

Conservatism and Constitutional Thought

Richard Ekins
Adam Perry

University of Oxford HT 2025

Description

This seminar series considers the relationship between conservatism and constitutional theory and practice. We start with some central conservative themes, including opposition to sudden and sweeping change, concern to protect established goods, scepticism about the power (reach) of human reason, and pessimism regarding human motivation. We then explore these themes in connection with specific constitutional issues, such as the merits of different types of constitutions and constitutional norms, constitutional interpretation, and the relationship between government institutions. Ultimately, the aim is to reflect on questions of broad importance. Does the fact that an institution has survived for decades or centuries count in favour of its continuation? Should the constitution facilitate innovation and reform, or safeguard our fragile political and legal inheritance? What significance does the complexity of social life have for judicial review of political action? There are many examples drawn from the United Kingdom constitution, but the series is meant to be mainly philosophical and theoretical, rather than being about the doctrine or practice of a specific jurisdiction.

List of seminars

Week 1: Conservative themes
Week 2: The nature and purposes of a constitution
Week 3: Conservatism and the common law
Week 4: Balanced/mixed constitutions
Week 5: [no seminar]
Week 6: Politics, practice, and constitutionalism
Week 7: Bills of rights
Week 8: Constitutional interpretation

Expectations and reading

Students are expected to do *all* the core reading *before* the seminar. The background reading is meant to fill in some of the gaps, but if you have studied the topic before, you can probably skip it. The further reading is designed mainly for those doing a tutorial on a topic or revising it for the exam.

The seminars are meant to be a discussion. For them to work well, we need everyone to be involved. You should aim to say something every seminar.

Week 1: Conservative Themes

Background reading

- A Quinton, 'Conservatism' in Robert Goodin, Philip Pettit, and Thomas Pogge (eds), *A Companion to Contemporary Political Philosophy* (2nd edn, Blackwell 1993)
- A Hamilton, 'Conservatism' in Edward Zalta (ed), *Stanford Encyclopedia of Philosophy* (2020) <<https://plato.stanford.edu/archives/spr2020/entries/conservatism/>>

Core reading

- E Burke, *Reflections on the Revolution in France* (1790) available on Solo
- M Oakeshott, 'Rationalism in Politics' and 'On being Conservative' in *Rationalism in Politics* (Methuen & Co 1962)
- G Brennan and A Hamlin, 'Analytic Conservatism' (2004) 34 *British Journal of Political Science* 675
- G Gee and G Webber, 'A Conservative Disposition and Constitutional Change' (2019) 36 *Oxford Journal of Legal Studies* 526
- FA Hayek, *The Constitution of Liberty* (University of Chicago Press 1960) ch 4 ('Freedom, reason, and tradition') and Postscript ('Why I am not a conservative')

Further reading

- L Strauss, *Natural Right and History* (University of Chicago Press 1953) ch VI.B ('Burke')
- S Huntington, 'Conservatism as an Ideology' (1957) 51 *American Political Science Review* 454
- A Quinton, *The Politics of Imperfection* (Faber & Faber 1978), esp chapter I
- R Kirk, *The Conservative Mind* (Regnery Publishing 1986), esp chapters I & II
- R Grant, 'The Politics of Equilibrium' (1992) 35 *Inquiry* 423
- J Kekes, 'What is Conservatism?' (1997) 72 *Philosophy* 351
- R Scruton, *The Meaning of Conservatism* (3rd edn, Palgrave 2002)
- Y Listokin, 'Learning through Policy Variation' (2008) 118 *Yale Law Journal* 101

- G Gee and G Webber, 'Rationalism in Public Law' (2013) 76 Modern Law Review 708
- GA Cohen, 'Rescuing Conservatism' in *Finding Oneself in the Other* (Princeton University Press 2018)

Discussion questions

- Conservatism is often said to be marked by a presumptive opposition to sudden or sweeping change. What, if anything, justifies this opposition?
- Is conservatism simply scepticism about the application of human reason to political matters?
- Is conservatism a methodological or a substantive view? That is, is it a view about *how* we should work towards our goals, or about *what* goals we should work towards?
- What, if anything, distinguishes conservatism from liberalism? From socialism? From utopianism?
- How does conservatism's emphasis on tradition relate to its views of human motivation and reasoning?

Week 2: Nature and purposes of constitutions

Core readings

- A Welikala, 'Conservatism' in P Cane and H Kumarasingham (eds.), *The Cambridge Constitutional History of the United Kingdom: Volume I* (CUP, 2023), 457-479
- J Baker, 'Our Unwritten Constitution' (2010) 167 *Proceedings of the British Academy* 91-117
- J Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019), ch V
- R Ekins, 'Between Usurpation and Authority? Common Good and Constitutional Government' (2024) 69 *American Journal of Jurisprudence* 45
- M Loughlin, 'Burke on Law, Revolution and Constitution' (2015) 29 *Journal of Constitutional History* 48

Further readings

- J Waldron, 'Constitutionalism: A Skeptical View' in *Political Theory* (HUP, 2016), 23-44
- Oliver O'Donovan, 'Representation' and 'Legitimacy' in *Ways of Judgment* (Eerdmans, 2005), 149-185
- C Casey, 'Constitutional Design and the Point of Constitutional Law' (2022) 67 *American Journal of Jurisprudence* 173
- NW Barber, 'Against a Written Constitution' [2008] *Public Law* 11-18
- M Loughlin, *Against Constitutionalism* (Harvard University Press, 2022), chapters 1-4
- G Sartori, 'Constitutionalism: A preliminary discussion' (1962) 56 *American Political Science Review* 853-64
- WH Riker, 'Social Choice Theory and Constitutional Democracy' in T Christiano (ed), *Philosophy and democracy: an anthology* (OUP, 2003), 161-194
- J Bryce, *Constitutions* (OUP, 1905), Essay I "Rigid and Flexible Constitutions", 3-94, and Essay II "The Action of Centripetal and Centrifugal Forces on Political Constitutions", 95-141

Discussion questions

- Can a constitution be deliberately made? Should it be?

- What are the objects of a constitution? What are the preconditions of a constitution?
- Is constitutionalism conservative (or libertarian)?
- Is there a distinctive British constitutional conservatism?
- Is there a stable relationship between conservative political thought and practice and (a) democracy, (b) institutions, or (c) populism?

Week 3: Conservatism and the Common Law

Core reading

- JGA Pocock, 'Burke and the Ancient Constitution – A Problem in the History of Ideas' (1960) 111 *The Historical Journal* 125
- FA Hayek, *Law, Legislation, and Liberty* (Routledge 2022; first published in 1973) chs 1, 4
- G Postema, *Bentham and the Common Law Tradition* (OUP 1986) ch 1
- A Kronman, 'Precedent and Tradition' (1990) 99 *Yale Law Journal* 1029
- A Vermeule, *Law and the Limits of Reason* (Harvard University Press 2009), chs 1-3

Further reading

- B Simpson, 'The Common Law and Legal Theory' in William Twining (ed), *Legal Theory and Common Law* (Basil Blackwell 1986)
- H Berman, 'The Origins of Historical Jurisprudence: Coke, Selden, Hale' (1994) 103 *Yale Law Journal* 1651
- C Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733
- R Posner, 'Conceptions of Legal Theory: A Response to Ronald Dworkin' (1997) 29 *Arizona State Law Journal* 377
- J Stoner, 'Natural Law, Common Law, and the Constitution' in Douglas Edlin (ed), *Common Law Theory* (CUP 2009)
- J Gardner, 'Some Types of Law' in Douglas Edlin (ed), *Common Law Theory* (CUP 2009)
- J Laws, *The Common Law Constitution* (Cambridge University Press 2014)

Discussion questions

- Is the common law a type of customary law?
- Is the common law a repository of practical wisdom or a record of past prejudices?
- Should conservatives prefer the common law over statute law as a mode of regulation?
- 'The longevity of the artifacts that at any given moment constitute the world of culture make it possible for one generation to build upon the work

of its predecessors, to refine their accomplishments and to extend them, thereby passing onto to its successors a world richer and more finished than the one it inherited' (Kronman, p 1051). Does the common law satisfy Kronman's description?

Week 4: The balanced/mixed constitution

Core reading

- R Ekins, 'The Balance of the Constitution' (2022) 67 *American Journal of Jurisprudence* 199-222
- Sir John Laws, *The Constitutional Balance* (Hart, 2021), 8-9, 43-44, 57-58, 117-124
- W Blackstone, *Commentaries on the Laws of England*, Book 1, chs 2, 7 (see also chs 6, 9)
- T Endicott, *The Stubborn Stain Theory of Executive Power: From Magna Carta to Miller* (Policy Exchange, 2017)

Further reading

- J Finnis, 'Brexit and the Balance of Our Constitution' in R Ekins (ed.), *Judicial Power and the Balance of Our Constitution* (Policy Exchange, 2018),
- J Atkins, 'Constitutional Change and the Mixed Constitution' in *Cicero on Politics and the Limits of Reason* (CUP, 2013), 80-119
- N Aroney, 'Subsidiarity, Federalism and the Best Constitution: Thomas Aquinas on City, Province and Empire' (2007) 26 *Law and Philosophy* 161-228
- A Vermeule and E Posner, *The Executive Unbound: After the Madisonian Republic* (OUP, 2011)
- J Waldron, 'Separation of Powers in Thought and Practice' (2013) 54 *Boston College Law Review* 433-468
- O O'Donovan, 'Powers of Government' in *Ways of Judgment* (Eerdman, 2005), 186-210
- J Norman, 'What does the failure of the House of Lords Bill tell us about the constitution?' Inaugural [Lecture](#), Bingham Constitutional Studies Centre, Balliol College, 3 March 2016

Discussion questions

- Does the idea of constitutional balance obscure more than it reveals? What, if anything, should the constitution balance?

- Is the British constitution a mixed constitution? Should it be a mixed constitution?
- What does conservative constitutional thought have to say about whether or how the executive and legislature should be situated in relation to one another?
- What is the constitutional role of the judge?

Week 6: Practices, Politics, and Constitutionalism

Background reading

- JAG Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1

Core reading

- M Foley, *The Silence of Constitutions* (Taylor & Francis 2011; first published in 1989) ch 5
- A Tomkins, *Our Republican Constitution* (Hart 2005) ch 1
- G Gee and G Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273
- G Gee, 'The Political Constitution and the Political Right' (2019) 30 *King's Law Journal* 148
- A Perry, 'The Case for Conventions' in *The Conventional Constitution* (forthcoming, available at <...>)
- Gregoire Webber, 'Eulogy for the constitution that was' (2014) 12 *ICON* 468 (reviewing Martin Loughlin's *Very Short Introduction to the British Constitution*)

Further reading

- Richard Ekins, 'How to be a Free People' (2013) 58 *American Journal of Jurisprudence* 163-182
- J McLean, 'The Unwritten Constitution and its Enemies' (2016) *ICON* 119
- A Kavanagh, 'Recasting the Political Constitution' (2019) 30 *King's Law Journal* 43
- J Sumption, *Trials of State* (Profile Books 2019) chs I and II
- BC Jones, 'A (Brief) Case Against Constitutional Supremacy' in Richard Johnzon and Y Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart 2023)
- C Harlow, 'Judicial Encroachment on the Political Constitution?' in Richard Johnzon and Y Yi Zhu, *Sceptical Perspectives on the Changing Constitution of the United Kingdom* (Hart 2023)
- R Grealley, 'Ideologies of Political Constitutionalism' (2024) 44 *OJLS* 949

Discussion questions

- Is there a useful concept of a 'political constitution'?

- What is the relationship between political constitutionalism and constitutional conventions? What is the relationship between constitutional conventions and conservatism?
- ‘One of the fabled strengths of unwritten constitutions is that they are said to be more flexible. They are more open to change and adaptation. But that is only partly true—they are also inherently more conservative and conserving’ (McLean, p 136). Is an unwritten constitution inherently conservative and conserving?
- If conservatives are presumptively opposed to political change, and judicial review makes it more difficult for political actors to ‘get things done’ (Brennan & Hamlin, p 683), then should conservatives favour judicial review?

Week 7: Bills of rights

Core reading

- J Finnis, 'Human Rights and Their Enforcement' in *Human Rights and Common Good: Collected Essays Volume III* (OUP, 2011), chapter 1
- R Barnett, 'In Defense of Constitutional Republicanism: A Reply to Criticisms of *Our Republican Constitution*' (2017) 32 *Constitutional Commentary* 207-246
- R Ekins, 'Human Rights and the Separation of Powers' (2015) 34 *University of Queensland Law Journal* 217-238
- J Sumption, *Trials of the State: Law and the Decline of Politics* (Profile Books 2019), chIII"
- J Norman and P Osborne, *The Conservative Case for the Human Rights Act* (Liberty 2009)

Further reading

- P Yowell, *Constitutional Rights and Constitutional Design* (Hart, 2018)
- NW Barber, Richard Ekins and Paul Yowell (eds.), *Lord Sumption and the Limits of the Law* (Hart 2016), essays by Lord Sumption, John Finnis and Lord Hoffmann
- M Duranti, *The Conservative Human Rights Revolution* (OUP 2016)
- S Girgis and RP George, 'A Philosophy of Civil Rights and Liberties' in J Tasioulas (ed.), *Cambridge Companion to the Philosophy of Law* (Cambridge University Press 2020), 291-312
- J Rivers, 'Christian Constitutional Rights?' in N Aroney and I Leigh (eds.), *Christianity and Constitutionalism* (OUP 2023), chapter 13
- R Ekins and G Webber, 'Legislated Rights in the Anglo-American Tradition' (2018) 10 *Faulkner Law Review* 129-169

Discussion questions

- What is the relationship between (human) rights and legitimate government?
- Why do conservatives support Bills of Rights?
- Why do conservatives oppose Bills of Rights?
- What does the debate about rights-based judicial review reveal about conservative constitutional thought, in the Anglo-American tradition(s)?

Week 8: Conservatism and Constitutional Interpretation

Background reading

- J Goldsworthy, 'Constitutional Interpretation: Originalism' (2009) 4 *Philosophy Compass* 682
- M Berman, 'Constitutional Interpretation: Non-Originalism' (2011) 6 *Philosophy Compass* 408

Core reading

- Ernest Young, 'Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation' (1994) 72 *North Carolina Law Review* 619
- Cass Sunstein, 'Burkean Minimalism' (2006) 105 *Michigan Law Review* 353
- David Strauss, 'Common Law Constitutional Interpretation' (1996) 63 *University of Chicago Law Review* 877
- Adrian Vermeule, 'Common Law Constitutionalism and the Limits of Reason' (2007) 107 *Columbia Law Review* 1482 (some overlap with the book chapters from week 7)
- Adrian Vermeule, *Common Good Constitutionalism* (Polity 2022) chs 1 & 2
- JJ Alicea, 'Practice-Based Constitutional Theories' (2023) 133 *Yale Law Journal* 568
- Gerard V. Bradley, 'Moral Truth and Constitutional Conservatism' (2021) 81 *Louisiana Law Review* 1317-1430
- Richard Ekins, 'Objects of Interpretation' (2017) 32 *Constitutional Commentary* 1-25

Further reading

- Philip Hamburger, 'The Constitution's Accommodation of Social Change' (1989) 88 *Michigan Law Review* 239
- Antonin Scalia, 'Common Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws' in *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997), 3-48
- Michael McConnell, 'Textualism and the Dead Hand of the Past' (1997) 66 *George Washington Law Review* 1127
- Cass Sunstein, *A Constitution of Many Minds* (Princeton University Press 2009) chs 3 & 4

- William Baude and Stephen Sachs, 'The "Common-Good" Manifesto' (2023) 136 Harvard Law Review 681
- Sherif Girgis, 'Living Traditionalism' (2023) 98 NYU Law Review 1477

Discussion questions

- What is the relationship between humility and constitutional minimalism?
- Is there room in conservatism for significant judicial innovations in constitutional doctrine?
- Should conservatives be originalists or non-originalists?
- What is the proper role of tradition in constitutional interpretation?
- Is originalism compatible with scepticism about the power of human reason?