

**ADVANCED CONSTITUTIONAL LAW:  
CHARTER RIGHTS LAW 5330**

**Spring 2010**

Grant Huscroft

**Class Times**

Tuesday 9:30-11:50 Room 204

Thursday 9:30-11:50 Room 204

**Course Materials**

Course materials are available on the web. I have put links in the syllabus where possible, otherwise the material is available through LexisNexis or Heinonline.

**Teaching Format**

This course places a premium on discussion. I expect you to have read the assigned material before class and to arrive ready to discuss, ask questions, and make arguments about it.

**Classroom decorum**

I expect that there will be differences of opinion about the various topics, often involving deeply-held beliefs and values. You will be challenged to think about things and I expect classroom discussion to be spirited, but always conducted with a spirit of goodwill and respect for opposing views.

You are not permitted to tape or otherwise record the class.

**Office hours**

If you would like to meet please send me an e-mail message at [grant.huscroft@uwo.ca](mailto:grant.huscroft@uwo.ca) proposing a time.

## Course Objectives

The purpose of this course is to help you to develop

- a better understanding of the nature of rights
- an appreciation of the role of judicial review and the role of courts, legislatures, and the executive in the constitutional order
- familiarity with various schools of thought on constitutional interpretation
- the ability to conduct proportionality analysis
- familiarity with sources of comparative law
- an understanding of current and pending *Charter* controversies

In particular, the course is designed to improve your ability to make oral and written arguments.

## Assessment

As indicated in the Faculty Calendar and on the Faculty's website, courses in the Faculty of Law at Western are graded by letter grades rather than numbers or percentages. The Faculty defines the grades as follows:

- “A” – “Excellent”
- “B” – “Good”
- “C” – “Competent”
- “D” – “Marginal Pass”
- “F” – “Fail”

## Method of Assessment

80% three short essays (20%, 30%, and 30%); 20% participation

### 1. Short essays

Choose three paper topics from the topics set out in the syllabus. Each paper must be 8-10 pages. These papers are based on the readings and require analysis and critique. These papers are to be submitted and graded by **blind number** (not by name).

### 2. Class participation

Students are expected to attend class having prepared in advance, and to participate in the class discussions. Participation grades will be based on the quality of your contributions to class discussions.

**Failure to attend classes or to participate meaningfully in class will result in poor – and may result in failing – participation grades.**

#### Release of Grades

Professors may not release or disclose your results until after the holding of the Faculty Grades Meeting. After this dates, you will be able to find out your results via Lawsys.

#### Warning about Plagiarism

Plagiarism is a major academic offence. Any incidents of plagiarism in any assessment method, including examinations, will be penalized severely according to University policy. Failing to properly cite a source you rely upon is plagiarism. Whenever you take an idea, or a passage from another author, you must acknowledge your debt both by using quotation marks where appropriate and by proper referencing such as footnotes.

The University's policy on plagiarism and other academic offences can be found at: <http://www.uwo.ca/univsec/handbook/appeals/scholoff.html>

## 2010 Syllabus

### **Feb 9 Introduction**

Assignment of readings

### **Feb 11 The nature of judging and judicial review**

Reading:

Lon L. Fuller, [“The Case of the Speluncean Explorers”](#) (1949) 62 Harv. L. Rev. 616.

This is a classic in legal theory and you will enjoy reading it. The goal is to understand a variety of approaches to the role of the judge. As you read the various judgments, try to locate your own views on the spectrum Fuller presents. See also if you can recognize where leading Canadian and American judges fall.

Supplementary reading:

- James Allan, ed., *The Speluncean Case: Making Jurisprudence Seriously Enjoyable* (1998)
- William N. Eskridge, “The Case of the Speluncean Explorers: Twentieth-Century Statutory Interpretation in a Nutshell” (1993) 61 Geo. Wash. L. Rev. 1731
- (1999) 112 Harvard. L. Rev. 1834 (Fiftieth Anniversary Essays)
- Peter Suber, *The Case of the Speluncean Explorers: Nine New Opinions* (1998)

### **Feb 16 How do judges reason?**

Reading:

Jeremy Waldron, “Do Judges Reason Morally?”  
[http://www.ucl.ac.uk/laws/jurisprudence/docs/08\\_waldron.pdf](http://www.ucl.ac.uk/laws/jurisprudence/docs/08_waldron.pdf)  
 in Huscroft ed., *Expounding the Constitution: Essays in Constitutional Theory* (2008)

Supplementary reading:

[An Exchange with Jeremy Waldron](#), 7 International Journal of Constitutional Law (2009) for replies from several scholars including David Dyzenhaus and Wojciech Sadurski

**Assignment:**

Critically evaluate the exchange between Waldron and any of his critics.

**Feb 18 Dialogue theory**

Dialogue theory was first promoted in Canada by Peter Hogg and Alison Bushell, and it has proven popular with the Supreme Court as an explanation for and justification of judicial review. Our purpose is to understand the theory and its shortcomings, and to assess its continuing relevance.

Reading:

Peter W. Hogg, “Charter Dialogue Revisited – Or ‘Much Ado About Metaphors’”  
(2007) 45 Osgoode Hall LJ 1  
<http://ohlj.ca/english/current.htm>

Supplementary reading:

Kent Roach, “Sharpening the Dialogue Debate: The Next Decade Of Scholarship”  
(2007) 45 Osgoode Hall LJ 169

Peter W. Hogg & Alison A. Bushell, “The Charter Dialogue between Courts and Legislatures (or Perhaps the Charter of Rights isn’t such a Bad Thing After All)”  
(1997) 35 Osgoode Hall L.J. 75 (The original dialogue article)

**Feb 23 Critique of dialogue theory**

Reading:

Grant Huscroft, “[Rationalizing Judicial Power: The Mischief of Dialogue Theory](#)”  
in Kelly and Manfredi, *Contested Constitutionalism: Reflections on the Charter of Rights and Freedoms* (2009)

Peter W. Hogg, “[A Reply on Charter Dialogue Revisited](#)” (2007) 45 Osgoode Hall LJ 193

Supplementary reading:

- Jeremy Waldron, “Some Models of Dialogue Between Judges and Legislators” in Huscroft and Brodie eds., *Constitutionalism in the Charter Era* (2004); also at 23 Sup. Ct. L. Rev. 7
- Grant Huscroft, “[Constitutionalism from the Top Down](#)” (2007) 45 Osgoode Hall LJ 91

- Andrew Petter, [“Taking Charter Dialogue Much Too Seriously”](#) (2007) 45 Osgoode Hall LJ 147

**Assignment:**

Analyze and critique Rosalind Dixon, “The Supreme Court of Canada, Charter Dialogue, and Deference” (2009) 47 Osgoode Hall LJ 235

<http://ohlj.ca/english/current.htm>

**Feb 25            Pre-legislative scrutiny and the role of the Attorney General**  
**March 2**

The Attorney General plays an important role under the *Charter* that is often overlooked. We will consider the role of the Attorney General (and the legislature) in pre-legislative scrutiny and the role of the Attorney General and the Executive in *Charter* litigation. How do legislatures and the executive participate in developing and solidifying the meaning of the *Charter*?

Reading:

Kent Roach, [“Not Just the Government’s Lawyer: The Attorney General as Defender of the Rule of Law”](#) (2006) 31 Queen’s LJ 598

Grant Huscroft, [“The Attorney-General in the Charter Era”](#)(2009) 34 Queen’s LJ 773

**Assignment:**

How could/should pre-legislative scrutiny be improved? (due March 2). Note that there is a good deal of research on pre-legislative scrutiny in Canada, NZ, Australia, and the UK. See eg, Janet Hiebert, David Kinley, James Kelly, and Grant Huscroft.

**March 4, 9    International influences**

Reading:

Waldron, “Foreign Law and the Ius Gentium” (2005) 119 Harvard LR 129  
<http://www.trinitinture.com/documents/waldron1.pdf>

[Scalia – Breyer debate](#), American University 2005

Allan and Huscroft, [“Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts”](#) (2006) 43 San Diego LR 1

Supplementary reading:

Allan, Huscroft, and Lynch, [“The Citation of Overseas Authority in Rights Litigation in New Zealand: How Much Bark? How Much Bite?”](#) (2007) 11 OtagoLR

Sujit Choudhry ed., *The Migration of Constitutional Ideas* (2006)

Sitaraman, “The Use and Abuse of Foreign Law in Constitutional Interpretation” (2009) 32 Harv Journal of Law and Public Policy 653

### **Assignment:**

Assess the relevance of American debate about the use of foreign authority to Canadian law.

### **March 11 Interpreting the Constitution: New originalism**

Originalism is a theory you may have heard of, but it is much more sophisticated than its critics usually acknowledge. Larry Solum’s “Semantic Originalism” is a leading exposition of what is sometimes called the “new originalism”.

Reading:

Lawrence B Solum, [“A Reader’s Guide to Semantic Originalism”](#)

Supplementary reading:

- Randy Barnett, *Restoring the Lost Constitution* (2004)
- Ian Binnie, “Constitutional Interpretation and Original Intent” in Huscroft and Brodie eds., *Constitutionalism in the Charter Era* (2004)
- Mitch Berman, [“Originalism is Bunk”](#)
- Ronald Dworkin, “The Moral Reading” in *Freedom’s Law: The Moral Reading of the American Constitution* (1996)
- Antonin Scalia, “Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws” in Gutman ed., *A Matter of Interpretation: Federal Courts and the Law* (1997)
- Keith Whittington, *Constitutional Interpretation* (1999) and *Constitutional Construction* (1999)

## March 16, 18      Proportionality and balancing

You will be familiar with the idea of rationality and proportionality from Canadian constitutional law, and in particular the *Oakes* test. Our goal here is to understand the antecedents to the *Oakes* test and to see what can be learned from them.

Reading:

Alec Stone Sweet, “Proportionality Balancing and Global Constitutionalism” 47 *Columbia Journal of Transnational Law* 73 (2008)  
[http://works.bepress.com/alec\\_stone\\_sweet/11/](http://works.bepress.com/alec_stone_sweet/11/)

Stephen Gardbaum, “[A Democratic Defence of Constitutional Balancing](#)” 4 *Law and Ethics of Human Rights* (2010)

Supplementary reading:

- Dieter Grimm, “Proportionality in Canadian and German Constitutional Jurisprudence” (2007), 57 *U.T.L.J.* 383
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- Larry Solum, *Legal Theory Lexicon* #024, “[Balancing Tests](#)”

### Assignment:

Critically evaluate the section 1 reasoning of the SCC in [Her Majesty the Queen in Right of the Province of Alberta v. Hutterian Brethren of Wilson Colony, et al.](#) 2009 SCC 37

**March 23, 25      No classes**

**March 30, April 1      Same-sex marriage**

We will consider same sex marriage as a case study in the management of a *Charter* issue by the Executive, Parliament, and the Court.

Readings:

[Government background paper](#)

[Reference Re Same-Sex Marriage](#), [2004] 3 S.C.R. 698

[Government Response](#)

[Law Professors’ Letter](#)

Paul Martin, Address by the Prime Minister on Bill C-38 (House of Commons, February 16, 2005); Stephen Harper, Address in the House of Commons on Bill C-38 (February 16, 2005) (on reserve)

Supplementary reading:

[History of events](#)

Huscroft, "[Political Litigation and the Role of the Court](#)" (2006) 34 Sup Ct LR 35

## **April 6            The constitutional position of polygamy**

Reading:

Criminal Code section 293

[BC Superior Court decision quashing charge](#)

[BC Press release](#)

[Preliminary issues](#)

Supplementary reading:

Benjamin Berger, "[Moral Judgment, Criminal Law and the Constitutional Protection of Religion](#)" (2008) 41 Sup Ct L Rev

## **Assignment**

What will be the outcome of the reference case?

## **April 8, 13            Freedom of association and collective bargaining**

We will consider recent developments in the Supreme Court's approach to freedom of association, and its approach to *stare decisis*, and speculate about the impact of the Courts new approach a case currently under consideration.

[Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia](#), [2007] 2 S.C.R. 391

*Attorney General of Ontario v. Michael J. Fraser on his own behalf and on behalf of the United Food and Commercial Workers Union Canada, et al.* (argued in December 2009)

[Ontario AG Factum](#)

[Fraser factum](#)

[Ontario AG reply](#)

**Assignment:**

How should the SCC decide *Fraser*?

**April 15 Damages for breach of *Charter* rights**

The Supreme Court of Canada is considering a case that concerns the availability of damages as a remedy for breach of *Charter* rights in a case called *Vancouver (City) v Ward*, which was argued January 18, 2010.

Reading:

[Plaintiff factum](#)

[BC factum](#)

[Canada factum](#)

**Assignment:**

How should the Court decide *Ward*?