Are we (truly) all originalist now? The debate on constitutional interpretation and the Biden Presidency

By Graziella Romeo

Abstract: Il dibattito sull'interpretazione costituzionale e la Presidenza Biden – President Biden maintained that his choice for a Supreme Court nominee would take into consideration someone adhering to a "mainstream interpretation of the constitution". His statement can hardly be regarded as a renounce to confront the ideological dominance of conservative jurisprudence. It is therefore relevant to explore how President Biden agenda impacts on Supreme Court's ideological polarization in matters of constitutional interpretation. The Article argues that Biden choices concerning his Supreme Court's nominee reveal liberals' interest in protecting civil rights jurisprudence grounded in evolutionary readings of the constitution. The argument shall be developed as follows: para. 2 shall clarify Biden's choices by analysing his nominee at the Supreme Court. Para 3. shall delve into the liberal/conservative divide concerning constitutional interpretation by focussing on the issue of constitutional precedents. The article goes on by elucidating in para. 4 the case for defending constitutional precedents. Finally, para. 5 shall offer some preliminary conclusions.

Keywords: originalism, textualism, Supreme Court, constitutional interpretation, constitutional precedents.

1. Introduction

When President Biden announced his nominee to the Supreme Court, he clarified that his choice was primarily intended to send a signal of inclusion toward those components of the Nation that have long suffered marginalization from public life and the enjoyment of basic rights.[1] Biden appears to support the case for fostering diversity to improve the quality of the judiciary. When explaining his choice for the Supreme Court, Biden mentioned the importance of building an institution that mirrors the

[1] L. Gambino, *Biden nominates Ketanji Brown Jackson to become first Black woman on Supreme Court*, *The Guardian*, 25 February 2022, available at https://www.theguardian.com/us-news/2022/feb/25/ketanji-brown-jackson-supreme-court-nomination-biden-pick.

DPCE online
ISSN: 2037-6677

complexity and richness of American society. Scholars have discussed judicial diversity as valuable not simply because it reflects societal pluralism but because it also improves the quality of judicial reasoning.[2] A Court that mirrors social pluralism is more likely to reach decisions that meet claims emerging from the polity. The functioning of the Supreme Court therefore benefits from diversity. Ketanji Brown Jackson, Biden's choice and first Black woman to sit on the highest court of the country, reflects the President's commitment to promoting diversity in institutional offices.[3]

In contrast, in Biden's agenda for the Supreme Court there was little attention paid to problems of constitutional interpretation. The President declared himself uninterested in picking someone who would openly oppose the "mainstream interpretation of the constitution."[4] He is as dispassionate on the debate concerning constitutional interpretation as Republican Presidents, including Donald Trump, were fervent supporters of one particular doctrine, namely originalism.

At least since the establishment of the Federalist Society, Republicans have advanced the claim that originalism could restore the balance of power set forth in the Constitution avoiding the kind of judicial activism exemplified by Chief Justice Earl Warren's Court of 1953 to 1968. Originalism was then born as a doctrine of constitutional interpretation with a clear ideological background. In recent years, originalism has proven itself to be a highly adaptable doctrine of interpretation. In fact, it has been discussed in its countless variants as a solid theory by scholars and judges since the beginning of the 1990s.[5]

The initial skepticism surrounding originalism was directed to the notion of original intent. Detecting the original intentions of a collective body appeared to lack a scientific basis. Moreover, even if such a collective intention could be identified, scholars have maintained that tying a constitutional interpretation to the Framers' intents implies reducing the

[2] J. Milligan, *Pluralism in America: Why Judicial Diversity Improves Legal Decisions About Political Morality*, 81 *N.Y.U. L. Rev.* 1206 (2006).
[3] See Executive order on diversity, equity, inclusion and accessibility in the federal workforce, available at https://www.whitehouse.gov/briefing-room/presidential-actions/2021/06/25/executive-order-on-diversity-equity-inclusion-and-accessibility-in-the-federal-workforce/.
[4] A. Hollis-Brusky, *Biden said he won't make an 'ideological' Supreme Court pick. Republicans do exactly that*, *Washington Post*, 14 February 2022, available at https://www.washingtonpost.com/politics/2022/02/14/supreme-court-biden-nominee-ideological/.
[5] A. Scalia, *Foreword*, in S.G. Calabresi (ed), *Originalism. A Quarter Century Debate*, Washington DC, 2007, 43.

constitution to the enforcement of individuals' aims rather than to a document which incorporates an historically situated, and therefore objectivized, political will.[6] The late Justice Antonin Scalia was the first originalist to understand that original intent would not take the doctrine very far. He proposed a new reading of originalism called public meaning originalism, based on historicist textualism. Public meaning originalism aims to rediscover the historical meaning of the words and sentences included in the constitutional text.[7] This particular approach to originalism succeeded in convincing scholars and justices to the point that even liberal ones refrained from challenging its theoretical foundations.[8]

In recent years, however, originalism's appeal has found a competitor in the textualist approach advanced by Justice Brett Kavanaugh. A Republican nominee, Kavanaugh has gained the attention of scholars for his inclination to delve into problems of constitutional interpretation. Most importantly, he distanced himself from originalist jurisprudence to defend a version of textualism grounded in history, tradition, and precedent.[9] Since the Constitution is first and foremost a written document, culturally shaped by the history of its formation, it can be regarded as a piece of legislation. Consequently, Kavanaugh approaches it as he would any other statute, by prioritizing the text over any other elements of constitutional argumentation. He agrees with originalists that judicial interpretation should not use modern values to reshape the text.[10] However, he distinguishes himself from originalists by his lack of interest in finding the public meaning or even in disregarding precedent. The originalist Justices Clarence Thomas, Neil Gorsuch, and Samuel Alito find in Kavanaugh a decisively reluctant supporter of their options in matters of constitutional interpretation. Chief Justice Roberts appears equally hesitant to unreservedly support originalist arguments.[11] This may be why

[6] R. Pannier, *An Analysis of the Theory of Original Intent*, 18 *William Mitchell Law Review* 696, 707 (1992).
[7] A. Scalia, *Originalism: The Lesser Evil*, 57 *U. Cinn. L. Rev.* 849 (1988-1989).
[8] For a critical discussion see J.M. Balkin, *The Construction of Original Public Meaning*, 26 *Constitutional Commentary* 71 (2016).
[9] B. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 *Notre Dame Law Review* 1907 (2014). See also G. Romeo, *The Supreme Court's debate on constitutional interpretation under Trump presidency*, in *Dpce Online*, 1, 2021, 8.
[10] E. Bazelon, E. Posner, *Who Is Brett Kavanaugh?*, *The New York Times*, 3 September 2018 available at https://www.nytimes.com/2018/09/03/opinion/who-is-brett-kavanaugh.html.
[11] J. Rosen, *Originalism, Precedent, and Judicial Restraint*, 34 *Harvard Journal of Law & Public Policy* 129, 130 (2010) (arguing that while Chief Justice Roberts's attitude

DPCE online
ISSN: 2037-6677

originalism was hardly mentioned in one of the most contentious decision of the last Court term. In *Dobbs v. Jackson*, the Supreme Court's judgment regarding the right to abortion, originalism is implicit in the decision yet it is never explicitly used to ground it.[12] In fact, the Court performs an historical analysis of the Fourteenth Amendment without using the originalist method to clarify the meaning of the provision.[13]

From this perspective, Biden's reference to the "mainstream interpretation of the Constitution" sounds like an inaccurate depiction of the reality of the Supreme Court. However, his statement can hardly be regarded as demonstrating a reluctance to confront the ideological dominance of conservative jurisprudence. It is therefore relevant to explore the impact of Biden's agenda on the Court's ideological polarization in matters of constitutional interpretation. Against this backdrop, the Article argues that Biden's choices concerning his Supreme Court nominee reveal liberals' interest in protecting civil rights jurisprudence, grounded in evolutionary readings of the Constitution. The argument is developed as follows: para. 2 clarifies Biden's choices by analyzing his nominee for the Supreme Court. Para 3. delves into the liberal/conservative divide concerning constitutional interpretation by focusing on the issue of constitutional precedents. The article continues by elucidating in para. 4 the case for defending constitutional precedents. Finally, para. 5 offers some preliminary conclusions.

2. Are we all originalist now?

President Biden's preference for a nominee to fit his diversity agenda found the perfect match in Ketanji Brown Jackson. A former judge for the District of Columbia Circuit, Jackson accepted her appointment to the Court by emphasizing her black identity and heritage. She stated that her appointment to the highest Court in the Nation was evidence of the unceasing social and cultural progress of the United States. Both Biden and Jackson intended to mark a historical–cultural continuity which connects

towards precedent is inconsistent, he can hardly be considered a fully fledged originalist).

[12] R. Siegal, *Memory Games: Dobbs's Originalism as Anti-Democratic Living Constitutionalism—and Some Pathways for Resistance*, 101 *Texas L. Rev.* (forthcoming 2023), now available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4179622.

[13] Ibidem at 43 (arguing that Dobbs is not an originalist decision because of the methodology used therein; rather it is originalist in that it reflects the political practice and agenda of originalism).

the newly appointed justice to Martin Luther King and Thurgood Marshall. They all are iconic figures testifying to the liberation of the black population as well as the path of cultural emancipation the Nation has proceeded down. Jackson mentioned both Justice Marshall and King, declaring she intends to continue in the footsteps traced by their cultural heritage.[14] At the same time, the speech in which she welcomed her nomination lacked the vindictive tones of civil struggles. On the contrary, the new Justice framed her appointment within the context of the American history, maintaining that her landing on the Court must be a source of pride for the nation as: "We have come a long way toward perfecting our union. It took just one generation [...] to go from segregation to the Supreme Court."[15] Jackson's words recall the trust in republican institutions and law as agents of social change that characterized Thurgood Marshall's jurisprudence. In that respect, she was clear in her belief that the Supreme Court can effectively improve the situation of marginalized groups in a political community. Her views can easily be read as a defense of judicial activism. During the Senate hearings, Brown Jackson was repeatedly asked about her views of the role of justices. She maintained that justices should not engage in policy considerations and should defer to the United States Congress whenever the answer to a problem cannot be found in the existing legal framework.[16] She further stated full adherence to some of the tenants of originalism, declaring herself in favor of employing the original intent and the original public meaning in constitutional interpretation. She deems these techniques adequate as the Constitution is the bearer of a fixed meaning that delimits the creative capacity of judicial interpretation. The concept of "fixed meaning" echoes Justice Scalia's idea that the Constitution is "dead" as it has set forth rules and values once and for all.[17]

[14] Ketanji Brown Jackson's Remarks at the White House after Her Supreme Court Confirmation, 8 April 2022, available at edition.cnn.com/2022/04/08/politics/ketanjibrown-jackson-confirmation-speech/index.html.
[15] Ketanji Brown Jackson's Remarks at the White House after Her Supreme Court Confirmation, above fn. 14.
[16] Committee on the Judiciary, Judge Ketanji Brown Jackson Written Responses to Questions for the Record, 7, available at https://www.judiciary.senate.gov/download/judge-ketanji-brown-jackson-written-responses-to-questions-for-the-record.
[17] A. Scalia, *Constitutional Interpretation the Old Fashioned Way*, Woodrow Wilson International Center for Scholars, Washington D.C. 14 March 2005, available at https://www.bc.edu/content/dam/files/centers/boisi/pdf/Symposia/Symposia%202010-2011/Constitutional_Interpretation_Scalia.pdf.

DPCE online
ISSN: 2037-6677

Jackson is not alone in her defense of originalism from the liberal perspective. Before her, Justice Elena Kagan famously stated during Senate hearings, "we are all originalist now."[18] Even the late Justice Ruth Bader Ginsburg counted herself as an originalist, even if she took a quite peculiar stance on what originalism meant. For Bader Ginsburg, originalism included the commitment to equality as the "motivating idea" of the Declaration of Independence.[19] The promise of equality could not be realized "by the original Constitution because of the odious practice of slavery that was retained."[20] Consequently, according to Bader Ginsburg, any interpretation of the Constitution as a project directed toward the progressive realization of an inclusive society is perfectly consistent with originalism.

Scholars such as Conor Casey and Adrian Vermeule have argued that this generalized support for originalism is a Pyrrhic victory for authors such as Robert Bork or Scalia and for originalists in general.[21] Rather than demonstrating its success as the prevailing doctrine of interpretation, such sweeping references to originalism only magnify the extent to which it can be understood and applied in different ways, leading to almost opposite conclusions. Once associated with the conservative culture, originalism is now upheld by some liberals who use it to argue for the recognition of rights that do not belong to the original constitution. The critical point, according to Casey and Vermeule, is the level of generality on which the reading of the constitutional text is performed. Justice Bader Ginsburg's reference to the "motivating idea" of the Declaration is a good example here. If an original value, such as equality of all men, is detected at a high level of abstraction, then there is sufficient room for an evolutionary interpretation of the Constitution without rejecting the originalist methodology. Originalism, however, was born as a

[18] The Nomination of Elena Kagan to be an Associate Justice of the Supreme Court of the United States. Hearing before the Committee on the Judiciary, United States Senate One Hundred Eleventh Congress, Second Session June 28–30 and July 1, 2010, Serial No. J–111–98, at 62. Available at https://www.govinfo.gov/content/pkg/CHRG-111shrg67622/pdf/CHRG-111shrg67622.pdf.

[19] A. de Vogue, *Justice Ginsburg Speaks About Gender Equality*, ABC News 18 November 2011, available at https://abcnews.go.com/blogs/politics/2011/11/justice-ginsburg-speaks-about-gender-equality/.

[20] Ibidem.

[21] C. Casey, A. Vermeule, *If every judge is an originalist, originalism is meaningless*, *The Washington Post*, 25 March 2022, available at https://www.washingtonpost.com/outlook/2022/03/25/if-every-judge-is-an-originalist-originalism-is-meaningless/.

theory which aims to promote democracy and popular sovereignty by substantially curbing Justices' ability to elaborate on constitutional values to meet the needs of contemporary morality. In this respect, Justice Jackson's commitment to advancing social and racial equality is inconsistent with the early tenets of the originalist doctrine of interpretation. Jackson's confirmation hearings clarify that originalism has been progressively transformed by a series of doctrines which vaguely share one single concept: the need to trace back values and principles to the constitutional text. Such an idea, however, is compatible with many different techniques on how to extract meanings from a legal text.

Therefore, Biden's reference to a "mainstream interpretation of the Constitution" sounds like an oversimplification of the legal and cultural debate over the meaning of originalism in constitutional doctrine and case law. At the same time, Biden's dispassionate approach to constitutional interpretation indicates that he (and Democrats in general) has understood that the crucial disagreement within the Supreme Court is no longer originalism as a method but rather the endurance of constitutional precedents.[22] One of the latest theoretical developments of originalism concerns the relationship between precedents and constitutional interpretation. For many originalist scholars and Justices, a precedent inconsistent with originalism has been "wrongly decided" and therefore deserves to be overruled. It is not difficult to foresee the implication of such a reading for certain historical precedents of the civil rights movement era which were largely based on an evolutionary reading of the Constitution or even expressly overcame the entrenched history and culture of the country. Biden's naivety on the debate over constitutional interpretation may subsequently be read as an awareness of the true ideological and cultural clash occurring at the Supreme Court.

3. Constitutional precedent and originalism

Although common law legal culture is imbued with the logic of precedent,[23] the latter possesses a wholly peculiar status in the case law of

[22] J.M. Balkin, *Why Liberals and Conservatives Flipped on Judicial Restraint: Judicial Review in the Cycles of Constitutional Time*, 98 *Texas L. Rev.* 215, 242-43 (2019).

[23] That common law systems make extensive use of precedent is so well known that it is listed among the prima facie distinguishing features of this legal tradition. According to Roscoe Pound, the success of the doctrine of precedent depends on its ability to ensure legal certainty and, at the same time, "the power of growth", *i.e.*, the

DPCE online
ISSN: 2037-6677

the highest courts, especially regarding decisions of constitutional relevance.

Some scholars have maintained that precedent does not play an important part in the case law of the Supreme Court.[24] This argument does not imply that precedent is not employed in constitutional reasoning; its use is wide-ranging and easily documented. In contrast, the argument correctly identifies that Supreme Courts do not perceive precedent as a coercive authority when they believe past decisions to be incorrect. The coercive function of the precedent, i.e., its ability to condition, and not simply influence, a judge's reasoning, is generally missing in decisions of constitutional importance. This is another way of saying that precedent is not imperative for the apical courts of the system as it is accepted, both on a theoretical and a practical level, that these judges should possess sufficient freedom, especially in constitutional matters, to interpret the law in light of the needs of protection expressed by the concrete and current case. This freedom, moreover, is functional to avoid interpretations of law becoming fossilized and unchanging with respect to issues of general interest.

To understand the logic of the constitutional precedent, therefore, it is necessary to distinguish between the strict rule of the precedent (*stricto sensu* precedent) and the use of the (horizontal) precedent by the highest court in the judicial system.

Stricto sensu precedents do not simply represent a past decision, or a series of past decisions, that are to be used to resolve the legal problem of the present case. They are something more: a model of correct legal solution that acts as an authority for legal reasoning. The first step is the identification of the *ratio decidendi*. Once this is isolated by the judge of the subsequent case, the ratio decidendi will constitute the precedent. From this perspective, the precedent presents itself as the authentic detection and application of law that existed before the decision and is merely manifested clearly to the present concrete case.[25]

The traditional doctrine of precedent has not survived in many common law jurisdictions. It has certainly been surpassed by the Supreme

evolution of legal solutions in the direction of their adaptation to changing social needs. R. Pound, *The Spirit of the Common Law*, Francestown (NH), 1921, 182-183.

[24] F. Schauer, *Thinking like a lawyers*, Cambridge, 2009, 36.

[25] U. Mattei, *Stare decisis. Il valore del precedente giudiziario negli Stati Uniti d'America*, Milano, 1988, at 115 and 289 and 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.

Court of the United Kingdom (and before that by the House of Lords).[26] Similarly, it is not relevant in the United States Supreme Court, where there is a certain freedom of justices to: a) argue on the basis of precedent and b) devise sophisticated techniques to avoid the application of the past decision or to at least modulate the contribution of that particular ratio decidendi to the definition of the final solution of the case. Furthermore, the problem of constitutional precedent is somewhat reduced by the manner in which the Supreme Court operates. In fact, the ability to select the cases included in the docket for each term allows the Court to implement a "policy of precedent." The Court can identify both decisions that need to be overcome and those that it is appropriate to confirm.[27]

Against this backdrop, it is also possible to distinguish between precedents and generic recourse to the case law in the search for an argument to support certain interpretations. The Supreme Court often cites previous cases not to signify that it is decisively bound by them but rather to recover supporting arguments within the case law. Precedents *stricto sensu*, instead, always imply a (presumptively) accurate reference to the principle of law included in the rationale of the decision used as precedent.[28] That principle is binding irrespective of judges' belief in its correctness, because it is part of the sources of law.

Constitutional precedents do not coincide (and could not coincide) completely with either an application of stare decisis in the strict sense nor with the generic reference to past decisions. The term "constitutional precedent" refers to the precise application by the Supreme Court of its own precedent, which does not impose itself by virtue of pertaining to the sources of law but rather as a fact to which justices pay attention, both in the cases in which they want to depart from it and in the cases in which they intend to use it.[29]

Against this backdrop, the status of constitutional precedent is peculiar as it is binding to the extent Justices are convinced of its enduring authority. Such authority can be lost in constitutional adjudication when precedent fails to reflect contemporary values or tenets of social coexistence. Justice Benjamin Nathan Cardozo maintained that adherence

[26] *Practice Statement* House of Lords 1966, [1966] 1 WLR 1234.
[27] R.A. Posner, *How Judges Think*, Cambridge, 2008, 374.
[28] F. Schauer, *Why Precedents in Law (and Elsewhere) is not totally (even substantially) about analogy*, above fn. 23, 45 and U. Mattei, *Il modello di common law*, Torino, 2014, 154.
[29] N. MacCormick, R.S. Summers, *Further General Reflections and Conclusions*, in Id., *Interpreting Precedents*, Dartmouth, 1997, 531.

DPCE online
ISSN: 2037-6677

to precedent was an expression of empiricist epistemology, as well as a guarantee that the judicial system and even the legal system as a whole, can function reasonably.[30] For Cardozo, recalling precedent allowed judges to avoid discussing problems for which a solution had been found and therefore responded to a need for rationality and efficiency.[31] However, even Cardozo, often cited as an example of a strenuous defender of precedent, was convinced of the need for a relaxed application of the principle of stare decisis to constitutional matters. The peculiar nature of constitutional scrutiny, always concerned with social justice and issues of common good, suggested a departure from the strict logic of precedent. According to Cardozo, constitutional law is an area in which the change in social sensitivity—in the values of reference and in the need for protection—is perceived with particular promptness as this change has immediate repercussions for the methods of social coexistence and on the acceptability of law as an instrument of its regulation.

Originalism challenges adherence to precedent in the strict sense for reasons that have nothing to do with Cardozo's viewpoint. Indeed, originalists do not dispute the value of resorting to precedent as such, but rather the preference for this strategy when it is, instead, possible to employ tools of interpretation. From the perspective of scholars inclined to a reading of the original intent, the interpretation of the Constitution, carried out according to this method, must always prevail over previous ones or, at least, over those that constitute "bad decisions" (or bad laws) as they are examples of judicial activism and lack any roots in the constitutional text (non-originalist precedents).[32] Originalism does not challenge the rule of precedent as such; that is, it does not cast doubt on the logic of *stare decisis*. Rather, the critique addresses the use of precedent which, in the originalists' opinion, departs decisively from the Constitution due to its novelty. By novelty, they mean that the decision is rooted in historically unfounded evolutionary readings of the constitutional text and legal tradition. At the same time, the originalists warn that precedent allows judges the freedom to disregard the Constitution and instead foster

[30] B. Cardozo, *The Nature of the Judicial Process*, New Haven, 1921, 149 and *Rule and Discretion in the Administration of Justice*, in 33 *Harvard Law Review* 972 (1920).
[31] B. Cardozo, *The Nature of the Judicial Process*, above fn. 29, 143: "I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. We have had to do this sometimes in the field of constitutional law".
[32] v. H.P. Monaghan, *Stare Decisis and Constitutional Adjudication*, in 88 *Columbia Law Review* 723 (1988).

the development of a constitutional law detached from the Constitution's master text. In conclusion, precedent is always an element that signals a departure from the constitutional text and, therefore, a circumvention of the normativity of the written Constitution.[33]

Some originalists, therefore, strive to combine the rule of precedent with originalism, arriving at solutions based on the normativity of the written Constitution. In particular, they argue that it is the Constitution itself that allows the use of precedent because the text considers precedent in the same manner as federal common law, which Congress can always repeal via legislation. In essence, the argument is that the Constitution must be applied together with precedent. Thereby, the use of precedent does not undermine the full normativity of the written text. Rather, precedent ensures the normativity of the Constitution. In other words, the common law works as a reservoir of principles and rules that can be integrated into the Constitution whenever the text allows it.[34]

Although a defense of precedent can be found also in originalist scholarship, originalist Justices are fairly outspoken in challenging the constitutional status of past decisions.[35] The logic has been escalated in particular by those Justices who have openly criticized historical precedent as wrongly decided because of its inconsistency with an originalist approach.[36] Liberals on the Supreme Court now face this line of criticism over constitutional precedents of iconic relevance. Justice Jackson will likely contribute to identifying arguments to address those challenges.

[33] See *Justice* Scalia's dissent in *South Carolina v. Gathers*, 490 U.S. 805, 825 (1989): "I agree with Justice Douglas: 'A judge looking at a constitutional decision may have compulsions to revere past history and accept what was once written. But he remembered above all else that it is the Constitution which we swore to support and defend, not the gloss which his predecessors may have put on it'. Douglas, *Stare decisis*, 49 *Colum. L. Rev.* 735, 736 (1949)".

[34] J.O. McGinnis, M.B. Rappaport, *Reconciling Originalism and Precedent*, 103 *Northwestern University Law Review* 128 (2009).

[35] In particular, Justices of the current conservative majority have repeatedly stated that the principle of stare decisis should not be interpreted as an absolute command: *Ramos v. Louisiana*, 140 S. Ct. 1390, 1413-14 (2020) (Kavanaugh, J., concurring) (stating that stare decisis is not strict when interpreting the Constitution because of the nature of constitutional adjudication. Stare decisis is therefore applied without a "consistent methodology or roadmap" in constitutional cases). See also G. Romeo, L. Testa, *La giurisprudenza della Corte Suprema degli Stati Uniti nei terms 2015/2016 e 2016/2017*, *Giurisprudenza costituzionale*, no. 5, 2017, 2303-2336. Examples of such an attitude toward precedents also include references to the decision *Chevron USA, Inc. v. Natural Resources Defense Council*, Inc. (467 U.S. 837), often mentioned as unclear guidance for similar cases: see G. Romeo, *Interpretazione della legge e judicial deference nella Corte Suprema del dopo Scalia*, in *DPCE*, issue 2, 517, 519 (2018).

[36] See *infra* fn. 51.

DPCE online
ISSN: 2037-6677

4. A defense of constitutional precedent

Many scholars have advanced a defense of constitutional precedent, using a diverse range of arguments which are nonetheless all characterized by a concern for the stability of the supporting structures of the common law legal thought.

Ronald Dworkin's theory of law as a social practice and as an "interpretative concept" can be included within the theories supporting precedent. For Dworkin, the law can be known and understood primarily through the reconstruction of its reference values.[37] Within such a context, the determination of the meaning of norms necessarily occurs through the study of the practice of their application and interpretation. In turn, this implies that to determine the meaning of law, judges must make use of the coherent narrative of past decisions as these testify to the inclusion of legal solutions in the historical continuity of a tradition and indicate its acceptance by the community. From Dworkin's perspective, therefore, precedent represents a decision of a correct kind but also indicates the principles of morality which justify the legal solution embodied in the case.[38] This reading of precedent is part of a conception of law as "integrity" or as a scheme of rights and responsibilities which are built through an interpretation of the content of social practice with the intention of binding and guiding the exercise of power. In turn, the interpretation of social practice utilizes a diachronic and synchronic reading of facts and juridical models. In fact, for Dworkin, each judge participates in a "chain novel," writing a chapter bound to a form of coherence with those that came before.[39]

Other scholars justify precedent on prudential grounds, maintaining that judicial prudence and modesty suggest adherence to precedent. As a model of a correct decision, the precedent guides the judge, removing the problem of finding a legal solution by relying on individual assessments, guiding the judge toward a tested argumentative path and ensuring that judicial balance does not give way to harmful activism.[40]

David Strauss offers a theory wholly consistent with Dworkin's thought but peculiar in that he does not insist at all on the authoritative nature of constitutional precedent. For Strauss, precedent should be

[37] R. Dworkin, *Law's Empire*, Cambridge, 1986, 80.
[38] R. Dworkin, *Law's Empire*, above fn. 35, 228.
[39] R. Dworkin, *Law's Empire*, above fn. 35, 230.
[40] L.F. Powell, *Stare Decisis and Judicial Restraint*, in 1991 *Journal of Supreme Court History* 13, 16.

binding because it reflects conceptualizations that have been tested and continuously elaborated over time, offering (theoretically) the solution that best fits the specific case. Strauss thus outlines the common law constitutional interpretation in the context of which the constitutional precedent must fully contribute to the judge's reasoning.[41]

A defense of precedent is also proposed by Bruce Ackerman and, in particular, his thesis on constitutional moments. Those moments represent stages of profound transformation of American constitutional history, which include both formally constituent events, such as the founding one, as well as cases of substantial and informal transformation of the Constitution, such as the New Deal era. According to Ackerman, decisions adopted in these situations represent precedents that judges are required to respect as they determine the identity of the American political community and legal culture. From this perspective, Ackerman advances an argument for strict adherence, at least with respect to a limited number of precedents, i.e., those that identify turning points in American constitutional history.[42]

Ackerman's constitutional moments reflect the concept of "super precedents," which describe decisions that have become entrenched in political practice and are widely relied upon within the legal system. Super precedents include decisions such as *Marbury v. Madison*, which remain over time and decisively contribute to shaping the legal system.[43]

Scholars who justify constitutional precedent, however, do not go as far as maintaining that the Supreme Court is always under an obligation to apply its own precedent. In particular, they concede that constitutional cases require Justices to assess whether a given precedent fits in the constitutional system. Any attempt to defend precedent in constitutional matters assumes that justices should distinguish between the strict and loose meaning of precedent. The former denotes its binding nature, which is generally discounted for Supreme Court's decisions. The latter's meaning indicates that precedents that control the decision of the case are part of a more complex argumentative strategy. In that sense, the principle of *stare decisis* derives from prudential and pragmatic considerations concerning the role of judges and the stability of the legal system. The respect for precedent contributes to the legitimation of the judicial function.

---

[41] D. Strauss, *Common Law Constitutionalism*, in 63 *University of Chicago Law Review* 877, 879 (1996).
[42] B. Ackerman, *We the People*, Vol. II, Cambridge, 1988, 418.
[43] V.M.J. Gerhardt, *The power of precedent*, Oxford-New York, 2008, 178-179.

DPCE online
ISSN: 2037-6677

Justice Jackson took a decisive stance on precedent when asked about her view of her role as judge during her confirmation hearings. She claimed that judges should stay within the boundaries of their role and that being faithful to precedent helps ensure that this happens.[44] She further clarified that while as a lower court judge she was bound by precedent, as justice of the Supreme Court she would feel bound to the stare decisis doctrine because judges "have limited authority" and must stay in a "limited judicial lane."[45] According to Jackson, the authority of precedent is particularly strong in matters concerning fundamental rights.[46] This is the element of her reasoning that mirrors liberals' concerns the most. To a question regarding whether the Supreme Court has the authority to examine American society and decide that rights once held fundamental are no longer fundamental, she answered by recalling the meaning of stare decisis. In particular, she argued that "In the substantive due process context, Supreme Court cases that recognize fundamental rights are binding precedents that are subject to respect under the principle of stare decisis."[47] It is hard not to see in this Jackson referring to cases such as *Obergefell v. Hodges*,[48] *Lawrence v. Texas*,[49] *Griswold v. Connecticut*,[50] and *Roe v. Wade*.[51]

Civil rights cases applying substantive due process have been seriously questioned by the Supreme Court's recent decision in *Dobbs v. Jackson*. Here, the Court overruled *Roe v. Wade*, a 1973 precedent which recognized the right to have an abortion as inherent in the freedom to make choices concerning one's personal life as protected by the Fourteenth Amendment's Due Process Clause.[52] In *Dobbs*, Justice Alito argued for the majority that *Roe* had been wrongly decided because it ignored the fact the Due Process Clause only protects historically entrenched liberties.[53]

[44] Committee on the Judiciary, *Judge Ketanji Brown Jackson Written Responses to Questions for the Record*, 8, available at https://www.judiciary.senate.gov/imo/media/doc/Judge%20Ketanji%20Brown%20Jackson%20Written%20Responses%20to%20Questions%20for%20the%20Record.pdf.
[45] Ibidem at 1.
[46] Ibidem at 7.
[47] Ibidem.
[48] 576 U.S. 644 (2015), concerning the recognition of the right to same sex marriage.
[49] 539 U.S. 558 (2003), declaring unconstitutional criminal punishments for consensual, adult non-procreative sexual activity.
[50] 381 U.S. 479 (1965), declaring unconstitutional laws criminalizing the use of contraceptives by married couples.
[51] 410 U.S. 113.
[52] Above fn. 49.
[53] 597 U.S. ___ (2022).

According to the Court, the right to abortion does not belong to such a category.

Despite the majority's reassurance that the decision only concerns *Roe v. Wade* and has no broader implications for substantive due process cases,[54] many commentators have warned of a radicalization of the Supreme Court. Jackson's confirmation hearing appears to confirm that the newly appointed Justice intends to affirm the role of stare decisis in such a crucial moment for constitutional developments. In that respect, President Biden's choice precisely addresses the new issue of ideological polarization within the Supreme Court.

5. Conclusion

The debate on the merits of originalism in constitutional interpretation has remained distinct from President Biden's decision concerning his nominee for the Supreme Court. Unlike his predecessor Trump, Biden did not actively support a certain method of constitutional interpretation when picking his candidates. Instead, he stated that he desired someone who adheres to the mainstream view on interpretation. Justice Jackson followed this expectation by not challenging originalism. In fact, in her confirmation hearings, she openly declared herself in favor of public meaning originalism and cited Scalia as the most influential author in matters of constitutional interpretation.

One may be tempted to conclude that Biden decided to avoid further ideological confrontation in the Supreme Court. Upon closer examination, however, it appears that he has picked a Justice who is interested in a fundamental tenet of the judicial system: constitutional stare decisis. Although she has accurately avoided challenging originalism as a constitutional interpretation technique, Jackson has nonetheless openly discussed the outer limits of originalism jurisprudence. In her view, those limits are precisely curbed by the doctrine of *stare decisis*. She has conceded that the public meaning of the constitutional text binds justices however, she has been equally vocal in defending *stare decisis* as an additional source of meaning in interpreting fundamental rights cases. She entertained the argument that stare decisis contains judicial activism and safeguards the proper role of judges.

[54] Ibidem (Alito J. (Opinion of the Court) at 38, slip op.

DPCE online
ISSN: 2037-6677

When approached from this perspective, Biden's choice for the Supreme Court reveals that he did not intend to walk away from confronting conservative justices. In contrast, he and Justice Jackson are evidence that ideological clashes regarding the Court have moved from the justification of originalism to the limits of constitutional precedents.

Graziella Romeo
Dip.to di Studi giuridici
Università comm.le "L. Bocconi"
graziella.romeo@unibocconi.it