Law 618, The Montana Constitution (Fall 2021)
Mon. & Wed. 10:30 – 12:00, Law 219; Prof. Anthony Johnstone, Rm. 312 (x6711)

This course considers the history, development, and future of the Montana Constitution. Beginning with the 1972 Constitutional Convention, it surveys the structure of Montana state government and key provisions in the Declaration of Rights, including 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 interpreting the constitution. Students will synthesize the material in class discussion; short moot courts; and a research paper, draft judicial opinion, or online “wiki” posting.

Learning Outcomes. Law: primary distinctions between state and federal constitutional texts and practices; origins and development of individual rights and governmental powers in the Montana Constitution; and 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. The primary text is Johnstone, The Montana Constitution in the State Constitutional Tradition (Carolina Academic 2021), and any readings denoted with an *asterisk. Also read your classmates’ briefs in preparation for the day’s arguments.

Attendance. Class attendance is synchronous in-person with face masks. Attend remotely via Zoom (https://umontana.zoom.us/my/johnstone) if you have COVID-19 symptoms or exposure, any exigent circumstances in handbook, or my prior permission.

Assessment. Your grade has three components: discussion (20%), arguments (30%), project (50%). Please see the rubric for additional details.

Discussion measures weekly constructive engagement in class discussion and classmates’ arguments. In addition to class discussion, you may receive up to 5 points for each correction, clarification, or condensing cut to the draft casebook.

Argument measures the research, analysis, and presentation of two briefs posted on Moodle (750 wds. max.) 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, but not from the casebook) 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) a research paper (3000 wds. min., 5000 wds. min. for AWR); (b) a judicial opinion and dissent (3000 wds. min.); or the equivalent legal research and reporting of a wiki entry on one or more sections of the Montana Constitution posted to the MonConWiki uploaded to Moodle (or posted to wiki) by 5pm December 17.

Questions. Please post course questions on Moodle. You may make an appointment (Zoom or outdoors) by sending me a calendar invite via an iCalendar (.ics) compatible app.

Academic Honesty. All students must practice academic honesty under the Student Conduct Code of the University of Montana and the Law School Honor Code.

Disabilities. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and the Office for Disability Equity. If a disability may be affecting your academic performance, contact ODE.
# Course Rubric

<table>
<thead>
<tr>
<th>Excellent:</th>
<th>Good: Fully satisfies course standards; normal.</th>
<th>Satisfactory:</th>
<th>Poor: Partially satisfies course standards.</th>
<th>No Credit:</th>
<th>Does not satisfy course standards.</th>
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<tbody>
<tr>
<td>Substantially exceeds standards.</td>
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<td>Substantially satisfies standards.</td>
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**Discussion: 20 pts.** (20 engagements throughout semester, see rubric for breakdown*)
*Includes posted responses to relevant events during semester; contact me to nominate an event.

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<tr>
<th>1. Insightful engagement. Well-prepared, engaged in materials, advances discussion.</th>
<th>0.5. Basic engagement. Makes basic effort to understand, respond to discussion.</th>
<th>0. Disengaged. Absent/disruptive.</th>
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**Arguments: 2 x 15 pts.** (5 pts. research, 5 pts. analysis, 5 pts. communication)

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<tr>
<th>1. Writing fail.</th>
<th>4. Good research. Applies law to relevant court case on issue; covers key background; cites leading cases, including cases outside the readings.</th>
<th>3. Basic research. Applies law to relevant case; covers basic background; cites appropriate leading cases from the readings.</th>
<th>2. Poor research. Applies law to obvious case without apparent research; cites few other cases; apparently no significant outside research.</th>
<th>0-1. No research. Reiterates existing case; no original case citations; no indication of research beyond the readings.</th>
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<td>Lacks organization; not proofread. &amp; Argument. Unprepared; nonresponsive or distracting responses.</td>
<td>Syntactically clear; logically sound structure and organization; avoids minor errors, typos. &amp; Argument. Confident delivery; well-paced, little reading; draws questions.</td>
<td>Syntactically clear and well-organized; avoids errors and typos. &amp; Argument. Tentative delivery; mostly reading; too fast or too long; relying on brief, basic responses.</td>
<td>Incomplete; not proofread. &amp; Argument. Unorganized; not well-written.</td>
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**Paper/Opinion/Wiki: 50 pts.** (20 pts. research, 20 pts. analysis, 10 pts. writing)

|--------------------------------|-------------------------------|-------------------------------|-------------------------------|--------------------------------|

**18-20. Compelling analysis. (Above)**

|-------------------------------------|-----------------------------|-------------------------------|-------------------------------|--------------------------------|

**9-10. Lucid Writing. (Above)**

|-------------------------------|------------------------|----------------------------|-----------------------------|------------------------------|

AWR Planning Guide (see handbook; suggested for projects): (1) Topic selection, September; (2) Bibliographic Essay, October; (3) First Draft, November; (4) Classmate reviews draft, December; (5) Oral presentation at Lawlapalooza; (6) Final Draft, Dec 17.
The syllabus is subject to change depending on course and legal developments.

| 1. Mon 8/23 | Chapter 1: Origins of the Montana Constitution  
A. **THE STATE CONSTITUTIONAL TRADITION**  
1. **Ideological Origins of State Constitutions**  
2. **Contemporary State Constitutionalism**  
   - Rodriguez, *State Constitutional Failure* (2011)  
B. **FRAMING THE MONTANA CONSTITUTION**  
1. **The 1889 Statehood Constitution**  
2. **Framing the 1972 Constitution**  
   - *In re Leo C. Graybill, Jr.*, 159 Mont. 549 (1972)  
| 3. Mon 8/30 | Chapter 1: Origins of the Montana Constitution  
C. **CONSTITUTIONAL REVISION**  
   - MONT. CONST. Art. II, § 2 (Self-government); MONT. CONST. Art. XIV, § 8 (Amendment by legislative referendum); MONT. CONST. Art. XIV, § 9 (Amendment by initiative); MONT. CONST. Art. XIV, § 11 (Submission)  
| 4. 9/1 | [FACULTY RETREAT]  
   - **11:30 – 2:30 Gathering of Living Delegates**  
     To attend online, see here: https://meic.org/events/concon-celebration/ |
| 9/6 | [LABOR DAY] |
### Chapter 2: Interpretation & Enforcement

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**A. STATE CONSTITUTIONAL INDEPENDENCE (HEREIN OF CRIMINAL PROCEDURE)**

1. **Independent and Adequate State Grounds**
   - *State v. Robinette*, 73 Ohio St.3d 650 (1995)
   - *State v. Robinette*, 80 Ohio St.3d 234 (1997)

2. **Making State Constitutional Distinctions**

Notes on State Constitutional Distinctions and Lockstepping


### Chapter 2: Interpretation & Enforcement

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**B. CONSTITUTIONAL REMEDIES**

- **1. Sovereign Immunity**

- **2. Constitutional Torts**

- **3. Attorneys’ Fees**

**PART II: STRUCTURE**

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**Chapter 3: Legislative Powers, Duties, and Limits**

- **A. LEGISLATIVE PROCESS AND PUBLIC PURPOSE**

- **B. SPECIAL LEGISLATION**
  - *Van Kley, Article V, Section 12 of the Montana Constitution* (2018)

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**Chapter 4: Executive Powers**

- **A. THE DIVIDED EXECUTIVE BRANCH**

- **B. DELEGATION OF POWERS**
  - *Judge v. Legislative Finance Committee*, 543 P.2d 1317 (1975)
  - *In the Petition to Transfer Territory, Lame Deer*, 303 Mont. 204 (2000)
9. Chapter 5: Judicial Powers  
   MONT. CONST. Art. VII, § 1 (Judicial power); MONT. CONST. Art. VII, § 2  
   (Supreme Court jurisdiction); MONT. CONST. Art. VII, § 8 (Selection); MONT.  
   CONST. Art. II, § 16 (The administration of justice)  
   A. JUDICIAL INDEPENDENCE  
   Reichert v. State, 365 Mont. 92 (2012)  
   B. JUSTICIABILITY  
   Reichert v. State, 365 Mont. 92 (2012)  
   Wilmot, Reichert & Increased Pre-Election Substantive Judicial Review (2013)  
   Hershkoff, State Courts and the “Passive Virtues” (2001)  
   Howell, “Purely the Creature of the Inventive Genius of the Court” (2008)  

10. Chapter 5: Judicial Powers  
   C. OPEN COURTS  
   Schuman, The Right to a Remedy (1992)  
   Meech v. Hillhaven West, 238 Mont. 21 (1989)  
   Schuman, The Right to a Remedy (1992)  

11. Chapter 6: Local Government  
   MONT. CONST. Art. XI, § 4 (General powers); MONT. CONST. Art. XI, § 6 (Self-  
   government powers); MONT. CONST. Art. XI, § 8 (Initiative and referendum)  
   A. THE SCOPE AND PREEMPTION OF LOCAL POWER  
   Weaver & Mathre, Local Government Charters (Rev. Ed. 2008)  
   B. THE STRUCTURE OF LOCAL GOVERNMENT  
   Phillips v. City of Whitefish, 375 Mont. 456 (2014)  
   Tafoya, The Legislative-Administrative Question in Montana (2016)  

12. Chapter 7: Education  
   MONT. CONST. Art. X, § 1 (Educational goals and duties); MONT. CONST. Art. X,  
   § 7 (Nondiscrimination in education); MONT. CONST. Art. X, § 8 (School district  
   trustees)  
   A. THE SCHOOL SYSTEM & EQUAL OPPORTUNITY  
   Bartmess v. Board of Trustees of School District No. 1, 223 Mont. 269 (1986)  
   B. PUBLIC SCHOOL FUNDING  
## Chapter 8: Elections & Voting

Mont. Const. Art. II, § 13 (Right of suffrage); Mont. Const. Art. IV, § 1 (Ballot); Mont. Const. Art. IV, § 2 (Qualified elector); Mont. Const. Art. IV, § 3 (Elections); Mont. Const. Art. V, § 14 (Districting and apportionment)

### A. The Right to Vote

- Weinschenk v. State, 203 S.W.3d 201 (Mo. 2006)

### B. Districting and Representation


## PART III: RIGHTS

### Chapter 9: Introduction to the Declaration of Rights


### A. The Structure of Constitutional Rights

- Butte Community Union v. Lewis, 219 Mont. 426 (1986)

### B. Inalienable Rights Applied and Revisited


### Chapter 9: Introduction to the Declaration of Rights

#### C. A Clean and Healthful Environment

- MEIC v. Department of Environmental Quality, 296 Mont. 207 (1999)
- Cape-France Enterprises v. Estate of Lola H. Peed, 305 Mont. 513 (2001)
- Park County Environmental Council v. DEQ, 2020 MT 303 (2020)

### Chapter 10: Dignity & Equality

Mont. Const. Art. II, § 4 (Individual dignity); P.R. Const. Art. II, § 1 (Human dignity and equality); Applegate, Montana Constitutional Convention Bill of Rights Study (1971)

#### A. Frameworks for Dignity and Equality


#### B. Equal Protection of the Laws

- Arneson v. State, 262 Mont. 269 (1993)
<table>
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<tr>
<th>Week</th>
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<th>Chapter</th>
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|      |       | C. THE HUMAN RIGHTS ACT, RACE, AND CULTURE  
|      |       | 1. Montana's Tentative Approach  
|      |       | 2. Other State Approaches  
| 18.  | Mon 10/25 (24) | Chapter 10: Dignity & Equality  
|      |       | D. GENDER, SEX, AND EMERGING ISSUES  
|      |       | 1. Sex Discrimination (herein of state action)  
|      |       | In the Matter of Will of Cram, 186 Mont. 37 (1980)  
|      |       | 2. “Sex,” Sexual Orientation, and Suspect Classes  
|      |       | Donaldson v. State, 367 Mont. 228 (2012)  
|      |       |  
|      |       | A. THE ORIGINS AND SCOPE OF INDIVIDUAL PRIVACY  
|      |       | State v. Long, 216 Mont. 65 (1985)  
| 20.  | Mon 11/1 (32) | Chapter 11: The Right of Privacy  
|      |       | B. PRIVACY AS AUTONOMY  
|      |       | C. PRIVACY’S FRONTIERS AND DIGNITY, REVISITED  
| 22.  | Mon 11/8 (34) | Chapter 12: Freedoms of Religion and Expression  
|      |       |  
|      |       | A. FREEDOM OF RELIGION  
|      |       | 1. Free Exercise and Establishment of Religion  
|      |       | Big Sky Colony, Inc. v. Department of Labor & Industry, 368 Mont. 66 (2012)  
|      |       | 2. Other Religion Clauses and “the Play in the Joints”  
|      |       | Espinoza v. Montana Department of Revenue, 393 Mont. 446 (2018)  
|      |       | Dougherty, Montana’s Prohibition on Aid to Sectarian Schools (2016)  
|      |       | B. FREEDOM OF SPEECH, PRESS, AND EXPRESSION  
|      |       | 1. A Distinct Freedom of Expression?  
|      |       | City of Billings v. Laedeke, 805 P.2d 1348 (Mont. 1991)  
|      |       | City of Helena v. Krautter, 852 P.2d 636 (Mont. 1993)  
|      |       | 2. The Current Scope of the Freedom of Expression  
|      |       | 3. Religion, Speech, and Civil Rights, Revisited  

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<th>Date</th>
<th>Topic</th>
<th>Notes</th>
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<tr>
<td>24.</td>
<td>Chapter 13: Rights to Participate &amp; Know</td>
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<tr>
<td>Mon</td>
<td>A. The Scope of and Relationship Between the Rights to Participate &amp; Know</td>
<td>MONT. CONST. Art. II, § 8 (Right of participation); MONT. CONST. Art. II, § 9 (Right to know)</td>
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</table>
Snyder, The Right to Participate and the Right to Know in Montana (2005)                                                                                      |
| (22)   |                                                             |                                                                                                                                                                                                     |
| 25.    | Chapter 13: Rights to Participate & Know                  | B. LIMITS ON THE RIGHT TO KNOW                                                                                                                |
| (35)   |                                                             |                                                                                                                                                                                                     |
| 26.    | Chapter 14: Due Process of Law and Other Guarantees       | MONT. CONST. Art. II, § 17 (Due process of law); MONT. CONST. Art. II, § 34 (Unenumerated rights)                                                                                                       |
| Mon    | A. DUE PROCESS OF LAW                                      |                                                                                                                                            |
|        |                                                             | 738                                                                                                                                      |
|        | B. OTHER RIGHTS IN THE MONTANA CONSTITUTION               |                                                                                                                                            |
|        | 1. The Declaration of Rights                              |                                                                                                                                            |
|        |                                                                 | MONT. CONST. Art. II, § 28 (Rights of the convicted); MONT. CONST. Art. II, § 12 (Right to bear arms); MONT. CONST. Art. II, § 33 (Importation of armed persons); MONT. CONST. Art. II, § 35 (Servicemen, servicewomen, and veterans); MONT. CONST. Art. II, § 14 (Adult rights); MONT. CONST. Art. II, § 15 (Rights of persons not adults) |
|        |                                                                 |                                                                                                                                            |
|        | 2. Rights Elsewhere in the Montana Constitution            |                                                                                                                                            |
|        |                                                                 | Zackin, Why State Constitutions Contain America’s Positive Rights (2013)                                                                   |
|        |                                                                 | MONT. CONST. Art. XII, § 1 (Agriculture); MONT. CONST. Art. XII, § 2 (Labor); MONT. CONST. Art. XIII, § 1 (Non-municipal corporations); MONT. CONST. Art. IX, § 7 (Preservation of harvest heritage) |
| 11/24  | [THANKSGIVING BREAK]                                       |                                                                                                                                            |
| * TBA  | FALL 2021 LAWLAPALOOZA                                    | Discussion credit for each student AWR presentation attended with a response posted on Moodle (or a question asked at the presentation and posted on Moodle).                          |