the state ratifying conventions—had the authority to tear up the Articles of Confederation and establish a new government.
 - That’s the core of popular sovereignty—rule by “**We the People.**” (And it also flew in the face of the Articles of Confederation, which required unanimity for any revisions—not to mention the Convention’s own mandate, which was limited to amending (not replacing) America’s framework of government!)

So, that’s the original Constitution. We have also used Article V to amend the Constitution 27 times throughout American history. For now, we only have time for a few highlights—but we’ll cover many of these amendments in more detail throughout the year.

Bill of Rights: The first 10 amendments were proposed by the First Congress and ratified shortly thereafter.

- These amendments protect some of our most cherished liberties, including free speech, a free press, religious freedom, and the right to a jury trial—among many others.
- These amendments originally applied to the national government—*not* the states.
- (The 14th Amendment would later extend many of these rights to protect us against state abuses.)

Reconstruction Amendments: After the Civil War, we ratified a series of three amendments—the 13th, 14th, and 15th—that transformed the Constitution forever. Many scholars refer to these transformational amendments as our nation’s “Second Founding.”

- The 13th Amendment abolished slavery.
- The 14th Amendment wrote the Declaration of Independence’s promise of freedom and equality into the Constitution.
- And the 15th Amendment promised to end racial discrimination in voting.

Remaining Amendments: The remaining amendments altered the Constitution in ways both big and small.

- To give just one example: The 19th Amendment protected women against discrimination at the ballot box. And this year, we’re celebrating the 100th anniversary of that glorious amendment—in part, [with a new exhibit at the National Constitution Center: *The 19th Amendment: How Women Won the Vote!*](#)



So, that's a quick walking tour through the Constitution's text.

- **Big Idea:** For us, the big idea is that sound constitutional thinking must always begin with an intimate knowledge of the Constitution itself—its text, history, and structure. We hope to provide you with that foundation throughout the year.
- **Big Question:** What do you think are some of the most important ideas and principles enshrined in the Constitution? Why?

HOW TO USE THE SKILLS OF A CONSTITUTIONAL LAWYER TO ENGAGE IN CIVIL DISCOURSE ABOUT THE CONSTITUTION

Throughout the year, we want to teach you how to think like a constitutional lawyer. What do we mean by that?

When you read the Constitution and interpret its text, it's important to focus on how the Constitution *either* expands *or* limits the powers of the government. This is how constitutional scholars read and interpret it.

The key is to try to separate your political views (what *should* be done—a policy question) from your constitutional views (what *can* be done—a constitutional question).

- Policy question: *Should a public school principal search a student's locker?*
- Constitutional question: *Does the Fourth Amendment restrict the power of a government employee—like a public school principal—from searching a student's locker?*

Again, when interpreting the Constitution, our goal is to try to separate our political views from our constitutional ones.

Six Forms of Constitutional Arguments

That's a bit of background about the basics of constitutional thinking. But what specific methods do scholars (and judges) use to interpret the Constitution? In other words, what types of arguments do they employ when tackling important constitutional questions?

As you think about the Constitution in the weeks, months, and years ahead, I'd like you to keep in mind the following forms of constitutional argument. They're drawn from Philip Bobbitt's landmark text—*Constitutional Fate*. (Bobbitt is a law professor at Columbia and UT-Austin.)

Bobbitt's big idea is that constitutional law is a tradition of argument and, if you look closely, you can identify *six* standard forms of argument used by American lawyers. Judges use these arguments to decide concrete constitutional issues in individual cases.

Of course, different judges sometimes apply—and weigh—these arguments differently. And that means that judges don't always agree on the Constitution's meaning. Even so, these *six* forms of argument are familiar to pretty much all well-trained lawyers.

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- **Text:** Not surprisingly, this form of argument appeals to the Constitution's text.
 - The interpreter looks to the meaning of the Constitution's words, relying on common understandings of what the words meant at the time that the language was added to the Constitution.
 - The goal is to discover the best reading of the Constitution's text at the time of its ratification.
 - The interpreter might look at the period's leading dictionaries.
 - And she might analyze how the relevant words were used in context in documents from the period. (Now, you can even use special computer programs to search countless texts from America's past to study how words were used when the relevant constitutional text was ratified.)
 - Overall, the interpreter tries to understand the Constitution's text from the perspective of a reasonable person reading its words at the time of its ratification.
- **History:** With this form of argument, the interpreter looks to the historical context of when the Constitution's text was drafted and ratified to shed light on its meaning.
 - To that end, the interpreter studies the debates that shaped a given constitutional provision's framing and ratification.
 - Evidence might include records from the Constitutional Convention, battles over the amendments in Congress, and discussions in any ratifying bodies; materials shaping public discourse over the provision (*e.g.*, the period's newspapers and pamphlets); and accounts written by leading historians about the period's historical context.
 - By studying these materials, the interpreter looks to understand the key factors driving the push for constitutional reform; the paradigm evils that the ratifying generation was seeking to address; any broad principles that it was looking to write into the Constitution; and any evidence of how this generation expected the provision to apply to specific issues.
- **Structure:** With this form of argument, the interpreter reads the Constitution holistically and tries to derive any structural principles embodied in its text.
 - For instance, although the Constitution doesn't include a specific separation-of-powers clause, it's possible to infer that principle from the Constitution's text, and apply it in specific cases.
- **Doctrine:** With this form of argument, the interpreter applies precedents established in earlier cases to new cases.
 - This form of argument trumpets the virtues of remaining faithful to well-established precedent and shaping doctrine through an incremental process inside the courts.
 - On this view, a successful interpreter connects her decision in a specific case with the Constitution's meaning as articulated inside the courts over time, wrestling with how to apply previous rulings to new cases.



- **Prudence** (or Consequences): With this form of argument, the interpreter seeks to balance the costs and benefits of a particular ruling, including its consequences and any limits to a court’s power or competence in a particular constitutional area.
 - For instance, sometimes the interpreter will take her predictions about the policy effects of a ruling—whether good or bad—into account when reaching a decision in a constitutional case.
 - Or other times the judge may look at a constitutional controversy and conclude that it’s a question that the courts can’t (or shouldn’t) answer—whether because of a judge’s limited knowledge in the area or because of concerns about unelected judges settling an issue that remains controversial in the courts, in the elected branches, and among the American people.
 - Not every interpreter recognizes this form of constitutional argument as legitimate.
 - However, some interpreters—like Supreme Court Justice Stephen Breyer—argue that these types of arguments are essential to sound constitutional decision-making.

- **Ethos**: With this form of argument, the interpreter looks to the American ethos—the nation’s traditions, its laws, and its practices—to decide constitutional issues.
 - Perhaps the best way to think about this form of argument is as an attempt to frame your position as one based on constitutional principles deeply embedded in the American constitutional tradition.
 - As with prudential arguments, not every interpreter recognizes ethical arguments as legitimate.

So, those are the *six* forms of constitutional argument that constitutional lawyers most frequently draw on when interpreting the Constitution.

Now, how do we use these arguments to engage in a constitutional conversation? In other words, how do we use the skills of the constitutional lawyer to engage in civil discourse about the Constitution?

To get us started, here are a few tips for engaging in constitutional conversations.

- **First**: Be sure that you’re asking constitutional questions, not policy questions. Constitutional questions will not only help keep the conversation rooted in constitutional understandings, but it will also help us develop better questioning techniques.
 - Constitutional questions are based on whether the government has the power to do something. For example:
 - Does the government have the authority to restrict the possession of firearms in certain sensitive places?
 - And does the national government have the power to tax individuals?
 - Political questions are based on whether the government *should* do something. For example:
 - *Should* the government restrict the possession of firearms in certain sensitive places?
 - *And should* the national government increase (or decrease) taxes?
- **Second**: Try to steer clear of “yes or no” questions. They rarely move the conversation forward.
- **Third**: Whenever possible, incorporate scholarly work into your answers. Scholarly evidence can help support your point. So, do your research. Take notes. And highlight information as you read through the materials.
 - When giving an answer:

- Refer to the scholar and her work by name.
 - Refer to specific parts of the work.
 - Use your own words to explain it. (In fact, even when you quote directly, take the time to explain the passage in your own words.)
 - And make sure to explain how the work answers the essential question.
- At the same time, do *not*:
 - Use vague ideas that are only loosely connected to the question.
 - Talk about scholarly ideas without referring to the author or work by name.
 - Forget to explain what the information that you're citing means.
 - Or forget to connect your evidence to the bigger picture and/or essential question.

Discussion

So, that's a little background about how to use the skills of a constitutional lawyer to engage in a constitutional conversation. Let's end this section of the class with a concrete example. In fact, let's turn to (arguably) the most famous case in Supreme Court history—*Brown v. Board of Education*.

Brown asked whether state and local governments could require separate schools for white students and African American students. The Court famously (and resoundingly) said “no”—in a *unanimous* ruling authored by Chief Justice Earl Warren. Obviously, we celebrate *Brown* as one of the most important—and inspiring—decisions in Supreme Court history.

Question: Applying the skills that we just learned, how do we analyze this canonical case like a constitutional lawyer? What are the different *constitutional* arguments that you might make in the case?

PRACTICE OF CIVIL DIALOGUE

America's founding generation envisioned a constitutional system driven by (what they referred to as) civic republican virtue—a system that was guided by deliberation, reason, enlightened public opinion, and pursuit of the public good.

With this vision in mind, let's take a moment to think about the following questions:

- What's an argument? What does it sound like? What does it look like? And how does it feel?
- Many students say that an argument is a disagreement that can get pretty heated. It can sound like raised voices and people talking past one another. And it can feel pretty lousy.

When you think about arguments within the government and politics, your mind might immediately go to presidential debates, congressional hearings, and Supreme Court oral arguments.

- Of course, a debate can quickly turn into a contest in which the loudest, most dramatic, or even most controversial person (and position) wins.
- Or, from another perspective, everyone loses because each side refuses to understand the perspective of those on the opposing side.

Of course, some people—for instance, Supreme Court justices—argue for a living.

Constitutional Discussions at the Supreme Court

And in many ways, the Supreme Court can offer a model for how to make arguments in a constructive, cooperative way so that people with opposing views can meaningfully listen to one another, consider different viewpoints, learn from one another, and possibly change their position or reach a compromise.

But even when the justices continue to disagree on an issue, their approach often gets each justice to (at least) take reasonable arguments on the other side seriously and try to understand *why* the other side thinks the way that it does.

But how do they do it? How do the justices—who, at times, have different approaches to constitutional interpretation and different ideas—discuss and decide some of society’s most controversial issues?

In an interview at the National Constitution Center, Justice Stephen Breyer explained some of the ways that the justices do it—and his insights might help all of us engage in (constructive and collaborative) civil dialogues about constitutional issues. For instance:

- The justices don’t shout at each other. They aren’t rude to one another. And they don’t put each other down.
- Their conversations are civil, polite, and professional. And they listen to one another—even though they might strongly disagree.
- In particular, Justice Breyer gave the following advice:
 - *Stay calm and listen to others.*
 - If you have a friend, and you’re disagreeing about something and you’re in a big argument, what works best is to stay calm.
 - Listen to what she’s saying.
 - Try to deal with what *she’s* saying, not what *you’re* saying.
 - And the two main rules in the Supreme Court’s private conference—when the justices discuss cases—are:
 - *Number One—Don’t speak twice until everyone has spoken once.* That’s a great rule for whatever group you’re involved in because everyone thinks that they’ve been treated fairly.
 - *Number Two—Stay calm, listen, and respond to what the other person has said.*

Now, how might we apply Justice Breyer’s insights to our own conversations? What are some of the norms that we might set to engage in civil dialogue over important constitutional issues?

- *Don’t speak twice until everyone has spoken once.*
- *Stay calm.*
- *Listen patiently*—For instance, never interrupt others. And don’t have your hand up when someone else is speaking.
- *Listen actively*—Take notes on what other students say and cite one another.
- *Police your own voice*—Many of us like to talk a lot. Be aware of how long you’re speaking.



Question: With Justice Breyer’s advice in mind, how can we build a list of norms for our own conversations on Zoom this year?

- What are *three* interesting ways that you have heard people set norms for online discussion?
- What are *two* rules for online discussions?
- What is *one* word that you have heard repeated by people in healthy conversations online?

Possible Responses:

- One speaker at a time. Mute yourself when someone else is speaking. (The chat function should take care of this.) Raise your “Zoom” hand to speak.
- Refrain from distracting conversations in the “chat room.” Stay on point.
- Be present. Before sharing your thoughts, acknowledge the thoughts of others in the space.
- Step up and step back. Seek first to understand rather than to judge.
- No assumptions. The experience of others may not align with your own.
- In the end, our goal is to channel our inner Louis Brandeis—one of the most influential Supreme Court justices in American history. He famously remarked, **“Come let us reason together!”**

And so we will—in the weeks and months ahead!