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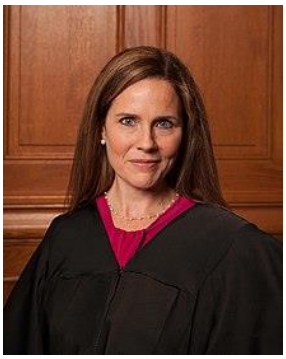
Research memo on Judge Amy Coney Barrett:
Prepared by Phillip L. Jauregui, President – Judicial Action Group

AFA Recommends Judge Amy Coney Barrett as nominee for the U.S. Supreme Court



Born: New Orleans, LA; Female; Age 48
Education: Notre Dame (J.D.); Rhodes (B.A.)
2017 – present: Circuit Judge of the U.S. Court of Appeals for the 7th Circuit
2002 – 2017: Professor of Law, Notre Dame Law School
2007 (Oct – Nov): Visiting Assoc. Prof. of Law, Univ. of VA School of Law
2001 – 2002: Fellow in Law at George Washington Univ. Law School
2001 (Spring): Adjunct Faculty, George Washington Univ. Law School
2001: Private practice, Baker Botts, DC
1999 – 2000: Private practice, Miller Cassidy, DC
1998 – 1999: Law Clerk, U.S. Supreme Court, Justice Antonin Scalia
1997 – 1998: Law Clerk, U.S. Court of Appeals, D.C. Circuit, Judge Laurence Silberman

JUDGE BARRETT'S RECORD INDICATES:

A Judge's Duty is to Follow the Text of the Constitution Over Contrary Court Precedent. Barrett says:

> I tend to agree with those who say that a justice's duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.[1]

[1] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711 at 1728 (2013) (emphasis added).

Value of the original public meaning of constitutional text over judicially constructed precedent. Barrett wrote that "[t]he legislator owes ***fidelity to the text***, not to ***precedent deviating from it***.[2] In the same article she also writes:

> Super precedent is what poses the supposedly intractable problem for originalism, because it is super precedent that ostensibly forces even the originalist to concede that an ***errant interpretation can sometimes virtually amend the text***. ***That is the claim we dispute***.[3]

Non-originalist precedent can be corrected. Barrett wrote:

> Justice Scalia was right to say that originalists can be pragmatic about precedent. But that pragmatism is not, as is commonly assumed, a choice to **treat erroneous precedent as law superseding the text it purports to interpret**. The pragmatism is one of timing. The office holder has the discretion to decide when the timing is right to correct the error. Until then, the office holder – be it the Supreme Court through the rules of adjudication or Congress with a presumption of constitutionality – can, as it were, assume arguendo that certain settled precedents are correct.[4]

She concludes by distinguishing between constitutional texts and interpretations and stating that interpretations are provisional only and can be changed: "The unbroken practice in the United States is to treat ***interpretations of the Constitution***, in contrast to ***the Constitution itself***, as ***provisional and subject to change***."[5] In other words, errant precedent is subject to change.

In 2013, Barrett, with "Faculty for Life" Reportedly Believed that Life Begins at Conception, *Roe* was Created by Judicial Fiat.

Barrett served on the Notre Dame's "University Faculty for Life (circa 2010-2016)"[6] and during "a week of campus observances of the 40th anniversary of the Supreme Court's *Roe v. Wade* decision," spoke about "Roe at 40: The Supreme Court, Abortion and the Culture War that Followed."[7] A lengthy excerpt of the speech is provided in the above footnote, but Barrett

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[2] Amy C. Barrett, & John C. Nagle, *Congressional Originalism*, 19 U. Pa. J. Const. L. 1 at 13 (2016) (emphasis added)

[3] *Id* at 33 (emphasis added).

[4] *Id* at 43 (emphasis added).

[5] *Id* at 43 (emphasis added).

[6] Amy Coney Barrett, Answers to the Senate Judiciary Questionnaire, at 6; available at: https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf

[7] John Nagy, *Students, faculty mark 40 years of Roe*. NOTRE DAME MAGAZINE (Jan. 25, 2013); https://magazine.nd.edu/news/lazy-i-students-faculty-mark-40-years-of-roe/ (Emphasis added.) The report states:

> Barrett reviewed the debate over the Supreme Court's "institutional capacity" to resolve divisive questions like the legality of abortion. A constitutional law authority and mother of seven who clerked for Associate

reportedly said life begins at conception, *Roe* was created through judicial fiat and, although she is pro-life, she assessed it unlikely *Roe* would be reversed but saw certain abortion limitations.

Report: Barrett said abortion deals with life of child. The Irish Rover covered Barrett's speech, *Roe at 40: The Supreme Court, Abortion and the Culture War that Followed* and wrote:

> Barrett said that one of the reasons that this decision was controversial was that in the past all cases dealing with the right to privacy drew from consensual situations such as marriage or the use of contraception. Abortion deals with the life of a child so it differs from the earlier case relating to privacy.[8]

Barrett says *Roe v. Wade* May be reversed because it is not settled by society and, therefore, sot a super-precedent.

Barrett said that so-called "super-precedents" are cases that "no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds."[9] She lists several super-precedents including *Marbury v. Madison* and *Brown v. Board of Education*, but says *Roe v. Wade* because the litigants in *Planned Parenthood of Southeastern Pennsylvania v. Casey* challenged *Roe v. Wade*, . This, she explains, demonstrates that *Roe* is not "super-precedent" because its validity is still questioned by the people and it may be overruled.[10]
Amy Coney Barrett wrote in the law review article:

> Justice Antonin Scalia, Barrett ***spoke both to her own conviction that life begins at conception and to the "high price of pregnancy" and "burdens of parenthood" that especially confront women before she asked her audience whether the clash of convictions inherent in the abortion debate is better resolved democratically***.
>
> By ***creating through judicial fiat*** a framework of abortion on demand in a political environment that was already liberalizing abortion regulations state-by-state, she said, the court's concurrent rulings in *Roe* and *Doe v. Bolton* "ignited a national controversy."
>
> Barrett noted that scholars from both sides of the debate have criticized *Roe* for unnecessarily creating the political backlash known colloquially as "*Roe* Rage," a dynamic that has since affected everything from federal and state elections to the federal judicial nominations process.
>
> Abortion opponents have found success in recent years passing and defending abortion restrictions such as informed consent laws, ultrasound requirements and the federal partial-birth abortion ban after rulings in *Casey v. Planned Parenthood* (1992), *Carhart v. Stenberg* (2000) and *Gonzales v. Carhart* (2007). ***But Barrett believes it is "very unlikely" the court will ever overturn*** **Roe*'s core protection of abortion rights, and sees the political battle shifting toward matters of public and private funding.*** [Note: This was Barrett's assessment then of what would happen, not her belief of what should happen.]

[8] Erin Stoyell-Muholland, *40 Years of Roe: The legal background*, THE IRISH ROVER (Jan. 26, 2013); https://irishrover.net/2013/01/40-years-of-roe-the-legal-background/

[9] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 at 1734 (2013).

[10] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 at 1735 (2013).

"*Superprecedents are cases that no justice would overrule*, even if she disagrees with the interpretive premises from which the precedent proceeds. Michael Gerhardt offers the following explanation:

> '[T]he point at which a well-settled practice becomes, by virtue of being well-settled, practically immune to reconsideration is the point at which that precedent has become a superprecedent. Nothing becomes a superprecedent, at least in my judgment, unless it has been widely and uniformly accepted by public authorities generally, including the Court, the President, and Congress.'

The following cases are included on most hit lists of superprecedent: *Marbury v. Madison*, *Martin v. Hunter's Lessee*, *Helvering v. Davis*, the *Legal Tender Cases*, *Mapp v. Ohio*, *Brown v. Board of Education*, and the *Civil Rights Cases*. [Barrett omits *Roe* from the list and specifically explains why below and in footnote 141.] These opinions are invoked as evidence that there are at least some occasions on which stare decisis undeniably and absolutely constrains the Court.

In my view, however, "superprecedents" do not illustrate a "super strong" effect of stare decisis at all. Stare decisis is a self-imposed constraint upon the Court's ability to overrule precedent. The force of so-called superprecedents, however, does not derive from any decision by the Court about the degree of deference they warrant. Indeed, *Planned Parenthood of Southeastern Pennsylvania v. Casey* shows that the Court is quite incapable of transforming precedent into superprecedent by *ipse dixit* [a dogmatic and unproven statement] [Note 141]. The force of these [superprecedent] cases derives from the people, who have taken their validity off the Court's agenda. Litigants do not challenge them. If they did, no inferior federal court or state court would take them seriously, at least in the absence of any indicia that the broad consensus supporting a precedent was crumbling. When the status of a superprecedent is secure – e.g., the constitutionality of paper money – a lawsuit implicating its validity is unlikely to survive a motion to dismiss. And without disagreement below about the precedent, the issue is unlikely to make it onto the Court's agenda.

Note 141 states:

> In an op-ed in *The New York Times*, Senator Specter characterized *Roe v. Wade* as a superprecedent. Arlen Specter, Op-Ed., *Bringing the Hearings to Order*, N.Y. TIMES, July 24, 2005. Scholars, however, do not put *Roe* on the superprecedent list because the public controversy about Roe has never abated. *See, e.g.*, Fallon, *supra* note 51, at 1116 ("[A] decision as fiercely and enduringly contested as *Roe v. Wade* has acquired no immunity from serious judicial reconsideration, even if arguments for overruling it ought not succeed."); Gerhardt, supra note 129, at 1220 (asserting that Roe cannot be considered a superprecedent in part because calls for its demise by national political leaders have never retreated)."[11]

[11] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, note 141 at 1735 (2013).

Barrett Voted to Uphold the Constitutionality of a Fetal Disposal Statute and an Anti-Eugenics Abortion Statute.

In *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Dep't of Health*,[12] Barrett joined the dissenting opinion of Judge Easterbrooks along with Judges Sykes and Brennan. The case concerned two state statutes: one eugenics statute that "makes it illegal to perform an abortion for the purpose of choosing the sex, race, or (dis)abilities of a child," and a second disposal statute that "requires fetal remains to be cremated or buried."[13]

Barrett Believes Scalia is what we Want in a Justice & Supreme Court Justices Should Adhere to the Rule of Law and not Impose their Political Preferences through Rulings.

In a speech before the 2016 Presidential election, Barrett said: "the divergence between partisan politics or political preferences and ***adherence to the rule of law***, and to me, that's ***the quality that we should be looking*** at when we think about what ***Justices*** would fill these vacant and soon to be vacant spots on the Court." Barrett, a former law clerk to Justice Scalia continued and said that ***Scalia is "what we want in a Justice***, someone who applies the law, who follows the law where it goes and doesn't decide simply on the basis of partisan preference."[14]

Barrett believes justices must resist the temptation to impose their policy preferences and must simply apply the Constitution. Barrett wrote:

> We shouldn't be putting people on the Court that share our policy preferences, we should be putting people on the Court who want to apply the constitution …. [Justices must] have the courage and integrity to say, I'm not going to interfere in the Democratic process; if the Constitution doesn't restrict your ability to do, electorate, what you've decided to do in this particular statute you've enacted, then I'm going to not interfere, I will resist the temptation as a judge to impose my preferences on you and say that you are limited in the policies that you want to pursue.[15]

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[12] *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Dep't of Health*, 917 F.3d 532 (2018).

[13] *Planned Parenthood of Indiana and Kentucky v. Commissioner of the Indiana State Dep't of Health*, 917 F.3d 532, 536 (2018).

[14] Amy Coney Barrett, *Justice Scalia and the Future of the Court*, Nov. 3, 2016, Presenter Hesburgh Lecture at Jacksonville University Public Policy Institute (emphasis added); available at https://www.youtube.com/watch?v=7yjTEdZ81lI

The full context of Barrett's comments is as follows:

"We shouldn't be putting people on the Court that share our policy preferences, we should be putting people on the Court who want to apply the constitution, and by the way, on the individual rights or the minority rights, when the Constitution demands that minority rights be protected that's what we want Justices to do, that's their job.

On the transgender bathroom case, Barrett says the intent of Congress and the text do not require that "Physiological Males who Identify as Females" be permitted in female bathrooms. Barrett said:

> "[In November 2016, Barrett said:] The court just took up that trans-gender bathroom case from North Carolina. That's a statutory question, that's a question involving the interpretation of Title IX … about whether ***physiological males who identify as females should be permitted in bathrooms, especially where there are young girls present*** …. [I]t's a "who decides" question. When Title IX was enacted, it's pretty clear that no one – including the Congress that enacted that statute – would have dreamed of that result at that time. … But it does seem to ***strain the text of the statute*** to say that Title IX demands it. So, is that the kind of thing that the Court should interpret the statute to kind of update it, to pick sides in this public policy debate, or should we go to our Congress, should we go to our legislatures and say, if this is the policy that we want to have now, now we have new recognition of the rights of transgender people and we want to shift the policy? Is that kind of sea change the sort of thing that should come legislatively, or from the Court?"[16]

> "I use the example with my Constitutional law students of Odysseus resisting the sirens. That the Constitution is like, Odysseus ties himself to the mast to resist the song of the sirens and he tells his crew, don't untie me no matter how much I plead. That's what we've done as the American people with the Constitution. We've said, you know it's the people sober appealing to the people drunk, that when you are tempted to get carried away by your passions and trample upon the First Amendment rights or minority rights this document will hold you back, and it's the job of the Justices, of judges generally, but then ultimately of the Supreme Court through the exercise of judicial review to tell us – like in the flag burning case – we
>
> understand you people, you American citizens, that you want to protect your flag, but you've made a more fundamental commitment to free speech that ties your hands and you can't do so.
>
> "That's what it's about. It's not about 'I like flag desecration - I don't like flag desecration.' It's about, are you going to enforce the limits that are there, but then if the people do something you don't like, if it's not one of those situations where the hands are tied, Odysseus is tied to the mast, that you have the courage and integrity to say, I'm not going to interfere in the Democratic process; if the Constitution doesn't restrict your ability to do, electorate, what you've decided to do in this particular statute you've enacted, then I'm going to not interfere, I will resist the temptation as a judge to impose my preferences on you and say that you are limited in the policies that you want to pursue."

[15] Amy Coney Barrett, *Justice Scalia and the Future of the Court*, Nov. 3, 2016, Jacksonville University Public Policy Institute; available at https://www.youtube.com/watch?v=7yjTEdZ81lI from 25:42 – 28:19.

[16] Amy Coney Barrett, *Justice Scalia and the Future of the Court*, Nov. 3, 2016, Jacksonville University Public Policy Institute; available at https://www.youtube.com/watch?v=7yjTEdZ81lI from 39:50 – 42:07. (Emphasis added.)

Barrett properly criticized Roberts' pinion in the Obamacare case. Barrett said:

> Roberts "pushed the Affordable Care Act ***beyond its plausible meaning to save the statute***," his "approach is at odds with the ***statutory textualism*** to which most originalists subscribe," and "it is ***illegitimate for the Court to distort either the Constitution or a statute to achieve what it deems a preferable result***."[17]

Barrett understands that courts have limited power and cannot exceed their interpretative authority. Barrett stated:

> ***Reliance*** interests count, but they count ***far less*** when ***precedent clearly exceeds a court's interpretive authority*** than they do when precedent, though perhaps not the ideal choice, was nonetheless within the court's discretion.[18]

Barrett: Congress has authority to change court made "Common Law." Barrett stated:

"Uniform federal procedural common law, like all federal common law, is wholly subject to congressional abrogation."[19]

Barrett is pro-life and believes life begins at conception.

Barrett was a member of the University of Notre Dame's "Faculty for Life" group[20] and joined a letter to the "synod Fathers in Christ giving witness to "the Church's teachings – on the dignity of the human person and the value of the human person and the value of ***human life from conception to natural death***."[21] In addition, it is reported that she believes "life begins at conception."[22]

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[17] Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Comm. 61 (2017) (emphasis added); available at https://conservancy.umn.edu/bitstream/handle/11299/183482/4%20-%20Barrett.pdf?sequence=1&isAllowed=y

[18] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011, 1075 (2003). (Emphasis added.)

[19] Amy Coney Barrett, *Procedural Common Law*, 94 Virginia L. Rev. 813, 819 (2008).

[20] Amy Coney Barrett, Answers to the Senate Judiciary Questionnaire; available at: https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf

[21] Letter from Catholic women, to Synod Fathers (Oct. 1, 2015), available at https://eppc.org/synodletter/

[22] John Nagy, *Students, faculty mark 40 years of Roe*. Notre Dame Magazine (Jan. 25, 2013); https://magazine.nd.edu/news/lazy-i-students-faculty-mark-40-years-of-roe/

Barrett opposed Obamacare requirement that employers provide contraceptive coverage in health care plans.

Barrett signed a statement titled "Unacceptable" criticizing the above policy as "a grave violation of religious freedom [that] cannot stand." The statement also called the policy "morally obtuse" and "an insult to the intelligence of … people of faith and conscience to imagine that they will accept an assault on their religious liberty if only it is covered up by a cheap accounting trick."[23]

Barrett Says church prohibitions on abortion are absolute.

Barrett says that the Catholic Church teaches that "[t]he prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not."[24]

Barrett sided with the dissent in *Obergefell* by saying the case was about "Who Decides?" Barrett said:

> Justice Scalia was not a fan of substantive due process. … People were presenting it [the *Obergefell* decision purportedly creating the right to homosexual marriage] as a vote on the Court for or against same-sex marriage. But that's not what the opinion was about. What the opinion was about was ***who gets to decide*** whether we have same sex marriage or not – with the majority saying that it was a right guaranteed by the Constitution and so, therefore, states were not free … to say that marriage had to be between a man and a woman. And the dissenters weren't taking a view – in fact Chief Justice Roberts dissent was very explicit about that – he said those of you who want same sex marriage, you have every right to lobby in state legislatures to make that happen – but the dissent's view was that ***it wasn't for the Court to decide***. That the Constitution didn't speak to the question, and so that it was a change that should occur through the legislative process and indeed many states were already moving in that direction in making legislative changes. So, I think *Obergefell* and what we're talking about for the future of the Court, it's really a ***who decides*** question.[25]

Barrett makes it clear that she agrees with the dissent in *Obergefell* that the case was a "who decides" question.

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[23] Statement from The Becket Fund, *Unacceptable* (Feb. 27, 2012), http://www.becketlaw.org/media/unacceptable/

[24] John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 Marq. L. Rev. 303, 305-06 (1998).

[25] Amy Coney Barrett, "Justice Scalia and the Future of the Court," Nov. 3, 2016, Jacksonville University Public Policy Institute; available at https://www.youtube.com/watch?v=7yjTEdZ81lI from 30:32 - 32:26

Other speeches by Barrett that give insight into the type of judge she would be:

- Notre Dame Club Speech, February 19, 2019, "A Conversation with Amy Coney Barrett," The Notre Dame Club of Washington, D.C. (interview about family, life with insight to temperament, values and character). https://www.youtube.com/watch?v=0HMAHnT-y7c

- Hillsdale Speech on May 21, 2019: https://www.youtube.com/watch?v=j0ZN532f9d0&list=PL75EF7AFBDBB663B7

- James Madison Program: The Constitution as Our Story, October 17, 2019: https://jmp.princeton.edu/events/constitution-our-story

- Heritage Interview, SCOTUS 101, on February 28, 2020, "The Dogma Lives Loudly with this Podcast" https://www.heritage.org/courts/commentary/scotus-101-the-dogma-lives-loudly-podcast from 15:10 – 32:42.

Concerns: (All concerns are stated whether seemingly reasonable or not, so that we can remember and assess):

Judge Barrett said in a speech five days before the November 2016 election, that if Trump wins, she does not think that *Roe* will be overruled, but simply limited. Barrett said:

> I think abortion – I think people phrase the abortion question when they think about the Supreme Court as: 'Is *Roe v. Wade* going to be overruled?' *Roe v. Wade* actually isn't the law. It was superseded by *Casey v. Planned Parenthood*, but we've had thirty plus years of a Court that did take - on the whole - a more conservative approach to the judicial role and *Roe v. Wade, Casey v. Pennsylvania* left *Roe* largely intact; reinstated a new test, but it's still there. I don't ***think*** that abortion – or the right to abortion – would change even under a Trump [the interviewer interrupts Barrett and asks: "do you think some of the restrictions might change?" She responds] I think some of the restrictions would change. I think that's what we just saw last term in the case out of Texas. States – after the Kermit Gosnell affair and all of that – states have imposed regulations on abortion clinics, and I think the question is: how much freedom the court is willing to let states have in regulating abortion. I think the question of – you know that Court has held that, in some circumstances, states can render partial-birth abortion illegal - very late-term abortions. I think that's the kind of thing that would change. I don't think the core case – *Roe's* core holding that women have a right to an abortion – I don't think that would change. But I think the question of whether people can get very late term abortions, how many restrictions can be put on clinics, I think that would change."[26]

[26] Amy Coney Barrett, *Justice Scalia and the Future of the Court*, Nov. 3, 2016, Jacksonville University Public Policy Institute (emphasis added); available at https://www.youtube.com/watch?v=7yjTEdZ81lI from 37:30 - 39:05.

Barrett's above statement is her assessment of what she ***thinks*** will happen, as opposed to her belief about what ***should*** happen. If Barrett was simply predicting what she thought ***would*** happen that is less concerning – perhaps not at all concerning.

Barrett on the Reagan court shifting conservative.

Barrett described the historical shift in the Court by Reagan's nominees:

> When you see [President] Reagan come in, that's where you had the real definitive shift. That's where you got Justice O'Connor, Justice Kennedy, Justice Scalia. You had a conservative majority; you had an active and energized conservative majority on the Court.[27]

Barrett's statement is somewhat concerning because we have not had a truly conservative constitutionalist majority on the Supreme Court at any point in the last two generations. At best, Justices O'Connor and Kennedy were moderates. To her credit, Barrett has stated elsewhere that "Kennedy is a moderate Republican."[28] In addition, in Barrett's defense, she may be correct if her point is that O'Connor and Kennedy moved the Court to the right ***compared to*** the more leftist direction of the Court in the 1960's and 1970's.

- END -

[27] Amy Coney Barrett, *Justice Scalia and the Future of the Court*, Nov. 3, 2016, Jacksonville University Public Policy Institute; available at https://www.youtube.com/watch?v=7yjTEdZ81lI from 20:16 – 20:32.

[28] Fight Over Vacant SCOTUS Gets Ugly, CBS News, Feb. 15, 2016; available at https://www.youtube.com/watch?v=cL55t3YBGII.