

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

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: 20 pts. (20 engagements throughout semester, see rubric for breakdown*) <i>*Includes posted responses to relevant events during semester; contact me to nominate an event.</i>				
1. Insightful engagement. Well-prepared, engaged in materials, advances discussion.		0.5. Basic engagement. Makes basic effort to understand, respond to discussion.		0. Disengaged. Absent/disruptive.
Arguments: 2 x 15 pts. (5 pts. research, 5 pts. analysis, 5 pts. communication)				
5. Deep research. Applies law to novel issue; concise background; cites on-point cases beyond leading cases, and secondary sources where appropriate.	4. Good research. Applies law to relevant court case on issue; covers key background; cites leading cases, including cases outside the readings.	3. Basic research. Applies law to relevant case; covers basic background; cites appropriate leading cases from the readings.	2. Poor research. Applies law to obvious case without apparent research; cites few other cases; apparently no significant outside research.	0-1. No research. Reiterates existing case; no original case citations; no indication of research beyond the readings.
5. Compelling analysis. Synthesizes law persuasively; headings caption each step; engages strongest arguments and counter-arguments.	4. Good analysis. Applies law accurately; clearly structured with headings; fully-supported claims; addresses strongest arguments in support of position.	3. Basic analysis. States law accurately; basically structured argument section; covers core argument but missing points.	2. Poor analysis. Misstates law; lacks structure or basic headings; misses core argument or makes irrelevant argument.	0-1. No analysis. Conclusory or adopts underlying case analysis without demonstrating comprehension of applicable law.
5. Lucid Writing. Winning intro; clear structure; nearly flawless prose. & Argument. Punchy delivery with roadmap; conversational; clear responses to ct, opp.	4. Good writing. Clear introduction, well-organized; minor errors, typos. & Argument. Confident delivery; well-paced, little reading; draws questions.	3. Basic writing. Basic introduction and organization; some errors. & Argument. Tentative delivery; too fast or too long; relying on brief; basic responses.	2. Poor writing. Poorly organized throughout; many errors. & Argument. Halting delivery; mostly reading from brief; missed chances to respond.	0-1. Writing fail. Incomplete; lacking organization; not proofread. & Argument. Unprepared; nonresponsive or distracting responses.
Paper/Opinion/Wiki: 50 pts. (20 pts. research, 20 pts. analysis, 10 pts. writing)				
18-20. Deep research. (Above)	16-17. Good research. (Above)	14-15. Basic research. (Above)	12-13. Poor research. (Above)	0-11. Lacks research. (Above)
18-20. Compelling analysis. (Above)	16-17. Good analysis. (Above)	14-15. Basic analysis. (Above)	12-13. Poor analysis. (Above)	0-11. Lacks analysis. (Above)
9-10. Lucid Writing. (Above)	8. Good writing. (Above)	7. Basic writing. (Above)	5-6. Poor writing. (Above)	0-4. Writing fail. (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.

PART I: INTRODUCTION	
1. Mon 8/23 (19)	Chapter 1: Origins of the Montana Constitution A. THE STATE CONSTITUTIONAL TRADITION 1. Ideological Origins of State Constitutions Wood, <i>State Constitution Making in the American Revolution</i> (1993) Elazar, <i>The Principles and Traditions Underlying State Constitutions</i> (1982) Baude, <i>Interstate Dialogue in State Constitutional Law</i> (1997) 2. Contemporary State Constitutionalism Brennan, <i>State Constitutions and the Protection of Individual Rights</i> (1977) Gardner, <i>The Failed Discourse of State Constitutionalism</i> (1992) Rodriguez, <i>State Constitutional Failure</i> (2011) Sutton, <i>Why Teach—and Why Study—State Constitutional Law?</i> (2009)
2. Wed 8/25 (16)	Chapter 1: Origins of the Montana Constitution B. FRAMING THE MONTANA CONSTITUTION 1. The 1889 Statehood Constitution Elison & Snyder, <i>The Montana State Constitution</i> (2000) 2. Framing the 1972 Constitution Tyler Stockton, <i>Originalism and the Montana Constitution</i> (2000) <i>In re Leo C. Graybill, Jr.</i> , 159 Mont. 549 (1972) <i>Burger v. Judge</i> , 364 F. Supp. 504 (D. Mont. 1973)
3. Mon 8/30 (24)	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) Johnstone, <i>The Constitutional Initiative in Montana</i> (2010) <i>Harper v. Greely</i> , 234 Mont. 259 (1988) <i>Marshall v. Cooney</i> , 293 Mont. 274 (1999) <i>Montana Ass'n of Counties v. State</i> , 2017 MT 267 (2017) Lowenstein, <i>Initiatives and the New Single Subject Rule</i> (2002)
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]

5. Wed 9/8 (25)	Chapter 2: Interpretation & Enforcement MONT. CONST. Art. II, § 1 (Popular sovereignty); U.S. CONST. Art. VI, cl. 2 (Supremacy Clause); MONT. CONST. Art. III, § 3 (Oath of Office) A. STATE CONSTITUTIONAL INDEPENDENCE (HEREIN OF CRIMINAL PROCEDURE) 1. Independent and Adequate State Grounds <i>State v. Robinette</i> , 73 Ohio St.3d 650 (1995) <i>Ohio v. Robinette</i> , 117 S. Ct. 417 (1996) <i>State v. Robinette</i> , 80 Ohio St.3d 234 (1997) 2. Making State Constitutional Distinctions <i>State v. Covington</i> , 2012 MT 31 (2012) <i>State v. Bullock</i> , 272 Mont. 361 (1995) <i>State v. A Blue in Color, 1993 Chevrolet Pickup</i> , 2005 MT 180 (2005) Notes on State Constitutional Distinctions and Lockstepping Liu, <i>State Constitutions & Protection of Individual Rights: Reappraisal</i> (2017)
6. Mon 9/13 (32)	Chapter 2: Interpretation & Enforcement B. CONSTITUTIONAL REMEDIES MONT. CONST. Art. II, § 18 (State subject to suit) 1. Sovereign Immunity Johnstone, <i>Immunity Confusion: What is Article II, Section 18 About?</i> (2017) 2. Constitutional Torts <i>Dorwart v. Caraway</i> , 312 Mont. 1 (2002) <i>Sunburst School District No. 2 v. Texaco, Inc.</i> , 2007 MT 183 (2007) Elison & Snyder, <i>The Montana State Constitution: A Reference Guide</i> (2001) 3. Attorneys' Fees <i>Western Tradition Partnership, Inc. v. Attorney General</i> , 367 Mont. 112 (2012)
PART II: STRUCTURE	
7. Wed 9/15 (30)	Chapter 3: Legislative Powers, Duties, and Limits MONT. CONST. Art. V, § 1 (Power and structure); MONT. CONST. Art. V, § 11 (Bills); MONT. CONST. Art. V, § 12 (Local and special legislation); MONT. CONST. Art. VIII, § 1 (Tax purposes); <i>The Federalist</i> 44 (Madison) A. LEGISLATIVE PROCESS AND PUBLIC PURPOSE <i>White v. State</i> , 233 Mont. 81 (1988) <i>Kottel v. State</i> , 312 Mont. 387 (2002) B. SPECIAL LEGISLATION <i>Rohlfs v. Klemenhausen</i> , 354 Mont. 133 (2009) Van Kley, <i>Article V, Section 12 of the Montana Constitution</i> (2018)
8. Mon 9/20 (31)	Chapter 4: Executive Powers MONT. CONST. Art. III, § 1 (Separation of powers); MONT. CONST. Art. VI, § 4 (Duties) A. THE DIVIDED EXECUTIVE BRANCH Marshall, <i>Break up the Presidency?</i> (2006) <i>Bullock, Governor v. Fox, Attorney General</i> , 2019 MT 50 (2019) <i>Board of Regents of Higher Education v. Judge</i> , 168 Mont. 433 (1975) B. DELEGATION OF POWERS <i>Judge v. Legislative Finance Committee</i> , 543 P.2d 1317 (1975) <i>MEA-MFT v. McCulloch</i> , 366 Mont. 266 (2012) <i>In the Petition to Transfer Territory, Lame Deer</i> , 303 Mont. 204 (2000) Schapiro, <i>Contingency and Universalism in State Separation of Powers</i> (1998)

<p>9. Wed 9/22 (43)</p>	<p>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)</p> <p>A. JUDICIAL INDEPENDENCE <i>Johnstone, A Past and Future of Judicial Elections: Montana</i> (2015) <i>Coate v. Omholt</i>, 203 Mont. 488 (1983) <i>Reichert v. State</i>, 365 Mont. 92 (2012) <i>McLaughlin v. Montana State Legislature</i>, 2021 MT 178 (2021)</p> <p>B. JUSTICIABILITY <i>Reichert v. State</i>, 365 Mont. 92 (2012) <i>McLaughlin v. Montana State Legislature</i>, 2021 MT 178 (2021) <i>Wilmot, Reichert & Increased Pre-Election Substantive Judicial Review</i> (2013) <i>Hershkoff, State Courts and the “Passive Virtues”</i> (2001) <i>Howell, “Purely the Creature of the Inventive Genius of the Court”</i> (2008)</p>
<p>10. Mon 9/27 (32)</p>	<p>Chapter 5: Judicial Powers C. OPEN COURTS <i>Schuman, The Right to a Remedy</i> (1992) <i>Meech v. Hillhaven West</i>, 238 Mont. 21 (1989) <i>Schuman, The Right to a Remedy</i> (1992)</p>
<p>11. Wed 9/29 (31)</p>	<p>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)</p> <p>A. THE SCOPE AND PREEMPTION OF LOCAL POWER <i>D & F Sanitation Service v. City of Billings</i>, 219 Mont. 437 (1986) <i>American Cancer Society v. State</i>, 325 Mont. 70 (2004) <i>Weaver & Mathre, Local Government Charters</i> (Rev. Ed. 2008) <i>Briffault, The Challenge of the New Preemption</i> (2018)</p> <p>B. THE STRUCTURE OF LOCAL GOVERNMENT <i>Phillips v. City of Whitefish</i>, 375 Mont. 456 (2014) <i>Tafoya, The Legislative-Administrative Question in Montana</i> (2016)</p>
<p>12. Mon 10/4 (32)</p>	<p>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)</p> <p>A. THE SCHOOL SYSTEM & EQUAL OPPORTUNITY <i>Bartmess v. Board of Trustees of School District No. 1</i>, 223 Mont. 269 (1986) <i>Kaptein v. Conrad School District</i>, 281 Mont. 152 (1997)</p> <p>B. PUBLIC SCHOOL FUNDING <i>Helena Elementary School District No. 1 v. State</i>, 236 Mont. 44 (1989) <i>Columbia Falls Elementary School District v. State</i>, 326 Mont. 304 (2005)</p>

13. Wed 10/6 (31)	<p>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)</p> <p>A. THE RIGHT TO VOTE Tokerud, <i>The Right of Suffrage in Montana</i> (2013) <i>Driscoll v. Stapleton</i>, 2020 MT 247 (2020) <i>Weinschenk v. State</i>, 203 S.W.3d 201 (Mo. 2006)</p> <p>B. DISTRICTING AND REPRESENTATION Aarab & Regnier, <i>Mapping the Treasure State</i> (2015) <i>League of Women Voters v. Commonwealth</i>, 178 A.3d 737 (Pa. 2018)</p>
PART III: RIGHTS	
14. Mon 10/11 (32)	<p>Chapter 9: Introduction to the Declaration of Rights MONT. CONST. Art. II, § 1 (Popular sovereignty); MONT. CONST. Art. II, § 2 (Self-government); MONT. CONST. Art. II, § 3 (Inalienable rights)</p> <p>A. THE STRUCTURE OF CONSTITUTIONAL RIGHTS Bourguignon, <i>A Practical Guide to Inalienable Rights in Montana</i> (2016) <i>Butte Community Union v. Lewis</i>, 219 Mont. 426 (1986)</p> <p>B. INALIENABLE RIGHTS APPLIED AND REVISITED <i>Wadsworth v. State</i>, 275 Mont. 287 (1996) <i>Wiser v. State</i>, 331 Mont. 28 (2006) <i>Montana Cannabis Industry Association v. State</i>, 2012 MT 201 (2012) Calabresi, Agudo, & Dore, <i>An Unnoticed Dialogue</i> (2015) Barnett, <i>Scrutiny Land</i> (2008)</p>
15. Wed 10/13 (33)	<p>Chapter 9: Introduction to the Declaration of Rights C. A CLEAN AND HEALTHFUL ENVIRONMENT <i>MEIC v. Department of Environmental Quality</i>, 296 Mont. 207 (1999) <i>Cape-France Enterprises v. Estate of Lola H. Peed</i>, 305 Mont. 513 (2001) <i>Park County Environmental Council v. DEQ</i>, 2020 MT 303 (2020)</p>
16. Mon 10/18 (24)	<p>Chapter 10: Dignity & Equality MONT. CONST. Art. II, § 4 (Individual dignity); P.R. CONST. Art. II, § 1 (Human dignity and equality); Applegate, <i>Montana Constitutional Convention Bill of Rights Study</i> (1971)</p> <p>A. FRAMEWORKS FOR DIGNITY AND EQUALITY Clifford & Huff, <i>The Meaning and Scope of the “Dignity Clause”</i> (2000) Freeman, <i>The Right to Dignity in the United States</i> (2017)</p> <p>B. EQUAL PROTECTION OF THE LAWS <i>State v. Egdorf</i>, 2003 MT 264 (2003) <i>Arneson v. State</i>, 262 Mont. 269 (1993) <i>Oberson v. US Department of Agriculture, Forest Service</i>, 339 Mont. 519 (2007)</p>

17. Wed 10/20 (21)	Chapter 10: Dignity & Equality C. THE HUMAN RIGHTS ACT, RACE, AND CULTURE 1. Montana’s Tentative Approach <i>Dupuis v. Board of Trustees</i> , 330 Mont. 232 (2006) <i>State v. Shook</i> , 313 Mont. 347 (2002) 2. Other State Approaches <i>Malabed v. North Slope Borough</i> , 70 P.3d 416 (Alaska 2003) <i>Sheff v. O’Neill</i> , 238 Conn. 1 (1996)
18. Mon 10/25 (24)	Chapter 10: Dignity & Equality D. GENDER, SEX, AND EMERGING ISSUES 1. Sex Discrimination (herein of state action) <i>In the Matter of Will of Cram</i> , 186 Mont. 37 (1980) 2. “Sex,” Sexual Orientation, and Suspect Classes <i>Snetsinger v. Montana University System</i> , 325 Mont. 148 (2004) <i>Donaldson v. State</i> , 367 Mont. 228 (2012)
19. Wed 10/27 (24)	Chapter 11: The Right of Privacy MONT. CONST. Art. II, § 10 (Right of privacy) A. THE ORIGINS AND SCOPE OF INDIVIDUAL PRIVACY <i>State v. Long</i> , 216 Mont. 65 (1985) <i>State v. Nelson</i> , 283 Mont. 231 (1997)
20. Mon 11/1 (32)	Chapter 11: The Right of Privacy B. PRIVACY AS AUTONOMY <i>Gryczan v. State</i> , 283 Mont. 433 (1997) <i>Armstrong v. State</i> , 296 Mont. 361 (1999)
21. Wed 11/3 (30)	Chapter 11: The Right of Privacy C. PRIVACY’S FRONTIERS AND DIGNITY, REVISITED <i>Walker v. State</i> , 316 Mont. 103 (2003) <i>Baxter v. State</i> , 354 Mont. 234 (2009)
22. Mon 11/8 (34)	Chapter 12: Freedoms of Religion and Expression MONT. CONST. Art. II, § 5 (Freedom of religion); MONT. CONST. Art. II, § 6 (Freedom of assembly); MONT. CONST. Art. II, § 7 (Freedom of speech, expression & press) A. FREEDOM OF RELIGION 1. Free Exercise and Establishment of Religion <i>Big Sky Colony, Inc. v. Department of Labor & Industry</i> , 368 Mont. 66 (2012) 2. Other Religion Clauses and “the Play in the Joints” <i>Espinoza v. Montana Department of Revenue</i> , 393 Mont. 446 (2018) <i>Dougherty, Montana’s Prohibition on Aid to Sectarian Schools</i> (2016)
23. Wed 11/10 (30)	Chapter 12: Freedoms of Religion and Expression B. FREEDOM OF SPEECH, PRESS, AND EXPRESSION 1. A Distinct Freedom of Expression? Wolff, <i>Trailing in the Wake: The Freedom of Speech in Montana</i> (2016) <i>City of Billings v. Laedeke</i> , 805 P.2d 1348 (Mont. 1991) <i>City of Helena v. Krautter</i> , 852 P.2d 636 (Mont. 1993) 2. The Current Scope of the Freedom of Expression <i>State v. Dugan</i> , 369 Mont. 39 (2013) 3. Religion, Speech, and Civil Rights, Revisited <i>Griffith v. Butte School District No. 1</i> , 2010 MT 246 (2010)

24. Mon 11/15 (22)	Chapter 13: Rights to Participate & Know A. The Scope of and Relationship Between the Rights to Participate & Know MONT. CONST. Art. II, § 8 (Right of participation); MONT. CONST. Art. II, § 9 (Right to know) A. THE RIGHTS TO PARTICIPATE AND KNOW Meloy, <i>Double and Nothing: Open Government in Montana</i> (2018) Bryan v. <i>Yellowstone County Elementary S.D. No. 2</i> , 312 Mont. 257 (2002) Snyder, <i>The Right to Participate and the Right to Know in Montana</i> (2005)
25. Wed 11/17 (35)	Chapter 13: Rights to Participate & Know B. LIMITS ON THE RIGHT TO KNOW 1. Implicit Limits on the Right to Know Nelson v. <i>City of Billings</i> , 2018 MT 36 (2018) 2. Privacy and the Merits of Public Disclosure Billings Gazette v. <i>City of Billings</i> , 372 Mont. 409 (2013)
26. Mon. 11/22 (31)	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) A. DUE PROCESS OF LAW 1. “Procedural” Due Process State v. <i>Stanko</i> , 292 Mont. 192 (1998) In the Matter of the Mental Health of <i>K.G.F.</i> , 306 Mont. 1 (2001) 2. “Substantive” Due Process 738 State v. <i>Egdorf</i> , 2003 MT 264 (2003) B. OTHER RIGHTS IN THE MONTANA CONSTITUTION 1. The Declaration of Rights Buhmann v. <i>State</i> , 2008 MT 465 (2008) 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, <i>Why State Constitutions Contain America’s Positive Rights</i> (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).