

A New Conservative Theory of Constitutional Change

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Graham Gee & Gregoire Webber, [A Conservative Disposition and Constitutional Change](#), 39 *Oxford J. Legal Studies* 526 (2019).

In this very interesting article, the authors apply some insights from the philosopher Michael Oakeshott to certain issues of constitutional law, with specific reference to Oakeshott's version of conservatism. Specifically, Oakeshott believed that a conservative disposition is necessary in the face of two related problems: (1) the conservative wishes to protect not the past but the present, for present practices, with all their imperfections, contain important principles and achievements of justice which should not be lightly exchanged for future uncertainties; and (2) appetites for change can be dangerous, for the change that one intends to bring about is always less than the total change one ends up making—change is unpredictable and very often throws up new problems, or permutations of old ones. Conservatives are not resistant to all change, or even to change in principle, but they mistrust change and are cautious about tampering with existing practices. Defined this way, a conservative disposition is not to be identified (certainly not in an unqualified way) with either the outlook of the British Conservative Party, or various political parties or movements around the world that are described as 'conservative'. Conservatism is not essentially right-wing, and shares few characteristics with so-called neo-con groups, and few political movements if any properly understand the conservative disposition and its underlying concerns.

The authors of the present article echo these points, which they develop within the specific context of UK Constitutional Law. "Conservatism—and especially a conservative disposition—is poorly understood within constitutional thought." (P. 527.) The initial part of the article thus spells out the various characteristics of a conservative disposition, observing that it encompasses "ideas about human nature, society, politics, law and government." (P. 530.) The starting point for conservatism's protection of existing arrangements (including, centrally, political arrangements) is that our present practices, however accidentally they may have come about, are founded upon human reason; upon efforts that are essentially collaborative and thus promoting of at least a basic level of peace, and embody stability over time, considered as a human good in its own right. The authors identify three components of a conservative disposition: traditionalism (which corresponds roughly to one above); skepticism (which roughly corresponds to two); and a third component, 'organicism', the view that "society [is] an organic whole that develops within the context of inherited institutions." (P. 532.) 'Organicism' can be described (though the authors do not formulate it in these terms) as a concern for the protection of civil society considered as an ongoing, culturally rich form of human ordering, to some extent autonomous with respect to changing governmental regimes, that is a vital source of human flourishing. If people did not spontaneously act (or forbear to act) out of civility, society would be an impoverished and dangerous place.

A significant part of the article is concerned with the issue of change. The authors rightly observe that "[a] conservative disposition is concerned with the *problem* of change." (P. 534, my emphasis.) This statement is significant: for few people, and fewer political theorists, even view change as a 'problem' with which we ought to be concerned. The subject of 'change' is explored in relation to the three dimensions of conservatism mentioned above: traditionalism, skepticism and organicism. Traditionalism, first of all, is not necessarily hostile to change, but wishes for change to be continuous with the past rather than revolutionary. For example, an evolving language is preferable to a dead one, for it makes possible new forms of expression and artistic choices, as well as new scientific vocabulary appropriate to scientific discovery. But it is also important to hold onto the vocabulary, grammatical forms, dialects, and customary usages that make a language what it is. Scepticism, at the same time, is innately suspicious of the intellectual hubris of one mind seeking to change cultural/political forms that are the outcome of countless minds. (P. 537.) (This is rather

reminiscent of the famous justification of common law as an “artificial perfection of reason.”) Again, such an attitude is not one of hostility to all change, but rather cautions against wholesale change, immoderate system-building, and ambitious revolutions, and argues that it is greatly easier to destroy than to rebuild. Organicism, finally, offers salient reminders that the purpose of politics and law is not to impose on society some final unified end to which people must contribute, but rather to allow all persons, to the extent reasonable and possible, to flourish in their own way according to ends that they devise for themselves. Such organic flourishing is the proper purpose of politics and law irrespective of the fact that laws need to be put in place in order to ensure that one person’s pursuit of their goals does not unreasonably impede another’s pursuit of theirs.

The middle section of the article considers three apparent problems with the conservative disposition. The first is that conservatives are more than usually content to uphold unjust, burdensome or structural inequalities, vested interests, and ignore the situation of the poor or those who in one way or another lose out under existing arrangements. But the authors point out that this is untrue: present arrangements are not upheld at any cost, and conservatives certainly do not cling to practices without critical scrutiny. (P. 540.) No institution is removed from the *possibility* of change. The second criticism examined is that conservatism fails to provide sufficient guidance for change, where change is acknowledged to be necessary. Here, the authors argue, “That it is difficult to craft an account of deliberate change is not to refute a conservative disposition, but to affirm its central arguments....The complexity of prevailing practices, along with the fact that the consequences of change cannot be confidently predicted, suggests that only limited guidance can ever be offered about when change is justified.” (P. 541.) This response is not terribly persuasive, and a better is available: that a conservative disposition is not the beginning and end of anyone’s practical deliberations; once the case for change has been established, one can employ the full range of capabilities of practical reason to work toward a solution. Conservatism does not exclude creativity; if it did so, conservatism would not be an attractive philosophy. A third criticism is that conservatism is incoherent because it tends to respond to change only in context and in the light of concerns then in play. It does not, for example, seek to apply sweeping and general principles across all areas of social life. To this criticism the authors respond with a version of the argument that was made in response to problem one: that a conservative’s response to a problem is not uncritical or random, and need not be entirely focused on only the matter presently in view. (P. 542.) Again, a better response is available in line with that to problem two: conservatism is not the same thing as political or moral relativism (e.g. relative to time, issue, or problem). It is perfectly possible for a conservative to adhere to a fully worked-out moral system, one which must be employed, just as conservatism itself is, in every context and in relation to every problem. Once again, a conservative disposition is not to be mistaken for an entire moral system nor for the totality of practical reason’s response to legal-political problems.

The second half of the article comprises two sections which apply conservative insights to matters of UK Constitutional Law. Since I am not a constitutional lawyer, I hope I will be forgiven for passing over these sections more briefly, although they contain a great deal of insight and analysis. The authors note that present constitutional law in the UK does not contain many traces of the conservative disposition, either in terms of the volume of reforms, or their substance and ambition. (P. 543.) In particular, the authors observe that “Overhauling [the Lord Chancellor’s] office and replacing the House of Lords with a Supreme Court were justified not on the basis that the then existing arrangements no longer worked, but by reference to generalisations on judicial independence and the separation of powers (contra scepticism). These reforms suggested a failure to grasp how the then prevailing arrangements reinforced shared understandings amongst constitutional actors about how the rule of law and judicial independence had been secured within the inherited institutional landscape (contra organicism). In all, there seems to prevail an attitude that conservatism in relation to the UK Constitution is synonymous with adherence to outmoded forms and imperfections. The authors wish to dispute this impression. They argue that ‘conservative arguments are especially relevant at a time of change and uncertainty, and hold for public lawyers with opposing assessments of our current constitutional condition.’” (P. 549.)

The conclusions of the article are complex, but perhaps the most important is this, which deserves to be quoted in full,

Conservative thought has tended to offer little guidance on when proactive change is required to ensure things

essentially remain the same. Much conservative thought draws overly stark contrasts between a supposedly stable status quo and far-reaching change, where the former is maintained by resisting the latter. But sometimes the proactive pursuit of change is necessary to maintain the status quo. This is especially important where, for example, a changing external environment leads to the inadvertent transformation of prevailing institutions and practices. In such circumstances, 'renovative' change may be necessary: proactive change that is aimed at conserving current arrangements. (P. 551.)

I thoroughly recommend this article to any reader interested in the dynamics of change, reform, or practical reasoning as applied to law and politics. Its arguments and conclusions are relevant to much work in jurisprudence and not only to the article's primary audience of constitutional lawyers, who will surely read it with great profit.

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