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Is Gorsuch A Positivist?



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As President Trump applies his whack-a-mole, hammer-them-all-on-the-head theory of leadership, could a Justice Neil Gorsuch legal philosophy join opinions that would declare the president's actions unconstitutional? It is a lot to ask when the president has just given you the greatest legal gift America can bestow. But if the bestower actually holds up federal money from the University of California or sanctuary cities, or does any other of the threatened unconstitutional actions in violation of established constitutional doctrine, the court will have to check and balance him as the country's founders intended.

Judge Gorsuch is, at times, a positivist. He is outside mainstream American judicial decision-making. I have looked at the headings and results in all 237 of his decisions. I read those that might reflect U.S. Supreme Court issues in the future — those cases I examined much more closely.

When the words "Oxford degree" are first uttered in the confirmation hearing, it will have a mesmerizing effect on the senators. He got a degree in legal philosophy there in 2004. He studied under the tutelage of John Finnis, a natural-law theorist, who according to Google supports the Catholic Church on a range of contentious issues. Finnis believes the state should deter public approval of "homosexual" behavior. He opposes gay unions and believes they are an assault on heterosexual marriage. More to the point of Gorsuch's legal philosophy, his teacher Finnis opposes looking for the "ought" in natural-law ethics. At the heart of all Western legal theory, there is the "is vs. ought" division; the United States Constitution is all about the ought.

The Finnis approach wafting out of Oxford should not be surprising, since the dominant legal professorial voice at Oxford was H.L.A. Hart, a radical positivist, until his retirement in 1992. Positivism is an outdated English legal philosophy, tracing its roots back to John Austin, who thought that law was just a command of the sovereign. There was no connection between law and morality, as Austin would have it; law should be value-free. The sovereign ordered something and the courts enforced it. Positivism imagines that the law represents an order that must be carried out. It assumes, contrary to all legal experience, that the law is always clear. It discourages consideration of the effect judicial rulings will have on those affected. If that sounds cruel, it can be. Look at the language of

the Eighth Amendment and ask how a judge can determine the meaning of “cruel and unusual punishment.” Being a judge is a creative enterprise, notwithstanding Senator Ted Cruz’s simplification of what actually happens in courts.

Compare this austere remote legal thinking to that of the American pragmatist John Dewey: “Law cannot be set up as if it were a separate entity, but can be discussed only in terms of the social conditions in which it arises and on what it concretely does there.” (“Human Nature and Conduct,” John Dewey, 1922)

Senator Cruz stated to a national audience that Judge Gorsuch will simply apply the law. We can see judges and law professors around the country wincing. Any good American judge knows that there are many gaps between legislation and earlier judicial decisions. Every day, judges are called upon to fill legal gaps because a case must be decided. That is why the Supreme Court issues two, three or four Fourth Amendment cases every term, even though the language of the Fourth Amendment has not changed. (In fairness, like Justice Antonin Scalia, Judge Gorsuch issues Fourth Amendment opinions that offer more protections than those of Judge Merrick Garland, who was nominated by the Democrats.)

How will Judge Gorsuch deal with gaps? In the senate chamber, the ghost of Justice Scalia may be troubled by the fact that Judge Gorsuch learned foreign legal philosophy at Oxford. Justice Scalia was adamant that foreign law not be considered by an American judge. The H.L.A. Hart theory of law has absolutist authoritarian aspects a new justice could apply at the worst time for Americans, given the president’s go-it-alone, non-empathetic orders. Is Judge Gorsuch a positivist? I wish a senator would raise that issue.

An Example

Perhaps the most serious evidence of positivist tendencies in Judge Gorsuch is his dislike of agency lawmaking. This has been a major point in the president’s thinking. For 30 years, the Supreme Court has allowed federal agencies to make reasonable decisions on relevant legal matters. I am referring to the Chevron case. Medicine, health care, air quality, schools, and protections for working people — even religious freedoms — will be adversely affected by the president’s clear and stated desire to take a hatchet to the power of federal agencies.

Judge Gorsuch has written against the Chevron rule. “What would happen in a no-Chevron world?” he asked in *Gutierrez-Brizuela v. Lynch*. His view would move power upward and away from expert agencies that specialize in overseeing business. Regulatory power is applied by knowledgeable specialists who are operating at the point of legal application to the facts.

The stock market is, at present, wildly celebrating the anticipated reduction of regulations. All consumers beware.

The Little Sisters of the Poor

In the Little Sisters of the Poor case, Judge Gorsuch and four other Tenth Circuit judges dissented because nuns in opposition to Obamacare objected on religious-liberty grounds. The federal government cannot order nuns to do something they believe is sinful on pain of a serious sanction, the dissenters opined. There is, in Judge Gorsuch’s reported decisions, a tendency to blur the constitutional lines between church and state. The “taxpayer money for religious entities” cases may find a strong supporter in Judge Gorsuch. This divisive but important issue of church and state could blossom in many

upcoming cases.

Rights of Corporations

One of the much-debated questions after the Supreme Court case of Hobby Lobby is what other corporate rights will be discovered and proclaimed by the Supreme Court. It is fair to say that, in a number of areas, Judge Gorsuch favors corporations. He is comfortable applying legal doctrines to defeat cases by individuals against corporations.

Justice Kennedy's Theory of Liberty

Justice Anthony Kennedy has developed an enlightened theory of liberty as one containing an element of personal development. Juveniles should not be executed because their personality is not fully developed. Private conduct should be protected from state interference. I see nothing in Judge Gorsuch's decisions suggesting the humanist warmth that has supported Justice Kennedy's thinking.

The Chief, Judge Gorsuch, and Presidential Power

When Chief Justice John Roberts was on the District of Columbia Circuit, he considered 31 cases where government power was questioned. He upheld government power in 30 cases. He upheld the government's power to enact Obamacare. Perhaps that likens him to Alexander Hamilton, who was a strong Federalist. In 2017, this president will do things that require judicial oversight. Will Justice Gorsuch and the chief justice form a strong center for judicial approval of President Trump's edicts?

If U.S. senators are convinced that a Supreme Court nominee will hurt a lot of their constituents, shouldn't their vote be no? The Citizens United case allows money to call the tune. Paraphrasing a saying of the former CEO of General Electric, do the senators have their face to the money and their asses to the people? Is that exactly what Trump voters were so upset about? Would it have made a difference if Judge Gorsuch had stayed home and studied John Dewey? Along with William James, Dewey, the son of a Vermont grocer, reinforced the greatest American strength: pragmatism. That is the opposite of authoritarian positivism. With Dewey the question was: Would law work for the people? That sounds very American to me.

—By James J. Brosnahan, Morrison & Foerster LLP

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