

LAW 604, ADVANCED CONSTITUTIONAL LAW (SPRING 2019)
Tue, 2:50 – 5:50 Rm. 215; [Prof. Anthony Johnstone](#), Rm. 312 (x6711)

This course addresses the theory and practice of constitutional law, with an emphasis on interpretation by courts and other constitutional actors. After a brief introduction through a current controversy, the first half of the course considers the theories underlying the primary modalities of American constitutional argument: text, structure, history, precedent, policy, and principle. The second half of the course considers the roles of federalism, liberty, and equality under the First Amendment, the Fourteenth Amendment, and structural provisions put into practice through 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. *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), readings as cited, linked, or 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 send me a calendar invitation for an appointment. Post any questions on Moodle rather than emailing so your colleagues can benefit from them.

Assessment. Your grade has three components: *discussion* (25%), *argument* (25%), 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 an argument posted on Moodle (1000 wds. max., Friday for openings, Sunday for responses, no attachments please) and debated in class (5 mins.). In the first half of the course, arguments should support either side of the day's resolution with one or more cases; in the second half, arguments should support either side of an emerging case with one or more of the methods presented in the first half. Selections are final (unless a classmate will swap). *Opinion* measures the legal research, analysis, and writing of a legal opinion and dissent (3000 wds. min. total), due by e-mail no later than 5pm May 10. Instead of an argument & opinion, students may satisfy their *Advanced Writing Requirement*, subject to Student Handbook policies; see me by Friday, Feb. 8.

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

Excellent: Substantially exceeds standards.	Good: Fully satisfies course standards; normal.	Satisfactory: Substantially satisfies standards.	Poor: Partially satisfies course standards.	No Credit: Does not satisfy course standards.
Discussion: 25 pts. (13 responses x 2 pts., throughout semester*) <i>*Includes posted responses to relevant events during semester; contact me to nominate an event.</i>				
2. Insightful engagement. Well-prepared, engaged in materials, advances discussion.		1. Basic engagement. Makes basic effort to understand, respond to discussion.		0. Disengaged. Absent / disruptive.
Argument: 25 pts. (10 pts. research, 10 pts. analysis, 5 pts. communication)				
9-10. Deep research. Applies law to novel issue; concise background; cites on-point cases beyond leading cases, and secondary sources where appropriate.	7-8. Good research. Applies law to relevant court case on issue; covers key background; cites leading cases, including cases outside readings.	6. Basic research. Applies law to relevant case; covers basic background; cites appropriate leading cases from the readings.	5. Poor research. Applies law to obvious case without apparent research; cites few other cases; apparently no significant outside research.	0-4. No research. Reiterates existing case; no original case citations; no indication of research beyond the readings.
9-10. Compelling analysis. Synthesizes law persuasively; headings caption each step; engages strongest arguments and counter-arguments.	7-8. Good analysis. Applies law accurately; clearly structured with headings; fully-supported claims; offers best arguments in support of position.	6. Basic analysis. States law accurately; basically structured argument section; covers core argument but missing points.	5. Poor analysis. Misstates law; lacks structure or basic headings; misses core argument or makes irrelevant argument.	0-4. No analysis. Conclusory or adopts underlying case analysis without demonstrating comprehension of applicable law.
5. Lucid Writing. & Argument. Winning intro; clear structure; nearly flawless prose. Punchy delivery with roadmap; conversational; clear responses to ct, opp.	4. Good writing. & Argument. Clear introduction, well-organized; minor errors, typos. Confident delivery; well-paced, little reading; draws questions.	3. Basic writing. & Argument. Basic introduction and organization; some errors. Tentative delivery; too fast or too long; relying on brief; basic responses.	2. Poor writing. & Argument. Poorly organized throughout; many errors. Halting delivery; mostly reading from brief; missed chances to respond.	0-1. Writing fail. & Argument. Incomplete; lacking organization; not proofread. Unprepared; nonresponsive or distracting responses.
Opinion: 50 pts. (20 pts. research, 20 pts. analysis, 10 pts. writing)				
18-20. Deep research. (Above)	15-17. Good research. (Above)	13-14. Basic research. (Above)	10-12. Poor research. (Above)	0-9. Lacks research. (Above)
18-20. Compelling analysis. (Above)	15-17. Good analysis. (Above)	13-14. Basic analysis. (Above)	10-12. Poor analysis. (Above)	0-9. Lacks analysis. (Above)
9-10. Lucid Writing. (Above)	7-8. Good writing. (Above)	6-7. Basic writing. (Above)	5. Poor writing. (Above)	0-4. Writing fail. (Above)
Self-Assessment (100 words) (optional, if you want an assessment of the assignment)				
Email me a reflection on your performance for the relevant assignment. (Please include <u>Adv19</u> in the subject, no spaces.) Consider <i>whether</i> your performance met expectations, <i>what</i> choices you could have made differently, <i>why</i> you made the choices you did (for yourself, for others involved, and for social/institutional reasons), and <i>how</i> your thinking process changed as a result of the performance.				

AWR Planning Guide (see handbook; suggested for projects): (1) Topic selection, January; (2) Bibliographic Essay, February; (3) First Draft, March; (4) Classmate reviews draft, April; (5) Oral presentation at Lawlapalooza, April 24; (6) Final Draft, May 10.

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

INTRODUCTION: CONSTITUTIONAL THEORY & PRACTICE

1. A. INTRODUCTION: THEORY OF THE COURSE [24]

- 1/15 *Philip Bobbitt, *Methods of Constitutional Argument*, 23 U. BRIT. COLUM.
[54] L. REV. 449 (1989) (online) [10]
CT:1 (American Constitutional Theory) [14]
Whittington, *Wechsler's Complaint and the Revival of Theory* (2000)

B. CONSTITUTIONAL CHANGE AND ENTRENCHMENT [30]

- CT:2.03 (Constitutional Change) & 2.04 (Constitutional Entrenchment)
Levinson, *Parchment & Politics: The Puzzle of Commitment* (2011) [9]
Ackerman, *Revolution on Human Scale & Transformations* (1998) [9]
Balkin & Levinson, *Understanding Constitutional Revolution* (2001) [9]

C. WHAT IS A CONSTITUTIONAL CRISIS? [4]

- *Jurecic & Wittes, [The Verge of a Constitutional Crisis?](#) (2018) (link) [4]

RESOLVED, the United States is facing a Constitutional Crisis. See ???
Find an issue that a commentator identifies with a "constitutional crisis."
Post a description of or link to the discussion of the issue on Moodle.
Do you agree? How do the readings help diagnose a crisis / non-crisis?

2. A. JUDICIAL REVIEW [25]

- 1/22 CT:4.01-4.02 (Theories of Judicial Review)
[81] Bickel, *The Least Dangerous Branch* (1962) [4]
Ely, *Democracy and Distrust* (1980) [5]
[Keck, *Party Politics or Judicial Independence?* (2007) [2]]
Pildes, *Is the Supreme Court a "Majoritarian" Institution?* (2011) [14]

B. JUDICIAL SUPREMACY & CRITICS [46]

- CT:4.03-4.04 (Judicial Supremacy Critiqued and Debated)
Waldron, *The Core of the Case Against Judicial Review* (2006) [18]
[Tushnet, *Taking the Constitution Away from the Courts* (1999) [2]]
[Posner, *Appeal and Consent* (1999) [1]]
Fallon, *The Core of an Uneasy Case for Judicial Review* (2008) [11]
Alexander & Schauer, *Extrajudicial Const. Interpretation* (1997) [3]
Whittington, *Three Objections and Responses* (2002) [12]

RESOLVED, the federal judiciary is supreme in the exposition of the law of the Constitution.

FOR _____ AGAINST _____

THE METHODS OF CONSTITUTIONAL ARGUMENT

3. A. TEXT & HISTORY: ORIGINALISM [47]

1/29 CT:5.01-5.05 (Originalism)

- [71] 5.01: Solum, *What is Originalism?* (2011) [25]
 5.05 Scalia, *Originalism, the Lesser Evil* (1989) [9]
 Barnett, *A Critique of Faint-Hearted Originalism* (2006) [13]

B. TEXT & HISTORY: TEXTUALIST APPROACHES [24]

CT:5.07 & CT:10.03 (Progressive Originalism)

- 5.07: Balkin, *Fidelity to Text & Principle* (2007) [10]
 Solum, *Construction & Constraint* (2013) [2]
 10.03: Ryan, *Laying Claim to the Const: New Textualism* (2011) [12]

RESOLVED, the original meaning of the Constitution is the primary source of its meaning.

FOR _____ AGAINST _____

4. A. STRUCTURE [49]

2/5 CT:6 (Structural Reasoning); CT:11.01-.03 (Separation of Powers)

- [49] [Black, *Structure & Relationship in Constitutional Law* (1969) [2]]
 [Formalism & Functionalism in Separation of Powers [6]]
 [Rights, States: Denning-Reynolds, *Comfortably Penumbral* (1997) [1]]
 [Executive: Calabresi & Yoo, *The Unitary Executive* (2008) [2]]
 [Politics: Levinson-Pildes, *Separation of Parties, Not Powers* (2006) [4]]
 Law & Versteeg, *Declining Influence of the US Constitution* (2012) [9]
 [Linz, *The Perils of Presidentialism* (1990) [2]]
 Ackerman, *The New Separation of Powers* (2000) [14]
 Calabresi, *The Virtues of Presidential Government* (2001) [9]

RESOLVED, the structure of the Constitution is the primary source of its meaning.

FOR _____ AGAINST _____

5. PRECEDENT & PRACTICE [40]

2/12 CT:8 (Precedent), CT:9, 376-80 (Tradition) & CT* (Strauss)

- (40) [*Stare decisis* case illustrations [17]]
 [Barnett, *It's a Bird, It's a Plane, No, It's Super Precedent* (2006) [3]]
 [Vermeule, *Constitutional Conventions* (2012) [2]]
 [Pritchard & Zywicki, McGinnis (1999) on Tradition [4]]
 *Strauss, *Common Law Const'l Interpretation* (1996) (Moodle) [14]

RESOLVED, the practice of the Constitution by the [Courts / People] is the primary source of its meaning.

FOR _____ AGAINST _____

6. A. PRINCIPLE: LIBERALISM [24]

- 2/19 CT*:7 (Moral Reasoning) & CT:10.01-02 (Progressive Constitutionalism)
 (46) Dworkin, *Freedom's Law: Moral Reading of the Constitution* (1996) [8]
 Perry, *Morality, Politics, and Law* (1988) [3]
 McConnell, *The Importance of Humility in Judicial Review* (1997) [13]

B. PRINCIPLE: CONSERVATISM [30]

- CT:9 (Conservative and Libertarian Theories)
 Office of Legal Policy, *Guidelines on Constitutional Litigation* (1988) [8]
 Scalia, *Economic Affairs as Human Affairs* (1987) [3]
 Epstein, *Judicial Review: Reckoning on Two Kinds of Error* (1987) [3]
 [Jaffa, *What Were the Original Intentions of the Framers?* (1987) [1]]
 [Thomas, *Higher Law Background of Privileges or Immunities* (1989) [1]]
 [Hamburger, *Natural Rights, Natural Law, American Const.* (1993) [2]]
 [Barnett, *Natural Rights in Constitutional Adjudication* (1995) [2]]
 Calabresi, *The ... Case Against Judicial Activism* (2005) [11]

RESOLVED, the principles underlying the Constitution are the primary sources of its meaning.

FOR _____ AGAINST _____

7. A. POLICY: PRAGMATISM (JUDICIAL REVIEW, REVISITED) [45]

- 2/26 CT:3 (Judicial Activism and Restraint)
 [53] Posner, *The Rise and Fall of Judicial Self-Restraint* (2012) [13]
 Sunstein, *Burkean Minimalism* (2006) [5]
 [Keck, *The Most Activist Supreme Court in History* (2004) [3]]
 *Vermeule, *System Effects and the Constitution* (2009) [19]
 CT:9. Posner, *The Constitution as an Economic Document* (1987) [5]

B. POLICY: POWER (JUDICIAL REVIEW, REVISITED) [8]

- CT: 8. Tushnet, *Progressive Constitutionalism: What Is "It"?* (2011) [8]

RESOLVED, the practical consequences of the Constitution are, or ought to be, the primary sources of its meaning.

FOR _____ AGAINST _____

CURRENT CONSTITUTIONAL ARGUMENTS**8. TOPIC 1:**

3/5

() OPENING _____ RESPONSE _____

9. TOPIC 2:

3/12

() OPENING _____ RESPONSE _____

10. TOPIC 3:

3/19

() OPENING _____ RESPONSE _____

3/26

[SPRING BREAK]**11. TOPIC 4:**

4/2

() OPENING _____ RESPONSE _____

12. TOPIC 5:

4/9

() OPENING _____ RESPONSE _____

13. TOPIC 6:

4/23

() OPENING _____ RESPONSE _____

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LAW-LAPALOOZA (AWR PRESENTATIONS)4/24 *Optional discussion credit available for attending and responding.*