

LAW 618, THE MONTANA CONSTITUTION (SPRING 2018)

Tue. & Th. 10:10-11:40, LAW 215; [Prof. Anthony Johnstone](#), Rm. 312 (x6711)

This course considers the history, development, and future of the Montana Constitution from a comparative perspective. Beginning with the forces that led to the Constitutional Convention of 1972, it surveys the structure of Montana state government and key provisions in the Declaration of Rights. It pays particular attention to distinctive provisions such as the right of privacy, the right to know, and the right to a clean and healthful environment. Throughout, the course considers the role of popular sovereignty in the interpretation of the constitution over time. Students will synthesize the material in short moot courts, an online research project, and a research paper or draft judicial opinion.

Learning Outcomes. *Law:* the primary distinctions between state and federal constitutional texts and practices in general; the origins and development of individual rights and governmental powers in the Montana Constitution; and the dynamics of formal and informal constitutional change through amendment and interpretation. *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 & equality of opportunity in the practice of law.

Readings & Class. Montana cases and materials will be supplemented by Holland et al.'s *State Constitutional Law: The Modern Experience* (West 2d Ed., 2015) (denoted SCL: chapter and section). In addition to the assigned reading, read your classmates' briefs in preparation for arguments that week. *Laptop use in class is discouraged to facilitate class engagement.*

Questions. I am generally available in my office except immediately before class. 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 four components: *discussion* (20%), *arguments* (30%), *opinion / wiki* (50%). *Discussion* measures ongoing constructive engagement in class discussion and classmates' arguments. *Argument* measures the research, analysis, and presentation of two briefs posted on Moodle (750 wds.) and argued in class (5 mins.): an opening brief arguing a case related to a day's topic (15%, posted 72 hours before class), and a response to a classmate's brief from a different day (15%, posted 24 hours before class); the case may be real (from Montana or other courts) or possible (e.g., from bills or other proposals). Selections are final unless a classmate will swap. *Please post, rather than attach, your brief on Moodle.* *Opinion/Wiki* measures the legal research, analysis, and writing of a short judicial opinion and dissent (1500 wds.) and the equivalent legal research and reporting of a *wiki* entry on a section of the Montana Constitution posted to the MonConWiki (25% each), or two *wiki* entries (25% each), due by e-mail (or posted on wiki) by 5pm May 18. Students may satisfy the *Advanced Writing Requirement* instead, subject to the Student Handbook; see me by Feb. 9.

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 (1 x 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 (1 x 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>Opinion / Wiki (2 x 25 pts.)</i>				
Research (8 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 (8 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 (4 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)				
TOTAL (100 pts.)				

AWR Planning Guide (Suggested for Projects)

Please consult the student handbook for details.

AWR Step (deadline)	Date
Topic Selection (by Feb. 9)	
Bibliographic Essay (by Mar. 2)	
Complete First Draft (by Apr. 2)	
Draft to Classmate (by Apr. 27)	
Oral Presentation: Law-Lapalooza (Tue., May 1)	
Final Draft with Self-Assessment (by May 18)	

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

PART I: INTRODUCTION

1. Introduction to State Constitutions (62)

1/23 Mont. Const. Art. I (Compact with the United States)
SCL XVI (Framing and History of State Constitutions) (987-1049)

2. History, Drafting, and Ratification of the Montana Constitution (39)

1/25 Mont. Const. Preamble
SCL I (Introduction)
*Part 1, *The Montana State Constitution*, Larry M. Elison and Fritz Snyder
**For This and Future Generations ...* (57 min. video)
**In re Graybill*, 159 Mont. 549 (1972); **Burger v. Judge*, 364 F. Supp. 504 (1973)

3. Constitutional Revision (33)

1/30 Mont. Const. Art. II, § 1 (Popular sovereignty)
Mont. Const. Art. II, § 2 (Self-government)
Mont. Const. Art. XIV (Constitutional Revision)
Skim Mont. Const. Art. II, § 36 (Rights of Crime Victims)
SCL XV: Amendment & Revision (941-959, 971-75)
Permaloff, *Altering State Constitutions* (2003)
George, *The Perils of Direct Democracy: The California Experience* (2009)
**Harper v. Greely*, 234 Mont. 259 (1988); **MACO v. State*, 2017 MT 267

Opening: _____ **Response:** _____

4. The Independence of State Constitutional Law (& Crim Pro) I (26)

2/1 Mont. Const. Art. II, § 10 (Right of privacy)
Mont. Const. Art. II, § 11 (Searches & seizures)
SCL III: Theories of State Constitutional Similarities (115-132)
Sitz v. State (Mich. 1993); *State v. Hempele* (N.J. 1990); *Blum v. Merrell Dow* (Penn. 1993); **State v. A Blue in Color, 1993 Chevrolet Pickup*, 2005 MT 180 (9)
Independent Grounds: *Ohio v. Robinette* (Ohio 1995, 1996, Ohio 1997) (139-150)
Sequencing: Sutton, *What Does ... Ail State Constitutional Law* (2011) (150-159)

Opening: _____ **Response:** _____

5. The Independence of State Constitutional Law (& Crim Pro) II (36)

2/6 Mont. Const. Art. II, § 10 (Right of privacy)
Mont. Const. Art. II, § 11 (Searches & seizures)
SCL III: Differences & Independent Grounds (132-33, 137-59)
State v. Jorden (Wash. 2007); *Ohio v. Robinette* (Ohio 1995, 1996, Ohio 1997);
**State v. Long*, 700 P.2d 153 (1985) (13)
Sequencing: Sutton, *What Does ... Ail State Constitutional Law* (2011)

Opening: _____ **Response:** _____

PART II: POWERS

6. Legislative Power: Limits on Legislation (43)

- 2/8 Mont. Const. Art. III, § 4 (Initiative)
 Mont. Const. Art. V, § 11 (Bills)
 Mont. Const. Art. V, § 12 (Local and Special Legislation)
 Mont. Const. Art. VIII, § 1, 3 (Tax purposes)
 SCL XIV.C: Public Purpose Requirements (790-97)
Town of Beloit v. County of Rock (Wis. 2003)
 **White v. State*, 233 Mont. 81 (1988) (8); **Rohlf's v. Klemhagen*, 2009 MT 440 (28)

Opening: _____ **Response:** _____

7. Executive Power & Separation of Powers (24)

- 2/13 Mont. Const. Art. III, § 1 (Separation of powers)
 Mont. Const. Art. VI, § 4 (Executive duties)
 Mont. Const. Art. X, § 9 (Boards of education)
 SCL XV.A, C.1: Executive & Legislative Powers (825)
 Executive Power: *Perdue v. Baker* (Ga. 2003) (838-46)
 Separation of Powers: **Board of Regents v. Judge*, 168 Mont. 433 (1975) (10)
 **MEA-AFT v. McCulloch*, 2012 MT 211 (6)

Opening: _____ **Response:** _____

8. Judicial Power (36)

- 2/15 Mont. Const. Art. VII, § 2 (Supreme court jurisdiction)
 Mont. Const. Art. XI, § 7 (Terms and pay)
 Mont. Const. Art. XI, § 9 (Qualifications)
 SCL XV.D.1, E: Judicial Power (864-871)
 Judicial Elections: Maute, *Selecting Justice in State Courts* (2000)
 **Coate v. Omholt*, 203 Mont. 488 (1983) (8); **Reichert v. State*, 2012 MT 111 (21)

Opening: _____ **Response:** _____

9. Open Courts (39)

- 2/20 Mont. Const. Art. II, § 16 (The administration of justice)
 SCL XI: The Right to a Remedy and Open Courts (635-638, 675-688)
 Roesler, *Defining a Right to a Remedy* (1999)
Laney v. Fairview City (Utah 2002); *Tindley v. Salt Lake S.D.* (Utah 2005)
 **Meech v. Hillhaven West*, 248 Mont. 21 (1989) (31)

Opening: _____ **Response:** _____

10. Local Government (26)

- 2/22 Mont. Const. Art. XI, § 4 (General powers)
 Mont. Const. Art. XI, § 6 (Self-government powers)
 Mont. Code Ann. § 7-1-111 (Powers denied)
 **D & F Sanitation Service v. Billings* 219 Mont. 437 (1986) (4); **American Cancer Society v. State*, 2004 MT 376 (9); **Phillips v. Whitefish*, 2014 MT 186 (Issue 2) (13)

Opening: _____ **Response:** _____

11. Education (28)

- 2/27 Mont. Const. Art. X, § 1 (Educational goals and duties)
 SCL X.A-C: School Funding Litigation (585-587, 593-98, 612-615)
 Equity: *Vincent v. Voight* (Wis. 2000); Adequacy: *Abbott v. Burke* (N.J. 2009);
 **Columbia Falls Elem. SD v. State*, 2005 MT 69 (entirety) (10)
 Emerging Issues: **Kaptein v. Conrad School Dist.*, 281 Mont. 152 (1997) (8)

Opening: _____ **Response:** _____

PART III: RIGHTS**12. Background of State Constitutional Rights (& Economic Rights)**

- 3/1 Mont. Const. Art. II, § 3 (Inalienable rights)
 (37) Mont. Const. Art. XII, § 3 (Institutions and assistance)
 SCL: V.A (Due Process Introduction) (233-235)
 **Butte Community Union v. Lewis*, 219 Mont. 426 (1986); **Wadsworth v. Department of Revenue*, 275 Mont. 287 (1996); **Wiser v. State*, 2006 MT 20

Opening: _____ **Response:** _____

13. Dignity, Equal Protection, & Nondiscrimination: Introduction (28)

- 3/6 Mont. Const. Art. II, § 4 (Individual dignity)
 Mont. Const. Art. II, § 15 (Rights of persons not adults)
 SCL: IV.A (Equality Introduction), IV.D (Age): *Arneson v. State* (Mont. 1993), IV.F (Economic Rights): *Benson v. North Dakota* (N.D. 1979) (161-162, 193-197, 207-211)
 **Caldwell v. MACO Workers Comp. Trust*, 2011 MT 162 (11);
 **Oberson v. USDA*, 2007 MT 293 (8)

Opening: _____ **Response:** _____

14. Dignity, Equal Protection, & Nondiscrimination: Race (28)

- 3/8 Mont. Const. Art. II, § 4 (Individual dignity)
 IV.B-C (Racial & Gender Equality) (161-179)
Sheff v. O'Neill (Conn. 1996); *Malabed v. North Slope Borough* (Alaska 2003);
 **State v. Shook*, 2002 MT 347 (6); **Dupuis v. Bd. of Trustees*, 2006 MT 3 (3);

Opening: _____ **Response:** _____

15. Dignity, Equal Protection, & Nondiscrimination: Sexual Orientation (103)

- 3/13 Mont. Const. Art. II, § 4 (Individual dignity)
 SCL: IV.E (Sexual Orientation): Note only (201)
 **Snetsinger v. Mont Univ*, 2004 MT 390 (35); **Donaldson v. State*, 2012 MT 288 (67)

Opening: _____ **Response:** _____

16. Privacy: Introduction (28)

- 3/15 Mont. Const. Art. II, § 10 (Right of privacy)
 SCL: XII.A (Privacy): *York v. Wahkiakum S.D.* (Wash. 2008) (693-700)
 **State v. Nelson*, 283 Mont. 231 (1997) (7);
 **Gryczan v. State*, 283 Mont. 433 (1997) (12)

Opening: _____ **Response:** _____

17. Privacy: Reproductive Autonomy (32)

- 3/20 Mont. Const. Art. II, § 10 (Right of privacy)
 SCL: V.B (Reproductive Autonomy): *In re T.W.* (Fla. 1989); *Planned Parenthood v. Sundquist* (Tenn. 2000); *Reprod. Health Svc. V. Nixon* (Mo. 2006) (242-256)
 **Armstrong v. State*, 1999 MT 261 (18)

Opening: _____ **Response:** _____

3/27

SPRING BREAK

3/29

18. Privacy: Bodily Integrity (Dignity, revisited) (49)

- 3/22 Mont. Const. Art. II, § 10 (Right of privacy)
 SCL: V.E (Bodily Integrity): *Ravin v. State* (Alaska 1975) (318-23)
 **Walker v. State*, 2003 MT 134 (16); **Baxter v. State*, 2009 MT 449 (28)

Opening: _____ **Response:** _____

19. Right to Know and Right to Participate (42)

- 4/3 Mont. Const. Art. II, §8 (Right of participation)
 Mont. Const. Art. II, § 9 (Right to know)
 **Bryan v. Yellowstone Co. SD*, 2002 MT 264 (11); **Billings Gazette v. Billings*, 2013 MT 334 (17); **Krakauer v. State*, 2016 MT 230 (14)

Opening: _____ **Response:** _____

20.* Elections and Voting (15)

- 4/5 Mont. Const. Art. II, § 13 (Right of Suffrage)
 Mont. Const. Art. IV, § 3 (Elections)
 SCL: IV.G (The Right to Vote) (221-231)
Weinschenk v. State (Mo. 2006); *League of Women Voters v. Rokita* (Ind. 2010);
 **Finke v. State ex rel. McGrath*, 2003 MT 48

Opening: _____ **Response:** _____

Browning Lecture: Judge Jeffrey Sutton on State Constitutions (5:00)
(Guest appearance in class TBD)

21. Freedom of Religion (39)

- 4/10 Mont. Const. Art. II, § 5 (Freedom of religion)
 Mont. Const. Art. X, § 6 (Aid prohibited to sectarian schools)
 SCL: IX (Religion Clauses): Introduction; *AG v. Desilets* (Mass. 1994); *Catholic Charities v. Serio* (Ct. App. N.Y. 2006); Establishment (Background); *Taxpayers for Public Ed. v. Douglas Co. S.D.* (Colo. 2015) (537-538, 545-549, 554-562, 567-73)
 **Big Sky Colony v. Dept. Labor & Industry*, 2012 MT 320 (20)

Opening: _____ **Response:** _____

22. Freedom of Expression (34)

- 4/12 Mont. Const. Art. II, § 6 (Freedom of assembly)
 Mont. Const. Art. II, § 7 (Freedom of expression)
 XII.B (Free Speech & Expression) (700): **State v. Henry*, 732 P.2d 9 (Or. 1987) (9);
 **State v. Dugan*, 2013 MT 38 (18); *State v. Lilburn*, 875 P.2d 1036 (1994) (6)

Opening: _____ **Response:** _____

23. Due Process (23)

4/17 Mont. Const. Art. II, § 17 (Due process of law)

State v. Stanko*, 1998 MT 321 (7); **Matter of J.S.*, 2017 MT 214 (11);In re Adoption of AWS*, 2014 MT 322 (5)**Opening:** _____ **Response:** _____**24. Economic Rights (55)**

4/19 Mont. Const. Art. II, § 29 (Eminent domain)

SCL: VIII.A-C (Property Rights): Introduction; Takings Provisions (Introduction & Notes); *Patel v. Texas Dept. of Licensing* (Tex. 2015) (469-470; 504-505; 513-36)**Buhmann v. State*, 2008 MT 465 (Issues 3-5) (30)**Opening:** _____ **Response:** _____**25. Right to a Clean and Healthful Environment (54)**

4/24 Mont. Const. Art. IX, § 1

MEIC v. DEQ*, 1999 MT 248 (13); **Robinson Tp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013) (41) (focus on the Section 27 environmental rights amendment claims)Opening:** _____ **Response:** _____**26. Implied Constitutional Remedies & Attorneys Fees (43)**

4/26 Mont. Const. Art. II, § 34 (Unenumerated rights)

SCL: XIV.D.4 (Implied Constitutional Remedies) (Notes) (932)

Dorwart v. Caraway*, 2002 MT 240 (31); **Sunburst SD v. Texaco*, 2007 MT 183 (Issue 3) (2); **Western Tradition Partnership v. Atty Gen.*, 2012 MT 271 (10)Opening:** _____ **Response:** _____