

HERTOG 2021 POLITICAL STUDIES PROGRAM

CONSTITUTIONAL ADMINISTRATION

Adam White, Resident Scholar, AEI

Led by legal scholar Adam J. White, fellows in this seminar will explore how the Executive, the federal agencies, and the courts interact to advance — and sometimes stymie — what Publius called, “the steady administration of the laws.” In charting the transformation of judicial and administrative power from the Founding to today, fellows will reflect on the nature of expertise in modern administration, the challenge of political accountability, and role of the courts as a check on Executive power.

This seminar will meet from **2PM – 5 PM ET** on **August 2–6, 2021**.

Course Materials:

- Course Reader
- United States Constitution included in course reader

Resources:

To learn more about the ideas and figures discussed in this course, we encourage you to explore a project supported by the Hertog Foundation: **The Great Thinkers** (<http://thegreatthinkers.org/>) and **Contemporary Thinkers** (<http://contemporarythinkers.org/>) websites. These sites are aimed at introducing important thinkers in Western thought, with a particular emphasis on politics and philosophy.

Monday, August 2, 2021

2PM – 5 PM ET

Session I: Constitutional Origins

Readings:

- The Declaration of Independence (1776)
- James Madison, “Vices of the Political System of the United States” (1787)
- Alexander Hamilton, *Federalist* Nos. 67, 68, 70, 71, 72, 76, 77
- James Madison, *Federalist* No. 37
- President George Washington, First Inaugural Address (1789)

- President George Washington, Second Inaugural Address (1793)

Questions:

1. What failures of administration were highlighted by the Declaration of Independence, and by Madison's memorandum?
2. What does Hamilton's defense of the presidency imply about his view of good administration?
3. How did the *Federalist's* view of administration relate to its view of legislation?
4. In Madison's description of the difficulties of "vague" laws in *Federalist* No. 37, what is the role of administration in clarifying the meaning of laws?
5. What do Washington's inaugural addresses suggest about his view of constitutional administration?

Tuesday, August 3, 2021

2PM – 5 PM ET

Session II: Dawn of the Administrative State

Readings:

- James Landis, *The Administrative Process* (Yale University Press, 1938), pp. 1–5
- Woodrow Wilson, "The Study of Administration," *Political Science Quarterly*, Vol 2 (1887), pp. 197–222
- *Lochner v. New York* (1905)
- *Pierce v. Society of Sisters* (1925)
- *A.L.A. Schechter Poultry Corp. v. United States* (1935)

Questions:

1. What are the shortcomings of our original Constitution, according to Landis?
2. What is the relationship between administration and democracy, according to Wilson?
3. What rights did the Supreme Court defend in *Lochner* and *Pierce*?
4. Why did the Supreme Court strike down the National Industrial Recovery Act's rulemaking provision in *Schechter Poultry*?

Wednesday, August 4, 2021

2PM – 5 PM ET

Session III: Reform & the Reagan Revolution

Readings:

- Antonin Scalia, “Regulatory Reform—The Game Has Changed,” *Viewpoint* (January/February 1981)
- President Ronald Reagan, Executive Order 12,291 (February 17, 1981)
- Antonin Scalia, “A Note on the Benzene Case,” *American Enterprise Institute Journal of Government and Society* (1980)
- Antonin Scalia, “Judicial Deference to Administrative Interpretations of Law,” *Duke Law Journal*, No. 3 (June 1989)
- Jack Goldsmith, “The Accountable Presidency,” *The New Republic*, February 2010

Questions:

1. According to Professor Scalia, what “game” had “changed” in 1980—and how?
2. What problems did President Reagan’s executive order attempt to solve?
3. Why was Scalia so wary of courts striking down statutes or rejecting agencies’ interpretations of statutes?
4. How and why did conservatives reconsider their view of executive power in the 1970s and 1980s, according to Goldsmith?

Thursday, August 5, 2021

2PM – 5 PM ET

Session IV: Expertise in Republican Government

Readings:

- Peter Shane, “Trump Shouldn’t Be Able to Fire Fauci for Contradicting Him,” *Atlantic* (2020)
- Greg Weiner, “Expertise and Prudential Politics,” *Law & Liberty* (2020)
- Yuval Levin, “The Coronavirus Crisis Shows Experts Aren’t Enough,” *Wall Street Journal* (2020)

- Antonin Scalia, “Rulemaking as Politics,” *University of Chicago Law School* (1982)
- Herbert Storing, “The Crucial Link: Public Administration, Responsibility, and the Public Interest,” *Public Administration Review*, Vol. 24 (1964), pp. 39-46

Questions:

1. What is the proper role of expertise in administration?
2. When the president and one of his advisors disagree, what should each do?
3. Is constitutional administration primarily a matter of politics or expertise?

Friday, August 6, 2021

2PM – 5 PM ET

Session V: Recent Reconsiderations

Readings:

- President Biden, “Modernizing Regulatory Review” (2021)
- *Department of Transportation v. Association of American Railroads* (2015) (Thomas, J., concurring)
- *Baldwin v. U.S.* (2020) (Thomas, J., dissenting)
- *Roman Catholic Diocese of Brooklyn v. Cuomo* (2020)

Questions:

1. Will President Biden’s proposed reforms to regulatory review promote expertise in administration?
2. How do Justice Thomas’s recent opinions on administrative law differ from Scalia’s earlier views?
3. What does the *Cuomo* case teach us about administration, democracy, rights, and religion?