

# The Structure of Liberty

Law 425 (001)

Spring 2024

Two credits

Wed 150 -- 350 p.m.

## *The Course*

The Structure of Liberty is a seminar in which we'll closely read the debates of the Framers at their Convention in Philadelphia in the summer of 1787. Faced with novel questions of governance and almost without examples to guide them in the creation of a republic, the Framers were called on to deliberate over the most fundamental questions of jurisprudence. We also, in the turbulent politics of today, are asked to resolve foundational questions of constitutional policy, such as:

- Can a presidential candidate be ruled ineligible for office under the Fourteenth Amendment?
- What does civic virtue mean, and should a constitution concern itself with it?
- Should we look for civic virtue in the voters or rather (as Madison thought at the Convention) in 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?
- Is secession permissible and how might it be accomplished?
- Do the Federalist Papers fairly represent what the delegates thought they had agreed to?

The delegates were amongst the most astute of practical political thinkers of their 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. The best way to understand the ordinary meaning of the text is by looking at what the Framers thought the words meant.

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 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 May 10, 2024. 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](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](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. Is there an ideal constitution that can be exported across the globe?

#### [Lorenzetti, Allegory of Good Government](#)

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?

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>

Records, May 25-28.

### ***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 29 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)

***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](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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