

Ketanji Brown Jackson and the Triumph of Originalism

Biden's Supreme Court nominee comes close to endorsing the philosophy that sank Robert Bork in 1987.

By Randy E. Barnett

Judge Ketanji Brown Jackson may not be an originalist, but she sounded like one in her confirmation hearings this week. "I believe that the Constitution is fixed in its meaning," she said on Tuesday. "I believe that it's appropriate to look at the original intent, original public meaning, of the words when one is trying to assess because, again, that's a limitation on my authority to import my own policy."

Even a nominee chosen by a Democratic president and facing a Democratic Senate felt it was necessary to say that she would adhere to the original public meaning of the text. To appreciate the significance of this development requires a bit of history.

Robert Bork described himself explicitly as an "originalist" when President Reagan nominated him to the high court in 1987. Democratic senators characterized originalism as a dangerously reactionary philosophy that would "turn back the clock" on civil rights and liberties. After the Senate rejected Bork, no Republican nominee adopted the label "originalist" until Neil Gorsuch, 30 years later. Since 2017, however, Brett Kavanaugh and Amy Coney Barrett also explicitly identified as originalists.

What accounts for that change? Scholars have worked hard to develop and refine a method that in 1987 was highly undertheorized. Perhaps the most important change was to move away from inquiring into "the intention of the framers" and toward identifying the "original public meaning" of the text—defined as the meaning that a competent speaker of English would attribute to the words of the Constitution, in context, when they were adopted.

A second development was the recognition that while judges are always obliged to follow the words of the text, those words alone sometimes aren't enough to resolve a case. That raises the need for a supplementary method, sometimes called "constitutional construction." The difference between these two modes of analysis—interpretation and construction—is captured by the metaphor "the letter and the spirit" of the text.

The letter of the text is its original public meaning. The spirit of the text is its original ends, functions or purposes. Crucially, for an originalist, the ends of the text should never be invoked to supersede, supplant or contradict its original meaning. Also crucially, both inquiries are historical. Judges are constrained to follow not their own purposes or preferences, nor those they discern from contemporary society, but the original meaning of the text and the original purposes for which it was adopted by the people, whether in 1789 or 1868.

In her testimony, Judge Jackson said that "adherence to text" requires a judge "to figure out what those words mean as they were intended by the people who wrote them. So, at this point, I'm looking at original documents. I am focusing on the original public meaning because I'm constrained to interpret the text." This is an apt description of originalist interpretation.

"But there are times," she went on, when "looking at those words [is] not enough to tell you what they actually mean. You look at them in the context of history. You look at the structure of the Constitution. You look at the circumstances that you're dealing with in comparison to what those words meant at the time that they were adopted." This describes originalist construction, if somewhat imprecisely.

Moreover, Judge Jackson expressly disclaimed "living constitutionalism," which "infuses" the document "with my own policy perspective or . . . the policy perspective of the day."

Why does this matter? First and foremost, it legitimates originalism. "The prevailing interpretive frame for interpreting the Constitution is now very clearly looking back

through history,” Judge Jackson testified. “That is now the way in which constitutional interpretation is done.” As Ed Whelan of the Ethics and Public Policy Center observed: “When the next Republican president nominates the next conservative nominee, it’s going to be very difficult for Dems to object that the nominee is an originalist.”

“We are all originalists,” Elena Kagan said during her 2010 confirmation hearings. Many discounted that pronouncement because she seemed to limit originalism to the “very specific rules” in the Constitution. Judge Jackson’s pronouncement was less conditional; her description of originalism was more specific and sweeping. Whether or not Judge Jackson adheres to originalism on the high court, she has affirmed that it is the norm.

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