This course concerns the law of lawmaking, from campaign to capitol to court. The course begins with an introduction to the system of representation, legislation, and interpretation. Then it takes each function in turn: first, the regulation of the electoral process including voting rights and campaign finance; second, the structure of the legislative process including lobbying, deliberation, and direct democracy; and third, the interpretation and implementation of resulting statutes. Students will synthesize the material in a paper or legislative project.

Objectives. Students should develop a practical understanding of: the dominant theories of representation, legislation, and interpretation; the interaction of political and legal dynamics in the political, legislative, and judicial process; and the impact of these dynamics on the creation and implementation of codified law. Skills emphasized: problem solving, legal analysis, legal research, communication, and litigation.

Readings. The primary text is Eskridge, Frickey & Garrett, Legislation: Statutes and the Creation of Public Policy, 4th Ed. (West 2007) (“L”) and Supplement (West 2012) (“S”) and supplemental cases and materials available online (*). Review material from Constitutional Law is indicated in brackets. In addition to the assigned reading, be prepared to discuss your classmates’ presentations that week.

Questions. I am generally available in my office except mornings prior to 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 three components: discussion (20%), brief (20%), and project (60%). Discussion measures ongoing constructive engagement in class discussion, including engagement as legislators or judges in classmates’ presentations. Brief measures the research, analysis, and presentation of two briefs on Moodle (500-1000 wds.) and argued in class (5-10 mins.): an opening brief arguing an issue related to a day’s topic (10%, posted by 5pm Friday before class, limit two per day), and a response in opposition to a classmate’s brief from a different day (10%, posted by 5pm Monday before class, one response per brief); brief day selections are final (unless a classmate will swap). Project measures the legal research, analysis, and writing of a 3000-word minimum (5000-word minimum for AWR) paper, or a similarly substantial project such as a proposed bill with supporting testimony, draft judicial opinion, political practices complaint, or memorandum due by e-mail no later than 5pm December 19.

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. The University of Montana assures equal access to instruction through collaboration between students with disabilities, instructors, and Disability Services for Students (“DSS”). If you think you may have a disability adversely affecting your academic performance, and you have not already registered with DSS, please contact DSS in Lommasson 154. The Law School will work with you and DSS to provide an appropriate accommodation.
The syllabus is subject to change depending on course and legal developments.

INTRODUCTION

1. Introduction to Legislation
Tue  Ch. 1, § 1: The Civil Rights Act of 1964
8/26  How a Bill Becomes a Federal Law (Skim L 1-38; S 1-3)
(86) Ch. 1, § 2: Descriptive and Normative Theories of Legislation
A. Pluralism and Interest Group Theories of Legislation (L 47-65)
B. Proceduralist Theories of Legislation (L 65-75)
C. Institutional Theories of Legislation (L 75-82)

PART I: REPRESENTATION

2. Voting
Tue  Ch. 2, § 1: Electoral Structures and Equality Values
9/2  [A. One Person, One Vote: Formal Equality in Representation (Review)
(46)  Reynolds v. Sims; optional interest: Dept. of Commerce v. Mont. (L 131)]
B. Race and Electoral Structures (instead read *)
  *United States v. Blaine County, 363 F.3d 897 (9th Cir. 2004)
[C. Political Gerrymandering (Review)
  Davis v. Bandemer / Veith v. Jubelirer]
Ch. 2, § 2: Eligibility to Serve in the Legislature
B. Qualifications Imposed by States (L 208-26; S 15)
  U.S. Term Limits, Inc. v. Thornton
C. Ballot Access Provisions (L 227-34; S 16)
  Timmons v. Twin Cities Area New Party; Munro v. Socialist Workers

3. Corruption & Influence
Tue  Ch. 3, § 1: Regulating “Corrupt” Deliberation
9/9  A. Bribery (L 299-310)
(38)  People ex rel. Dickinson v. Van de Carr
B. Extortion (L 310)
C. Conflicts of Interest (L 311-17; S 50-51)
  United States v. National Treasury Employees Union
Ch. 3, § 2: Lobbying (Introduction, L 318-22)
Ch. 2, § 3: Structures of Campaign Finance
A. The Constitutional Framework (L 235-47, S 16-18)
  Buckley v. Valeo

4. Campaign Regulation
Tue  Ch. 2, § 3: Federal and State Reforms
9/16 B. The Bipartisan Campaign Reform Act (L 252-92; S 18-19, 35-43)
(50)  (1. Generally) McConell v. FEC
    (2. Contribution Limits) Randall v. Sorrell
    (3. Expenditure Limits & Disclosure) [Citizens United v. FEC]
C. State Reforms and Public Financing (L 294-95)
  (But see Arizona Free Enterprise Club’s Freedom PAC v. Bennett)
PART II: LEGISLATION

5. Direct Democracy
   Tue Ch. 5, § 1: An Overview of Direct Democracy (L 523-535; S 69-76)
   9/23 Buckley v. American Constitutional Law Foundation; Doe v. Reed
   (53)

   Ch. 5, § 2: Popular Lawmaking and the Constitution
   A. An Introduction to the Problem (L 535-44; S 76)
      St. Paul Citizens for Human Rights v. City Council of City of St. Paul
   B. Popular Lawmaking and the Equal Protection Clause (L 556-59)
      [Romer v. Evans]
   C. Popular Lawmaking and the Due Process Clause (L 566-574)
      Philly's v. Byrne

   Ch. 8, § 3: Interpretation of Popular Initiatives (L 1101-04)
   Evangelatos v. Superior Court

6. Deliberation & Structural Due Process
   Tue Ch. 3, § 3: Rules Facilitating Legislative Deliberation
   9/30 A. Substantive Limitations on the Legislative Process (L 356-65; S 57-59, *)
   (47)    Department of Education v. Lewis; *Marshall v. Cooney, 1999 MT 33

   Ch. 4, § 1: Structural Due Process
   B. Lawmaking by Most Competent Branch (L 409-11, 420-34; S 63-64)
      Hampton v. Mow Sun Wong; Brest, The Conscientious Legislator’s Guide
   C. Legislative Drafting and Due Process of Lawmaking (L 435-46; S 64-65)

7. Legislative Drafting Workshop
   Tue Details to be announced.
   10/7

PART III: ADJUDICATION

8. Statutory Interpretation: Traditional Theories
   Tue Ch. 7, § 1: From Eclecticism to Systematic Theory (L 689-702)
   10/14 Hart & Sacks, The Legal Process; Rector, Holy Trinity Church v. U.S.
   (45)    Ch. 7, § 2: Legal Process Theories
   A. The Legal Process Classics, 1940s-50s (L 712-18)
      Fuller, The Speluncean Explorers
   B. Statutory Interpretation in Changed Circumstances (L 729-37, 739-42)
      Eskridge, Dynamic Statutory Interpretation; In the Matter of Jacob
   C. Concerns About Legal Process Theory, 1970s-80s (L 749-64)
      TVA v. Hill; Griffin v. Oceanic Contractors

   Tue Ch. 7, § 3: Current Debates in Statutory Interpretation
   10/21 A. The New Textualism (L 765-81, 794-95)
   (56)    Green v. Bock Laundry; Scalia, A Matter of Interpretation
   B. Economic Theories of Interpretation (L 798-814, 818-30, S 77-79)
   C. Pragmatic … Theories of Statutory Interpretation (L 830-35, 842-46)
      Eskridge & Frickey, Statutory Interpretation as Practical Reasoning

10. Textual Canons
    Tue Ch. 8, § 1(A): Textual Canons of Statutory Interpretation
    10/28 A. Textual Canons (L 847-880; S 101-108)
    (40)    Babbitt v. Sweet Home; United States v. Costello; Bilski v. Kappos
11. Substantive Canons
Tue. Ch. 8, § 1(B): Substantive Canons
       (52) Muscarello v. United States
2. Substantive Canons: Constitutional Avoidance (L 907, 911-22; S 110-11)
       NLRB v. Catholic Bishop; Dept. of Commerce v. U.S. House
       Gregory v. Ashcroft
*. Substantive Canons: The Indian Canon (*)
       Note, Indian Canon Originalism, 126 Harv. L. Rev. 1100-06 (2013)
C. Debunking and Defending the Canons (Skim: L 941-50; 120-23)
       Llewellyn, The Rules or Canons About How Statutes Are to be Construed

12. Pre-Enactment Legislative History
Tue Ch. 8, § 2(B): Legislative History (L 955-56)
       (46) Leo Sheep Co. v. United States
2. Committee Reports (the Legislative History Debate) (971-98, S 124-30)
       Blanchard v. Bergeron; In re Sinclair; Carr v. United States
3. Statements by Sponsors or Drafters (1000-1001, S 136-37)

13. Enactment & Post-Enactment Legislative ‘History’
Tue Ch. 8, § 2(B): Legislative History, cont.
12/1 4. Legislation Deliberation (L 1020-35)
       (50) FDA v. Brown & Williamson; Rapanos v. US; Mont. Wilderness v. USFS
5. Post-Enactment Legislative History (L 1035-1047; S 137-41)
       Montana Wilderness Ass’n v. United States Forest Service
6. Legislative Inaction (L 1047-66)
       Bob Jones University v. United States