

Bloomberg Law[®]

Justice Jackson Takes Originalist Approach on Voting Rights

Kimberly Strawbridge Robinson

October 4, 2022

Justice Ketanji Brown Jackson invoked the original meaning of the US Constitution in her first days of Supreme Court arguments, suggesting that she's willing to engage with a constitutional doctrine traditionally associated with conservatives.

The “framers themselves adopted the equal protection clause” reflected in the 14th and 15th amendments “in a race conscious way,” Jackson said Tuesday in countering the argument that redistricting—and particularly challenges to redistricting plans under the Voting Rights Act—must be race-blind.

Jackson hinted at a willingness to engage with the doctrine known as originalism—the idea that judges should look to the original meaning of the Constitution in interpreting its provisions—during her March confirmation hearings, in which she noted that text, history, and tradition had become the touchstone of the court's constitutional cases.

“By diving deep into the history of the Reconstruction Amendments, Justice Jackson made clear that she is not going to cede the text and history of the Constitution to conservatives,” said Brianna Gorod, chief counsel at the Constitutional Accountability Center, which describes itself as advancing “a progressive interpretation of the Constitution” through the use of originalism.

“She is prepared to engage with any of her colleagues who might distort or ignore the text and history of the whole Constitution,” Gorod added.

Own Terms

Thomas Berry of the libertarian Cato Institute said Jackson's confirmation testimony was “quite striking” in how different it was from other Democratic-appointed nominees in the past.

In an exchange with Sen. Ben Sasse (R-Neb.), Jackson said in cases involving constitutional interpretation, “I'm conscious of not interpreting those texts consistent with what I believe the policy should be,” but instead assessing “what it is that the parties who wrote the text intended.”

That's the approach she took Tuesday in her second day on the high court bench during arguments over Alabama's congressional maps in *Merrill v. Milligan*.

Alabama argued that considering race in challenges under the Voting Rights Act would itself violate the Constitution's equal protection guarantees. The "purpose of the Voting Rights Act is to prevent discrimination and to foster our transformation to a society that is no longer fixated on race," Alabama Solicitor General Edmund LaCour said. But "plaintiffs would transform that statute into one that requires racial discrimination in redistricting and carry us further from the goal of a political system in which race no longer matters."

Jackson, however, "explained that race-consciousness is baked into the Fourteenth and the Fifteenth Amendment's guarantee of racial equality at the polls," said CAC's Civil Rights Director David Gans.

Quoting from those who drafted them, Jackson said the entire point of the Reconstruction Amendments was to protect freed former slaves and that "unless the Constitution should restrain them, those states will all, I fear, keep up this discrimination and crush to death the hated freedmen."

"That's not a race-neutral or race-blind idea," Jackson said.

By starting with the Constitution rather than the Supreme Court's precedent—as LaCour did—Jackson did a "role reversal of the typical stereotype," Berry said, arguing for a progressive outcome using history and tradition.

It's a "strong signal that she's planning to engage other originalists on their own terms," Berry said.