

The Structure of Liberty

Law 425
Spring 2023
Two credits

Wed 150 -- 350 p.m.

The Course

The Structure of Liberty is a seminar that will examine the manner in which constitutions may be designed to protect liberty and good government, with a close reading of the debates of the Framers at their Convention in Philadelphia in the summer of 1787.

The Framers' debates are the greatest and least read set of deliberations upon liberty and democracy. 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.

The debates will be of the greatest interest to original meaning originalists, who believe the constitution should be interpreted as the Framers would have intended. But even original text originalists, who think the words should be interpreted according to their ordinary meaning at the time, will want to know what the Framers thought. How best to understand that ordinary meaning than by looking at what the Framers thought the words meant.

Whatever your ideas of the Constitution might be, you'll learn things about presidential overreach, corruption, democracy and secession that you'll find surprising. Through the prism of the Founders' debates and the Federalist, we'll take about the possibility of virtue politics and the goal of good government.

We'll also take a look at the parliamentary constitutions from which our constitution arose. He who know only his own country's constitution knows little enough of that.

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 government or else focus on a single Framers.

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 May 10, 2023. 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.

Buckley, *The Once and Future King* (Encounter Books, paperback, 2015, about \$15). (I'll have some freebies to hand out.)

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.

Other readings are available online, as indicated below.

Session One: The Background

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 <http://www.nhinet.org/ccs/docs/va-1776.htm>

Records, May 25-28.

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

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 <http://press-pubs.uchicago.edu/founders/documents/v1ch5s16.html>

Records, May 29 to June 4

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? 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? 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

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

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?

Session Six Gouverneur Morris Intervenes

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?

Session Seven What Kind of Presidency?

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

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, 15, 17

Buckley chapter 2

Constitution Art. II

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

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 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 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 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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