

## **History and Foundations of the Administrative State**

Law 646-001

Spring 2022

The Honorable Clarence Thomas

Professor Jennifer Mascott

Contact information: [jmascott@gmu.edu](mailto:jmascott@gmu.edu)

Office hours by appointment

This seminar will study the history and development of administrative agencies. Starting from the Founding era around the time of the Constitution's ratification in 1788, the course will trace the law and theory surrounding administration, including the influence of intercontinental thought and theory on the develop of American administration in the nineteenth and twentieth centuries. The course will consider questions related to the constitutional foundations of various forms of administrative action and administrative structure. The course will also trace the development of the contemporary relationship between administrative agencies and Congress, the President, and federal courts. The seminar will conclude with an examination of how this history might relate to modern controversies about the legal limits of administration.

### **Requirements:**

For each class session there will be required readings. Students should come prepared to discuss the materials each week. Students will also be assigned one class period during which they will work together in a pair or group of three to lead the in-class discussion of that day's assigned readings.

Two thirds of a student's grade will be based on a 20- to 25-page research paper due on Monday, April 25. Students should begin considering paper topics at the start of the semester. Initial topic statements are due to Professor Mascott and Justice Thomas by 11:59 p.m. on Thursday, February 3. Students must then submit a two-page outline of their project by 11:59 p.m. on Thursday, February 24. Students must also schedule a brief meeting with Professor Mascott in February to discuss their topic statement and outline for purposes of developing those documents into a final paper draft. The paper grade will be based on both the final work product and the progression of a student's research and writing on the project throughout the course of the semester.

One third of a student's grade will be based on in-class participation. This oral participation grade will incorporate a student's weekly contributions to in-class discussions, the student's one-time role as in-class discussion leader, and the student's oral in-class presentation on a draft of the student's written research paper. (In April, students will provide short in-class oral presentations based on the rough draft of their papers.)

Please sign up for the course's TWEN page, which will be used to email students and to post updates to reading assignments. You may also use TWEN to start discussions relating to the class. **\*\*In addition, prior to the first class, please reread all seven articles of the original CONSTITUTIONAL text. The course will assume close familiarity with the constitutional text.\*\***

## Reading Assignments

### **January 20—Introduction: Administration and the Constitution**

- U.S. Constitution arts. I-III
- [THE FEDERALIST](#) Nos. 47, 48, & 51
- Gary Lawson, [The Rise and Rise of the Administrative State](#), 107 HARV. L. REV. 1231-54 (1994)
- PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 1-11 (2014) (TWEN)

### **January 27—Early Administration**

- *Myers v. United States*, 272 U.S. 52, 106-77 (1926)
- [JERRY L. MASHAW, CREATING THE ADMINISTRATIVE CONSTITUTION 3-17 \(2012\)](#)
- JOSEPH POSTELL, BUREAUCRACY IN AMERICA 73-93 (2017) (TWEN)

### **February 3—Progressivism and Intercontinental Theory**

- Woodrow Wilson, “The Study of Administration,” 2 POL. SCI. Q. 197 (July 1887) (TWEN)
- Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice” (Speech to the ABA 1906) (TWEN)
- RONALD J. PESTRITTO, [WOODROW WILSON AND THE ROOTS OF MODERN LIBERALISM](#) (2005) (Introduction)
- G.W.F. HEGEL, [PHILOSOPHY OF RIGHT](#) 194-222 (§§ 257-274) (trans., S.W. Dyde) (Batoche Books 2001)

### **February 10—The President and Administration—Early Practice**

- *Seila Law LLC v. CFPB*, 591 U.S. \_\_\_ (2020)
- *United States v. Arthrex*, 141 S. Ct. 1970, 1997-2011 (2021) (Thomas, J., concurring)
- STEVEN G. CALABRESI & CHRISTOPHER S. YOO, [THE UNITARY EXECUTIVE: PRESIDENTIAL POWER FROM WASHINGTON TO BUSH](#) 1-21, 30-36 (2008)

### **February 17—Progressives and the Presidency**

- Woodrow Wilson, “The President of the United States,” in AMERICAN PROGRESSIVISM: A READER (Pestritto & Atto, eds. 2008)

- Theodore Roosevelt, “The Presidency; Making an Old Party Progressive,” in *AMERICAN PROGRESSIVISM: A READER* (Pestritto & Atto, eds. 2008)
- ERIC A. POSNER & ADRIAN VERMEULE, [THE EXECUTIVE UNBOUND: AFTER THE MADISONIAN REPUBLIC](#) 113-153 (2010)

### **February 24—Agency Adjudication: Private Versus Public Rights**

- *Wellness Intern. Network, Ltd. v. Sharif*, 575 U.S. 665 (2015)
- [THE FEDERALIST](#) Nos. 78, 79, 80, & 83
- Caleb Nelson, [Adjudication in the Political Branches](#), 107 COLUM. L. REV. 559, 561-93 (2007)

### **March 3—Agency Lawmaking: Delegation**

- *Department of Transportation v. Association of American Railroads*, 135 S. Ct. 1225 (2015) (Thomas, J., concurring opinion)
- Gary Lawson, [Delegation and Original Meaning](#), 88 VA. L. REV. 327, 335-72 (2002)
- Julian Davis Mortenson & Nicholas Bagley, [Delegation at the Founding](#), 121 COLUM. L. REV. 277 (2021) (Introduction)
- Joseph Postell & Paul D. Moreno, *Not Dead Yet--Or Never Born? The Reality of the Nondelegation Doctrine*, 3 CONST. STUD. 41 (2018).

### **March 10—Delegation, Due Process, and Contemporary Doctrine**

- *Gundy v. United States*, 588 U.S. \_\_\_ (2019)
- Eric A. Posner & Adrian Vermeule, [Interring the Nondelegation Doctrine](#), 69 U. CHI. L. REV. 1721, 1721-43 (2002).
- Philip Hamburger, [Delegating or Divesting?](#), 115 N.W. UNIV. L. REV. 88 (2020)

### **March 17—No class, spring break**

### **March 24—Interpretation and Law “Administration”**

- *Kisor v. Wilkie*, 588 U.S. \_\_\_ (2019)
- *Perez v. Mortgage Bankers Ass’n*, 575 U.S. 92, 112-33 (2015) (Thomas, J., concurring)
- Ernest Freund, [The Law of the Administration in America](#), 9 POL. SCI. Q. 403 (1894)

### **March 31—Presentations on draft research papers**

### **April 7—Presentations on draft research papers**

**April 14—Presentations on draft research papers**

**April 21—Where We Are Today: The Constitutional Status of Administration?**

- *Alabama Ass'n of Realtors v. HHS*, 594 U.S. \_\_\_ (2021)
- *Cochran v. SEC*, 20 F. 4th 194, 197-236 (5th Cir. 2021) (majority & concurring opinions)
- BLAKE EMERSON, [THE PUBLIC'S LAW: ORIGINS AND ARCHITECTURE OF PROGRESSIVE DEMOCRACY](#) (2019) (Introduction)
- PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 493-511 (2014) (TWEN)