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IN SEARCH OF CONSERVATISM

EM BUSCA DO CONSERVADORISMO

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Abstract: This essay was written as a comment on a paper by Professor Robert Nagel, entitled “Conservatism and Constitutionalism in the United States.” After considering and criticizing various candidates for a conservative constitutional jurisprudence, Nagel concludes by suggesting that the essence of judicial conservatism lies in a traditionalism that acknowledges that reason can only operate from within experience rather than as a more detached examination of experience. This comment questions Nagel’s conclusion, suggests that conservatism would need to have a more ethical and ontological dimension, and offers a distinction between “believing traditionalists” and “skeptical traditionalists” who may converge in their practical values and prescriptions even though they differ fundamentally on a more philosophical level.

Resumo: Este ensaio foi escrito como um comentário ao artigo do Professor Robert Nagel, intitulado “Conservadorismo e Constitucionalismo nos Estados Unidos”. Depois de considerar e criticar vários candidatos a uma jurisprudência constitucional conservadora, Nagel conclui sugerindo que a essência do conservadorismo judicial reside num tradicionalismo que reconhece que a razão só pode operar a partir da experiência, e não como um exame mais imparcial da experiência. Este comentário questiona a conclusão de Nagel, sugere que o conservadorismo precisaria de assentar numa dimensão mais ética e ontológica, e oferece uma distinção entre “tradicionalistas crentes” e “tradicionalistas cépticos”, que podem convergir nos valores e prescrições práticas, embora diverjam fundamentalmente a um nível mais filosófico.

Summary: I. What Is Conservative Jurisprudence? II. Doubting Nagel’s Diagnosis; III. Believing Traditionalists and Skeptical Traditionalists

Sumário: I. O que é a Jurisprudência Conservadora? II. Duvidando do Diagnóstico de Nagel; III. Acreditando nos tradicionalistas e tradicionalistas

1. Warren Distinguished Professor of Law, University of San Diego. I benefitted from comments on an earlier version of this comment by Jim Allan, Larry Alexander, Bob Nagel, and Maimon Schwarzschild, and also from commentary at the conference. Many thanks to Luís Pereira Coutinho for organizing the conference and, more generally, for his friendship, support, and constructive engagement and provocations.

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Palavras-chave: Conservadorismo; Tradição; Cepticismo; Constituição; Suprema Tribunal; Razão; Originalismo

It isn't so easy to be a conservative these days, or even to be sure what it means to be a conservative. More specifically, conservative constitutionalism, like the "man upon the stair" in the jingle,² may be a position that just "isn't there." Or at least that is a conclusion that someone might reach after reading Professor Nagel's deeply insightful but troubling paper.³

This isn't Nagel's own conclusion, to be sure; but I'm not sure whether he manages to provide a satisfactory alternative. It also isn't my conclusion, but I'm not sure whether I have a satisfactory alternative either. We'll see.

I. What Is Conservative Jurisprudence?

Nagel begins with an unsettling observation: for decades now, the United States Supreme Court has been dominated by Justices who were deliberately appointed with the goal of curbing the political activism of the so-called Warren Court, and who solemnly promised to stick to the historical Constitution without imposing their own moral or political values on the nation; and yet the overall tendency of the Court has been to continue and even increase the Court's aggressively reformist involvement in the nation's governance. "[J]udicial intervention in virtually all areas of American life has become normal."⁴ The same-sex marriage decision,⁵ written by the Reagan appointee and supposedly conservative Justice Anthony Kennedy, exemplifies this tendency.

Despite the promises of Presidents and judicial appointees, it seems the Court

2. Yesterday, upon the stair,
I met a man who wasn't there.
He wasn't there again today.
My gosh, I wish he'd go away.

3. ROBERT F. NAGEL, *Conservatism and Constitutionalism in the United States*, forthcoming, 2019.

4. ROBERT F. NAGEL, *Conservatism and*, p. 2.

5. *Obergefell v. Hodges*, 135 S. Ct. 2071 (2015).

simply cannot bring itself to adhere to a conservative judicial approach. Why? Maybe because there is no good reason why Justices, once in place, *should* adhere to a restrained and conservative jurisprudence? And so Nagel asks “whether there is any reason to expect conservative judges to enforce the Constitution independently of their personal moral or political judgments about how society might be improved”?⁶

His paper aims to answer that question. So Nagel reflects on a variety of possible justifications for conservative constitutionalism. But along the way, it seems to me, the inquiry modulates into something more basic: the search for justification becomes a search for something to justify. Is there even any such thing as an identifiably “conservative” approach to constitutionalism that could be distinguished from its supposed rivals— from more liberal or progressive approaches to constitutionalism? Something that would give us some standard or workable criteria for looking at a Justice’s decisions and opinions and saying, “You may or may not approve; but either way, this just *is*— or *isn’t*— a ‘conservative’ jurisprudence”?

Nagel declines the easy answer— that conservative constitutionalism would limit itself to understanding the Constitution in terms of original textual meaning.⁷ It is just as well that he doesn’t endorse this answer, I think, because so-called originalism has by now become so capacious, or so promiscuous, that it is no longer clear whether there is any meaningful practical distinction between originalism and “living constitutionalism,” as it is often called in the United States. The conspicuous case of Jack Balkin⁸ shows that you can be an “originalist” and still be an aggressive, left-leaning reformist in the outcomes you favor.⁹

So Nagel sensibly associates judicial conservatism not with *originalism* per se, but rather with some kind of *traditionalism*.¹⁰ But what kind? Here difficulties proliferate. Conservatives are said to value tradition, but this observation seems insufficient to distinguish them from their progressive rivals. After all, nearly everyone professes to see some value in tradition; and as thinkers like Alasdair MacIntyre explain,¹¹ everyone is in fact immersed in tradition, whether they like it or not. So, how to distinguish the conservative’s relation to tradition from everyone else’s?

Nagel considers some possible answers but finds them wanting. One common answer says that conservatives value tradition “for its own sake.” But this is more a liberal slander than an accurate description.¹² A different answer would suggest

6. ROBERT F. NAGEL, *Conservatism and*, p. 1.

7. ROBERT F. NAGEL, *Conservatism and*, p. 12.

8. See, e.g., JACK BALKIN, *Living Originalism*, USA, 2011.

9. See STEVEN D. SMITH *et al.*, *The New and Old Originalism: A Discussion*, 2014 (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2562531).

10. ROBERT F. NAGEL, *Conservatism and*, pp. 12-13.

11. E.g., ALASDAIR MACINTYRE, *Whose Justice? Which Rationality?*, 1988.

12. ROBERT F. NAGEL, *Conservatism and*, p. 13 (“Traditionalism, then, is not necessarily a blind devotion to the past. It is a set of understandings about the sources of knowledge and wisdom.”). For my own criticisms of the possibility of adhering to the past “for its own sake,”

that progressives give priority to “reason” over tradition; conservatives do the opposite. But this seems, again, a tendentious and unilluminating description. Everyone, liberal or conservative, is immersed in tradition; everyone, liberal or conservative, has no choice but to use their “reason,” or their capacities of thinking and understanding, to try to figure out what tradition means, what in tradition is normative or worth preserving, how what is normative in tradition applies to currently arising questions and problems.¹³

Or it may be said that progressives look to tradition to extract a *principle*-- which then becomes authoritative-- while conservatives try to respect and adhere to *the tradition itself*. But again, this distinction seems flimsy. Mindless repetition of the past, even if it were possible, is not conservatism. So how would one adhere to a tradition, as the world changes, except by trying to discern and respect its internal logic or meaning-- or, as we might say, the “principles” implicit in the tradition? What would it even mean to adhere to “the tradition itself”? Moreover, this seems just another way of saying that conservatives adhere to tradition “for its own sake”-- an interpretation that Nagel sensibly rejects.

Might we say that although both conservatives and progressives attempt to find and follow the principles in tradition, progressives favor formulating principles at a high level of abstraction, while conservatives prefer more concrete or narrowly formulated principles? There seems to be something to this suggestion, and Nagel considers it sympathetically and at some length in connection with a jurisprudential dispute between Justice Scalia and Justice Brennan (allied with Ronald Dworkin).¹⁴ And yet in the end Nagel seems dissatisfied with this account. There is no metric, for either conservatives or progressives, to measure the proper level of abstraction for formulating the principles we discern in our traditions. Edmund Burke, the quintessential conservative, could move to lofty heights or abstraction in understanding and arguing from tradition.¹⁵

As the paper progresses, it appears that each time Nagel seems to have put his finger on a potentially defensible conservative philosophy, further inspection proves to be disqualifying. And so it may come to seem that conservatism is not so much a *philosophy*, or a set of intellectual commitments, as an attitude or *disposition*. Conservatives and progressives may not reason in fundamentally different ways; the difference, maybe, is that the conservative is cautious, humble, deferential in her reasoning, while the progressive is more self-assured and adventurous, perhaps naively optimistic. Thus, Nagel quotes Michael Oakeshott as saying that conservatism is not a philosophy but rather a disposition.¹⁶

see STEVEN D. SMITH, *The Pursuit of Pragmatism*, *Yale Law Journal*, 100, 1990, p. 409.

13. Nagel points out that preeminent conservative thinkers like Michael Oakeshott and Edmund Burke understood the value and inevitability of using “reason.” ROBERT F. NAGEL, *Conservatism and*, pp. 16, 20.

14. ROBERT F. NAGEL, *Conservatism and*, pp. 6-9.

15. ROBERT F. NAGEL, *Conservatism and*, pp. 16-17. See *id.* (“In this sense, the modern Court-- including even when Justice Kennedy imposes a dramatic revision in the understanding of the institution of marriage-- could actually claim the mantle of Edmund Burke.”).

16. ROBERT F. NAGEL, *Conservatism and*, pp. 10.

There may be a good deal of truth in this observation. Reducing conservatism to a disposition, though, might make it less useable for various purposes— including for the purpose of understanding and criticizing legal decisions. Instead of analyzing the reasoning in a Supreme Court case, should we assess it on a scale of humility to arrogance? Actually, that approach might yield valuable insights, as it has in Nagel’s past work.¹⁷ Still, there would seem to be severe limits to this sort of inquiry. Moreover, it seems that different dispositions— of humility, or self-assurance— must be either nonrational (in which case it would be difficult to debate the relative merits of conservatism and progressivism) or else— and this seems more likely— they reflect assumptions about human beings and the world. Assumptions that ought to be expressible in propositional form, and thus worked into some kind of philosophy that could be examined and defended or criticized.

As I read the paper, Nagel does not end up saying that conservatism is nothing but a disposition. Rather, he ultimately identifies conservatism with a particular view of reason— of reason as something that works *within* experience rather than standing *outside* of and judging experience. Thus, after examining various candidates for a conservative judicial philosophy and finding them less than satisfactory, Nagel concludes by commending a view of reason which accepts that “understanding cannot be separated from activity and experience.” This view is contrasted with a kind of “rationalism” that “understands the mind to be operating independently of experience” and that “conceives of understanding to be a rationale or an order imposed upon experience.”¹⁸ And Nagel suggests that on the conception of reason-within-experience, it makes sense for political reform to come from people who are actively immersed in political practice and experience— legislators, for example. Conversely, judges are by institutional design more detached from political experience; it is therefore fitting that they should refrain from leading the reforms and would instead limit themselves to implementing decisions made by people better situated to decide what reforms are advisable.¹⁹

So, in this commendation of reason-within-experience leading to judicial restraint, have we at last found a viable candidate for a conservative constitutional jurisprudence?

17. See, e.g., ROBERT F. NAGEL, *Judicial Power and American Character*, New York, 1994, p. 138 (criticizing Joint Opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), as “an extravagant expression of hubris”).

18. ROBERT F. NAGEL, *Conservatism and*, p. 20.

19. ROBERT F. NAGEL, *Conservatism and*, pp. 20-21. Nagel thinks this approach is discernible in Scalia’s insistence on understanding principles at a low level of abstraction (though not in Scalia’s jurisprudence generally), in much of Burke, in the classic common law tradition, and in the ideas of James Bradley Thayer.

II. Doubting Nagel's Diagnosis

I have to admit to being skeptical. Actually, I'm sympathetic to nearly everything Nagel says; I appreciate the numerous insights he offers along the way; I agree that reason can only work within experience²⁰; and like him, I tend to favor a restrained role for courts, at least in principle.²¹ And yet I have reservations about the reason-within-experience position that he seems to settle on as the best articulation of conservative jurisprudence.

Let me mention several doubts. First, for someone who favors the concrete over the abstract, the practical over the aerily theoretical, the position Nagel commends seems worryingly abstract and theoretical. Suppose some aspiring jurist becomes sincerely convinced that she should judge conservatively, and she asks us how she should go about doing that. What could we tell her? "When you're reasoning about how to decide a case, remember that you are always reasoning from within experience. Don't try to detach yourself from human experience, or from your own experience, to judge or reason from the outside." Is that the prescription? Would this be helpful?

Suppose our conservative jurist responds: "Well, okay. I suppose I can do that. In fact, I'm not sure how I could do anything else. How *could* I step outside my experience as I reason? How could *anyone* do that? Wouldn't that be a physical (and maybe metaphysical) impossibility? By this standard, it seems that I will inevitably be a conservative in my approach-- and everyone else will be too."

Maybe we would respond by saying that yes, everyone will inevitably reason from within their experience-- the detached or Archimedean reason of "rationalism" is in fact an impossibility-- but the problem is that many people *think* they can use reason to transcend experience. Or perhaps they *try* to transcend experience. But such thinking is delusional, we might say, and such efforts are futile.

This response might be right, but I have two kinds of doubts. One is whether among the vast variety of possible delusions, this is the particular delusion that progressive jurists really are suffering from. Would it be accurate to say that Justice Brennan or Justice Souter thought they could step outside their experience in reasoning about how cases should be decided?

Another doubt is about whether this delusional aspiration (assuming some people have it) must necessarily be a bad thing. It might be that no one can

20. There seem to be difficult questions here, though. Insofar as we are engaging in reason, are we not to some limited extent trying to take a detached perspective on whatever it is that we are reasoning about? To consider that "whatever" in relation to more detached or universal concepts or criteria? In this sense, might we say that reasoning just does inherently involve a certain mental separation from experience?

21. Once judicial intervention and supervision of society become the accepted norm, as Nagel (very plausibly) says is that case today, it becomes uncertain what "conservative" judges should do, or even what "conservatism" would prescribe. In this context, would judicial restraint become the deviant and reformist approach? Maybe even a kind of judicial radicalism-- like a libertarian police officer who just lets people do pretty much whatever they want?

actually reason except from within their experience but that the effort to do so produces better results than does the abject acknowledgment of our experiential confinement. In this vein, Ernest Gellner acknowledged that we can never actually reason from outside culture, and yet he thought that it is “our destiny” to try.²² Similarly, I take it that my progressive friends who celebrate *Roe v. Wade* and *Obergefell v. Hodges* might respond to Nagel’s diagnosis by saying, “Those were good and just decisions, and if they were the products of the kind of delusion about disembodied reason that Nagel discerns, then may we have more of such delusion.” Which brings to mind the old Woody Allen joke about the man who goes to a psychiatrist and explains that his brother-in-law thinks he’s a chicken. The psychiatrist offers to cure the brother-in-law of this delusion, but the man says, “That’s the problem: we need the eggs.”

A different kind of doubt about Nagel’s diagnosis is that it articulates a kind of conservatism that seems applicable only to courts. It offers a rationale for *judges* to respect tradition—because judges are relatively detached from political experience— but it seems to supply no reason why legislators, or voters, or human beings generally, should have any particular kind of humble appreciation for tradition, or any caution about reforms. More specifically, Nagel’s judicial conservatism may suggest that the Supreme Court was mistaken to repudiate traditional marriage laws—because it is a *court*, composed of *judges*— but the position implies no reservations about legislators or voters doing the same thing.

This is a possible view, of course, and it may be that there are distinctive reasons why judges in particular should adhere to a conservative working philosophy, even though other officials and the rest of us are under no such constraint. Still, I would think that a conservative might wish for a more general account of conservatism or traditionalism— one from which judicial conservatism would then be derived. I know *I* would.

Finally, it seems to me that Nagel wants to explain conservatism, and to distinguish between conservative and more progressive orientations, mostly in epistemic terms— as disagreements about the workings of reason, or of human understanding. “The debate is, or should be,” he says in conclusion, “over the nature of reason and the sources of moral judgment”²³ Insofar as this observation is offered in opposition to the familiar and tendentious “reason *versus* tradition” description, I whole-heartedly agree. For myself, though, I doubt that it is possible to have meaningful debates about the nature of reason and the sources of moral judgment without first saying (or at least supposing) something about the kind of reality that reason and moral judgment are *reasoning*

22. See ERNEST GELLNER, *Reason and Culture*, 1992, p. 159 (emphasis in original):

This aspiration *defines* us, even though it cannot be fulfilled. We are what we are, precisely because this strange aspiration is so deeply inherent in our thought. We may never fulfill its demands fully, but we are what we are because our intellectual ancestors tried so hard, and the effort has entered our souls and pervaded our cognitive custom. We are a race of failed Prometheuses. Rationalism is our destiny. It is not our option, and still less our disease. We are not free of culture, or Custom and Example: but it is of the essence of *our* culture that it is rooted in the rationalist aspiration.

23. ROBERT F. NAGEL, *Conservatism and*, p. 21.

and judging about. And if I am right about this, then it seems that the real debates and disagreements would be more metaphysical and metaethical in nature.

This is hardly the place, obviously, to launch into those sorts of debates. But in concluding this comment, I want to make a few general, tentative observations about what I think the most basic disagreements are.

III. Believing Traditionalists and Skeptical Traditionalists

Let's go back to tradition.²⁴ Despite the complications mentioned earlier, it does seem that a fundamental divide between conservatives and progressives has to do with their relation to tradition. So, let me now put the question this way: *on what premises* about life and the world might someone favor a deferential or even reverent regard for tradition? It seems to me that the proponents of tradition have tended to embrace or implicitly accept one of two different answers to that question. As a philosophical matter these answers seem antithetical but they can converge in their practical implications or consequences.

One group might be called the “believing traditionalists,” or perhaps the “faithful traditionalists.” They believe that there is some natural or providential order to the world, or to our lives, and that this natural or providential order is both (imperfectly) embodied in and (imperfectly) apprehended through tradition.²⁵ And so following tradition— not slavishly or mechanically, but in a humble and discerning way— is our best strategy for living in conformity to the natural or providential order. I think many Catholic thinkers would be representatives of this kind of believing traditionalism. The classical common law was arguably in this mode as well.²⁶

A different group of traditionalists is more skeptical, although its skepticism has not issued (as skepticism can) in the mere interest-seeking instrumentalism that is so pervasive today. A valuable human life is not just one lived in the pursuit of various goods or “interests”; it is a life lived in accordance with some sort of meaningful and meaning-giving order.²

²⁷ In this respect, the skeptics agree with the believers. But the skeptics think there is no such order as a matter of nature or providence: the world is in fact just the product of random, purposeless interactions among molecules and evolving combinations of molecules. So any meaningful order will of necessity be one

24. The comments in this section are developed at greater length in STEVEN D. SMITH, Separation as a Tradition, *Journal of Law & Politics*, 18, 2002, p. 215.

25. Both components are necessary to yield a conservative conclusion. Someone who believes in a natural or normative order but does not think it is embodied in and apprehended through tradition— who believes, perhaps, that the normative order is known directly through “reason” or revelation, for example— would not be a conservative: quite the contrary.

26. See generally STEVEN D. SMITH, *Law's Quandary*, USA, 2004.

27. The contrast is developed at greater length in STEVEN D. SMITH, *Pagans and Christians in the City*, Michigan, 2018, ch. 2.

that we construct for ourselves. That sort of order is a laborious and fragile achievement, and it is embodied in our traditions. We would be well advised, therefore, to treasure and conserve the traditions that we inherit and inhabit, and that make us who we are-- because there is no valuable way of life outside of such traditions.

Traditions are not static, of course, and they can be helpfully reformed in a variety of ways. But it is merely foolhardy to deconstruct a culture or to smash a set of traditions in the reckless quest to remake life according to some theory or illusory ideal-- autonomy, maybe, or equality.²⁸ The ramshackle boat on which we sail the ocean of existence may need to be patched up in places, spiffed up in other spots. But to tear the boat apart in the vain hope that somehow an ideal boat will somehow materialize is to destroy the only thing that keeps us afloat. Ramshackle boats come in various forms, but they are all we will ever have, and they are valuable achievements or inheritances for which we should be humbly grateful.²⁹

In both their foundational premises and their ultimate commitments, the believing traditionalists and the skeptical traditionalists seem poles apart. But not only can they join in approving tradition, and in resisting radical alterations, but it seems to me that a person-- particularly a person of intellectual humility-- can even be agnostic up to a point as between these versions of traditionalism. There *may be* a natural or providential order reflected in our traditions; or it may be that the traditional order we have inherited is a purely human construction. Who can be certain? Either way, respecting and living virtuously in accordance with that order is the way to live a meaningful, valuable life.

My own surmise is that it is at this level-- at the level of metaphysics and metaethics, and at the question of what constitutes a valuable human life-- that the real divide between progressives and conservatives occurs. Disagreements about the nature of reason, I suspect, are derivative of these more fundamental disagreements.

I can imagine that Professor Nagel might resist this suggestion, because the suggestion if correct might push our debates in a more philosophical or theoretical direction, whereas his instinct and prescription are to shun the grandiose and to adhere to what we know most firmly and reliably-- the local, the concrete, the particular. I sympathize with that prescription. But I'm not sure whether a genuine and solid conservatism is possible, and defensible, without considering the more ultimate questions.

28. See STEVEN D. SMITH, Equality, religion, and nihilism, REX AHDAR (ed.), *Research Handbook on Law and Religion*, Massachusetts, 2018, p. 37.

29. These more skeptical traditionalists are familiar enough, I think. I would place David Hume, Alexander Bickel, Arthur Leff, and John Gray in this interesting and diverse family.