

Who's really packing the court?

Marjorie Arons-Barron

October 26, 2020

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Somewhere Robert Bork is chortling. In 1987, his honest articulation of his extremist originalist philosophy was deemed so frighteningly outrageous that, despite his excellent paper qualifications, he was deemed unfit to serve on the United States Supreme Court. Now, unless four Republican senators exercise profiles in courage, Amy Coney Barrett will become the fourth doctrinaire originalist on the court and establish for the foreseeable future a dominant 6-3 conservative majority.

Originalists believe the meaning of the Constitution was fixed in 1787 and that its text should be interpreted based either on the original intent of those who drafted and ratified it, or by what reasonable people living at that time would have understood its meaning to be. If it is to be changed, it must be done by Constitutional amendment. Justice Anthony Scalia was the foremost recent originalist on the court. The opposite view, eloquently expressed by the late Justice Ruth Bader Ginsburg, was that the Constitution is a 'living' document of principles that adapts to new circumstances unforeseen our Founding Fathers, while guided by precedent or 'stare decisis.'

Historians point out that those who created the Constitution viewed it as a framework, designed to change over time, not stone tablets etched with eternal verities. As Thomas Jefferson observed: 'We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.'

Despite a clear trail of writings and speeches, Barrett in her Judiciary committee hearing repeatedly refused to answer questions to probe her judicial philosophy. She said little, save for repeating that Scalia was her mentor of highest regard. Many of Ted Kennedy's ominous warnings of what Robert Bork's America would look like could apply to Amy Barrett's America.

So, later today, Donald Trump, who lost the 2016 popular vote by three million votes and was impeached for abuse of power, gets to select a third candidate for a lifetime appointment to the Supreme Court – in the middle of a new election.

Greater thanks for this travesty are due to Senate Majority Leader Mitch McConnell who blocked the appointment of hundreds of Obama-nominated federal judges and refused, after Scalia's death, even to hold a hearing on Obama nominee Judge Merrick Garland. Democrats have been complicit by not making federal court and Supreme Court appointments priority issues

at election time while well-heeled conservative organizations like the Cato Institute, Heritage Foundation, and the Federalist Society focused laser-like on not only reversing Warren Court decisions but undoing the doctrines and policies of the New Deal.

The result of McConnell's Machievellian strategy? **Trump has placed 218 judges throughout the federal judiciary**, many of whom the Bar Association and others rated patently unfit.

As for the Supreme Court, scholars have already deemed today's **pre-Barrett court the most conservative** in the last 80 years. With Barrett's addition, and the likelihood of 6-to-3 votes on critically important issues, the souped-up right-wing partisanship now laced through the federal judiciary will affect us for generations. It could start immediately after she takes her seat. Now that's what I call court packing.

So what can be done? I don't like the idea of making court reform the #1 priority for a new Congress, sucking oxygen from needed attention to a multidisciplinary health and economic response to Covid-19, improving the Affordable Care Act, dealing with long-ignored infrastructure issues and the existential crisis of climate change. (To move forward in these policy areas, unless the Democrats win an overwhelming majority of Senate seats, the first step may be to accept reality and eliminate the filibuster.)

I like Joe Biden's proposal that, if he wins, an independent bipartisan commission be established to consider Supreme Court reforms and report back with recommendations in a fixed period of time. Everything should be on the table as an antidote to the toxic partisanship poisoning our judicial system, including term limits, staggered terms, additional judges, mandatory retirement age, stripping jurisdiction of certain cases, and imposing super-majority requirements for some judicial review. A vigorous debate on all these is in order.

At this point, as furious as I am at what McConnell and his minions have wrought, I prefer structural changes that can de-weaponize the judiciary and not simply win short-term battles only to lose them again when elections turn out differently. Given the Supreme Court's gross ideological imbalance for years to come, I'm inclined to support reforms that restore the balance of power among the three supposedly equal branches of government.

I think Jefferson and his contemporaries would agree.