Reimagining the Conservative Legal Movement

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Imagine a political movement that wants to reorient a given area of public affairs. From scholarly islands that barely inconvenienced countervailing currents, hard work over long decades produces not just an intellectual architecture but generations of professionals trained to implement it.

Then, just as the movement reaches its pinnacle, placing its vanguard in the highest offices, with the power to make law and the ear of presidents and senators, some disaffected acolytes call to disband it.

It sounds far-fetched, but that's what my friend Josh Hammer is saying when he argues for overhauling the conservative legal movement with common-good originalism. In other words, the entire originalist/textualist project is corrupt and should be replaced with a concern for "substantive justice."

Forget the "analytical sophistry" of "value-neutral proceduralism," as Josh puts it. The only way to defeat the "hegemonic Left" is to empower a conservative counterpart to "outcome-oriented Dworkinian living constitutionalism."

This meltdown was triggered by one recent Supreme Court case, *Bostock v. Clayton County*, where Neil Gorsuch missed the textualist forest for the literalist trees. Gorsuch was correct that sex is part of sexual orientation and gender identity, but wrong in conceiving *Bostock* as turning on that question. Even in 2020, let alone when the Civil Rights Act was passed, you wouldn't say that someone fired for being gay was fired "because of sex."

That's why I (and nearly all originalists) agreed with the dissenters. Josh considers my piece to be "profoundly non-substantive," but that's true only if "substance" is synonymous with "policy." I focused on Gorsuch's error on the *substance* of the law, not *Bostock*'s sociological or business consequences.

Regardless, how can one example of bad textualism be the straw that broke Scalia's back? *Bostock* didn't even raise a constitutional issue. One would think that cases like *NFIB v. Sebelius* (Obamacare), *Fisher v. UT-Austin* (racial preferences), or *June Medical Services v. Russo* (abortion) would loom larger. Josh didn't even reference *Obergefell v. Hodges* (same-sex marriage)!

Of course, in all those cases, the "defectors" were either John Roberts or Anthony Kennedy, hardly movement poster boys. The Trump administration solved the problem of squishy

nominees by focusing on demonstrated originalism, not just being a good Republican. Josh pooh-poohs pushing back on the administrative state as a "libertarian fetish," but which part of government is forcing nuns to pay for abortifacients and instigating campus culture wars?

Originalism precludes judges from imposing their own views on the Constitution—but "common good originalism" invites judges to do just that, okaying theories of social justice, "active liberty," and the like. This legal equivalent to "common good conservatism" thus suffers from the same flaw: without neutral interpretive rules (for a document steeped in Enlightenment values), the progressive devil turns around on you.

In sum, I'm with Josh against the judicial restraint that does indeed tie hands behind judicial backs but, in the bizarre law triangle that spurred this digital dialogue, am with Ed Whelan in saying there's nothing wrong with bad judging that good judging can't fix.

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