

POLITICO

How Amy Coney Barrett Would Reshape the Court — And the Country

September 26, 2020

More than two dozen legal thinkers game out what President Trump's new Supreme Court pick means for America's biggest legal fights, the court's reputation, the fate of its "swing seat" and more.

Amy Coney Barrett has been a federal judge for just three years, but one thing is already certain: She'd mark a sharp turn from Ruth Bader Ginsburg on the Supreme Court. At just 48 years old, the former clerk to Justice Antonin Scalia would lock in a long-term conservative legacy for President Donald Trump, who is expected to nominate her officially this afternoon. Democrats are already anxious enough about the looming 6-3 conservative majority that they're openly considering expanding court-packing to counter it.

But what do we really know about her judicial philosophy, and how she'd rule on major issues? Politico Magazine asked top constitutional law experts and Supreme Court watchers to weigh in. They see a strong legal mind who could help usher in serious changes when it comes to abortion and other legal issues—welcome, or concerning, depending where your social politics fall. Others highlighted that Barrett would be a role model for women, even if not in a traditional feminist mold, and a strong voice for constitutional originalism. Some suggested her tenure might be less predictable than we think. How so? Here's what they all said.

Advertisement

A serious scholar with a clear conservative bent

Tomiko Brown-Nagin is dean of Harvard's Radcliffe Institute for Advanced Study and professor of constitutional law at Harvard Law School.

If confirmed, Judge Amy Coney Barrett will consolidate the conservative majority and shift the balance of power on the court decidedly to the right. She has called abortion "immoral" and written that judges are not always bound by precedent. And, consistent with the anti-abortion movement's current strategy, she has expressed openness to hollowing out *Roe v. Wade* through state regulations. Justice Ruth Bader Ginsburg made a mark as a strong supporter of reproductive freedom; she consistently voted against state encroachments on *Roe v. Wade*. A critic of Chief Justice John Roberts' role in the blockbuster case that upheld the Affordable Care Act in 2012, Judge Barrett is likely to give the law's opponents a sympathetic hearing in the case pending before the court. By contrast, Justice Ginsburg, a strong voice and critical vote in support of the ACA, would almost certainly have again sustained the federal law. On the question of gun rights,

Ginsburg sustained regulations, whereas Barrett has questioned the constitutionality of a categorical ban on gun ownership by felons.

The contrast between the two jurists is evident on numerous other issues. Given the stark differences between Justice Ginsburg's voting record and that of her presumed replacement, Judge Barrett's nomination promises to transform the Supreme Court. That said, it would be a mistake to dismiss Judge Barrett as a mere partisan or a zealot; her writings bear the mark of a scholar who reasons carefully about legal cases and controversies.

She 'will surprise her critics and fans'

Saikrishna Prakash is a professor at the University of Virginia School of Law and the author of The Living Presidency: An Originalist Argument Against Its Ever-Expanding Powers and Imperial from the Beginning: The Constitution of the Original Executive.

Judge Amy Coney Barrett has all the qualities of a first-class Supreme Court justice: intellect, wisdom, temperament and restraint. In addition to serving on the 7th Circuit, she is an accomplished teacher and scholar at Notre Dame, with several learned articles discussing the intricacies and nuances of statutory interpretation, originalism and precedent. Her nomination will inaugurate the accompanying rituals of ruthless smears and wild prophecy. Some senators will attempt to provoke her or, worse yet, malign her, for that is standard operating procedure in the Senate Judiciary Committee. Almost everyone will wonder what she will do on the court, with predictions of doom and gloom the loudest. Everyone forgets that justices can surprise their nominating presidents, with Justice David Souter, Chief Justice John Roberts and Justice Neil Gorsuch as recent examples. And people overlook the many justices who actually disappoint their appointers, like Justice William Brennan. Precisely how a Justice Barrett will surprise her critics and fans is unknown. But with perhaps almost two decades of service in front of her, what is certain is that she will do the unexpected. She is not a results-first, principles-second sort of jurist. And her principled stances on interpretation and the judicial role will lead her to unexpected outcomes.

'She is the wrong choice for America right now'

Kimberly Wehle, a former assistant U.S. attorney, is a professor at the University of Baltimore School of Law and the author of How to Read the Constitution—and Why and What You Need to Know About Voting—and Why.

In the wake of Justice Ruth Bader Ginsburg's death, I identified two baseline criteria for her replacement. Amy Coney Barrett plainly satisfies my first, which could have been a problem given Donald Trump's penchant for breaking norms: She has the intellectual chops and experience for the job. A number of her former colleagues and students at Notre Dame have even praised her as an effective and creative teacher with an affable demeanor — all positive traits for the eight Americans with whom she would share the extraordinary powers of the U.S. Supreme Court and for the elite members of that bar. But that's not the point.

Reportedly, President Trump's choice came down to Barrett and Judge Barbara Lagoa of the 11th Circuit Court of Appeals — a first-generation American whose parents fled communist

Cuba. A Lagoa pick would have potentially strengthened Trump's hand in Florida, a state he desperately needs to win in November, and where Joe Biden is nipping at his heels. It would have also increased his appeal among Latino voters across the country. In short, a Lagoa nomination would have signaled that Trump is serious about winning a legitimate election legitimately.

Lagoa met my second criterion, too. Although she signed on to a controversial opinion upholding the Florida Legislature's insistence that would-be voters with felony records pay fines as a prerequisite to voting, her brief record on the federal bench left her views on hot-button issues pretty opaque. In that posture, Lagoa would not have served as a severe splitter, a divider or a source of deep existential agony for millions of Americans.

Barrett, like Justice Brett Kavanaugh before her, may well be a delightful person. And while her professed devotion to a theory of interpretation called "originalism" puts her solidly in the camp of conservative jurists, Lagoa is of that ilk, too. The difference is that Barrett's views on contentious issues like abortion, Obamacare, gun rights, sexual assault and immigration are well-documented and lean decidedly against majorities of the voting public. Her nomination is thus a political act of splitting. It is yet one more Trumpian assault on "We the People" of a democratic republic composed of many different views, beliefs and needs. And sadly, in the wake of Justice Ginsburg's legacy of moderation and grace, pushing Barrett through a Republican-only Senate vote just days before an election that will determine the fate of American democracy is more fuel for the fires of hatred, extreme fear and violence. It does not bode well. She is the wrong choice for America right now.

'Once again, the court will be a conservative bulwark against democratic forces'

Howard Gillman is chancellor of the University of California, Irvine, and the co-author of The Religion Clauses: The Case for Separating Church and State.

For most of the nation's history, the Supreme Court was a protector of the rights and interests of America's elites against larger democratic forces. Its focus was the protection of property rights, corporate rights, slave owner rights and limits on the ability of legislatures to regulate. It struck down income taxes, child labor laws, minimum wage laws and civil rights legislation. It did very little to protect the rights and interests of those struggling for greater equality and opportunity. It prevented democratic majorities from advancing progressive agendas. It tried mightily to prevent the New Deal. In short, it was a conservative bulwark.

This legacy started to change in the 1950s and 1960s as a result of a bipartisan agreement among presidents and senators that courts should be more supportive of civil rights, civil liberties, the circumstances of "discrete and insular minorities," and the ability of government to address contemporary social challenges. Many of us who grew up during this period took for granted that the Supreme Court would be a force for protecting the vulnerable rather than the powerful. But no longer.

With the appointment of Amy Coney Barrett — an undoubtedly qualified jurist with rock-solid conservative credentials — the court will revert to the role it performed for most of our history,

with an ironclad majority of conservative justices who have dedicated their careers to taking back the courts. As a result, Congress' authority to address national challenges, including access to health care and the promotion of civil rights, will be diminished, regulatory agencies will work less in the interests of average people, voting rights will receive less protection, state and local governments will be allowed to align themselves more with majority religious sects, the interests of powerful religious groups will be privileged over hard-won protections for the LGBTQ-plus community, and women's reproductive rights will be at the mercy of state legislatures. Joining her in the new majority are other justices who were appointed by Republican presidents who did not win a majority of the popular vote, at a time when Democratic president candidates have won a majority or plurality of the popular vote in seven of the past eight elections. In short, once again, the court will be a conservative bulwark against democratic forces.

'She will likely move the Supreme Court in a principled direction'

Ilya Shapiro is director of the Robert A. Levy Center for Constitutional Rights at the Cato Institute and author of Supreme Disorder: Judicial Nominations and the Politics of America's Highest Court.

Judge Amy Coney Barrett has displayed a seriousness of purpose and is dedicated to finding and applying the Constitution's original public meaning. Her thoughtful opinions and academic writings show a willingness to hold government officials' feet to the constitutional fire, although [one law review article](#) gives me pause about potential over-deference to state authority regarding the sorts of regulations and restrictions that have come to the fore during the Covid-19 pandemic. I have no doubt she is qualified to be a justice and that she will bring esteem to the Supreme Court.

As Justice Barrett, she will likely move the Supreme Court in a principled direction, as there would no longer be a need to account for Chief Justice John Roberts' strategy to achieve a majority. I look forward to the court's finally starting to flesh out the scope of the right to keep and bear arms, to putting an end to treating people differently based on the color of their skin and to reining in the federal government's overreach in a host of areas. While Barrett isn't known for her administrative law opinions, I would hope also that she will join fellow Trump nominees Neil Gorsuch and Brett Kavanaugh in reining in the bureaucracy, forcing Congress to make the tough decisions about conflicting policy views. That's ultimately the only way we'll start dissipating the toxic cloud surrounding judicial nominations.

Kavanaugh is now the swing justice when it comes to abortion

Mary Ziegler is a professor at Florida State University College of Law and author, most recently of Abortion and the Law in America: Roe v. Wade to the Present.

Amy Coney Barrett seems likely to shape the court's jurisprudence for decades to come — not least when it comes to abortion. The court already had a conservative majority, but Chief Justice John Roberts' concern for the court's appearance seemingly made him reluctant to dismantle abortion rights too quickly. Barrett's ascent likely gives the deciding vote on abortion to Justice Brett Kavanaugh, a judge whose name still almost immediately brings to mind the #MeToo

movement. Kavanaugh, like Roberts, is not likely to give conservatives instant gratification when it comes to abortion. But his professed respect for precedent has not so far stopped him from rolling back abortion rights. He seemed to think that abortion foes could distinguish identical Louisiana and Texas laws, all while claiming to respect precedent. Kavanaugh understands that the court's undue-burden test provides a perfect vehicle for undermining abortion rights. There is no reason to expect that will change if Barrett becomes the high court's sixth conservative member.

Barrett may also help to form part of a more clearly — and unapologetically — conservative wing. Justice Clarence Thomas is fond of fiery dissents and concurrences, but he often finds no one to join him. Barrett firms up the court's conservative majority — creating a sort of insurance policy for the right if the chief justice or one of his colleagues breaks away from the pack. And Barrett's confirmation might make more of the justices comfortable joining Thomas in demanding radical changes to many areas of the law.

A foolproof conservative majority, with Barrett at its heart, might come at a real cost to the legitimacy of the Supreme Court. If, as widely expected, Joe Biden wins the popular vote, Democrats will have carried a public majority in seven of the past eight presidential elections. In the same period, the court has become ever more conservative, and likely to contravene policies that voters prefer. Roberts has long had a fear of backlash — the kind of political crisis that can plague the court when it departs too far from public opinion. Senate Majority Leader Mitch McConnell and President Donald Trump might not care about what becomes of the court as an institution, but members of the court's new conservative supermajority would be wise to recognize that the chief justice has reason to be concerned about the court's reputation. When it comes to abortion, or to the fate of Obamacare, everyone is watching. The fate of the judicial branch's legitimacy might just hang in the balance.

'We may be looking at the last new Roberts Court'

Josh Blackman is a professor at the South Texas College of Law Houston, an adjunct scholar at the Cato Institute and the co-author of [An Introduction to Constitutional Law: 100 Supreme Court Cases Everyone Should Know](#).

For the past 15 years, the Supreme Court has been known as the Roberts Court. But in truth, each new justice forms a new court. Chief Justice Roberts has presided over numerous personnel changes. Justices Sandra Day O'Connor, David Souter, John Paul Stevens, Antonin Scalia, Anthony Kennedy and Ruth Bader Ginsburg left, and Justices Samuel Alito, Sonia Sotomayor, Elena Kagan, Neil Gorsuch and Brett Kavanaugh have arrived. By Election Day, the chief justice will likely welcome Justice Amy Coney Barrett as the ninth member of the court. And a new Roberts Court will begin.

The confirmation process for Justice Barrett will be excruciatingly painful. Yet, it will still be familiar — a process that we know, with a predictable outcome. The future of the court, on the other hand, is far more uncertain. In 2021, or perhaps 2025, Democrats will likely push to expand the court. Roberts may soon have to greet two or more new members, even though there were no departures. The chief may go through all the same formalities, welcoming No. 10 and 11

the same way he welcomed No. 9 — but the Supreme Court will never be the same. We may be looking at the last new Roberts Court.

‘She has not been and will not be subject to a level of vetting appropriate to a lifetime appointment’

Jamal Greene is a professor at Columbia Law School and the author of the forthcoming book How Rights Went Wrong: Why Our Obsession with Rights Is Tearing America Apart.

Judge Barrett seems to be a smart lawyer and a decent person. But the fact is we can’t intelligently predict what her selection will mean for the court or for the country because she has not been and will not be subject to a level of vetting appropriate to a lifetime appointment to the Supreme Court. What we do know is that the woman whose seat she is seeking to fill lived a life committed not just to equality — what she often called “equal citizenship stature” for all — but to values of thoughtfulness and due process. To allow just two weeks to prepare for a hearing and vote, on the eve of a presidential election, dishonors her legacy.

A role model for women

Helen Alvaré is a professor at George Mason University’s Antonin Scalia Law School and the co-author of the forthcoming book Christianity and the Laws of Conscience.

Amy Coney Barrett will inspire several generations of female lawyers and academics for many of the same reasons Ruth Bader Ginsburg did. Her intellectual excellence and her dedication throughout decades to the unrelenting and high-stakes work of lawyering, writing, teaching and judging make her a role model for lawyers generally.

Advertisement

Realistically, though, female attorneys are still prone to asking themselves again and again whether they can “do justice” to both their work and their personal responsibilities. For these women, Judge Barrett’s example, like Justice Ginsburg’s, will be a touchstone for many years.

‘To talk about what Amy Coney Barrett would mean for this issue or that issue is to miss the true historical significance of this appointment’

Richard Pildes is a professor at the New York University School of Law.

The authority and legitimacy of public institutions takes decades to build up — but can unravel far more quickly. We have been in the midst of a blood feud over the Supreme Court for some years now, which is increasingly likely to cause great damage to an institution the country needs. Like in all blood feuds, each side has its own story of how it all began, which goes back nearly 40 years: *You blocked Bork. You denied Garland a hearing. We had to get rid of the filibuster for lower court judges. We had to get rid of it for the Supreme Court.* Overwhelmed by the politics of the moment when in power, neither side can stop, making it inevitable that when the worm turns, the other side will up the ante all the more.

To talk about what Amy Coney Barrett would mean for this issue or that issue is to miss the true historical significance of this appointment and what it will mean for the court. If Democrats

capture the Senate and White House this fall, the pressures to pack the court will become more formidable than at any time since Franklin D. Roosevelt's disastrous 1937 attempt (the political backlash against that effort brought about the end of the New Deal). That effort might press to add four new justices, to create a 13-member court with seven Democratic appointees. As soon as the Republicans regain power, they will then take their turn at refashioning the court to serve their aims.

A bespoke court, custom designed and redesigned to serve the interests of the party in power, would lose much of the institutional capital it has built up over two centuries. Perhaps Judge Barrett's nomination will eventually lead the warring tribes to forge a treaty that reduces the stakes in these appointments (through mechanisms scholars have discussed for years). Or perhaps the stakes in Supreme Court appointments will diminish because one political party gains complete control of government for decades, thus making the court less relevant, as Republicans did after the Civil War and Democrats did during the New Deal. Of course, each side's firm belief that it is (always) on the cusp of doing that is part of what propels the feud forward.

Barrett deserves a fair hearing — from both sides

Adam J. White is a resident scholar at the American Enterprise Institute.

As a judge and a scholar, Amy Coney Barrett has dedicated her career to thoughtful study of interpreting laws and weighing precedents. She would be an ideal Supreme Court justice in any era, but especially in this era, when proper understandings of legal interpretation and stare decisis are of such central importance to the court's work. There is every reason to expect that Judge Barrett will be an exemplary justice, and the Senate Judiciary Committee's hearing should be a good moment to introduce her to the broader American public and to consider the proper role of the court and the rule of law in our constitutional government.

Given the profound importance of each of the Supreme Court's nine seats, no nominee should be confirmed to this life-tenured office without a fair and deliberate confirmation hearing—an opportunity to build up the public legitimacy of the court's work, and the Senate's. Republican senators should take care not to race through the process hastily, trying to beat an Election Day clock. And Democratic senators should take care not to descend into the politics of personal destruction. In 1916, Justice Louis Brandeis' nomination was met with a wave of anti-Semitic bigotry, still infamous today; a century later, let's hope that the nomination process will not return to the political weaponization of anti-religious innuendo.

Roberts will be unbound

William Araiza is a professor at Brooklyn Law School.

With a solid majority of five conservative justices now backing him up, the confirmation of Judge Amy Coney Barrett might liberate Chief Justice John Roberts from any institutionalist-based caution in moving the law. If the new conservative bloc stays united in a given case, Roberts' vote would make for a 6-3 majority, rather than a closely divided 5-4 split. That larger margin might free the chief justice to embrace more aggressive transformation in the law. This

new dynamic could trigger change across an entire range of issues, from abortion to affirmative action. It could lead to the acceleration of already-brewing doctrinal change, including on separation of powers, regulatory law issues and church-state questions. Rather than focusing exclusively on Judge Barrett — as important as her views will become — observers should keep a close eye on Chief Justice Roberts.

‘The country should not, and need not, rely upon one justice to preserve and secure the rights we hold dear’

Renee Knake Jefferson is a professor at the University of Houston Law Center and co-author of Shortlisted: Women in the Shadows of the Supreme Court.

The nomination of Amy Coney Barrett is a historic moment. A female Supreme Court justice is still a novelty in the United States (she will be only the fifth woman of more than 100 justices), one that undoubtedly will bring inappropriate media attention to her appearance, family and personal life as has been the case for all of the women shortlisted before her. Her nomination is also historic because, if confirmed, we will likely see a Supreme Court reaching more conservative outcomes in cases that matter to individual rights. For the country, this means that legislative representatives at the local, state and federal levels will become increasingly important. The “Notorious RBG” modeled the power of dissent not just for the Supreme Court, but for all of us. If rights are unfairly denied, she taught, go to the legislature. When the Supreme Court voted 5-4 to overturn the jury award that proclaimed Lilly Ledbetter should not receive less pay than her male counterparts over her entire career, Justice Ginsburg’s dissent (read from the bench, a rarity) led the way for Congress to pass the Lilly Ledbetter Fair Pay Act. The country should not, and need not, rely upon one justice to preserve and secure the rights we hold dear.

She should recuse herself from playing in a role in the election

Aziz Huq is a professor at the University of Chicago Law School and the co-author of How to Save a Constitutional Democracy.

The Supreme Court is fundamentally unlike other courts: It selects its cases, unlike any other federal courts, and operates unconstrained by any supervising body. It is, as Judge Richard Posner, has said, “a political court.”

There is, though, one sense in which the court has rarely if ever been “political.” President Trump has refused to commit to a peaceful transition of power should he lose. He has expressed his desire to install a justice in expectation of election-related disputes being resolved by the court — and it is plain that he expects that justice to rule on his behalf, even if he has not said so explicitly. Senator Lindsey Graham has also talked of accepting a Democratic victory if (and perhaps only if) the court “decides” as much — omitting any mention of how Americans actually vote. This comment suggests a desire to replace the democratic process with a judicial one, controlled by a court whose partisan orientation runs against present estimates of the national popular orientation. Even more worryingly, Attorney General William Barr has allowed the Justice Department to be conscripted into the president’s spurious campaign to delegitimize vote-

by-mail through the specter of litigation. These comments and actions evince the clear and present danger that the Supreme Court will be leaned on in November as an instrument to deliver a specific outcome in the presidential election.

Under these extraordinary circumstances, no justice should be confirmed unless she commits, under oath, to recuse herself from election-related cases, and to refrain from voting to issue any order or grant review in such a case. This is desirable not least because it reduces the temptation to use the courts to undermine a democratic outcome. (There would be a greater chance of a 4-4 split, although this is far from likely anyway.)

Such a commitment would be unwarranted under normal circumstances, and I do not think it should be asked of any and all candidates. But we are not in normal circumstances. A failure to make that commitment will cast direct light on the candidate's integrity, and their commitment to our constitutional system of democratic self-rule. In contrast, the making of such a commitment, under oath, would be an affirmation of the nonpartisan character of the Supreme Court. At a time when our most important democratic institutions, including the courts and the Justice Department, are in grave danger of being suborned to anti-democratic ends, silence on this point should, however, be disqualifying — whatever the other merits of a nominee might be.

Over time, she will swing the court to the right

Mark Tushnet is a professor emeritus at Harvard Law School and author, most recently, of Taking Back the Constitution: Activist Judges and the Next Age of American Law.

With a newly constituted Supreme Court, we're *not* going to see dramatic changes in constitutional law within a year. But let's assume the court stays the same for the next five years (perhaps with replacements for Justices Stephen Breyer and Clarence Thomas). Over that period, we can expect the court to hold race-based affirmative action unconstitutional in public universities and banned by statute for private colleges; uphold one or two newly enacted restrictions on access to abortion and then, toward the end of the period, overrule *Roe v. Wade*; and strike down some fairly restrictive regulations of gun ownership while upholding most of the more important restrictions. The court won't retrench on the core of its gay rights holdings, but it will allow businesspeople who object for religious reasons to providing services to LGBTQ-plus people to avoid liability under antidiscrimination laws (more broadly than a court with a liberal majority would). And — a wildcard prediction here — it will lay the groundwork for holding that states *must* fund the tuition of students who attend religiously affiliated schools.

If a Democratic administration pushes hard to expand regulation of the economy, the court will push back, finding many such expansions unauthorized by existing law. If a Democratic Congress and president enact new regulatory statutes or expand health care or impose innovative taxes, the court will find some of these new statutes unconstitutional, but we can't predict which ones because we don't know what the Democrats will do. The court might find some aspects of the Democrats' "democracy expanding" agenda unconstitutional, though again details will matter. A national ban on partisan gerrymandering might be constitutionally vulnerable, for example, and efforts to rein in campaign financing will almost certainly be held unconstitutional.

Samuel Alito will become the median justice

Robert L. Tsai is a professor of law at American University and author, most recently of Practical Equality: Forging Justice in a Divided Nation.

By all accounts, Amy Coney Barrett has been a thoughtful and respected academic at Notre Dame, and I have no doubt she will be a collegial member of the Supreme Court. But how her ascendance to the court will shape the basic law of the land is the question that will be on the minds of most Americans. Ideologically, she will slot in somewhere to the right of Chief Justice John Roberts — making this the most conservative court in our lifetime. Barrett’s addition would most likely turn Justice Samuel Alito into the median justice and the person toward whom most legal arguments would have to be pitched.

As a judge on the U.S. Court of Appeals for the 7th Circuit, Barrett has shown a willingness to examine criminal sentences closely for excessiveness, though she has also disagreed with colleagues who found that a prosecutor had improperly withheld exculpatory evidence in a murder case. On abortion, I expect her eventually to be a vote to overrule *Roe v. Wade*, though this might not happen right away. Barrett considers herself a textualist and an originalist. She has written that precedent operates only in a “weak” sense, acknowledging that a textualist “would more often find precedent in conflict with her interpretation of the Constitution” than a jurist with a more “flexible” approach. That suggests that she would join a strong majority to sweep away precedent when she feels it is incompatible with the original meaning of the text. I would not expect her to be sympathetic to expanding the rights of sexual minorities any further. She would continue the Roberts court’s solicitude for religious exemptions to civil rights laws. On guns, she may turn out to be more aggressive than her mentor, Justice Antonin Scalia, in striking down regulations. As Adam Winkler has pointed out, she dissented in a case that upheld a ban on felons possessing firearms, asserting that only restrictions with a historical pedigree can be squared with the Second Amendment. This would put off-limits creative regulations to deal with modern weapons, even when supported by a majority of voters.

Being effective on the Supreme Court is all about building consensus. One thing we won’t know for some time is how the personal relationships she forges with fellow justices — such as with the other women on the court — might affect her jurisprudence. If I were Elena Kagan or Sonia Sotomayor, I would already be making plans to welcome her so there will be open lines of communication even among natural philosophical adversaries.

‘Far to the right of most in American society’

Erwin Chemerinsky is dean of the University of California at Berkeley School of Law.

Everything that is known about Judge Amy Coney Barrett is that she is extremely conservative and will be at the far right of the Supreme Court. She is a self-professed originalist. President Donald Trump undoubtedly picked her because she is a sure vote — and likely the fifth vote — to overturn *Roe v. Wade*. Not to mention, she has criticized the court’s upholding of the Affordable Care Act, and she has written judicial opinions indicating she is going to be a vote to aggressively expand the protection of gun rights under the Second Amendment. Barrett is everything the right wing of the Republican Party wants, and there is nothing Democrats can do to stop her confirmation.

Democrats must make clear that the Republicans are packing the court in the stunning hypocrisy of confirming her after refusing to even consider Merrick Garland in 2016. And they must communicate that, with Barrett, Trump has picked someone far to the right of most in American society.

A predictable nominee but perhaps unpredictable justice

Daniel Epps is a professor at the Washington University in St. Louis School of Law.

In choosing Amy Coney Barrett, President Trump for the third time in his presidency went with the safest and most predictable choice among his short list of potential nominees. Barrett seems likely to be a reliable conservative. What remains to be seen is whether she is cast more in the mold of Justice Neil Gorsuch, whose originalist methodology sometimes leads him to unpredictable results, or if she is more like Justice Samuel Alito, who consistently votes for conservative outcomes.

It's unclear how much traction Democrats will be able to generate against her. Republicans will no doubt emphasize that she is the mother of seven children. Democrats may err by raising questions about her affiliations and beliefs that could be perceived as anti-religious bigotry by voters. As a former law professor, however, she has a larger paper trail than some nominees. Depending on how her rollout goes, Democrats might choose to focus their efforts more on the process concerns with the nomination than with Barrett herself.

'She can be expected to tear down many precedents and protections'

John Culhane is a fellow in constitutional law and co-director of the Family Health Law & Policy Institute at Delaware Law School (Widener University).

I come both to praise and to bury Amy Coney Barrett.

First, the praise. She is an able federal judge. Her writing is crisp and clear, and her arguments sound — if you agree with her starting principles. She has a compelling personal story. Among other things, she and her husband have adopted two children from Haiti, and her students and colleagues at Notre Dame Law School have commended her teaching and her collegiality. It's also refreshing to see a nominee without an Ivy League degree. Barrett, who also attended Notre Dame Law School and a small liberal arts college, boasts academic qualifications that are second-to-none.

But the concerns with this nomination run far deeper than Barrett's qualifications, for both institutional and jurisprudential reasons. The institutional concerns pertain to both the U.S. Senate and the Supreme Court itself. Ramming through a nominee at this point exposes the naked hypocrisy of the GOP senators. While blockading even *consideration* of President Barack Obama's nominee Merrick Garland, the craven caucus invented precedent in support of their position: Confirming a new justice simply isn't done in a presidential year, they proclaimed, at least not once primary season has begun. Now, of course, the fog of amnesia has settled over most of those same senators, who, without an apparent ounce of shame, stand ready to confirm this nominee. And we're not just in "election season" this time — *voting has already begun*. As

to the Supreme Court itself, this kind of cynical maneuvering can do nothing to improve the public's view of that body. Every poll has strong majorities of those with opinions opposing this nomination. People understand unfairness and inconsistency.

Still more concerning, though, is Barrett's record as both a judge and an academic. She can be expected to tear down many precedents and protections that the late Ruth Bader Ginsburg devoted her life to as both an advocate and then as a justice. As a federal appellate judge, Barrett has (in dissent) supported abortion restrictions that clearly impose a "substantial obstacle" to women seeking to exercise that option, in defiance of Supreme Court precedent. She has criticized Chief Justice Roberts' opinion upholding the Affordable Care Act, and has put forth a very skeptical view of laws that seek to regulate firearms. Like the justice for whom she clerked, Antonin Scalia, she takes refuge in the theory of "originalism," which tries to wring legal conclusions from what was on the minds of the 18th-century slave owners who drafted the Constitution. But as countless decisions by Scalia himself revealed, originalism is a sort of legal raincoat, doffed and donned as the weather changes. It's a deliberate attempt at misdirection from the plain fact that the justices — whether left, right or center — follow their own policy preferences, especially where they care the most about the outcome. Expect to hear an earful, during the dreary confirmation hearings, about Barrett's commitment to following the law, rather than "making" it. It's nonsense. We're about to replace a progressive champion with an extreme conservative, and it doesn't look like anything can stop this from happening.

It's time to pack the court

Peggy Cooper Davis is a professor and director of the Experimental Learning Lab at NYU School of Law.

When Andrew Johnson was president, Congress shrank the size of the Supreme Court in order to assure that he would not be able to make an appointment to that extraordinarily important bench. When Ulysses S. Grant succeeded Johnson, Congress restored the court to its pre-Johnson size. Would that we had a Congress today with the courage to restrain intemperance in the Oval Office. The need is clear.

'Despite its flaws, the judiciary is working better than the other two branches'

Edward A. Hartnett is a professor at Seton Hall University School of Law and the co-author of Supreme Court Practice (11th ed.).

The bitterness, hypocrisy, intensity and partisanship surrounding each vacancy on the Supreme Court suggests both that the appointment process is broken and that the Supreme Court has too much power. There are calls for 18-year term limits for justices to turn down the heat surrounding each appointment, because a vacancy would arise every two years. Whether or not Congress could mandate that without a constitutional amendment, Congress could create strong incentives for justices to take senior status after 18 years. Similarly, much of the court's current power comes from its ability to choose the cases it wants to decide. Congress, not the Constitution, gave the court that power, and Congress could take it back.

But there's a problem with focusing on efforts to reform the court, one that is painful for a believer in democracy to admit: Despite its flaws, the judiciary is working better than the other two branches.

When the next justice takes her seat on the bench, the chief justice will wish her a long and happy career in "our common calling." That phrase will be repeated whenever a justice celebrates a milestone anniversary. United in that common calling, justices make decisions that need to be made, sometimes disagreeing deeply. But they remain friends, ready to face together the next decision required by their common calling.

As important as reforms to the Supreme Court might be, reforms elsewhere to help restore a sense of "common calling" in our elected representatives may be more pressing.

'An ultraconservative anti-healthcare Supreme Court justice'

Nan Aron is founder and president of Alliance for Justice, a progressive advocacy organization focused on the courts.

During a worldwide pandemic — with hundreds of thousands of Americans dead and millions more saddled with lifelong chronic health conditions — the president has prioritized ramming through an ultraconservative, anti-health care Supreme Court justice who will, at the first chance, take away health care from millions and allow insurance companies to deny care to those with preexisting conditions.

'A patchwork of pro- and anti-abortion states'

Peter H. Irons is a professor emeritus of political science at University of California, San Diego, and author of numerous books on the Supreme Court and constitutional litigation, including A People's History of the Supreme Court: The Men and Women Whose Cases and Decisions Have Shaped Our Constitution.

Justice Ruth Bader Ginsburg's chair on the Supreme Court's bench is draped in black crepe. Is it time to drape the court's portico, into which are chiseled the words "Equal Justice Under Law," with this symbol of mourning? The greatest fear of those who revere Justice Ginsburg is that her all-but-confirmed successor, Judge Amy Coney Barrett, will provide the long-sought fifth vote to inter *Roe v. Wade*. That may happen, although it's more likely that the Trump court will continue its piecemeal evisceration by upholding more and more restrictions on abortion access.

But either way, all will not be lost. There are currently 15 states with both Democratic legislatures and governors (and Maryland and Massachusetts have pro-choice GOP governors). Those states, and maybe more after Nov. 3, will likely move to cement abortion rights into their constitutions, beyond the Supreme Court's reach. Having a patchwork of pro- and anti-abortion states (as we do now with marijuana legalization) is not ideal, but it is preferable to a nationwide ban, only attainable through an unlikely constitutional amendment. That's my take today, but nothing is now predictable; as President Donald Trump says, we'll have to wait and see. Meantime, as Joe Hill said before his execution, "Don't mourn for me. Organize!"

A vehicle for the GOP's exercise of raw power

Anna O. Law is a professor of political science at CUNY Brooklyn College.

President Trump's nomination of Amy Coney Barrett to the Supreme Court is not about principles, precedent, ideas or theories of constitutional interpretation; it's about the GOP exercising raw power via America's counter-majoritarian institutions to ram through unpopular proposals. The 1787 Constitution created multiple institutions that do not reflect government of the people and by the people. Some of these interlocking concessions also enhanced the political power of slave interests; these include the Electoral College, the U.S. Senate, House and the federal courts. Once the compromise was made to count enslaved Black people as three-fifths of a person for the purposes of House apportionment, that meant that political influence of the states where people owned people was magnified. The Senate, with its allotment of two senators regardless of population size, further enhanced the electoral power of the slave states and smaller population states. Smaller population states and slave states also got a bump in the Electoral College where states' electoral votes are based on adding the number of representatives and senators together.

A highly unpopular and impeached Trump is now attempting to lock in his party's unpopular policies for generations using the force of the nation's undemocratic institutions to do it. Trump, who lost the popular vote by almost 3 million votes, gained the presidency by the quirkiness of the Electoral College. He is historically unpopular, with his approval numbers never breaking 45 percent, and is now using the Senate to jam through a SCOTUS nomination. This is the same institution where the senators who voted not to remove him after impeachment represent about 40 percent of the U.S. population or 18 million fewer voters than the senators who voted for removal. In Barrett, Trump and his supports see a reliable additional vote to scrap the Affordable Care Act, weaken abortion protections and roll back other liberal gains. In the electorate, portions of the ACA (e.g. prohibition of discrimination against pre-existing conditions) are highly popular among Democrats and Republicans. On abortion, the nation has been about evenly split for some time now, with a plurality saying abortion should be legal under some circumstances. Through the use of undemocratic institutions, Trump, who has presided over some 200,000 Covid-19 deaths, aided by the Senate, will now appoint a "pro-life" justice.

An incongruous successor to RBG

Ediberto Roman is a professor at Florida International University College of Law.

As many of us now realize, Justice Ruth Bader Ginsburg was a champion for equality under the law. Indeed, she became a cultural icon late in life in large part for defending civil rights and fighting for gender equality. Judge Amy Coney Barrett has diametrically opposing views to those of Ginsburg when it comes to a woman's reproductive choice and, evidently, gender equality.

For instance, Barrett signed a 2015 letter to Catholic bishops championing the "value of human life from conception to natural death." While on the 7th Circuit, in *Planned Parenthood of Indiana and Kentucky v. Commissioner of Indiana*, she joined a request for a rehearing on a case holding unconstitutional a law requiring burials of fetal remains after miscarriage or abortions, strongly suggesting her belief the law was constitutional. Put bluntly, Barrett appears likely to overrule *Roe v. Wade*. What's more, as the Human Rights Campaign recently observed, "Judge

Barrett's history tells a story of anti-LGBTQ Ideology.” Her opposition on Title IX protections extending to transgendered Americans speaks volumes of her beliefs in equality.

As I write these words, I am watching my 10-year-old on her computer studying American history, and I can't help but wonder how much my Bella will be inspired by our recently passed icon and how much she will learn of the battles the “Notorious RBG” fought for her. How different equality may look like in a world led by those who appear to reject it — the epitome of being selectively principled.