

The Structure of Liberty

Law 425
Spring 2018
Two credits

Monday 600 -- 750 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 ban corruption, with 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. 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 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 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.

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 plentitude 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.

In the last three 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 I learn of which you want to write about, I'll suggest readings. The readings for the last three classes are tentative, and may be revised depending on your writing plans.

Method of Evaluation

There is no exam but I shall require a paper from each of you, in the vicinity of 8,000 to 20,000 words, due on Wednesday, May 2, 2018. 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)

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 http://lf-oll.s3.amazonaws.com/titles/2712/Hume_Commonwealth1777.pdf

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? 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

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://www.eldritchpress.org/owh/shay.html>

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?

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, 7-9

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 Empirical Studies

Buckley, chapter 6

[Session Twelve Making Law by Regulation]

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984)

United States v. Mead Corp., 533 U.S. 218 (2001)

Free Enterprise Fund v. Public Company Accounting Oversight Board, 130 S. Ct. 3138 (2010)

See Larry Alexander and Saikrishna Prakash, Delegation Really Running Riot, 93 Va. L. Rev. 1035 (2007)

Christopher deMuth, The Regulatory State, 12 National Affairs 70 (2012), at <http://www.nationalaffairs.com/publications/detail/the-regulatory-state>

Buckley chapter 5

[Session Thirteen Unmaking Laws by Waiver and Non-enforcement; The Executive Spending Power]

Office of Legal Counsel, 18 Op. O.L.C. 199, 200-03 (1994)

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

Texas v. U.S., at https://www.supremecourt.gov/opinions/15pdf/15-674_jhlo.pdf

Buckley, chapter 5

[Session Fourteen The War Power]

Dellums v. Bush, 752 F. Supp. 1141 (D.D. Cir.,1990)

Hamdi v. Rumsfeld, 542 U.S. 507 (2004)

Hamdan v. Rumsfeld, 548 U.S. 557 (2006)

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)