

The Importance of Amy Barrett; The Judge can solidify an originalist majority on the High Court.

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FULL TEXT

President Trump's nomination of Amy Coney Barrett for the Supreme Court is a highlight of his Presidency and perhaps a hinge moment for the judiciary. Judge Barrett's record and intellect suggest she can join Mr. Trump's other appointees in reviving core constitutional principles in American law and life.

If this sounds like a tall order for one Justice, we do not mean to suggest this is her job alone. She is the latest example of a new generation of originalist judges whom Mr. Trump and the GOP Senate have elevated to the federal bench. The numbers—three Justices and 53 appellate-court judges—are crucial, but more important is how they approach the law. With rare exceptions, they think of themselves as protectors of the proper constitutional order, not as a third policy-making alternative to the political branches.

Though she has only served three years on the federal bench, Judge Barrett certainly seems an exemplar of this model. At the White House on Saturday, Judge Barrett said her legal principles are those of the late Justice Antonin Scalia, for whom she clerked. This could be dismissed as a rote genuflection to the revered Scalia, but her opinions and scholarship suggest she means it.

As David Rivkin and Andrew Grossman write nearby, her reasoning shows careful attention to statute and the Constitution. Her dissent in *Kanter v. Barr* (2019) on broad restrictions on gun rights for convicted criminals is especially impressive.

The easy decision would have been to go along with the panel majority, and popular opinion, by barring gun ownership to felons. Judge Barrett looked at the constitutional history and the Supreme Court's *Heller* precedent to make important distinctions that protect the Second Amendment the way liberal jurists once protected the First Amendment regarding unpopular political speech. Perhaps on the High Court she can coax Chief Justice John Roberts to stop treating the Second Amendment as the prodigal son of the Bill of Rights.

Democrats will portray her as a blank check for executive power, but they misjudge her principles. She has ruled against the Trump Administration on immigration law, notably in *Morales v. Barr*, a deportation case.

At a Hillsdale College event in 2019, she noted that "[Justice] Robert Jackson owed his career to Roosevelt. . . . Yet Jackson did not allow whatever personal loyalty or affection that he had for Roosevelt influence his decision in [*Korematsu*, the Japanese-American internment case in World War II]. Unfortunately, he was in the minority. His was a dissent. The Court decided 6-3 that the exclusion order was constitutional."

The political left is also portraying Judge Barrett as a "radical" who will easily dismiss precedent, especially on abortion. This is what they say about every conservative, and they are wrong. She adhered faithfully to precedent on the Seventh Circuit, notably on abortion in *Price v. Chicago* (2019). One dissent she joined in an Indiana abortion case was vindicated at the Supreme Court. Our guess is that on overturning precedent she will fall in the Court's middle—more willing than the Chief Justice but less than Justices Clarence Thomas and Neil Gorsuch. A note about abortion is in order here that will displease the left and right. Both sides claim for political reasons that they anticipate a repeal of *Roe v. Wade*, but they are likely to be disappointed. Anti-abortion conservatives

once supported Anthony Kennedy for the High Court because like Judge Barrett he is Catholic, only to be disappointed in *Planned Parenthood v. Casey* (1992).

Roe was transcended by *Casey*, which further embedded abortion rights in precedent. You can believe, as even Justice Ruth Bader Ginsburg said, that Roe was based on faulty logic and still believe the right to abortion is too settled in law to overturn now. The real legal battleground will be over the limits of state regulation such as late-term abortion and health restrictions.

It's no accident that Clarence Thomas is the only current Justice who has called for overturning Roe. Demanding that a nominee declare herself on Roe is a destructive exercise, whether from Democrat Mazie Hirono or Republican Josh Hawley, and Judge Barrett shouldn't answer.

Every new Justice changes the dynamics on the High Court, and in ways that are hard to predict. One helpful change with a sixth center-right Justice is that Chief Justice Roberts would need to persuade at least one other conservative if he wants to form a majority with the three remaining progressives.

Democrats view all this with horror, but we think they would be wiser to view it as an opportunity. One reason Court nominations have become so bitter is because progressives have long viewed the judiciary as a second legislature for policies they can't pass in Congress. Think racial preferences and climate regulation (*Massachusetts v. EPA*, 2007). If that avenue is foreclosed, as we hope it will be, then the left may have to achieve what they want the old-fashioned way—democratic persuasion and consent.

This is also a lesson for Republicans, who shouldn't default to the courts simply because there are more conservatives on the bench. In the best case, a more modest Supreme Court that sticks to the law and its constitutional calling may even cause Congress to return to doing its job of forging durable consensus.

All of this is hope for the judicial future. For now, and no matter the election consequences, Republican Senators should do their elected duty and confirm an excellent nominee. Win or lose in November, they will have left a significant legacy in restoring proper constitutional government.

DETAILS

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