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THE JUDICIAL PHILOSOPHY OF JUSTICE KETANJI BROWN JACKSON

Luke Green, Michael Goutsaliouk, and Gader Wren[*]

"We are all originalists now."
Justice Elena Kagan [1]

ABSTRACT

This article explores the judicial philosophy of Justice Ketanji Brown Jackson during her first terms on the United States Supreme Court by analyzing the interpretive methods she employs in her opinions. Specifically, it examines the various modalities of constitutional and statutory interpretation that Justice Jackson utilizes. This article also surveys common themes found throughout her opinions, particularly her emphasis on individual rights and fairness in the judicial process. By analyzing the tendencies of the High Court's newest member, this article offers useful insights for appellate practitioners, scholars, and Supreme Court observers.

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* Green, judicial law clerk to Judge Rosemary Emory of the Fifth Judicial District in Jerome, Idaho; Goutsaliouk, judicial law clerk to Judge Connie Steinheimer of the Second Judicial District Court in Reno, Nevada; Wren, Idaho Deputy Attorney General and former judicial law clerk to Justice Patricia Lee of the Nevada Supreme Court. Many thanks to Nazo Demirdjian, Samuel Holt, and Leslie Griffin for their helpful edits and suggestions. All views contained herein are those of the authors and not of the aforementioned individuals or institutions.

1. Michael Waldman, *Originalism Run Amok at the Supreme Court*, BRENNAN CENTER FOR JUSTICE (June 28, 2022), brennancenter.org/our-work/analysis-opinion/originalism-run-amok-supreme-court.

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I. INTRODUCTION

Historically, judicial nominees were confirmed without much scrutiny.[2] However, in modern times, judicial nominees face extensive congressional questioning aimed at predicting the nominee's votes in cases likely to come before federal courts.[3] As a means of evasion, nominees often appeal to canon three of the judicial code of conduct which requires that judges conduct themselves in a manner that "minimize[s] the risk of conflict with the obligation of the judicial office," including the appearance of prejudging a case.[4] Though canon three shields nominees from

2. Robert F. Nagel, *Advice, Consent, and Influence*, 84 NW. U. L. REV. 858, 859 (1990) ("Beginning in 1959, with the hearings on Potter Stewart's nomination, senators have considered it proper to use the occasion of the nominee's appearance [at the confirmation hearing] to inquire about specific cases, judicial philosophy, and attitudes on issues likely to come before the Court."); Drew DeSilver, *Up Until the Postwar Era, U.S. Supreme Court Confirmations Usually Were Routine Business*, PEW RESEARCH CENTER (Feb. 7, 2022), https://pewresearch.org/short-reads/2022/02/07/up-until-the-postwar-era-u-s-supreme-court-confirmations-usually-were-routine-business/.

3. *See id*.

4. MODEL CODE OF JUD. CONDUCT Canon 3 (AM. BAR ASS'N 2020); *see also* VALERIE C. BRANNON & JOANNA R. LAMPE, CONG. RSCH. SERV., R45300, QUESTIONING JUDICIAL NOMINEES: LEGAL LIMITATIONS AND PRACTICE, 1 (2022) ("Judicial nominees have often refused to answer certain questions at their confirmation hearings, or have volunteered only perfunctory responses, claiming that fully answering certain questions could violate various ethical norms that apply to judges and judicial candidates or impair the independence or fairness of the federal judiciary.").

answering questions about pending or hypothetical cases,[5] it does not block questions related to a candidate's judicial philosophy.[6] This is because answering a question related to a nominee's general judicial philosophy only requires the nominee to describe their legal interpretive methods—rather than describe how that method would apply in a particular case or fact pattern.[7]

Federal judges and justices enjoy life tenure so that they may remain independent from the other political branches.[8] However, a frequent criticism of federal judges and justices is that they, as judicial officers who are not accountable to the People, sometimes "substitute[] [their] own ideas about policymaking for Congress's" or those of the Founders.[9] Though few would say this never happens, a judge who faithfully follows a recognized judicial philosophy is better positioned to avoid this pitfall.[10]

Judicial philosophies vary in their flexibility. Some philosophies consider a wide range of factors to reach a particular answer, while others apply a more rigid formula. For instance, then-Judge Sonia Sotomayor, during her judicial nomination proceedings to the United States Supreme Court, indicated that her judicial philosophy was "[s]imple: fidelity to the Law . . . I have applied the law to the facts at hand."[11] In contrast, Judge Robert Bork explained that a legitimate judicial philosophy must abide by neutrality in the derivation of principle, definition of principle, and application of principle.[12]

As many scholars and jurists recognize, adherence to judicial philosophies provides judges with a formula to interpret the law, thereby minimizing the influences of personal preference and limiting judges from usurping the voice of the People.[13] Today, most judges follow one of three mainstream judicial philosophies:

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5. BRANNON & LAMPE, *supra* note 4, at 7.

6. *Id*.

7. Vikram David Amar, *How Senate Confirmation Hearings Should Better Educate Senators and the American Public: The Instructional Necessity of Case-Specific Questioning*, 61 HASTINGS L.J. 1407, 1412–13 (2010).

8. U.S. Const. art. III § 1; THE FEDERALIST NO. 78 (Alexander Hamilton).

9. W. Virginia v. Env't Prot. Agency, 597 U.S. 697, 783 (2022) (Kagan, J., dissenting).

10. *See* ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–53 (Simon & Schuster, 1990) (explaining that a legitimate judicial philosophy will prevent judges from usurping the will of the People).

11. *Confirmation Hearing on the Nomination of Hon. Sonia Sotomayor, to Be an Associate Justice of the Supreme Court of the United States: Hearing Before the S. Comm. on the Judiciary*, 111th Cong. 59 (2009) (statement of Sonia Sotomayor, J.).

12. *See* BORK, *supra* note 10.

13. *See The Rule of Law in the Marketplace of Ideas: Pledges or Promises by Candidates for Judicial Election*, 122 HARV. L. REV. 1511, 1527 (2009).

originalism, living constitutionalism, and constitutional pluralism.[14] Though distinct, each philosophy *generally* accepts that questions of interpretation must begin and end with the text absent ambiguity.[15] However, when the text is ambiguous, judicial philosophies diverge.

Some jurists who practice modern originalism,[16] the judicial philosophy endorsed by many, including Justice Black,[17] Justice Scalia,[18] Justice Thomas,[19] Judge Bork,[20] Judge Ginsburg,[21] and Judge Bea,[22] believe that ambiguous texts must be interpreted in accordance with their original public meaning.[23] In contrast, living constitutionalists, such as Chief Justice Warren,[24] Justice

14. *See generally* Lawrence B. Solum, *Originalism Versus Living Constitutionalism: The Conceptual Structure of the Great Debate*, 113 NW. U. L. REV. 1243 (2019); *but see* Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353, 356 (2006) (highlighting constitutional minimalism).

15. *See* Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) (Justice Kagan remarking, "We are all textualist now."); American Constitution Society, *How Should We Interpret the Constitution?,* YOUTUBE (Sept. 17, 2019).

16. *See* Gader Wren, *The Establishment Clause: No Longer a Lemon*, 100 U. DET. L. REV. ONLINE 1, 2–4 (2023) (explaining that at least two branches of originalism exist—original public meaning and original intent; the latter, an often-considered antiquated approach to originalism, values what the Framers intended to convey when they ratified the constitution); *see also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 38 (Princeton University Press, 2018).

17. SCALIA, *supra* note 16, at xvii; *but see* Everson v. Bd. of Ewing Twp., 330 U.S. 1, 8–17 (1947) (interpreting the Establishment Clause through an original intent lens).

18. SCALIA*, supra* note 16 at 38 (explaining that the Constitution should be interpreted according to its "original meaning").

19. *See e.g.*, New York State Rifle & Pistol Ass'n, Inc. v. Bruen, 597 U.S. 1, 18 (2022) (explaining that "Constitutional rights are enshrined with the scope they were understood to have when the people adopted them.") (quoting *D.C. v. Heller*, 554 U.S. 570, 634 (2008)).

20. *See generally* BORK, *supra* note 10.

21. Douglas H. Ginsburg*, Originalism and Economic Analysis: Two Case Studies of Consistency and Coherence in Supreme Court Decision Making*, 33 HARV. J.L. & PUB. POL'Y 217, 237 (2010) (arguing that "originalism promises to constrain constitutional interpretation").

22. Joan Hamilton, *Judge Carlos T. Bea: A Measured View of the Law*, STANFORD LAWYER (Nov. 22, 2019), https://law.stanford.edu/stanford-lawyer/articles/judge-carlos-t-bea-a-measured-view-of-the-law/.

23. *See The Rule of Law in the Marketplace of Ideas, supra* note 13.

24. Trop v. Dulles, 356 U.S. 86, 100 (1958) (introducing the concept that the Eighth Amendment should be interpreted according to "evolving standards of decency").

Brennan,[25] Justice Stevens,[26] and Justice Breyer,[27] act on the basis that the meaning of the Constitution (or statutes) should change over time.[28] This difference is well-demonstrated in the Supreme Court's Eighth Amendment jurisprudence. In *Trop v. Dulles*, the U.S. Supreme Court, in an era led by living constitutionalists,[29] held that the Eighth Amendment's ban on "cruel and unusual punishment" must be weighed against the "evolving standards of decency."[30] In the decades that followed, the Court limited the application of the death penalty to crimes against the state and murder.[31] In sharp contrast, Justice Scalia, an originalist, rejected the evolving standard of decency and argued that since the death penalty was permitted at the founding, it remains permissible today.[32] Thus, while living constitutionalists take the view that the Constitution should be interpreted with modern sensibilities, originalists generally reject that view and, instead, principally rely on historical understandings.

Though sometimes considered a subcategory of living constitutionalism, constitutional pluralism is a hyper-flexible judicial philosophy that enables judges to selectively apply various modalities of interpretation.[33] Popularized by Philip C. Bobbitt, modern constitutional pluralists believe that legal arguments and determinations should examine, in no particular order, constitutional structure, text, ethics, prudence, history, and

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25. William Brennan, *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1, 8 (1991) ("I approach my responsibility as a Justice to read the Constitution in the only way that I can: as a Twentieth Century American . . . [with] the ultimate question . . . [being] what do the words of the text mean in our time?").

26. McDonald v. City of Chicago, Ill., 561 U.S. 742, 876 (2010) (Stevens, J., dissenting) (suggesting that the language of the constitution should be interpreted with consideration to the "changing environment"); Rummel v. Estelle, 445 U.S. 263, 307 (1980) (Stevens, J., dissenting) ("We are construing a living Constitution.").

27. N.L.R.B. v. Noel Canning, 573 U.S. 513, 538 (2014) (suggesting that the court should consider how constitutional terms appeal to "a modern ear").

28. *Id*.; Galloway v. Truesdell, 83 Nev. 13, 25, 422 P.2d 237, 245 (1967) ("The constitution is a living thing and is to be interpreted in the light of changing conditions.").

29. *See generally* Alex Tobin, *The Warren Court and Living Constitutionalism*, 10 IND. J.L. & SOC. EQUAL. 221 (2022).

30. *Trop*, 356 U.S. at 101.

31. *See generally* Kennedy v. Louisiana, 554 U.S. 407, 446–47, as modified (Oct. 1, 2008), opinion modified on denial of reh'g, 554 U.S. 945 (2008).

32. *See* Atkins v. Virginia, 536 U.S. 304, 337–54 (2002) (Scalia, J., dissenting).

33. Randy E. Barnett & Lawrence B. Solum, *Originalism After* Dobbs, Bruen*, and* Kennedy*: The Role of History and Tradition*, 118 NW. U. L. REV. 433, 451 (2023) ("Constitutional Pluralism is usually understood as a form of living constitutionalism."); HOWARD LEE MCBAIN, THE LIVING CONSTITUTION 33 (Macmillan, 1928) (describing the Constitution's "living skin" as "*elastic*, expansile, and . . . constantly being renewed") (emphasis added).

doctrine.[34] Thus, when faced with constitutional questions, some constitutional pluralists often "start with the [desired] result" and marshals the modalities of interpretation to achieve an intended result.[35] To determine which judicial philosophy a jurist follows requires an extensive examination of the jurist's writings.

In Justice Ketanji Brown Jackson's judicial nomination hearings, then-Judge Jackson commented, "I believe that the Constitution is fixed in its meaning. 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."[36] Jackson further added that when the words of the Constitution are ambiguous, judges should look to historical analogs and precedent.[37] When pressed by senators, Jackson said she was "reluctant" to take on the label of an originalist or a living constitutionalist.[38]

In her first two terms, Jackson has made her presence known. Like Scalia, Jackson engages in lively exchanges with counsel and asks pointed questions that may cause even the most seasoned attorneys to feel some trepidation. In her first term, Jackson authored six majority opinions, five concurring opinions, and six dissenting opinions. In her second term, Jackson authored an even greater number of opinions: five majority, eleven concurrences, seven dissents, and two opinons concurring in part and dissenting in part.

This essay explores Jackson's writings, her comments at oral arguments, and the modalities applied in her opinions, which all provide helpful evidence as to the newest Justice's judicial philosophy. This exploration reveals that while Jackson is comfortable using originalism as a means of constitutional interpretation, Jackson appears to focus on the preservation of individual rights and the needs of vulnerable individuals.

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34. *See generally* PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION (Oxford University Press, 1982).

35. The Federalist Society, *What is the Difference Between Originalism and Living Constitutionalism? [No. 86]*, YOUTUBE (May 19, 2020).

36. Andrew Koppelman, *Ketanji Brown Jackson's Originalism,* THE HILL (Apr. 10, 2022, 12:00 PM), https://thehill.com/opinion/judiciary/3263173-ketanji-brown-jacksons-originalism/; PBS NewsHour, *WATCH: Sen. Ben Sasse Questions Jackson in Supreme Court Confirmation Hearings*, YOUTUBE (March 22, 2022).

37. PBS NewsHour, *WATCH: Sen. Ben Sasse Questions Jackson in Supreme Court Confirmation Hearings*, YOUTUBE (March 22, 2022).

38. *Id*.

II. THE 2022-2023 TERM

Reviewing Jackson's first-term opinions reveals a superseding pattern motivating her writings. Regardless of her expressed justification, she argues for resolutions that advance the interests of vulnerable individuals—even if it places burdens on parties with institutional power. This superseding pattern is most apparent in cases that address individual rights, or place an individual adverse to an institutional actor. However, this paradigm is confirmed by Jackson's consistent use of it even in cases where the implicated individuals are not parties to the case, or the institutional nature is only perceived. Thus, this review highlights two categories of opinions: (a) those that directly implicate the individual-institution dichotomy and (b) those that apply it by extension. Further, it only addresses cases in which Jackson authored an opinion as limited insight may be gleaned from another Justice's words.

A. Those Establishing the Individual-Institution Dichotomy.

Jackson has established this superseding pattern most directly in cases concerning the substantive liberty interests of individuals. In *United States v. Hansen*, the Court considered a federal criminal statute in which Congress prohibited the act of "encourag[ing] or induc[ing]" others to immigrate unlawfully.[39] They were asked whether the statute's language covered so much protected speech that it should be struck down via an overbreadth First Amendment challenge.[40] In Jackson's view, the conflict was between "overbreadth's goal of limiting criminal laws that chill constitutionally protected speech" and "the values that underpin [the] ordinary canon of constitutional avoidance."[41] The former goal would protect individual liberty and free speech, while the latter would safeguard Congress as an institution and address the institutional concerns of federalism.[42] The majority's interpretation favored Congress by narrowing the statute to conform with the individual liberty interest instead of invalidating the law. Jackson chided the majority for "diverg[ing] from the text and history" and criticized the "subver[sion of] the speech-protective goals of the constitutional doctrine plainly

39. 8 U.S.C. § 1324(a)(1)(A)(iv); United States v. Hansen, 559 U.S. 762, 774 (2023).
40. *Hansen,* 559 U.S. at 766.
41. *Id.* at 807–08 (Jackson, J., dissenting).
42. *Id.* at 762, 766 (Barrett, J., majority opinion).

implicated."[43] Acting prudentially, Jackson would have held the law to be unconstitutional "and thereby prompt[] the enactment of a narrower replacement [law]."[44] Placing that burden on Congress, Jackson argued, was necessary to help individuals faced with "the real and ever-present risk of continuing to have facially overbroad criminal statutes on the books."[45] Thus, Jackson argued for a resolution advancing individual rights by burdening the implicated institution.

In *Samia v. United States*, the Court was asked whether certain witness testimony introduced at a joint trial counted as testimony "against a defendant" in violation of the confrontation clause.[46] Applying its default rule, the Court held that a witness is not against a defendant "if the jury is instructed to consider that testimony only against a codefendant."[47] The Court reasoned that the institutional value in "preserving government resources"[48] and institutional trust that "jurors follow their instructions"[49] outweighed "the risk of potential prejudice that may arise inferentially in a joint trial" undermining the individual right to confrontation.[50] While the principal dissent focuses on precedent,[51] Jackson's dissent contended that the majority's "approach inverts the constitutional principles that govern [the] case."[52] Finding "no dispute" that the other requirements of the Confrontation Clause were met, Jackson believed that "the default presumption . . . should have been" that the witness was *against* him "because the statement implicated Samia on its face."[53] Thus, she offered an analysis "which guarantees the right of the accused" individual without consideration of the institutional parties.[54] Ultimately, Jackson would have advanced individual rights at the expense of burdening institutions.[55]

Jackson's pattern of preferencing perceived vulnerable individuals also echoes through cases addressing the procedural protections of individuals. In *Coinbase v. Bielski*, the Court

43. *Id*. at 793 (Jackson, J., dissenting).
44. *Id*. at 808.
45. *Id*. at 810.
46. Samia v. United States, 599 U.S. 635, 644 (2023).
47. *Id*. (quoting Richardson v. Marsh, 481 U.S. 200, 206 (1987)).
48. *Id*. at 654.
49. *Id*. at 650 (internal quotations omitted).
50. *Id*. at 655.
51. *See id*. at 657–67 (Kagan, J., dissenting).
52. *Id*. at 667 (Jackson, J., dissenting).
53. *Id*. at 668.
54. *Id*. at 668, n.*.
55. *See id*. at 669.

addressed whether a district court must stay proceedings while certain interlocutory appeals are ongoing.[56] Specifically, it held that an appeal from a denial of a motion to compel arbitration requires a stay because "the entire case is essentially involved in the appeal."[57] While all Justices agreed that the Federal Arbitration Act was adopted "against a clear background principle," the majority and dissent disagreed as to the direction of that clear principle.[58] The majority concluded that the stay was mandatory, fortifying the right to arbitration while limiting the right to trials and pretrial procedures.[59] Jackson's dissent particularly criticized the majority for providing a "windfall . . . to defendants seeking arbitration, preferencing their interests over all others,"[60] by "invent[ing] a new stay rule perpetually favoring one class of litigants—defendants seeking arbitration," i.e. institutions.[61] Accordingly, Jackson argued for a resolution favoring another class of litigants—plaintiffs avoiding arbitration, i.e. individuals, which burdens defendant institutions.[62]

In another procedural case, the majority, joined by Jackson, expanded court access for individual plaintiffs. In *Mallory v. Norfolk Southern Railway Co.*, the Court was asked whether a trial court has personal jurisdiction over "an out-of-state corporation that *has* consented to in-state suits in order to do business in the forum."[63] A narrow majority held that the corporate defendants were subject to personal jurisdiction in that state, finding no "showing that original and historic understandings of due process foreclose consent statutes."[64] The dissent doubted the sufficiency of waiver to overcome the institutional, federalism concerns of allowing states to expand their jurisdiction over foreign corporations.[65] The majority conceded that the dissent's federalism argument is "half right,"[66]

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56. Coinbase, Inc. v. Bielski, 599 U.S. 736, 738 (2023).

57. *Id*. at 741.

58. *Id*. at 740.

59. *Id*. at 744.

60. *Id.* at 761 (Jackson, J., dissenting).

61. *Id*. at 748.

62. *See id*. at 761.

63. Mallory v. Norfolk S. Ry. Co., 600 U.S. 122, 138 (2023) (emphasis in original).

64. *Id*. at 131, n. 4.

65. *Id.* at 170–71 (Barrett, J., dissenting) ("Pennsylvania's power grab infringes on more than just the rights of defendants—it upsets the proper role of the States in our federal system").

66. *Id*. at 144 (Gorsuch, J., majority opinion) (citing Bristol-Myers Squibb Co. v. Superior Court of Cal., San Francisco Cty., 582 U.S. 255, 263) (indicating that "the Due Process Clause"' may "act[ ] as an instrument of interstate federalism" and that "[t]he sovereignty of each State … implie[s] a limitation on the sovereignty of all its sister

but still acknowledged that the Due Process Clause creates "a *personal* defense."[67] Concurring, Jackson distanced herself from the majority's middle-of-the-road approach and argued that it is "straightforward" that personal jurisdiction "is an individual, waivable right."[68] She argued that "the interstate federalism concerns informing [personal jurisdiction] are 'ultimately a function of the individual liberty interest' that this due process right preserves."[69] Here, Jackson was motivated to write separately to frame the case squarely on individual rights and not institutional federalism concerns.[70] This pattern extends into cases with a covert individual-institution dichotomy.

B. Cases that Extend the Individual-Institution Dichotomy.

In cases where institutions are adverse, Jackson's opinions often favor disadvantaged individuals and whichever institution has aligned interests. In *Glacier Northwest, Inc., v. International Brotherhood of Teamsters*, the Court determined whether a state tort action involving labor conduct may be heard by a state court or must initially be taken up by the employee-friendly National Labor Relations Board.[71] The Court's *Garmon* standard performs what Jackson describes as a "*gatekeeping* function:" if labor conduct is "arguably protected" by federal labor law then "the legal action must be suspended to allow the Board to make an initial assessment of the matter" and develop standards.[72] In this turf war between institutional courts and administrative agencies within this dispute between institutional labor unions and employers, all agreed that strikers are required to take "reasonable precautions to protect their employer's property from foreseeable, aggravated, and imminent danger due to the sudden

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States."); *see also* World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293 (1980) ("But the Framers also intended that the States retain many essential attributes of sovereignty, including, in particular, the sovereign power to try causes in their courts. The sovereignty of each State, in turn, implied a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment.").

67. *Mallory*, 600 U.S. at 144 (Gorsuch, J., majority opinion) (emphasis in original).

68. *Id.* at 147 (Jackson, J., concurring).

69. *Id.* (quoting Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702, n.10 (1982) (suggesting that personal jurisdiction "represents a restriction on judicial power not as a matter of sovereignty, but as a matter of individual liberty").

70. *See generally id*. at 147–49.

71. *See* Glacier Nw., Inc. v. Int'l Bhd. of Teamsters Loc. Union No. 174, 598 U.S. 771, 777, 779 (2023).

72. *Glacier Nw., Inc.*, 598 U.S. at 796–97 (Jackson, J., dissenting) (emphasis in original).

cessation of work."[73] "[G]iven this undisputed limitation on the right to strike," the majority held that the state court inappropriately dismissed the case and should have adjudicated the matter as the implicated conduct was not arguably protected.[74] Justice Thomas' concurrence took issue with "the scope" of *Garmon* since under it the NLRB's authority "is defined … as the Board develops, or declines to develop, its own carefully insulated common law of labor relations."[75] In a lone dissent, Jackson agreed with Thomas' assessment of the "the fact-bound nature of the reasonable-precautions analysis" and approvingly concluded that "in all but the most exceptional circumstances" strike conduct could be arguably protected unless a court is "able to point to a reasonable-precautions case from the Board that is on all fours with the facts of the case before it and that found the conduct unprotected."[76] Thus, in *Glacier Northwest*, Jackson argued for application of a standard which would almost always burden the cumbersome institutions of the judiciary and employers, though done with an institutional agency, to the advantage of vulnerable individuals.

In *Abitron v. Hetronic*, the Court considered a trademark dispute between two companies: one domestic and one foreign.[77] To resolve the case, the Court established a standard to determine whether a trademark infringement claim is domestic.[78] The Court fractured regarding this standard. The majority reasoned that "the dividing line between foreign and domestic applications"[79] must focus on "the infringing use in commerce of a trademark,"[80] i.e., whether the commercial activity is domestic. In concurrence, Sotomayor argued that the application becomes domestic when the "activities carried out abroad" cause "a likelihood of consumer confusion in the United States,"[81] i.e., when the confusion is domestic. The latter standard may appear to align with the needs of individuals. However, the principal concurrence's reasoning was motivated by concern that "limiting the Lanham Act to purely domestic activities leaves U.S. trademark owners [, usually

73. *Id.* at 780 (Barrett, J., majority opinion) (internal quotation marks omitted).
74. *Id.*
75. *Id.* at 787 (Thomas, J., concurring).
76. *Id.* at 804 (Jackson, J., dissenting).
77. Abitron Austria GmbH v. Hetronic Int'l, Inc., 600 U.S. 412, 417 (2023).
78. *Id.* at 417–18.
79. *Id.* at 423.
80. *Id.* at 428 (internal quotation marks omitted).
81. *Id.* at 433 (Sotomayor, J., concurring in the judgment).

corporations,] without adequate protection."[82] Recognizing that this dispute was between institutional actors and their interests, Jackson provided the majority's fifth vote but wrote separately placing the determination in individuals' hands. Instead of engaging with the litigants, Jackson preferred to "[i]magine" a scenario where "American students buy [a German company's Coache handbags] while on spring break overseas."[83] Under Jackson's view, whether the handbags' mark is being used in commerce, and, accordingly, the company is subject to domestic application of trademark law, hinges on whether the students "upon their return home employ those bags to carry personal items" or "tire of the bags … and resell them in this country."[84] Thus, when faced with a dispute between institutional actors in *Abitron*, Jackson argued for a standard subjecting institutions to the actions of non-party individuals.

In a highly anticipated case, *SFFA v. Harvard*, the Court functionally overruled the only established grounds for justifying affirmative action in college admissions against Equal Protection challenges.[85] While Justice Sotomayor's dissent presented the legal disagreements,[86] Jackson's dissent concerned the "universal benefits" of affirmative action in college admissions "in response to [the] suggestion . . . that it is *unfair*. . . ."[87] Jackson relied on the individual-institution dichotomy but does so in reverse alignment to the parties: students against administrators. Instead of engaging with the litigants, Jackson preferred to "[i]magine two college applicants." "John," the first applicant, "is White" and "would be the seventh generation to graduate" while "James would be the first" and "is Black."[88] Jackson traced events "in the distant past" that have "been passed down to the present day through the generations" creating "[g]ulf-sized race-based gaps exist[ing] with respect to health, wealth, and well-being of American citizens."[89] "[T]he seven generations' worth of historical privileges and disadvantages that each of these applicants was[, supposedly,] born with" highlight the institutional form of one as opposed to the

82. *Id.* at 444, n.7.

83. *Id.* at 430 (Jackson, J., concurring).

84. *Id.* at 430–31.

85. *See* Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181, 230 (2023).

86. *See generally id.* at 318–84 (Sotomayor, J., dissenting).

87. *Id.* at 385 (Jackson, J., dissenting) (emphasis in original).

88. *Id.* at 385–86.

89. *Id.* at 384.

isolated individual status of the other.[90] Although she admitted that "[i]t is hardly John's fault" to be advantaged,[91] she reasoned that "to say that anyone is now victimized"[92] by affirmative action programs "fails to acknowledge the well documented intergenerational transmission of inequality."[93] Jackson believed that "to best assess" people, colleges should view more than their "individual lives"; they should consider their "inheritances."[94] Thus, in Jackson's view, affirmative action admissions programs are fair because they advantage vulnerable individuals without advantageous "inheritances" by burdening institutional-in-form applicants.

Jackson's first-year opinions reveal her consistent support for vulnerable individuals based on an individual-institution dichotomy. Such a superseding conviction is inconsistent with less flexible judicial philosophies, like originalism.

III. THE 2023-2024 TERM

Jackson's opinions from her second term on the Court further demonstrate the same superseding pattern motivating her writings. Throughout this most recent term, she relied on diverse modalities of interpretation to argue for resolutions that advance individual rights by means that burden institutions or parties with perceived institutional power. Again, for clarity, her opinions can be clustered into (a) those that directly implicate the individual-institution dichotomy and (b) those that apply it by extension.

A. Those Establishing the Individual-Institution Dichotomy.

In *McElrath v. Georgia*, the Court considered whether the Double Jeopardy Clause of the Fifth Amendment prohibits a second prosecution for a crime of which the defendant was previously acquitted when the original prosecution results in a repugnant verdict—a verdict that may be set aside when there are "affirmative findings by the jury that are not legally and logically possible of existing simultaneously."[95] Writing through a lens of originalism, Jackson—on behalf of a unanimous court—concluded that "the jury's verdict constituted an acquittal for double jeopardy

90. *Id.* at 398.
91. *Id.* at 396.
92. *Id.* at 385.
93. *Id.* (internal quotations omitted).
94. *Id.* at 398.
95. McElrath v. Georgia, 601 U.S. 87, 89–90, (2024) (citing McElrath v. State, 839 S.E.2d. 573, 579 (Ga. 2020)).

purposes" regardless of "its apparent inconsistency with other verdicts that the jury may have rendered."[96] Explaining that the Double Jeopardy Clause prohibits judges from usurping a criminal defendant's right to a jury verdict, Jackson emphasized that "[w]e simply cannot know why the jury in [Defendant's] case acted as it did, and the Double Jeopardy Clause forbids us to guess."[97] Jackson's focus on institutional restraint mirrored her colloquies during oral argument. During oral arguments, Jackson emphasized the "time immemorial principle" that juries could "do whatever they want" with respect to jury deliberations and that a juries' decision-making is "sort of inviolate."[98] Overall, Jackson highlighted that the Double Jeopardy Clause specifically prevents the institutional judiciary from double-guessing a jury and stripping criminal defendants of the right to a jury verdict, further displaying Jackson's view on constitutional restraint of institutional powers.[99]

In *Moyle v. United States*, the Court considered whether the Emergency Medical Treatment and Labor Act ("EMTALA") obligates hospitals to provide abortions services even when such services are restricted by state law.[100] In a *per curiam* opinion, the Court dismissed the case as improvidently granted—restoring the district court decision to enjoin the Idaho law that prohibits abortion except where abortion is necessary to save the life of the mother.[101] Justices Kagan and Barrett wrote concurring opinions that both emphasized that it was appropriate to dismiss the case as improvidently granted as it was too early in this case's history for the Court to issue a ruling on its merits.[102] Jackson, while "concur[ring] in the Court's *per curiam* decision to lift its stay," would have "decide[d] the merits of the critical pre-emption issue" in favor of the United States as "EMTALA plainly requires doctors to provide medically necessary stabilizing abortions in limited situations."[103] While Jackson's opinion largely focused on the institutional procedural mechanisms to determine when it is appropriate to dismiss a case as improvidently granted, her

96. *Id.* at 90.

97. *Id.* at 97.

98. Transcript of Oral Argument at 21–22, McElrath v. Georgia (U.S. No. 22-721, 2023).

99. *McElrath*, 601 U.S. at 94.

100. *See* Moyle v. United States, 603 U.S. 324, 326 (2024) (Kagan, J., concurring).

101. *See* Moyle v. United States, 603 U.S. 324 (2024); *see also* Idaho Code § 18-622(2)(a)(i).

102. *Moyle*, 603 U.S. at 329 (Kagan, J., concurring in part and dissenting in part); *Moyle*, 603 U.S. at 332 (Barrett, J., concurring).

103. *Id.* at 339, 343 (Jackson, J., concurring in part and dissenting in part).

opinion also addressed how the Court's failure to decide the case on the merits would significantly impact the individuals seeking abortions.[104] Jackson, concerned with practical consequences, underscored that the Court's decision "is not a victory for pregnant patients in Idaho. It is delay."[105] And this delay, according to Jackson, meant that many vulnerable women are now "in a precarious position."[106] Jackson further stated that the "Court had a chance to bring clarity and certainty to this tragic situation," but because it did not do so, "pregnant patients . . . will be paying the price."[107] Here, much like in *Coinbase* and *Mallory*, Jackson argues for a procedural process that protects vulnerable individuals.[108] As such, Jackson has made clear that concerns for individual rights outweigh concerns for institutional procedures to such an extent that institutional procedural mechanisms simply cannot be considered without considering the impact on individuals. This approach mirrors her opinion in *Glacier Northwest* where she also argued for application of a standard that would almost always burden an institution to the advantage of vulnerable individuals.[109]

In *Fischer v. United States*, the Court considered whether 18 U.S.C. § 1512(c) includes acts unrelated to investigations.[110] Specifically, the Court considered whether the statute applied to the January 6th protestors' who allegedly attempted to prevent Congress from certifying the electoral votes in the 2020 Presidential election.[111] 18 U.S.C. § 1512(c) provides:

> (c) Whoever corruptly—
>
> (1) alters, destroys, mutilates, or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object's integrity or availability for use in an official proceeding; or
>
> (2) otherwise obstructs, influences, or impedes any official proceeding, or attempts to do so,
>
> shall be fined . . . or imprisoned not more than 20 years, or both.

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104. *Id*. at 344.
105. *Id*. at 344–45.
106. *Id*.
107. *Id*.
108. *Id*.; *Coinbase, Inc*., 599 U.S. at 761 (Jackson, J., dissenting); *Mallory*, 600 U.S. at 138.
109. *Glacier*, 598 U.S. at 796–97 (Jackson, J., dissenting).
110. Fischer v. United States, 603 U.S. 480, 485 (2024).
111. *See id*. at 484.

The Court concluded that the applicability of the residuary clause hinged on whether "Congress sought to criminalize *all* obstructive acts," after "having named a few examples" in the preceding section, or whether it only sought to "fill any inadvertent gaps that might exist" in that list.[112] Jackson joined the majority in rejecting the institutional actors', i.e., federal prosecutors', "all-encompassing interpretation" of the statute. That "novel interpretation would criminalize a broad swath of prosaic conduct," i.e., the commonplace activities of individuals.[113] Jackson also wrote "separately to explain why and how that interpretation of § 1512(c) follows from the legislative purpose that th[e] statute's text embodies."[114] Jackson argued that regardless of how the Court "might interpret Congress' drafting choices in other contexts," it "should be wary of finding that a statute addresses significant criminal conduct" without clear indication of congressional intent.[115] This judicial safeguard, Jackson argued, would defend individuals from overenforcement of laws "which implicate the possible imposition of punitive sanctions."[116] Accordingly, Jackson openly favored an interpretive method that would protected vulnerable individuals from the aggressive enforcement by institutional actors.

B. Cases that Extend the Individual-Institution Dichotomy.

In *United States v. Rahimi*, the Court considered whether 18 U.S.C. § 922(g)(8), which forbids the possession of firearms by persons subjected to domestic-violence restraining orders, violates the Second Amendment.[117] In making its decision, the Court clarified that the *Bruen* tradition test does not create "a law trapped in amber," and then found that sufficient "historical analogues" exist to support the constitutionality of 18 U.S.C. § 922(g)(8).[118] Jackson joined the majority which held that the statute was not facially unconstitutional, but filed a concurrence asserting that the case did not "properly" involve an individual right.[119] Regarding pre-*Heller* developments, she wrote that "[t]he meaning of the Second Amendment ha[d] been considered settled

112. *Id*. at 487.
113. *Id*. at 496.
114. *Id.* at 499 (Jackson, J., concurring).
115. *Id*. at 505.
116. *Id*.
117. United States v. Rahimi, 602 U. S. 680, 686 (2024); *see also* 18 U.S.C. § 922(g)(8).
118. *Id*. at 691, 700.
119. Rahimi, 602 U.S. at 743 (2024) (Jackson J., concurring) (quoting D.C. v. Heller, 554 U.S. 570, 676 n. 38 (2008) (Stevens J., dissenting)).

by courts and legislatures for over two centuries," and "judges and legislators . . . properly believed . . . the Second Amendment did not reach possession of firearms for purely private activities."[120] Skeptical of finding an individual right in the second amendment and taking a pragmatic stance, Jackson focused on "how [the Court's] legal standards are actually playing out in real life," for the individuals affected.[121] Jackson voiced concern over whether the Court's history and tradition test established in *Bruen* "prevent[s] advancement" in laws protecting the victims of gun violence by "stifl[ing] both helpful innovation and democratic engagement."[122] She also highlighted concerns that it deprives citizens of "legal standards that foster stability, facilitate consistency, and promote predictability," as it "conscripts parties and judges into service as amateur historians, casting about for similar historical circumstances."[123] Jackson emphasized "[t]he public, too, deserves clarity when the Court interprets our Constitution."[124] As such, not viewing the case as involving an individual right, Jackson placed her focus on the victims of gun violence and those required to apply the Court's history and tradition test.

In a heavily anticipated case *Trump v. United States*, the Court considered whether, and to what extent, a Former President enjoys presidential immunity from criminal prosecution for conduct alleged to involve official acts during the president's time in office.[125] The Court held that (1) a "President is absolutely immune from criminal prosecution for conduct within his exclusive sphere of constitutional authority," (2) a President enjoys "at least a presumptive immunity from criminal prosecution for a President's acts within the outer perimeter of his official responsibility," but (3) "[a]s for a President's unofficial acts, there is no immunity."[126] Jackson, looking to the original public understanding of presidential accountability, dissented explaining how the majority "alter[ed] the paradigm of accountability for Presidents of the United States."[127] In Jackson's view, the natural consequence of the majority's decision is that the people of the United States "lost a substantial check on Presidents," and more

120. *Id*. (quoting *Heller*, 554 U.S. at 676 n. 38 (Steven, J., dissenting)).
121. *Id*. at 747.
122. *Id*. at 745, n. 3.
123. *Id*. at 746.
124. *Id*.
125. Trump v. United States, 603 U.S. 593, 601 (2024).
126. *Id*. at 609, 614–15.
127. *Id.* at 686 (Jackson, J., dissenting).

broadly the executive branch, who may now use his or her official powers to "commit crimes with impunity while in office."[128] Jackson also expressed worry that individuals must now put their faith in the courts "to determine when (if at all) the criminal laws that their representatives have enacted to promote individual and collective security will operate as speedbumps to Presidential action or reaction."[129] Thus, Jackson expressed concern that the majority's decision greatly elevated the power of the Executive, arguably the most powerful institution in the Free World, while curtailing the individual's right to have an accountable democratically elected leader.

Much like her 2022-2023 opinions, Jackson's opinions in the 2023-2024 term demonstrate her consistent inclination to interpret the law in a way that protects perceived vulnerable individuals. Jackson's opinions further demonstrate her perspective based on an individual-institution dichotomy. Such a superseding conviction is inconsistent with less flexible judicial philosophies, like originalism.

IV. CONCLUSION

After an examination of the opinions Justice Jackson authored during her first two terms on the High Court, it appears likely that she is not an originalist. This does not mean that Jackson was dishonest at her confirmation hearings when she said that words are fixed in meaning and that it is appropriate to look at original intent. It is more certain that Jackson believes that modalities associated with originalism are legitimate but are not an exclusive means of interpretation.

In her opinions, Jackson emphasizes the centrality of individual rights and fairness to individuals in the judicial process. To arrive at these conclusions, for example, Jackson uses a variety of modalities. In *Fischer* she relied on legislative purposes, in *Mallory* she relied on precedent and structure, and in *Hansen,* she relied on text and history. Though the nuances of Jackson's judicial philosophy remain somewhat unknown, Supreme Court advocates would be wise to emphasize individual rights and address the impact of their cases on vulnerable individuals, if they intend to win over Jackson.

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128. *Id*.
129. *Id*. at 705.