

Conservative Political and Legal thought 2020-2021 Course Syllabus Taught by Amy Wax at the University of Pennsylvania Law School

Course description: This year-long seminar will explore the conservative intellectual tradition in Anglo-American and European thought and its ramifications for law, including the role of tradition, precedent, central planning, autonomy, contractarianism, private law vs. public law, liberty, equality, rights, national sovereignty, immigration, the welfare state, and the appropriate roles of the criminal law and perfectionism.

There are three required texts:

- 1) Jerry Z. Muller (ed.), *Conservatism: An Anthology of Social and Political Thought from David Hume to the Present* (Princeton: Princeton Univ. Press 1997) (ISBN 978-0691037110); in bookstore
- 2) Russell Kirk, *The Conservative Mind: From Burke to Eliot* (Washington: Regnery Publishing, 7th rev. ed. 1985, 2014 reprint) (ISBN 978-0895261717); to be ordered by student or in bookstore; also available on library reserve.
- 3) Richard M. Weaver, *Ideas Have Consequences* (Chicago: Univ. of Chicago Press 1948, paperback 1984) (ISBN 978-0226090061).
Recommended: Yuval Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left*

READING LIST

Week 1: Tuesday, September 8 (FINAL)

History, Tradition, and Incrementalism: Edmund Burke & Joseph de Maistre

Russell Kirk, *The Conservative Mind*, Chapter I Introduction (Idea of Conservatism) & chapter II (Burke and Politics of Prescription)

Jerry Z. Muller, *Conservatism*: Intro, pp. 1-31 + pp. 63-69 (ch. 1: Burke, *Vindication of Natural Society*) + pp. 78-122 (ch. 2: Burke, *Reflections on the Revolution in France*)

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Anthony Quinton, *The Politics of Imperfection*, pp. 16-23 (1978) (on course website)

Recommended: Muller, pp. 134-145 (ch. 2: de Maistre, *Essay on the Generative Principle*)

Strongly recommended: Yuval Levin, *The Great Debate: Edmund Burke, Thomas Paine, and the Birth of Right and Left*, ch. 2-7 & Conclusion (2014) (on library reserve; consider purchasing)

Week 2: Tuesday, September 22 (FINAL)

Against Mill, utilitarian pluralism, and democracy: 19th century England

Muller, pp. 187-209 (ch. 3: James FitzJames Stephen on "Liberty", from *Liberty, Equality, Fraternity*)

Muller, pp. 358-371 (ch. 9: Irving Kristol, "Pornography, Obscenity, and the Case for Censorship")

James FitzJames Stephen, from *Liberty, Equality, Fraternity*, p. 76 (starting from "The real question is as to social intolerance")-p. 79 (end of 1st para)

James FitzJames Stephen, from *Liberty, Equality, Fraternity*, pp. 238-255 (last 17 pp. of ch. V, on "Equality") (starting from "I now proceed to the most important of the remaining senses of the word 'equality'-the equal distribution of political power" to end of chapter)

Willmoore Kendall, "The 'Open Society' and Its Fallacies," 54 *Am. Pol. Sci. Rev.* 972 (1960)

Optional:

Kirk, *The Conservative Mind*, pp. 298-327 (ch. 9.1-3) (on Mill, Comte, Stephen, and Maine)

Muller, pp. 167-186 (ch. 3: Matthew Arnold, *Culture and Anarchy*)

Thomas Carlyle, "The Present Time" (1850), in *1 Latter-Day Pamphlets*

Sir Henry Maine, *Popular Government: Four Essays* ch. 2-3 (1885)

Week 3: Tuesday, October 6 (FINAL)

The failure of Enlightenment progress & bureaucratic rationality

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Richard Weaver, *Ideas Have Consequences* (entire book)

Alasdair MacIntyre, *After Virtue*, chs. 5 & 6, 8

Optional:

Alasdair MacIntyre, *After Virtue*, chapters 7, 17 & 18

Bertrand de Jouvenel, *On Power* pp. 330-81, ch. XVII.10-XIX

Leo Strauss, "On German Nihilism"

Week 4: Tuesday, October 27 (FINAL)

Against perfectionism, rationalism, and optimism about human nature

Muller, pp. 290-312 (ch. 8: Michael Oakeshott, "Rationalism in Politics")

Muller, pp. 313-334 (ch. 8: Friedrich Hayek, "The Errors of Constructivism" and *The Mirage of Social Justice*)

Michael Oakeshott, "On Being Conservative" pp. 9-13; pp. 1-9 optional but recommended

James Burnham, *Suicide of the West: An Essay on the Meaning and Destiny of Liberalism*, ch. III - V (pp. 46-98 of text); optional ch. VII, summary of points

Steven Pinker, *The Blank Slate: The Denial of Human Nature* ch. 16

Optional:

Pinker, *The Blank Slate*, ch 17-18

Michael Oakeshott, "The Tower of Babel"

Jonathan Haidt, *The Righteous Mind: Why Good People Are Divided by Politics and Religion* ch. 7 (2012)

Week 5: Tuesday, Nov. 10 (FINAL)

Markets, capitalism, "progress" and central planning; libertarians vs. conservatives:

F.A. Hayek, *The Use of Knowledge in Society* (1945)

Milton Friedman, *Capitalism and Freedom* ch.1 (1962)

F.A. Hayek, *Why I Am Not a Conservative*, in *The Constitution of Liberty* (1960), parts 3.-5. only

Russell Kirk, "Libertarians: The Chirping Sectaries" (1981)

Oren Cass, *Resolved: America Should Adopt an Industrial Policy* (2019)

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Daniel Bell, *The Cultural Contradictions of Capitalism* xvi-xviii, xxv-xxviii, 53-60 (first para.) (1976)

Optional:

Daniel Bell, *The Cultural Contradictions of Capitalism*, 60-80, 244-51

Roger Scruton, *The Meaning of Conservatism* ch. 5 (1984)

Twelve Southerners, *I'll Take My Stand*, introduction (ix-xx); pp.122-54, "A Critique of the Philosophy of Progress"(1930)

Hillaire Belloc, *The Servile State* 38-68 (1912)

Week 6: Tuesday, December 1 (FINAL)

The Founding and the U.S. Constitution: equality, individualism, hierarchy, individualism etc.

The Declaration of Independence

Federalist No. 10, 49, as excerpted in Muller, pp. 146-51, No. 51 (in files)

Alexis de Tocqueville, *Democracy in America*, excerpts:

vol. I, pt. II, ch. 7-8: On the Omnipotence of the Majority, and Causes which Mitigate Tyranny of the Majority, p. 403-407

vol.II, pt.II, ch.4: Of Political Association in the United States, p. 302-312;

vol.II, pt.I, ch. 8: How Equality Suggests to Americans the Idea of the Indefinite Perfectibility of Man,, p. 759-762;

vol.II, pt.II, ch.1, 2 & 4: More Enduring Love of Equality than Liberty; The Individualism of Democracies; That Americans Combat Individualism with Free Institutions, p. 873-878; 881-884; 887-894

vol. II, pt. IV, ch. 1-4: How Equality Gives Men a Taste For Free Institutions, etc. p. 1191-1205

vol. II, Pt. IV, ch. 6 (excerpts): Soft Despotism & Democracy

Russell Kirk, *The Conservative Mind* ch. 3 (part 2: Alexander Hamilton,

part 3: Fisher Ames, parts 4 & 5: John Adams), ch.6 (part 4: Tocqueville)

Harry Jaffa, *Equality as a Conservative Principle*, Loyola L. Rev. (1975), sections 2-3, pp. 474-477; section 9, p. 489-491; section 11, p. 500-501

M.E. Bradford, *The Heresy of Equality: Bradford Replies to Jaffa*, Modern Age, 1976, parts I & II, p. 62-63

H.A. Trask, *The Great Debate: Bradford v. Jaffe, Chronicles* (2020)

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Rufus Choate, *The Positions and Functions of the American Bar, as an Element of Conservatism in the State*, in Muller p.152-66

Optional:

Sir Henry Maine, *Popular Government: Four Essays* ch. 4 (1885) (on the Constitution of the United States)

Thomas G. West, *Jaffa versus Mansfield: Does America Have a Constitutional or a "Declaration of Independence" Soul?*, *Perspectives on Political Science* 235

Week 7, Tuesday Dec. 8 (FINAL):

The U.S. Radical Right (with Jared Taylor, of American Renaissance)

Russ Nieli, *Jared Taylor and White Identity*, ch. 9 in Sedgwick, *Key Thinkers of the Radical Right*

Enoch Powell, from *No Easy Answers*, interview with the BBC
optional but recommended:

<https://www.amren.com/features/2020/06/the-manufactured-crisis-of-police-racism/>

SPRING SEMESTER:

Week 8, Tuesday Jan 26 (FINAL):

Constitutional, Common-Law, Statutory Interpretation

Antonin Scalia, *Common-Law Courts in a Civil-Law System*, in *A Matter of Interpretation*, p. 23-41 (top); 44 (middle) - 47

Anthony Kronman, *Precedent and Tradition*, 99 *Yale L.J.* 1029 (1990), Parts III and IV, pp. 1036-1047

Michael W. McConnell, *The Right to Die and the Jurisprudence of Tradition*, 3 *Utah L. Rev.* 665-73, 681-91 (1997) (pts. IA, IB, IIA, IIB)

Thomas W. Merrill, *Bork v. Burke*, 19 *Harv. J.L. & Pub. Pol'y* 509 (1996)

Optional:

Karl Llewellyn, *The Common-Law Tradition* pp. 59-61, 121-22, 213-23 (1960)

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Anthony Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 Yale L.J. 1567 (1985)

Week 9, Tuesday Feb. 9 (FINAL):

The criminal law - moralism, agency, responsibility

Substantive criminal law -- Justifications

Emile Durkheim, *The Division of Labor in Society*, pp. 62-63

Sir James FitzJames Stephen, 2 *The History of the Criminal Law of England*, pp. 79-83

Marc DeGirolami, *Against Theories of Punishment: The Thought of Sir James FitzJames Stephen*, 9 Ohio State J Crim L--part III, pp. 721-741

Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 Harv L Rev (2016) pp. 1489-1497 and 1519-1524

Paternalism/Law and Morality/"Victimless" Crimes

Lord Patrick Devlin, *The Enforcement of Morals* (1965)--chapter I, pp. 7 (bottom, "In Jurisprudence . . .") to pp. 15 (middle)

Criminal justice enforcement - the overincarceration debate

Heather MacDonald, *The Decriminalization Delusion*, City Journal, Autumn 2015

Optional:

James B. Jacobs, *Imagining Drug Legalization*, The Public Interest 1990

DeGirolami, *supra*, part II

Devlin, *supra*, remainder of chapter I; chapter VI, VII

Joshua Kleinfeld, *Reconstructivism*, remainder of article except part II

Bernard Harcourt, *The Collapse of the Harm Principle Redux*

James Q. Wilson, *Against the Legalization of Drugs*, Commentary 1992

Stephanos Bibas, *Prisoners Without Prisons*, National Review, Sept. 21, 2015

Heather Mac Donald, *Back to Bedlam*, City Journal, April 19, 2016

Week 10, Tues Feb. 23 (FINAL):

Meritocracy, bureaucracy, and the administrative state

The administrative state & the bureaucracy:

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Robert Scott, *Seeing Like a State*, pages 88 (middle "I believe . . .") - 97 (top para.);

Philip Hamburger, *Is Administrative Law Unlawful*, pp 1-12 (top), 364 - 376

Chris DeMuth - *Our Voracious Executive Branch*, *Weekly Standard*

Elites and Inequality:

Muller, *Conservatism, excerpts from Schumpeter*, pp. 222-232; Lubbe, *page 390-400*

Robert Klitgaard, *Choosing Elites (1985)* - pp 3-13

William Henry, *In Defense of Elitism*, pp 11-23 (top);

Ross Douthat, *The Case Against the Meritocracy (2018)*

Optional:

Yuval Levin, *The Fractured Republic*, page 36-53

Michael Young, *The Rise of the Meritocracy*, pp 79-95;

Scott, *Seeing Like a State*, pp 309-316 (The Simplifications and Practical knowledge)

Brett Stephens, *Doomed to Stagnate*

Week 11, Tuesday March 9 (FINAL):

The Welfare State, redistribution, socioeconomic class:

DeTocqueville - *Essay on Pauperism*

Ronald Dworkin, *The Theory and Practice of Equality*, from *Sovereign Virtue*, pp 327-328 only (The Psychological Argument)

Bertrand de Jouvenel, *The Ethics of Redistribution* 39-43; 63-66; 72-73

Yuval Levin, *The Fractured Republic* - 114-117

Charles Murray, *Coming Apart*, 84-88; 220-225; 230-235

Greg Ip, *Universal Basic Income for Kids*, *Wall St. Journal* 2021

American Compass: Family Income Proposal, 2021

Optional:

Himmelfarb, *The Demoralization of Society*, 130-142

Jennifer Roback Morse, *The Modern State as an Occasion for Sin*

Fred Siegel, *The Future once Happened here*, pp. 53-56; 66-71.

Donald Moon, *The Moral Basis of the Welfare State (excerpts)*

Conard, *The Upside of inequality* - 210-216

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Eberstadt, A National of Takers 3-40, 59-65

Myron Magnet, The Dream and the Nightmare, chapter 6, pp. 121-137

Muller, Conservatism - Berger and Neuhaus, The Mediating Structures, pp 374-389

Week 12, Tuesday March 23 (FINAL):

Marriage & family, gender and sexuality

Marriage and family:

Amy Wax, The Decline in Marriage as a Disorder of Choice, pp. 15-33; 56 (bottom)-65 (1st para)

Amy Wax, Learned Helplessness

Henderson, Why Being a Foster Child Made me Conservative, found at <https://www.nytimes.com/2018/05/21/opinion/foster-child-conservative.html> (Links to an external site.) (Links to an external site.)

Gender and Sexuality:

Kenneth Minogue, How Civilizations Fail

Geary, Sex Differences in Occupational Attainment

Park MacDougald, How Cheap Sex is Changing our Lives and Politics, reviewing Mark Regnerus, "Cheap Sex"

Swaim, The Sexual Revolution is Over

Elhage, Powerless to say no: Teenage Girls and Sexting

Optional:

David Murray, Poor Suffering Bastards, from Policy Review

David French, Can We Be Honest About Men, National Review

Dennis Prager, Male Sexual Nature: A Primer for the College Educated, National Review

Heather MacDonald, Women Don't Belong in Combat Units, at <https://www.wsj.com/articles/women-dont-belong-in-combat-units-11547411638> (Links to an external site.) (Links to an external site.)

Col. John Ripley testimony on women in combat,

<http://www.tfp.org/testimony-of-col-john-w-ripley-to-the-presidential-commission-on-the-assignment-of-women-in-the-armed-forces/> (Links to an external site.) (Links to an external site.)

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Kay Hymowitz, *Marriage and Caste*, chapter 1, pp 15-30; optional:
chapter 5

Kay Hymowitz, *The Sexual Revolution's Angry Children*

Maggie Gallagher, *The Abolition of Marriage*, page 143-152

Jennifer R. Morse, from *the Meaning of Marriage*, pp. 74-75; 81-88

Brenda Almond, *The Fragmenting Family*, pp. 61-66

Christopher Lasch, *The Culture of Narcissism*, 191-198

Charles Murray, *No Welfare is Really Not the Problem*

David Popenoe, *Life Without Father*, pp. 141-147

Harper's symposium, *A Duty to Family*, p 47-50

Amy Wax, *Experiments in Matrimony, First Things*

Week 13, Tuesday April 6: Immigration, nationalism, culture (FINAL)

Amy L. Wax, *Debating immigration Restriction: the Case for Low and Slow*

David Miller, *Strangers in Our Midst*, 57-71

Lawrence Auster, *The Path to National Suicide*, 10-26

Enoch Powell, 1964 BBC interview, from *No Easy Answers*

Samuel Huntington, *Who Are We?*, 264-273

Charles Murray, *Human Accomplishment*, 247-253

Adam, Garfinkle, *No It Wasn't About Race*

Roger Kimball, *Of Home Truths and Shitholes*

JD Vance on immigration, at

<https://www.newsweek.com/true-compassion-requires-secure-borders-stopping-illegal-immigration-opinion-1576943>

Optional:

David Miller, Strangers in Our Midst, 102-109

Hirsi Ali, in *Defense of Dissidence*, *New Criterion*

John Judis, *Two Sides to immigration Policy*

Karen McQuillan, *What I Learned in the Peace Corps in Africa: Trump is Right,*

Samuel Huntington, *Who Are We?*, 221-247; 253-256

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Ilana Mercer, 'Shithole Countries': What Makes a Country? the Place or the People?

Ponnuru and Lowry, For Love of Country, National Review, 2017

Week 14, Tuesday April 20 (FINAL):

Race, identity + Summing up (future of conservatism)

Wax, Race, Wrongs and Remedies 15-45

Glenn Loury, Unspeakable Truths about Racial Inequality, at

<https://quillette.com/2021/02/10/unspeakable-truths-about-racial-inequality-in-america/>

Murray and Herrnstein, The Bell Curve, chapter 22 --

Rusty Reno, Bigot-Baiting, from First Things