The Structure of Liberty

Two credits

The Structure of Liberty is a seminar that will examine the manner in which constitutions may be designed to protect liberty, with an emphasis upon and a close reading of the debates of the Framers at their Convention in Philadelphia in the summer of 1787. We’ll also examine the empirical literature of how presidential and parliamentary regimes have fared, when it comes to protecting liberty, and read Bagehot’s The English Constitution. We’ll end with a look at the expansion of executive power in the U.S.

The Framers’ debates are the greatest and least read or understood set of deliberations upon liberty and democracy, and to understand just what how the Constitution was drafted requires an understanding of what the delegates feared from the new government. The delegates were amongst the most astute of practical political thinkers of their or of any time. They agreed for the most part about ends, but strongly disagreed about the means to get there, and their debates have the excitement of a fine detective novel.

The Records of the Convention are seldom read, and those who today style themselves as “Originalists” often display their ignorance of the kind of government the delegates wanted for America. Doubtless, the length of the Records has put off many of them, for it’s much easier (though a lot less fun) to read The Federalist Papers. What you might find from this course, however, is that the Federalist is a most imperfect précis of what the Framers believed, that what they intended was something more complicated, which in some respects more closely resembles a parliamentary than our modern presidential form of government. What they wanted to avoid, said the sainted George Mason, was an “elective monarchy,” which he thought was worse than the real thing.

The readings and the discussion will concentrate on the structure of the American government, and in particular the division of powers between the executive and legislative branches. We will not have time to discuss several important, though vexed, issues, such as the compromise over slavery.

Amongst the countries ranked as free by Freedom House, two models stand out. One would preserve freedom by dividing government into different branches which then would check each other, and this is the presidential form of government described in The Federalist Papers and familiar to us today. The second would preserve liberty by placing the plenitude of power in an elected government and relying on the machinery of democracy to rein in the executive branch, and this is the parliamentary form of government to be found in Great Britain and the 50 countries (with 2 billion people) of the Commonwealth. Looking at how the two systems have
fared in other countries might lead one to wonder whether the American system was made for export, unlike the Westminster system of Great Britain.

In the third part of the course we’ll look at developing trends in the structure of American government, which taken to the next level, might threaten liberty in America. These will include the executive power to govern by regulation, the president’s power to nullify a law by refusing to enforce it, and the presidential war power.

I expect you to find the legal materials in the readings from Lexis or from JSTOR.

I have my own point of view about all of these questions, which I hope to see challenged by you.

**Required Texts**

Notes of Debates in the Federal Convention of 1787, at [http://avalon.law.yale.edu/subject_menus/debcont.asp](http://avalon.law.yale.edu/subject_menus/debcont.asp). Access to the web site is free, but I strongly recommend that students purchase Volumes 1 and 2 of Max Farrand’s Notes of the Convention (about $40 each). There is also a $27 one-volume set of the Madison’s notes introduced by Adrienne Rich, which would do fine if you can get it. Beware of other, abridged editions. The Rich edition is over 700 pages, which should give you some idea of what to expect from a 200 pp. edition. I shall assign readings from the Records of the Convention by date.


Suggested readings with either be placed on reserve or will be accessible to you through the online data catalogues of the law school library.

**Method of Evaluation**

This is a “paper” course, and students will be asked to submit an original essay of 30-50 pages on some aspect of the course. From the readings and discussions, I would expect that some of you will want to submit papers on just what the Framers of the Constitution intended, in the form of government they devised. I’ll ask you to speak to me privately about your plans for the paper before you get started on it.
**Session One: The Background**

Beeman pp. 3-85

The Articles of Confederation, at [http://avalon.law.yale.edu/18th_century/artconf.asp](http://avalon.law.yale.edu/18th_century/artconf.asp)

The Annapolis Conference, at [http://avalon.law.yale.edu/18th_century/annapoli.asp](http://avalon.law.yale.edu/18th_century/annapoli.asp)

The Constitution of Virginia, 1776, at [http://www.nhinet.org/ccs/docs/va-1776.htm](http://www.nhinet.org/ccs/docs/va-1776.htm)


Questions: Were the Articles of Confederation “broken.” In what respect was a loose association of state more protective of liberty, and in what respect was it less efficient than a federal system? How did the procedural decisions in the first days of the Convention shape its outcome? How was the government of the 1776 Virginia Constitution different from that of today’s federal government?

**Session Two: The Virginia Plan**


Records, May 29 to June 4

Beeman, pp. 86-143.

Questions: Madison had read Hume at college in Princeton. How much of the Vices essay, and the Virginia Plan, was taken from Hume? How would the Virginia Plan have reduced gridlock? Why did Madison and Randolph want judges as members of the Council of Revision? How would the Virginia Plan have struck a balance between the power of the federal government and that of the states? What did the delegates have to say about democracy, and what did they mean by it? What role did the delegates see for the president? Was this a plan for a parliamentary government?
Session Three: The Delegates Deliberate

Records, June 4 to June 11

Beeman pp. 144-62

Questions: What does the vote about a plural executive say about the delegates’ beliefs about the presidency? How did the delegates refine their thoughts about democracy and representation? Did the delegates think that sovereignty could be divided? Which was most to be feared: states encroaching on the federal power, or vice versa?

Session Four: The New Jersey Plan

Records, June 12 to June 18

Beeman pp. 163-89

Questions: Would the New Jersey Plan have reduced gridlock? In what respect was it a decentralizing document? What were Hamilton’s thoughts on government?


Session Five: The Great Compromise

Records, June 19-July 1, July 16

Beeman pp. 190-239

Questions: Just how was the compromise arrived at? Who gave up what? What were the dissenters opposed to, and who were they? Why was the compromise just what one would have expected to emerge from the debates? Who cut the deals, and who was left out? On the debate about states’ rights, who had the better of the argument?
Session Six: Gouverneur Morris Intervenes

Records, July 17-21

Beeman pp. 240-50

Questions: Why did Gouverneur Morris oppose the national veto? To which constituencies did he appeal in arguing for an elected president? When did Madison turn on the issue, and what changed his mind?

Session Seven: What Kind of Presidency?

Records, July 24-26, August 6, 23-24

Beeman pp. 250-76

Questions: How did the arguments about how to elect a president affect how delegates felt about limits on the office?

Session Eight: What Did They Decide?

Records, Sept. 4, 6-8, 17

Constitution Art. II

Beeman pp. 277-307, 346-68

Questions: How did the delegates expect the president to be chosen? What discretion were the electors to exercise? How often did the delegates think that a president would fail to get a majority of the electoral vote? To what extend would politics be centered at the state level? How did they arrive at their test for impeachment?

Session Nine: The Federalist Papers

Federalist 10, 47-49, 51, 67-70

Questions: To what extent do the Federalist papers reflect the views of the Framers? If they don’t, which do you prefer?
Session Ten: Bagehot on Parliamentary Government

Walter Bagehot, The English Constitution, chs. 1-3, 7

Questions: How did it happen that the British constitution changed so radically from the time of the Framers? Is Bagehot’s constitution closer in spirit to what the Framers wanted than the present-day American Constitution? What are the safeguards on tyrannical government in the English constitution? Is it more efficient than the American Constitution, and is there an efficiency-liberty trade-off?

Session Eleven: Empirical Studies

Buckley, American Exceptionalism [to come]

Questions: Sure. Annoy me. Pick holes in it.

Session Twelve: Making Law by Regulation


Christopher deMuth, The Regulatory State, 12 National Affairs 70 (2012)
**Session Thirteen: Unmaking Laws by Waiver and Non-enforcement; The Executive Spending Power**


[Robert Rector](http://blog.heritage.org/2012/07/12/obama-guts-welfare-reform/) and [Kiki Bradley](http://blog.heritage.org/2012/07/12/obama-guts-welfare-reform/), Obama Guts Welfare Reform, Heritage Foundation (July 12, 2012)


Train v. New York, 420 U.S. 35 (1975)


Buckley, chapter 5

**Session Fourteen: The War Power**


Patrick James and John R. Oneal, The Influence of Domestic and International Politics on the President’s Use of Force, 35 J. Conflict Resolution 307 (1991)