

The Structure of Liberty

Law 425

Fall 2024

Two credits

Mon 4:00-6:00 p.m.

The Course

The Structure of Liberty is a seminar on constitutional theory, as seen through the lens of the Framers' debates at the 1787 Constitutional Convention. We'll discuss how the Federalist Papers misrepresent their ideas and present a faulty account of the structure of American government. We'll also ask how it is that, almost alone amongst countries that adopted a constitution modelled on American lines, we managed to remain free.

Questions we'll pursue include:

- Is constitution-making simply a matter of getting the structure of government right? Is there an ideal constitution that can be exported across the globe?
- Or does civic virtue matter, and if so how would you define it?
- Should we look for virtue in the voters or rather (as Madison thought at the Convention) in our public officials?
- Is there a trade-off between civic virtue and liberty?
- Does the separation of powers promote the common good? Does it create misincentives? A failure to take responsibility? Overlong legislation?
- What's more important? Vetting legislation before it's passed or reversing bad laws thereafter?
- What are the limits on the powers of a president who seeks to rule as the tribune of the people?
- Depending upon student interest, we'll might also look at such questions as secession, the Electoral College, and the possible criminal liability of presidents.

The delegates were amongst the most astute of practical political thinkers of theirs or of any day. 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

Convention nearly adjourned several times, and some delegates expected to see a break-up of the country and a civil war.

We'll also take a look at the parliamentary constitutions from which our constitution arose, by way of understanding some of the problems with American constitutionalism.

In the last two sessions I'll look to you to supply your ideas, from the papers you propose to write, and will ask you to speak to those ideas in class. As you tell me what you want to write about, I'll suggest readings for you.

The choice of papers is your own. You might either pick out one idea about the structure of government or else focus on a single Framers. Who were the delegates who provided the crucial insights at the Convention? Who is underrated and who overrated? In any event, I'll expect that the Framers' debates will be a major focus of your paper.

Method of Evaluation

There is no exam, but I will require a paper from each of you, in the vicinity of 5,000 to 10,000 words, due on Jan. 6, 2025. I shall also assign 20 percent of the marks based on classroom performance, as I shall want good discussions in the seminar. I'll ask you to speak to me privately about your plans for your paper before you get started on it.

Required Texts

I have ordered up the following books for the course, which you should find in the bookstore. In a pinch, there's always Amazon.

Max Farrand, Notes on the Debates in the Federal Convention, volumes 1 and 2. These come to between \$20 and \$50 each, and you should buy them. I note, however, that the materials are also available online for free at http://avalon.law.yale.edu/subject_menus/debcont.asp. In the reading list below, I refer to Farrand's Notes as "Records," by their date.

The Federalist Papers, again available for free online, at http://avalon.law.yale.edu/subject_menus/fed.asp.

Buckley, The Once and Future King (Encounter Books, paperback, 2015, about \$15)

Other readings are available online, as indicated below.

Session One: The Background

Questions. How would you design a constitution? Is the goal to maximize some unique good (e.g., wealth or equality) or to design a process aimed at serving democratic goals subject to side constraints (e.g., individual rights). Or a bit of both? How important is the need for virtuous government, of the kind seen in Lorenzetti's [Allegory of Good Government](#)? If you think that people are naturally self-interested and incapable of disinterested behavior, you'd say not at all. In that case you'd want a constitution that blunts self-interest, along the lines Madison suggested in Federalist 10.

[Lorenzetti, Allegory of Good Government](#)

Sermon, by Rev. Samuel McClintock, at <https://www.consource.org/document/a-sermon-on-occasion-of-the-commencement-of-the-new-hampshire-constitution-by-samuel-mcclintock-1784-6-3/>

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?

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

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

The Constitution of Virginia, 1776, at https://avalon.law.yale.edu/18th_century/jeffcons.asp

Session Two: The Virginia Plan

Questions: Madison had read Hume at college in Princeton. How much of the Vices essay and the Virginia Plan were taken from Hume? How would the Virginia Plan have reduced gridlock? How might it have filtered away unworthy leaders? How would the Virginia Plan have struck a balance between the power of the federal government and that of the states? Was this a plan for a parliamentary government? 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?

Montesquieu, The Spirit of the Laws XI.6, at
<http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws>

Montesquieu, The Spirit of the Laws VIII.16, at
<http://oll.libertyfund.org/titles/montesquieu-complete-works-vol-1-the-spirit-of-laws>

David Hume, Idea of a Perfect Commonwealth, at
<https://oll.libertyfund.org/page/oll-reader-70>

James Madison, Vices of the Political system of the United States, at
<https://founders.archives.gov/documents/Madison/01-09-02-0187>

Records, May 25 to June 4

Session Three: The Delegates Deliberate

Records, June 4 to June 11

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

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 5-6, 16

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?

Oliver Wendell Holmes Sr., The Deacon's Masterpiece, at <http://holyjoe.org/poetry/holmes1.htm>

Session Six What Kind of Presidency?

Records, July 17-21

Questions: Who attended the breakfast on the morning on July 17, and what did they say? 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? How important was the fear of corruption to the delegates?

Records, July 24-26, August 6, 17, 22-24

Records, Sept. 4, 6-8

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

It's time for you to think about a summing-up. Based on what you've read, can you tell me how you think the Framers in general came down on:

- Filtration
- The fundamental requirements of democratic government
- The division of power between the feds and the states
- The separation of powers—and its purpose
- The allocation of powers to the fed in Article I
- Presidential elections
- Civic Virtue and Corruption

Session Seven What Did They Decide?

Records, Sept. 15-17

Buckley chapter 2

Constitution Art. II

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 extent would politics be centered at the state level? How did they arrive at their test for impeachment?

Chiafalo v. Washington, 591 U.S. ____ (2020)

Session Eight The Federalist Papers

Federalist 1, 3, 9, 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 Nine Parliamentary Government

Buckley chs. 3, 6-9

Questions: How did it happen that the British constitution changed so radically from the time of the Framers? Is the present British 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 Ten The Limits of Presidential Power

U.S. v. Texas, 579 U.S. ____, 136 S. Ct. 2271 (2016)

John Locke, Second Treatise, ch. 14, at https://www.gutenberg.org/files/7370/7370-h/7370-h.htm?ref=americanpurpose.com#CHAPTER_XIV

Trump v. U.S., https://www.supremecourt.gov/opinions/23pdf/23-939_e2pg.pdf

Session Eleven Secession

Texas v. White, 74 U.S. 700 (1869), at

https://scholar.google.com/scholar_case?case=1134912565671891096&q=texas+v.+white&hl=en&as_sdt=6,47&as_vis=1

Reference re Secession of Quebec, [1998] 2 S.C.R. 217 (Canadian Supreme Court), at

<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>

Session Twelve *Student Presentations*

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