

LAW 604, ADVANCED CONSTITUTIONAL LAW (SPRING 2017)

Tue & Thu, 10:20-11:50 Rm. 215; [Prof. Anthony Johnstone](#), Rm. 312 (x6711)

This course traces the intertwined development of federalism, liberty, and equality principles through periods of opposition and harmonization, when both national and local powers have either upheld or violated a range of rights. The course considers the roles of federalism, liberty, and equality under the First Amendment, the Fourteenth Amendment, and structural provisions. The course views current controversies through the lenses of competing constitutional theories, as well as constitutional practice based on analysis of leading cases and emerging issues chosen by students. In addition to discussion, students will present short moot courts and produce a research paper or draft judicial opinion.

Learning Outcomes. *Law:* the dominant theories of constitutional interpretation; their implications for constitutional practice by various government actors; and the dynamics of constitutional change with particular application to legal doctrines concerning federalism, liberty, and equality. *Skills:* problem solving, legal analysis, legal research, communication, and litigation. *Values:* Excellence in role as a representative of clients, an officer of the court, and a public citizen responsible for the quality and availability of justice; diversity and equality of opportunity in the practice of law.

Readings. The readings generally include a review of cases and new readings from the Constitutional Law casebook (denoted C:page numbers), Gerhardt et al.'s *Constitutional Theory: Arguments and Perspectives*, 4th ed. (LexisNexis 2013) (denoted CT:chapter numbers), the same book, 3rd ed. (denoted CT* and available on Moodle), one or more full cases as cited, and other materials posted on Moodle indicated by an asterisk (*). In addition to the assigned reading, read your classmates' briefs in preparation for arguments that week. *Laptop use in class is discouraged to facilitate engagement in class discussion.*

Questions. I am generally available except Tuesdays and Thursdays, my teaching days. Stop by any time my door is open or email for an appointment. Otherwise, please post questions on Moodle rather than emailing so your colleagues can benefit from them.

Assessment. Your grade has three components: *discussion* (20%), *argument* (30%), and *opinion* (50%). *Discussion* measures ongoing constructive engagement in class discussion, including engagement as judges in classmates' arguments. *Argument* measures the research, analysis, and presentation of two briefs posted on Moodle (1000 wds.) and argued in Thursday's class (5 mins.): an opening brief arguing an issue related to the week's topic (15%, posted 72 hours before class, limit one per day), and a response in opposition to a classmate's brief from a different week (15%, posted 24 hours before class, one response per presentation). Selections are final (unless a classmate will swap). *Opinion* measures the legal research, analysis, and writing of a 3000-word legal opinion and dissent, due by e-mail no later than 5pm May 19. Students may write an alternative to an opinion to satisfy their *Advanced Writing Requirement*, subject to Student Handbook policies; see me by Feb. 10.

Academic Honesty. All students must practice academic honesty. Academic misconduct is subject to an academic penalty by the course instructor and/or a disciplinary sanction by the University. All students need to be familiar with the [Student Conduct Code of the University of Montana](#). Law students should also be familiar with the Law School Honor Code in the Law Student Handbook.

Disabilities. Students with disabilities may request reasonable modifications by contacting me. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students. "Reasonable" means the University permits no fundamental alterations of academic standards or retroactive modifications.

Course Rubric

<i>Discussion (10 x 2 pts.)</i>				
0 <i>Disengaged; counter-productive.</i>	1 <i>Minimal engagement; leaves discussion where it stood.</i>	2 <i>Significant engagement; advances the discussion.</i>	1	6
			2	7
			3	8
			4	9
			5	10
<i>Opening Brief & Argument (15 pts.)</i>				
Research: Originality, Background, Coverage, Depth (5 pts.)				
Analysis: Balance, Accuracy, Synthesis, Conclusion (5 pts.)				
Communication: Organization, Format, Clarity, Style (5 pts.)				
<i>Response Brief & Argument (15 pts.)</i>				
Research: Originality, Background, Coverage, Depth (5 pts.)				
Analysis: Balance, Accuracy, Synthesis, Conclusion (5 pts.)				
Communication: Organization, Format, Clarity, Style (5 pts.)				
<i>Project (50 pts.)</i>				
Research (20 pts.) Originality (adds perspective to course material) Background (develops relevant factual and procedural background) Coverage (covers relevant legal authorities) Depth (explores focused topic deeply relative to paper length)				
Analysis (20 pts.) Balance (addresses arguments on both sides) Accuracy (correctly relies on relevant authority) Synthesis (synthesizes legal principles in application) Conclusion (supports brief conclusion with arguments)				
Writing (10 pts.) Organization (structures content effectively at all levels) Format (professional in type, grammar, punctuation, and spelling) Clarity (reads well as legal prose) Style (conveys content with rhetorical effect)				
<i>TOTAL (100 pts.)</i>				

AWR Planning Guide (Suggested for Projects)

Please consult the student handbook for details.

AWR Step (deadline)	Date
Topic Selection (by Feb. 10)	
Bibliographic Essay (by Mar. 3)	
Complete First Draft (by Mar. 30)	
Draft to Classmate (by Apr. 21)	
Oral Presentation: Law-Lapalooza (Tue., May 2)	
Final Draft with Self-Assessment (by May 19)	

The syllabus is subject to change depending on course and legal developments.

INTRODUCTION: CONSTITUTIONAL THEORY & PRACTICE

1. A. WHY THEORY?

- 1/24 CT:1 (American Constitutional Theory)
 (40) Whittington, *Wechsler's Complaint and the Revival of Theory* (2000)
 CT*:15 (Theory and Discontents)
 Tribe, *Challenges to the Coherence of Constitutional Law* (2005)
 Whittington, *Constitutional Theory as Political Science* (1998)

1/26 B. The Emoluments Clause

- (46+) *Tillman [Professor Teachout's Anti-Corruption Principle](#) (2012)
 Teachout, [Gifts, Offices, and Corruption](#), Nw. U. L. Rev. Colloquy (2012)

Opening: _____ **Response:** _____

2. A. CONSTITUTIONAL CHANGE

- 1/31 CT:2 (Constitutionalism and Constitutional Change)
 (42) Levinson, *Parchment & Politics: The Puzzle of Commitment* (2011)
 Ackerman, *Revolution on Human Scale* (1999) & *Transformations* (1998)
 Balkin & Levinson, *Understanding the Constitutional Revolution* (2001)

2/2 B. FEDERALISM

- (51+) *NFIB v. Sebelius*, 567 U.S. 1 (2012)

Opening: _____ **Response:** _____

3. A. JUDICIAL REVIEW

- 2/7 CT:4.01-4.02 (Theories of Judicial Review)
 (46) Bickel, *The Least Dangerous Branch* (1962)
 Ely, *Democracy and Distrust* (1980)
 Sultany, *The Project of Political Justification* (2012)
 [Keck, *Party Politics or Judicial Independence?* (2007)
 Pildes, *Is the Supreme Court a "Majoritarian" Institution?* (2011)

2/9 B. FREEDOM OF SPEECH

- (53+) *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010)

Opening: _____ **Response:** _____

4. A. JUDICIAL SUPREMACY & CRITICS

- 2/14 CT:4.03-4.04 (Judicial Supremacy Critiqued and Debated)
 (46) Waldron, *The Core of the Case Against Judicial Review* (2006)
 Fallon, *The Core of an Uneasy Case for Judicial Review* (2008)
 Alexander & Schauer, *Extrajudicial Constitutional Interpretation* (1997)
 Whittington, *Three Objections and Responses* (2002)

- 2/16 **B. VOTING & CIVIL RIGHTS / SOVEREIGNTY**
(18+) *Shelby County v. Holder*, 133 S. Ct. 2612 (2013)

Opening: _____ **Response:** _____

THE CONVENTIONS OF CONSTITUTIONAL ARGUMENT

5. **A. TEXT:**
2/21 CT*:5 (Textualism, excerpts)
(52*) Scalia, *A Matter of Interpretation* (1997)
Ely, *Democracy and Distrust* (1980)
Posner, *The Case Against Strict Constructionism* (1987)
[Lessig, *Fidelity in Translation* (1993)]
*Amar, *The Document and the Doctrine* (2000)

- 2/23 **B. THE RIGHT TO KEEP AND BEAR ARMS**
(42+) *District of Columbia v. Heller*, 554 U.S. 570 (2008)

Opening: _____ **Response:** _____

6. **A. HISTORY I: ORIGINALISM**
2/28 CT:5.01-5.05 (Originalism)
(55) Solum, *What is Originalism?* (2011)
Kay, *Original Intention and Public Meaning in Interpretation* (2009)
Whittington, *The New Originalism* (2004)
Barnett, *Interpretation and Construction* (2011)

- 3/2 **B. RELIGIOUS LIBERTIES**
(24+) *Burwell v. Hobby Lobby*, 554 U.S. 134 S.Ct. 2751 (2014)

Opening: _____ **Response:** _____

7. **A. HISTORY II: ORIGINALISM'S CRITICS**
3/7 CT:5.06-5.08 (Critiques) & CT:10.03 (Progressive Interpretation)
(45) Griffin, *Rebooting Originalism* (2008)
Klarman, *Antifidelity* (1997)
Balkin, *Fidelity to Text & Principle* (2007)
Solum, *Construction & Constraint* (2013)
Ryan, *Laying Claim to the Constitution: New Textualism* (2011)

- 3/9 **B. DEFINING RIGHTS**
(57+) *McDonald v. Chicago*, 130 S.Ct. 3020 (2010)

Opening: _____ **Response:** _____

8. A. STRUCTURE

- 3/14 CT:6 (Structural Reasoning); CT:11.01-.03 (Separation of Powers)
 (47) [The Formalist / Functionalist Debates]
 [Denning & Reynolds, *Comfortably Penumbral* (1997)]
 [Calabresi & Yoo, *The Unitary Executive* (2008)]
 [Levinson & Pildes, *Separation of Parties, Not Powers* (2006)]
 Law & Versteeg, *The Declining Influence of the US Constitution* (2012)
 Ackerman, *The New Separation of Powers* (2000)
 Calabresi, *The Virtues of Presidential Government* (2001)

3/16 B. EXECUTIVE POWER

- (46+) *Hamdi v. Rumsfeld*, 542 U.S. 507 (2004)

Opening: _____ **Response:** _____

3/21

[SPRING BREAK]

3/23

9. A. PRECEDENT & PRACTICE

- 3/28 CT:8 (Precedent in Constitutional Adjudication) & CT* (Strauss)
 (36) [*Stare decisis* case illustrations]
 [Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent* (2006)]
 [Vermeule, *Constitutional Conventions* (2012)]
 *Strauss, *Common Law Constitutional Interpretation* (1996)

3/30 B. CRUEL AND UNUSUAL PUNISHMENT

- (38+) *Roper v. Simmons*, 543 U.S. 551 (2005)

Opening: _____ **Response:** _____

10. A. PRINCIPLE: LIBERALISM

- 4/4 CT*:8 (Moral Reasoning) & CT:10.01-02 (Progressive Constitutionalism)
 (52*) NB: Online chapter from CT*:8 is easier to read than hard copy of CT:7
 Dworkin, *Freedom's Law: The Moral Reading of the Constitution* (1996)
 Perry, *Morality, Politics, and Law* (1988)
 McConnell, *The Importance of Humility in Judicial Review* (1997)
 Tushnet, *Progressive Constitutionalism: What Is "It"?* (2011)
 *Leiter, *The Supreme Court as Super-Legislature*

4/6 B. LIBERTY INTERESTS I: PERSONAL LIBERTY

- (29+) *Whole Women's Health v. Hellerstedt*, 132 S. Ct. 2292 (2016)

Opening: _____ **Response:** _____

11. A. PRINCIPLE: CONSERVATISM

4/11 CT:9 (Conservative and Libertarian Theories)

- (50) Office of Legal Policy, *Guidelines on Constitutional Litigation* (1988)
 Posner, *The Constitution as an Economic Document* (1987)
 [Pritchard & Zywicki, *An Economic Analysis of Tradition's Role* (1999)]
 [McGinnis, *In Praise of the Efficiency of Decentralized Traditions* (1999)]
 Scalia, *Economic Affairs as Human Affairs* (1987)
 Epstein, *Judicial Review: Reckoning on Two Kinds of Error* (1987)
 [Hamburger, *Natural Rights, Natural Law, and American Const* (1993)]
 [Barnett, *Natural Rights in Constitutional Adjudication* (1995)]
 Calabresi, *Originalist, Normative Case Against Judicial Activism* (2005)

4/13 **B. LIBERTY INTERESTS II: ECONOMIC LIBERTY**

- (37+) *Lee Optical v. Williamson*, 120 F.Supp. 128 (W.D. Okla. 1954); *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *Milnot Co. v. Richardson*, 350 F.Supp. 221 (S.D. Ill. 1972); *Hettinga v. U.S.*, 677 F.3d 471 (D.C. Cir. 2012)

Opening: _____ **Response:** _____

12. A. POLICY: POWER

4/18 CT* 12 & 13 (Selections) (Feminist and Critical Race Theory)

- (49) [Sherry, *Civic Virtue and the Feminine Voice in Adjudication* (1986)]
 [Smith, *Feminist Jurisprudence and the Nature of Law* (1993)]
 [Bartlett, *Feminist Legal Methods* (1990)]
 Levit, *The Gender Line: Men, Women and the Law* (1998)
 MacKinnon, *Difference and Dominance: On Sex Discrimination* (1987)
 Harris, *Race & Essentialism in Feminist Legal Theory* (1990)
 Matsuda, *Introduction: Words That Wound* (1993)
 Crenshaw, *Introduction: Critical Race Theory* (1995)
 [Bell, *Faces at the Bottom of the Well* (1993)]
 [Delgado, *The Rodrigo Chronicles* (1995)]
 *Higginbotham, *Local 542*, 388 F. Supp. 155, 163-66 (E.D. Pa. 1974)

4/20 **B. EQUAL PROTECTION / SOVEREIGNTY**(40*) *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)*NOTE: *Santa Clara, Feminist Legal Theory, and [Tribal Membership]*

Opening: _____ **Response:** _____

13. A. POLICY: PRAGMATISM (JUDICIAL REVIEW, REVISITED)

4/25 CT:3 (Judicial Activism and Restraint)

- (42) Posner, *The Rise and Fall of Judicial Self-Restraint* (2012)
 Sunstein, *Burkean Minimalism* (2006)
 [Keck, *The Most Activist Supreme Court in History* (2004)]
 *Vermeule, *System Effects and the Constitution* (2009)

4/27 **B. SEPARATION OF POWERS**(31+) *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014)

Opening: _____ **Response:** _____