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Legal Conservatism After *Bostock*

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Over the last decade, several political scientists have explored what is often called "the legal conservative movement." These scholars have almost uniformly taken the view that the movement has been a success, mounting a "conservative counterrevolution" on the judiciary, bar, and legal academy. For several years, I was the only scholar challenging this narrative. But that changed last week, when several commenters supported my assessment after the Supreme Court's landmark decision in *Bostock v. Clayton County* to extend Title VII to include discrimination on the basis of sexual orientation.

Bostock: Betrayal or Triumph?

The *Bostock* decision immediately sparked widespread criticism of legal conservatism. Consider, for example, how Daniel Horowitz wrote that "the 'conservative' legal movement, which has promoted the idea of 'appointing better judges' rather than fighting the entire concept of judicial supremacism, has failed miserably."

Josh Hammer was even more vituperative in his analysis: "*Bostock* . . . lays bare the moral and intellectual bankruptcy of the conservative legal movement," a movement whose "various institutional vessels, such as the Federalist Society, have failed conservatism." Unless we get "a more forceful conservative legal movement," Hammer forebodingly concluded, "the conservative legal movement deserves to perish."

The big bang came from Senator Josh Hawley, who claimed that *Bostock* reveals how easy it is for judges to "invoke 'textualism' and 'originalism' in order to reach their preferred outcome." *Bostock*, Senator Hawley concluded, underscores how these twin pillars of the legal conservative movement can be used to achieve progressive results. In this sense, *Bostock* "marks a turning point for the legal conservative movement," in that it "represents the end of the conservative legal movement, or the conservative legal project, as we know it." Like Hammer, Senator Hawley called for a new movement: "Let this be a new beginning, let this be the start of something better."

While I of course find satisfaction in such significant figures agreeing with the thrust of my research on the legal conservative movement, I do not agree entirely that Justice Gorsuch and Chief Justice Roberts have betrayed conservatives, or for that matter, the social movement that put them on the Court. The betrayal, if it can be called that, happened long before these men were appointed to the Supreme Court.

In a very important sense, people like David French and Ilya Shapiro are right in claiming that the *Bostock* decision, even if one dislikes the result, represents a victory for the legal conservative movement's commitments to statutory textualism and constitutional originalism.

This triumph, however, should not allay concerns about the movement's status and future. On the contrary, the fact that the same event can be seen as both a triumph and a betrayal by members within the same movement is revealing of the movement's structural defects.

Below, I will explore three structural defects in the legal conservative movement—defects that explain why these triumph-betrayal divisions occur on the legal Right and not on the legal Left. Together, these defects, more than the *Bostock* decision itself, spell trouble for the future of legal conservatism as a cohesive movement.

Substance Versus Form

First, the movement never worked out its arbitration between the tugs of substance and form. The legal conservative movement was initially organized around substantive opposition against the Warren Court. But legal conservatives used the language of form to address those substantive concerns.

This was not a significant problem until the Federalist Society became the dominant organization within legal conservatism and, shortly thereafter, originalism became the organization's unifying idea. As a result, originalism became not merely a *mode* of interpretation favored by legal conservatives; originalism became *indistinguishable* from legal conservatism.

An ideological asymmetry in legal discourse emerged: While the legal Left was occupied with how to make the law fulfill its moral promise (which for liberals means the promise of more equality), the legal Right became a linguistic society, a movement devoted to an interpretive theory above anything else.

Consider how this ideological asymmetry plays out in post-decision analyses. Everyone knows when the legal Left wins or loses. Extending gay rights, minority rights, abortion rights, etc.—those are all liberal wins. The legal Right, however, crumbles into pieces in such post-decision analyses, because many decisions can be represented as wins for conservatives by selectively invoking the dueling values of substance and form.

This is precisely why, after liberal decisions like *Obergefell*, there is a mad rush among conservatives to explain how the substance of that decision could have been reached through a conservative form. The result is that even participants within the movement miscalculate the movement's trajectory and fail to take stock of how much they have lost along the way.

Conservatism Versus Libertarianism

Second, the movement never sought to reconcile its dueling commitments to conservatism and libertarianism. Fusionism (the combination of libertarian and traditionalist values) may have worked in the early days of *National Review*, because in that era—mostly due to the common enemies represented by the Cold War and the Warren Court—the differences between conservatives and libertarians did not matter as much as they do today.

Consider a revealing point made by Roger Pilon in a 2008 Federalist Society debate with Judge Robert Bork. Pilon observed that "a major divide between conservatives and libertarians" is over

whether (1) "the Fourteenth Amendment wrought few changes in our federalism" (this is the conservative position), or (2) the Fourteenth Amendment "incorporated against the states, *ab initio*, not only most of the Bill of Rights but our common law and natural rights as well" (this is the libertarian position). Pilon traced this division to "the infamous *Slaughterhouse* Court of 1873," a division that "continues today, in many variations."

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Pilon is right, but he understates the significance of this disagreement. It is not a mere disagreement over doctrine; it is a division that lies at the core of American constitutional law. On the one hand, there is the view that the original constitutional order was not substantially changed in 1868, leaving intact a robust role for local governance and voluntary associations. On the other hand, there is the view that the Fourteenth Amendment displaced the 1787 design, making individual rights, enforced by the federal judiciary, the centerpiece of our constitutional order.

I am not saying one of these views is necessarily right or wrong as a descriptive or normative matter. I am saying, however, that these views are irreconcilable with one another. And the former view opposes legal liberalism, whereas the latter does not.

The Lure of Liberal Morality

Third, the movement has been unable to resist the moral and cultural pressure presented by legal liberalism—the predominant ideology within the legal academy, elite law firms, and judiciary.

This pressure is apparent in the strategies adopted by the architects of legal conservatism—namely, the strategies adopted by Michael Horowitz (author of the influential 1980 memorandum that led to the Federalist Society) and Clint Bolick (a key figure in shaping the movement's litigation agenda). Both Horowitz and Bolick emphasized the need for legal conservatives to be seen as "the good guys." As Horowitz explained in his memorandum, conservative organizations had to "exhibit idealism and provide an opportunity for conservatives to be seen on the side of the 'good guys.'"

But who are "the good guys"? Both Horowitz and Bolick sought to gain the moral upper-hand under the progressive hierarchy of victimhood by showing how conservatives—and not liberals—"were the true inheritors of the civil rights struggle." This meant that legal conservatives had to be on the side of an expansive Fourteenth Amendment. And that meant that legal conservatism had to become more like legal liberalism.

This particular conceptualization of who is a "good guy" was not required by law or policy. It was a strategic choice. Indeed, Horowitz and Bolick could have proposed an oppositional legal morality by shifting conservative attention to such sympathetic causes and groups as the rural poor ravaged by urbanization and globalization; traditional families torn asunder by our culture's sexualization, materialism, and secularism; homeschoolers struggling under onerous educational regulations; and blue-collar workers increasingly displaced by federal trade and immigration policies.

These problems were all beginning to materialize at the time that legal conservatism coalesced into an organized movement, but Horowitz and Bolick did not focus on any of these issues. Why not? Because, under the progressive hierarchy of victimhood, the rural poor, traditional families, homeschoolers, and blue-collar workers are not "the good guys."

As long as legal conservatives insist on being seen as "the good guys" within a progressive moral framework, originalism and textualism will twist and turn to produce progressive results. No matter how big the Federalist Society budget becomes, how long Republicans control the Supreme Court, or how many times federal judges recite the magical incantations of textualism and originalism—the result will be the same: legal conservatism will not halt the progressive march through our constitutional order.

Moving Forward

These failures, as noted by Senator Hawley in his speech, can quickly turn into a political liability for a Republican Party that has derived significant power from campaigning on the importance of judicial nominations. *Bostock* is a wake-up call, a rude reminder, akin to the 2016 populist revolt, of a movement in need of change.

In seeking such change, however, the movement should be careful not to make two errors that are currently tempting its loudest critics.

First, we must not confuse the chronology. It is not time to think "beyond originalism" as much as it is time to think *before* originalism—i.e., on the social substrate necessary for constitutional meaning to survive. Originalism cannot operate when the prerequisites for American constitutionalism (such as local governance, voluntary associations, and family units) are decaying.

Two, we must not confuse our particulars. Critics tend to focus on how particular justices have betrayed a broad mass of conservative activists and voters. But this focus obscures how the conservative movement, as a collective enterprise, has betrayed the particular ways of a people.

Healthy change will neither condemn originalism as a theory, nor single out particular judges as traitors. It will, instead, redirect legal conservatism toward the American ways of life that can sustain originalism. This will require legal conservatives to frame their agenda and arguments within a distinctly conservative moral framework—one focused on the conservation of a traditional order of faith, family, and community.