The Supreme Court's debate on constitutional interpretation under Trump presidency

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Abstract: Il dibattito sull'interpretazione costituzionale durante la Presidenza di Trump – The essay explores how the debate on constitutional interpretation evolved in the four years of Trump Presidency thanks to the contribution of Justices appointed by the outgoing President. To this end, the essay addresses Justices' arguments, with a view to detect their stance on constitutional interpretation within the broader context of the Court's debate on the matter. The Author argues that the newly appointed Justices' views on constitutional interpretation impacts especially on two issues that are far from being settled within the Court: a) the relationship between originalism and textualism and b) the interplay between theories of constitutional interpretation and the principle of stare decisis in constitutional case law.

Keywords: Constitutional interpretation; Textualism; Originalism; Supreme Court; Trump Presidency.

1. Introduction

Analysing how the debate on constitutional interpretation developed in the Supreme Court under the four years of Trump's presidency needs some clarifications on the "what" and "why" questions justifying this particular line of research.

Presidents' chances to appoint Justices at the Supreme Court are mostly dependent on historical circumstances, including the availability of vacancies. The odds of appointing someone who will then shape the debate on constitutional interpretation are even more conditional to the particular context in which the new Justice will operate. The overall composition of the Court as well as the personal inclinations of the newly appointee to deal with constitutional interpretative issues are decisive factors in understanding the impact of that particular Justice on the matter. It happened that Trump was able to appoint three Justices; if this affected (or is going to affect) the debate on constitutional interpretation depends, to a great extent, on personalities, appointees' legal philosophies and the general configuration of the Court. In other words, any attempt to examine what has changed in the four years of Trump Presidency cannot claim, with sufficient scientific rigour, the existence of anything like a "Trump effect" on the debate on constitutional interpretation, being numerous the independent

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variables that are in play. What can be studied, and in fact contributes to the research on the impact of Trump's presidential identity on US institutions and legal culture, is how the debate on constitutional interpretation evolved, in the last four years, thanks to the contribution of Justices appointed by the outgoing President. To do so means exploring their arguments, with a view to detect their stance on constitutional interpretation within the broader context of the Court's debate on the matter. Attributing then to Trump's political will any (proved or foreseeable) effects on the Supreme Court's intention to reshape or, better, reframe doctrines of constitutional interpretation is something that this contribution does not intend to claim.

Truth be told, apart from some laconic statements, there is no evidence that Trump was much concerned with the fate of constitutional interpretation when he picked the nominees for the Supreme Court[1]. Trump did mention originalism as a criterion to choose the appointees somehow implying that there is logical consistency between the Republican Party's ideology and the original interpretation of the Constitution. Nevertheless, he did it in a moment in which such an interpretative theory had already conquered a steady foot in the Supreme Court, at least if one intends originalism as a doctrine defending an historicist reading of the Constitution. In that sense, there is no sign of the grand ideological design that President Reagan and Attorney General Meese had when they launched the originalist agenda in the first place. Indeed, under Regan Presidency, originalism represented a response to what Republicans thought had been years of impermissible judicial activism[2]. On the contrary, President Trump did not make a deliberate decision to direct constitutional interpretation in a particular course, rather he followed a path that was opened by other Republican Presidents before him. His choices, however, may greatly impact the debate on constitutional interpretation, because such choices urge the rest of the bench to take quite a clear stance on important theoretical issues. As this Article argues, the new Justices' views on constitutional interpretation impact especially on two issues that are far from being settled within the Court: *a)* the relationship between originalism and textualism and

[1] Few weeks after the 2016 election, Trump's transition team stated that the President would have nominated judges "who are committed to interpreting the Constitution and laws according to their original public meaning": *see* R.E. Barnett, *Two Questions for Donald Trump's Supreme Court Nominees*, *Wall Street Journal*, 17 November 2016, available at www.wsj.com/articles/two-questions-for-donald-trumps-supreme-court-nominees-1479342425. Later on, President Trump seemed more committed to originalism, without any defined meaning of what this would entail: E. Bazelon, *How Will Trump's Supreme Court Remake America?*, *New York Times*, 27 February 2020 (reporting that according to former White House counsel Donald F. McGahn II, "The Trump vision of the judiciary can be summed up in two words: 'originalism' and 'textualism,"), available at www.nytimes.com/2020/02/27/magazine/how-will-trumps-supreme-court-remake-america.html.

[2] *See* President Reagan and Attorney General Meese's speeches at the Federalist Society, published in S.G. Calabresi (ed), *Originalism. A Quarter Century Debate*, Washington DC, 2007, at 95 and 71.

b) the interplay between theories of constitutional interpretation and the principle of *stare decisis* in constitutional case law.

This Article will address those issues by clarifying, in para. 2, why the debate on constitutional interpretation needs to be closely examined if one seeks to understand how a legal culture is slowly evolving. The Article will go on by focusing on how Justices Gorsuch and Kavanaugh, two of the three Trump's nominees, are contributing to the debate on constitutional interpretation within the Supreme Court (paras 3 and 4)[3]. It will then use the opinions written and the views expressed by those Justices, with a view to detect how the debate on constitutional interpretation is slowly moving towards the identification of the theoretical implications of originalism, a result hardly attributable to the political will of President Trump.

2. What is so special in constitutional interpretation?

The debate on constitutional interpretation has been historically very lively in the United States, as neither scholars nor Justices doubt that, by interpreting the Constitution in a certain way, they are in fact advocating for certain politics of the law[4]. It is questionable whether, by doing so, scholars and Justices are also implying that constitutional interpretation needs to be distinguished from statutory interpretation and therefore whether they maintain that constitutional norms require differentiated interpretative methods. What can be asserted, without risking oversimplification, is that both scholarly debate and Justices' arguments seem to suggest that the Constitution deserves to be construed in distinctive ways, not much for the nature of constitutional norms[5], rather for the broader implications that constitutional reading entails as to how a political community deals with its own identity and functioning. In other words, constitutional interpretation deserves to be closely examined as it plays a role in shaping a political community.

The large body of originalist scholarship engages precisely with such side of the problem of interpretation when it frames its interpretative theory against the backdrop of a certain understanding of the relationship between judicial review and democratic processes. Originalists claim that any interpretation creating meanings that were not originally included in the text of the Constitution is inconsistent with democratic values[6]. They argue that the Supreme Court, consisting of unelected officials who are

[3] This Article mentions Justice Amy Barrett, the least appointment made by President Trump, since she joined the bench when this work was about to be printed.
[4] J.M. Shaman, *Constitutional Interpretation*, Westport (CT), 2001, 13.
[5] *See* G. Romeo, *The conceptualization of constitutional supremacy: global discourse and legal tradition*, *German Law Journal*, Vol. 21, no. 5, 2020, 171, arguing that the distinctiveness of constitutional norms should always be contextualised in a broader understanding of the legal system.
[6] R.H. Bork, *Neutral Principles and Some First Amendment Problems*, *Indiana Law Journal*, Vol. 47, no. 1, 1971, 14.

unaccountable to the electorate, should neither be creative nor adjust the meaning of the Constitution to changing social values. The fidelity to the original understanding of the text is the only guarantee of the proper balance between the judiciary and the other branches of government. There is then a wide range of theories as to what such an original understanding should consist of. Truth is that the success of originalism in the last thirty years has at the same time watered down its core content so much that it can now be associated to many different streams of thought. American scholars count twenty-seven different types of originalism[7]. All those versions boil down in three main alternatives: 1) original intent originalism[8]; 2) public meaning originalism[9]; 3) original understanding originalism[10]. Each one of these accounts stands out for what it exactly seeks to infer from the text.

Original intent originalism points at identifying Framers' intent, by also including the participants in the ratifying conventions or legislative sessions throughout the Nation. According to this view, the original understanding of the people through their representatives should provide authoritative meaning for the constitutional text.

On the contrary, both public meaning and original understanding originalism shift the attention from the intent to the text. Public meaning originalism supports the idea that what interpreters should look for is the construction of the meaning that can be attributed not only to the ratifiers of the Constitution, but also to the people they represented and whose consent was necessary for the ratification. Finally, original understanding originalism focused the attention to the text of the Constitution, with a view to extract the meaning it had at the time it was ratified by using the usual interpretative techniques.

All these different forms in which originalism is scholarly defended and judicially applied differ as to the methodology that they use to construe the meaning of the text, with original intent more focused on the documents that can enlighten the intentions of the Framers and original understanding keen to adjust the traditional canons of interpretation to the constitutional document.

What all those different versions of originalism have in common is a clearly stated agenda: the limitation of the creativity of judicial interpretation, where creativity means to attribute to the text meanings or values that the text did not have when it was drafted. To that extent, originalism is a movement that seeks to contrast what has been defined as

[7] A. Scalia, *Foreword*, in S.G. Calabresi (ed), *Originalism*, above note 2.
[8] *See* Bork, above note 6.
[9] A.R. Amar, *The Constitution Today: Timeless Lessons for the Issues of Our Era*, New York (NY), 2016; B. Friedman, *The will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution*, New York (NY), 2009 and J.M. Balkin, *The Construction of Original Public Meaning*, *Constitutional Commentary*, Vol. 26 2016. *See* also J. Driver, *The Consensus Constitution*, *Texas Law Review*, Vol. 89, 755 (2010-2011).
[10] A. Scalia, *A Matter of Interpretation: Federal Courts and the Law*, Princeton (NJ), 1997.

'judicial activism', identified with interpretative methodology grounded on the idea that the Constitution is a living document[11].

Truth be told, non-originalist theories do not claim that judges should make the law, rather they start from the assumption that any interpretation is creative in its own ways. The challenge is then to identify what validates a good interpretation. There are many answers to this question. Structuralism supports the idea that the Constitution should be read by taking into account its text and structure. Each norm should be framed against the backdrop of the constitutional system so as to value the interconnection between each norm and the system of norms that form the system as a whole[12]. Doctrinalism maintains that interpreters should identify governing standards within the case law or within other relevant legal materials that guide the interpretation of the Constitution. David Strauss has coined the locution 'common law constitutionalism' precisely to explain that constitutional adjudication developed mainly through the progressive elaboration of principles and rules that now complement the Constitution[13]. No one can seriously maintain, according to Strauss, that the Constitution does not in fact include that body of law (doctrines) resulting from decisions of constitutional significance.

Pragmatism and consequentialism are both theories that benefit from a realistic viewpoint towards constitutional adjudication. Pragmatists call for the need to take into consideration empirical observations in any interpretative activity. According to Richard Posner, for example, judges should contextualize their decision by appreciating factual elements that justify a given interpretation. Such an attitude is more important than seeking the internal congruency of the legal system. Consequentialists advocate for a constitutional reading that is consequence-oriented, meaning that any interpretation should confront the practical circumstances in which it is put in place[14].

Finally, pluralism openly renounces to support a single theory of constitutional interpretation by embracing the idea that the Constitution should equally benefit from all the hermeneutical approaches. According to pluralists, interpretative theories as well as argumentative strategies are incommensurable, meaning that no one can claim to be able to offer the true meaning of constitutional norms. Richard Fallon elaborated the theory of

[11] *See* L. Kalman, *The Strange Career of Legal Liberalism*, New Haven (CT), 1996, 137-38 who believes that originalism's success lies precisely in the failure of liberal legal thinking to theoretically and effectively reply to such a critique.
[12] A.R. Amar, *Intratextualism*, *Harvard Law Review*, Vol. 112, 1999, 747.
[13] D. Strauss, *Common Law Constitutional Interpretation*, *University of Chicago Law Review*, Vol. 63, 1996, 879 and Id., *The Living Constitution*, Oxford, 2010, 1.
[14] T.A. Aleinikoff, *Constitutional Law in the Age of Balancing*, *Yale Law Journal*, Vol. 96, 1987, 943, 949 ("Building on the work of Holmes, James, Dewey, Pound, Cardozo, and the Legal Realists, and flying the flags of pragmatism, instrumentalism and science, balancing represented one attempt by the judiciary to demonstrate that it could reject mechanical jurisprudence without rejecting the notion of law").

DPCE online
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constructive coherence to support the idea that judges should apply a number of interpretative approaches with two caveats: the constitutional argument should be *a)* internally consistent and *b)* clear in the interpretative result it offers[15]. The logical unity of the argument, despite the plurality of methods, is a way to validate the soundness of the interpretative result[16]. Only when such soundness cannot be achieved, interpreters should go back to a hierarchy of interpretative theories, by prioritizing textualism.

The universe of non-originalist theories is not irrelevant for understanding Supreme Courts' interpretative practice. At times, Justices from the liberal side of the bench have selectively justified decisions by using one of these theories[17]. Nevertheless, thirty years of originalists conservative Justices have urged the rest of the bench as well as scholars to confront with originalism in the sense of defending alternatives views along the lines of originalist critiques. Originalists were then successful especially in presenting themselves as the true guardians of the Constitution to be understood as the highest expression of the popular will[18]. One then can understand why Justice Ginsburg, a champion of liberal ideas, maintained that she could have been deemed to be an "originalist in the sense of what [Founders] meant—a Constitution that would govern through the ages."[19] The debate on constitutional interpretation turns then to be a debate on what the Constitution stands for as well as on how constitutional adjudication can perform its role without placing itself as the only true holder of a volatile meaning of the constitutional text. If one looks at interpretative theories from such a viewpoint, it appears that originalism is consistent with conservative ideology as it tends to freeze the constitutional structure at the time of the 'liberal constitution', where federal intervention in socio-economic relationships was severely limited and judicially

[15] R. Fallon, *A Constructivist Coherence Theory of Constitutional Adjudication*, *Harvard Law Review*, Vol. 100, 1987, 1189.
[16] *See* also P.C. Bobbitt, *Constitutional Interpretation*, Hoboken (NJ), 1991, 164.
[17] There are numerous examples of structuralist approaches applied by the Supreme Court: *Gregory v. Ashcroft*, 501 US 452 (1991); *Seminole tribe of Florida v. Florida*, 517 US 44 (1996); *Alden v. Maine*, 529 US 706 (1999); *Kimel v. Florida Board of Regents*, 528 US 62 (2000); *Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356 (2001); *US v. Comstock*, 560 US 126 (2010); *Rucho v. Common Clause*, 588 US __ (2019).
[18] M.W. McConnell, *The Role of Democratic Politics in Transforming Moral Convictions into Law*, *Yale Law Journal*, Vol. 98, 1989, 1501, 1502. The Author argues that "The appeal of originalism is that the moral principles so applied will be the foundational principles of the American Republic—principles we can all perceive for ourselves and that have shaped our nation's political character—and not the political-moral principles of whomever happens to occupy the judicial office.". *See* also M. Ziegler, *Grassroots Originalism: Rethinking the Politics of Judicial Philosophy*, *University of Louisville Law Review*, Vol. 51, 2012, 201.
[19] J. Toobin, *Heavyweight. How Ruth Bader Ginsburg has moved the Supreme Court*, *The New Yorker*, November 3, 2011, at www.newyorker.com/magazine/2013/03/11/heavyweight-ruth-bader-ginsburg.

discouraged[20]. Consequences ranges from the meaning of federalism, with originalist generally inclined to keep a dualist structure, to the content and limits of civil rights. On this respect, originalist would prevent the inclusion of rights not included in the Constitution, especially if they express an actualization of the original constitutional values.

Non-originalist theories instead suit more a liberal agenda to the extent in which they admit that the Constitution can be interrogated to solve contemporary problems through the lenses of a holistic and moral reading of the text. Such an approach in turns gives some space for a civil rights programme that includes reproductive rights, minorities' rights and so on.

In any case, no Justice arrives at the bench without being fully aware that constitutional interpretation is an intellectual exercise one cannot consider neutral in terms of consequences and impact on the relationship between the political community and its laws.

3. A textualist turn in the dominant originalist jurisprudence?

The popularity of originalism, *i.e.*, its ability to attract many advocates as well as to urge even those who came from a quite different standpoint to engage with it (or even to find compromises with such a view), suggests that it now dominates the debate on constitutional interpretation[21]. To a closer look, what is interesting to notice is that all Justices, including liberal ones, resort from time to time to arguments that are consistent with originalism, such as the historical contextualization of constitutional Articles, which is functional to understanding their meaning[22]. Nevertheless, what is distinctive of original jurisprudence is the claim to represent the one and only method for ascertaining the meaning of the Constitution. Since originalism has now a strong foot in Supreme Court's jurisprudence, Justices do not seem longer concerned with the justification of originalism in the first place, as it was the case up until few years ago; rather they now delve into originalism with a view to identify the proper interpretative methodology and to clarify its implications in terms of constitutional theory. In particular, the debate seems to have taken two distinctive, though correlated,

[20] R.A. Epstein, *The Classical Liberal Constitution*, *Cato Institute*, Policy Report, March/April 2014, available at www.cato.org/policy-report/marchapril-2014/classical-liberal-constitution. The Author maintains that "Without demonstrated fidelity to constitutional text, nothing whatsoever in the American constitutional system prevents insulated and unelected justices from invoking the "living constitution" to impose their personal, usually political liberal, preferences on the United States in ways that short-circuit the mechanisms of democratic accountability that lie at the heart of our system of government."

[21] *See* for example J.M. Balkin, *The Living Originalism*, Cambridge (MA), 2011.

[22] Examples include Justice Breyer's use of *travaux préparatoires* and legislative history for interpretation of statutes: S. Breyer, *On the Uses of Legislative History in Interpreting Statutes*, *Southern California Law Review* Vol. 65, 1992, 845 and 864.

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directions: a) the meaning and extent of textualism as a product of originalism and b) the role of precedents in constitutional interpretation.

Let us start with the first direction: textualism as a method in constitutional interpretation. In his last years on the bench, Justice Scalia insisted on the need for textualist jurisprudence, also to mild originalism or, better, to overcome some of the critiques originalism was facing inside and outside the Court. Scalia, as many other originalists, acknowledged that originalism could not aim for being a complete theory of constitutional argumentation. While it can operate when the legal issue under scrutiny is straightforwardly covered by a constitutional norm, it is insufficient when Justices are confronted with a problem calling into question doctrines and precedents. In such a context, originalism should give way to constitutional construction, which is not pure interpretation of the Constitution. Constitutional construction is indeed a methodology striving for keeping the internal consistency of the legal system. It consists in elaborating on doctrines and precedents in those matters of constitutional relevance that are not expressly covered by the constitutional text and nevertheless included in constitutional law. The distinction between interpretation and construction, though artificial, is functional to isolate originalism as interpretation methodology grounded on the text. Justice Scalia often clarified that his originalism was a form of strict adherence to the text of the Constitution[23]. The historical reading of the text marked his methodology: this was a way to depict originalism as a way of solving the problem of textualist interpretation. Some scholars had followed this path even before Scalia, by drawing a line of continuity between originalism and textualism. Akhil Amar did so with his *intertextualism*, a theory of interpretation framing the meaning of each constitutional norm, to be textually construed, against the background of the constitutional system in an effort to build internal consistency[24]. Despite the intention to emancipate originalism from the narrow view of an old intentionalist theory of interpretation, by linking it with textualism, originalist Justices and scholars could not dispense themselves with a label that somehow recalls an old-fashioned theory whose success cannot be disentangled from Republican party's ability to have its owns nominees delivered. It comes then as no surprise that those Justices that are now considered to be originalists are trying to elucidate what their originalism is about.

Brett Kavanaugh, who was appointed at the bench in October 2018, seems to be convinced that the Court should decisively move to textualism. He opposes textualism to literalism, which he believes represents a narrow reading of the Constitution. So, what he is looking for is not a simplistic analysis of constitutional norms word by word; he is rather interested in elucidating the meaning of the Constitution by starting with the text as

[23] L.B. Solum, *Originalism and construction*, *Fordham Law Review*, Vol. 82, 2013, 453.
[24] Amar above note 12.

contextualised in history, tradition and precedents[25]. Now, for Kavanaugh the Constitution is first and foremost a written document, historically and culturally shaped, and yet essentially a piece of legislation. As a consequence, he approaches it as he would approach any other statute, by prioritizing the text over any other elements of constitutional argumentation. To what extent is this approach consistent with originalism[26]? For Kavanaugh, as much as for other originalist-textualists, judicial interpretation should not use modern values to reshape the text. In that sense, the newly appointed Justice defends an historical textualism, whereby textualism is only the starting point of interpretation, meaning that the text needs then to be contextualised with history, tradition and precedents.

If one looks at recently decided cases, there are signs of Kavanaugh's commitment to this model of constitutional interpretation, while there are no proofs, at least so far, of any attraction to originalism.

In the case *Moore v. Texas*, Kavanaugh joined Chief Justice Roberts and the liberals in the bench in tossing a death sentence for a mentally ill prisoner[27]. The *per curiam* decision builds upon a 2017 opinion, authored by Justice Ginsburg, that considered the lawfulness of Texas Court of Criminal Appeals' determination that the applicant was not intellectually disabled. In that opinion, Justice Ginsburg argued in favour of recognizing evolving standard of decency that should inform constitutional interpretation, thus defending the need for updating the meaning of the Constitution. Mindful of such a precedent, in *Moore v. Texas* Alito, Thomas and Gorsuch wrote a dissent, which is almost exclusively grounded on the argument that the Court outstretched her competences to achieve a given result, *i.e.* tossing a death sentence, irrespective of any historically grounded reference to be found in the Constitution. Interestingly enough, Kavanaugh did not uphold the minority's contention that the Court, led by Justice Ginsburg, was essentially promoting a progressive reading of death penalty jurisprudence. Kavanaugh's commitment to textualism is indeed something to be distinguished from his upholding of originalist jurisprudence. In fact, originalist arguments tend to leave the Justice quite cold since it never happened that he has openly sided with originalist Justices.

Kavanaugh joined again Chief Justice Roberts and the liberal side of the Court in *Garza v. Idaho*, a case concerning the Sixth Amendment that

[25] B. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, *Notre Dame Law Review*, Vol. 89, 2014, 1907. Kavanaugh's viewpoints are clearly stated in the case *Bostock v. Clayton County*, 140 S. Ct. 1731, concerning the interpretation of Title VII of the of the Civil Rights Act of 1964. Kavanaugh defends textualism from what he thinks are the uncontrolled effects of literalism.

[26] R. Posner, *Is Brett Kavanaugh An Originalist?*, available at ericposner.com/is-brett-kavanaugh-an-originalist/. According to Richard Posner, Kavanaugh can hardly be considered as a pure originalist, since he never really advocated for this particular kind of constitutional theory.

[27] 586 U.S. ___ (2019).

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was argued by resorting to precedents and doctrines[28]. Again, Justice Thomas wrote a dissenting opinion, joined by both Gorsuch and Alito, which is essentially a defence of originalist jurisprudence. According to Thomas, the majority opinion created a right to effective assistance that has no basis in the original meaning of the Sixth Amendment. For the second time in a row, Justice Kavanaugh did not join the conservative side and he did not seem attracted by the originalist argument. What is crucial in his legal philosophy is his commitment to textualism as well as to defending the common law tradition of constitutional precedents.

In the case *June Medical Services L. L. C. v. Russo*, concerning abortion rights, Justice Kavanaugh dissented with the majority opinion arguing that a Louisiana law placing hospital-admission requirements on abortion clinics doctors was unconstitutional because created an excessive burden on women that want to terminate pregnancy[29]. Kavanaugh's viewpoint though has nothing to do with any original understanding of constitutional clauses, evoked by Thomas's separate dissent. Rather he agrees with Alito's dissenting on the need to ascertain the proper standards for reviewing abortion rights and points at the lack of factfinding analysis to reach a final decision in such a case. The absence of an originalist perspective is evident because Kavanaugh deliberately decided to avoid an originalist turn even when the latter was somehow available and even expressly stated by the other conservative members of the bench.

In the pivotal case *Trump v. Vance* regarding the immunity enjoyed by a sitting President, Kavanaugh provides commentators with a clear demonstration of his method of judicial interpretation (and argumentation)[30]. The case addressed the question whether Article II and the Supremacy Clause of the Constitution precludes or requires a heightened standard for the issuance of a criminal subpoena in a state criminal process against a sitting President. The Court found no need for heightened standards, with Kavanaugh joining but writing a separate concurring in the judgment opinion. While Thomas' dissent resorted again to an original understanding of Article II of the Constitution, Kavanaugh opted for a clearly distinctive approach. Without even mentioning one single time originalism, Kavanaugh approached the issue by analysing the large body of precedents concerning presidential immunity. He then moved to frame Article II within the precedents, making sure that his understanding of the constitutional clause matches the broader context in which precedents place the clause with a view to protect the fundamental interests underlying it: the integrity of the Presidency and the supremacy of the Constitution[31]. The contextualization, to which Kavanaugh referred a couple of times in his

[28] 139 S. Ct. 738 (2019).
[29] 591 U.S. ___ (2020).
[30] 40 S. Ct. 2412 (2020).
[31] *Ibidem*, Kavanaugh J., concurring in the judgment opinion.

concurring, implies that the meaning of Article II is dilucidated by its text and its framing within the interests protected by the Constitution. Precedents, in turn, clarify which interests the text is essentially protecting in the given, particular circumstances of the case under review.

In three of the four cases reported here, Kavanaugh left the conservative side to join the Chief Justice and the Court's liberal members. He does not appear to be interested in developing originalism. He seems rather keen to defend textualism according to an approach that comes close to Amar's intertextualism.

What is interesting is that Kavanaugh's methodology stands side by side with another trend in constitutional interpretation, which is likely to be decisively pushed forward by the other Trump's nominees, Justices Neil Gorsuch and Amy Barrett.

4. Precedents and constitutional interpretation

The impact of the newly appointed Justices' views is also visible as far as the status of 'constitutional precedents' is concerned. The problem of constitutional precedents can be rephrased in the following terms: can constitutional precedents be overruled by solutions dictated by a certain theory of constitutional interpretation? In order to answer such a question, some clarifications as to the concept of constitutional precedent are needed.

Constitutional precedents do not fully belong to the traditional doctrine of stare decisis, meaning that the Supreme Court is not bounded to follow a precedent that she considers having been wrongly decided. Nevertheless, in practice, constitutional precedents are not easily overruled. In fact, precedents often build constitutional doctrines, which represent a coherent set of rules and principles governing a certain institution or a certain matter. Doctrines are a complex universe. In particular, this coherent system sometimes limits itself to providing precise rules applicable to a certain class of situations (for example, the enforcement of some civil rights), at other times it constitutes a theory complementing the structure of the legal system as a whole (this is the case for the pre-emption doctrine, concerning the relationship between federal and state law)[32]. One or more precedents can create a "doctrine", and Justices will refer to the latter more than to a specific precedent for the solution of a given case. Furthermore, doctrines often testify the preference for orienting the interpretation of a certain constitutional clause towards a policy objective that is only implicit in the text. Thus, for example, freedom of expression is interpreted in the

[32] J.E. Nowak, R.D. Rotunda, *Constitutional Law*, 6th ed., St. Paul (MN), 2000, 347-348, concerning the pre-emption doctrine and M.A. Godsey, *When Terry Met Miranda: Two Constitutional Doctrines Collide*, *Fordham Law Review*, Vol. 63, 715 (1994) concerning the so-called Miranda warnings, elaborated after the case *Miranda v. Arizona*, 384 US 436 (1966).

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light of its instrumental nature to the preservation and functioning of democratic processes[33].

Now, doctrines help explaining the difference between a strong and a weak conception of stare decisis. In fact, Supreme Court's applying a precedent performs an intellectual operation of a peculiar kind consisting in two steps: 1) inductive elaboration of the precedent's *ratio decidendi*, purified from *dicta* that are not relevant for the solution of the new case and 2) consequent deductive application of the general rule thus obtained to the question to be decided[34]. This logic guarantees that precedential constraint is activated in presence of identical or similar factual circumstances, so as to preserve legal certainty. When using doctrines, Justices reason differently. They identify a *corpus* of rules from the opinions considered as a whole, without asking themselves the problem, with respect to the case under scrutiny, of the precise correspondence of the facts between the precedents and the case to be decided. Doctrines apply, in other words, to a certain class of situations, identified for certain relevant similarities. The correspondence between the circumstances of the fact of all the judgments that contribute to delineating the doctrine and those of the new case to be decided is summarily appreciated. For this reason, "doctrines" are such when declared by the Supreme Court, being often unclear which the authentically creative precedent is. On the contrary, it is possible to construe, for each doctrine, a certain coherent narrative that links several decisions pertaining to the same subject (and, therefore, not necessarily to the same precise situation of life)[35].

In the United States, the overruling of a precedent justified by the choice of an interpretation technique that denies the principle of law contained therein is a far from frequent circumstance. Indeed, the Supreme Court often recalls Justice Frankfurter's incisive statement that stare decisis is a principle of policy, not a formula that requires some mechanical application[36].

Predictably enough, the cautious overcoming of the precedent is an operation carried out by Justices of different ideology, because none of the interpretative theories pushes itself to postulate the complete superiority of pure hermeneutical approaches over the common law method of progressive elaboration of case law[37]. After all, any overruling reveals a pathology of the

[33] R. Post, *Recuperating First Amendment Doctrine*, *Stanford Law Review*, Vol. 47, 1994, 1272.
[34] *See* F. Schauer, *Why Precedents in Law (and Elsewhere) is not totally (even substantially) about analogy*, in C. Dahlman, E. Feteris (eds), *Legal Argumentation Theory: Cross-disciplinary Perspectives*, Berlin, 2013, 45.
[35] N. Aroney, *Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine*, *Melbourne University Law Review*, Vol. 32, no. 1, 2008, 1.
[36] *Helving v. Hallock*, 309 U.S. 106, 119 (1940). Justice Frankfurter's quotation recurs in the *per curiam* decision, *Patterson v. McLean Credit Union*, 485 U.S. 617, 619 (1988).
[37] T.W. Merrill, *Originalism, Stare Decisis and the Promotion of Judicial Restraint*, *Constitutional Commentary*, Vol. 22, 2005, 271.

legal system, even when it would be justified by a textual interpretation or by another widely accepted method of constitutional interpretation. Justices' preference is always to combine the common law tradition with the principle of the supremacy of the constitution. In the decision *Apprendi v. New Jersey*, for example, the Supreme Court addressed an issue that called into question the body of precedents regarding procedural guarantees[38]. In particular, the Court had to decide whether or not the due process clause of the XIV Amendment required that any aggravating circumstance, involving the increase of the sentence beyond the maximum limit prescribed, should be assessed by the popular jury and proved beyond any reasonable doubt. The chain of precedents would have suggested a negative answer, since *McMillan v. Pennsylvania* has established the principle that any factual element affecting the determination of the sentence can be assessed without the need for a particular standard of proof, once a guilty verdict has been reached by the jury[39]. Justice Stevens, writing for the majority, proceeded to an interpretation of the XIV Amendment, which determined the partial overruling of *McMillan*, by affirming the need for the jury's appreciation for every factual circumstance involving the increase of the sentence beyond the limits established by law, according to the standard of proof set forth in the *beyond any reasonable doubt* formula. The holding of the *McMillan* ruling is, therefore, limited to cases where the aggravating circumstance does not lead to the application of a penalty exceeding the prescribed limits. *Apprendi* has become a symbol of overcoming precedents as a result of an interpretative effort that compares a given interpretation of the Constitution directly with the constitutional text, without the 'filter' of precedents. Indeed, in a couple of subsequent rulings the Court repeats this approach, although the principle of stare decisis represents a constant concern, in the sense that Justices always feel the need to recall it to justify their own intellectual operations[40].

More recently, the Supreme Court has gone into explaining the criteria that justify the rejection of a constitutional precedent. In particular, in *Janus v. American Federation of State, County and Municipal Employees* the Court offers a non-exhaustive list of elements that suggest the suitability of an overruling: 1) quality of the reasoning of the precedent; 2) workability of the principle or rule of law contained therein in the circumstances of the case; 3) systematic congruence of the precedent; 4) developments in factual circumstances from the moment the precedent was decided; 5) trust developed by private parties, public authorities, courts and society as a whole

[38] 530 U.S. 466 (2000).
[39] 477 U.S. 79 (1986).
[40] R.T. Svikhart, *Dead Precedents*, *Notre Dame Law Review Online*, Vol. 93, 1, 13 (2017). *See* also *Ring v. Arizona* 536 U.S. 584, 588 (2002) on capital punishment, where Justice Ginsburg maintained: «Although stare decisis is of fundamental importance to the rule of law, this Court has overruled prior decisions where, as here, the necessity and propriety of doing so has been established». *See* also *Crawford v. Washington*, 541 U.S. 36, 60-61 (2004), on the VI Amendment.

DPCE online
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in the principle of law contained in the precedent[41]. Those criteria show that the precedent is for the Supreme Court to be tested not exclusively with respect to its adaptability to the new case that it is to decide (as suggested by criteria 2 and 4), but first of all with respect to the stability of the reasoning and to its logical and substantial correctness (criteria 1 and 3).

Janus was a 5 to 4 decision, to which liberals voted against. Justice Kagan's dissent insisted on the meaning of stare decisis doctrine. She maintained that even Justices' belief that a case was wrongly decided cannot be enough for overruling it. At the time it was decided, Justice Ginsburg was still sitting in the bench, while both Kavanaugh and Barrett were yet to be nominated. With the current composition of the Supreme Court, Kagan's stance is likely to be even more isolated. In fact, Gorsuch has voiced his opinion as circuit judge maintaining the non-absolute value of *stare decisis* in constitutional cases, especially when the plain meaning suggests otherwise[42].

The most recent example of overruling precedent as a result of interpreting a constitutional clause without the filter of precedents is *Franchise Tax Board of California v. Hyatt*[43], a decision that overruled the 40-year-old precedent *Nevada v. Hall*[44]. In *Nevada*, the Court held that States lack sovereign immunity in each other's courts, while *Hyatt* now restored state immunity in civil lawsuit.

Justice Thomas straightforwardly contended that "Stare decisis does not compel continued adherence to [...] erroneous precedent" because it is not an "inexorable command". Justice Breyer's dissent is a timid defence of precedents, essentially construed on the idea that overruling must be exceptional because the logic of *stare decisis* requires the Court to elaborate on precedents, rather than simply overrule them.

It is plausible that Thomas and Gorsuch may find an ally in newly nominated Justice Amy Barrett, who openly endorsed the idea that precedents should not prevent the Court from departing from cases wrongly

[41] 38 S. Ct. 2448, *slip opinion*, 34-35. In *Montejo v. Louisiana*, 556 U.S. 778, 791-97 (2009), which overruled *Michigan v. Jackson*, 475 U.S. 625 (1986), Justice Scalia also mentioned the antiquity of a precedent (*i.e.* the period of time elapsed since it was decided) as a factor that could have suggested an overruling. Nonetheless, there is no mention of this element in *Janus*. Scalia's statement in *Montejo* seems at odd with what he contended some years before. Indeed in *South Carolina v. Gather* he wrote that the respect accorded to previous decisions increases, rather than decreases, with their "age", since the persistence of a precedent signals that society is well adapted to it and that the law receive application also on grounds of its effective validity: *South Carolina v. Gather*, 490 USA 805, 824 (1989) (Scalia, J., dissenting).

[42] *U.S. v. Games-Perez*, No. 11-1011 (D.Ct. No. 1:10-CR-00263-PAB-1), 17 Sept. 2012.

[43] 139 S. Ct. 1485 (2019). *See* S. Krishnakumar, *Academic highlight: Hyatt is latest example of textualist-originalist Justices' willingness to overturn precedent*, *SCOTUSblog* (May 24, 2019), available at www.scotusblog.com/2019/05/academic-highlight-hyatt-is-latest-example-of-textualist-originalist-justices-willingness-to-overturn-precedent/

[44] 99 S.Ct. 1182, 59 L.Ed.2d 416 (1979).

decided in a scientific article published in 2003[45]. Barrett pushed the argument even forward maintaining that the preclusive effect of precedent raises due-process concerns, and, on occasion, slides into unconstitutionality. Therefore, there are at least four Justices (Alito, Thomas, Gorsuch and Barrett) who now seem convinced of the need to reshape the constitutional stare decisis doctrine.

5. Conclusions

The debate on constitutional interpretation is, at least for now, focused on *a)* clarifying the content and the consequences of originalism-textualism or historical textualism and *b)* identifying the proper balance between the stare decisis doctrine and constitutional interpretation.

The two trends are not unrelated. Rather one can argue that the ultimate goal of a textualist approach to constitutional interpretation is precisely that of calling into question the authority of precedents and doctrine. After all, this is also the goal of originalism in the first place. To a closer look, it is quite clear that challenging stare decisis on the basis of a certain interpretative theory opens up deeper question as to the meaning of interpretation as judicial practice. In fact, proving that a precedent is wrong because a given interpretative technique suggests an alternative reading is consistent with the idea that there is a singular "correct answer" to every interpretive question. That answer, in turn, is to be found in one single (and correct) interpretative technique. In that respect, the combination of textualism and undermining of stare decisis doctrine may help originalism becoming a complete theory of interpretation, an ambition that it did not have when it was introduced in the Supreme Court with Justice Scalia.

It is arguable whether this is a result fully intended by President Trump. It is for sure causally connected to his choices. At any rate, such originalism "all the way down" seems highly difficult to reconcile with the common law attitude towards constitutional argumentation. The body of the common law has been consistently relevant, even for originalists, to solve cases of constitutional significance[46]. And even someone like Justice Scalia, who never really claimed the solitude and much less the imperialism of the written text, may have questioned the need to impose on the Court to reconsider precedents because originalism suggests so.

It would be revolutionary to start a path of disregarding precedents systematically. And it is extremely unlikely that the Court would do so. What can be concluded, for now, is that the undermining of stare decisis is functional to two key points in Republicans' agenda: the enforcement of

[45] A. Barrett, *Stare Decisis and Due Process*, *University of Colorado Law Review*, Vol. 74, 2003, 1011.
[46] *See e.g.*, *United States v. Jones*, 132 S. Ct. 945 (2012), where Justice Scalia interpreted IV Amendment guarantees in light of the rights and privileges recognised at the common law.

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traditionalism and the limitation of creative rulings in the field of economic regulation. In one word: such an approach to constitutional interpretation is functional to the protection of the *liberal* constitution as opposed to the *democratic* one. Both textualism and the downsizing of stare decisis leave room to restore certain economic liberties, to curb Congress' power to secure social welfare at the expenses of market's freedoms, while still protecting the traditional civil liberties. Textualism and reshaping constitutional stare decisis are more capable of reaching these two Republican priorities than what originalism initial narrative was. After all, originalism presented itself as a theory of judicial restraint that favoured Justices' moderation and left things to be decided by the political process. Current textualism, in the sense of a theory of meaning, is far more powerful because it can swamp precedents and opens the doors to that kind of judicial activism a conservative agenda may look for.

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