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Amy Coney Barrett's View of Tossing Supreme Court Precedent Alarms Critics

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Amy Coney Barrett's willingness to overthrow past U.S. Supreme Court decisions will be under scrutiny at her Senate confirmation hearing this week, with implications for tough political issues many Americans regard as settled, including abortion and gay rights.

Barrett didn't mention her views on precedents in prepared testimony she's expected to deliver on Monday, the first of four days of hearings. But there are clues in a 2013 law review article she wrote arguing that a Supreme Court justice should "enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it."

That and other writings have sparked concern among Democrats that Barrett would be even quicker to roll back landmark liberal rulings than the late Justice Antonin Scalia, her former mentor and a conservative icon. Her confirmation would give conservatives a 6-3 Supreme Court majority and almost certainly invite a wave of requests to transform longstanding law.

"If she is someone who is more open even than Scalia to revisiting, reviewing, reconsidering or overturning long-settled cases, that could lead to a period of great instability and conservative judicial activism," said Senator Chris Coons of Delaware, a Democrat on the Senate Judiciary Committee. He said she might toss out "dozens of settled cases in areas from voting rights and criminal defense rights to Native American sovereignty issues and labor rights."

The confirmation clash is loaded with political ramifications. President Donald Trump nominated Barrett, 48, to a life term in the final weeks of his re-election campaign, aiming to have her seated before voters decide the winner on Nov. 3. She would fill the vacancy left by the death of liberal icon Justice Ruth Bader Ginsburg.

Over the longer term, the Supreme Court's willingness to discard its precedents could become one of the nation's most pressing questions. The court's conservatives in recent years have reversed a handful of previous decisions, as when they overturned a 41-year-old precedent in a 2018 decision that let government employees refuse to pay union fees.

But the conservatives have stopped short in other contexts. In July the court rebuffed abortion opponents by leaving intact a precedent that lets states and cities prevent people from approaching women without consent as they are entering a clinic.

In the coming years, the court could be asked to throw out the 1973 Roe v. Wade abortion-rights ruling, the 1984 Chevron decision that requires courts to defer to federal regulators on the meaning of ambiguous statutes, and the 2003 ruling that lets universities consider race as an admission factor.

The court could also have chances to topple the 2015 decision that upheld state independent redistricting commissions, the 1976 ruling that lets the government limit the size of campaign contributions, and even the 2015 ruling that legalized same-sex marriage nationwide.

Deeply Held Views

Barrett could now make the difference. In her 2013 article, she said justices shouldn't be expected to "let go of their deeply held interpretive commitments," such as a belief that the original meaning of the Constitution's words should govern.

But she also said the position she advocated -- a "weak presumption" that constitutional precedents should stand -- was no different than the approach the court has generally used for decades. And she said any majority to overturn a precedent should have to provide "an explanation of why its view is so compelling as to warrant reversal."

In prepared opening remarks released Sunday by the White House, Barrett cast herself as a jurist committed to avoiding policy making, and one who would keep personal views out of her rulings.

"The policy decisions and value judgments of government must be made by the political branches elected by and accountable to the people," Barrett plans to say. "The public should not expect courts to do so, and courts should not try."

Ilya Shapiro, a lawyer at the libertarian Cato Institute, said Barrett is likely to be more willing to throw out precedents than Scalia but less so than Justice Clarence Thomas, a fellow Republican appointee. Thomas almost never sees himself bound by stare decisis, as the doctrine of precedent is known to lawyers.

"The upshot is that she's somewhere between Scalia and Thomas," said Shapiro, director of Cato's Robert A. Levy Center for Constitutional Studies.

Like Scalia

But Gregg Nunziata, a former Republican chief nominations counsel on the Senate Judiciary Committee, says he regards Barrett as being closer to Scalia than Thomas. Scalia once described himself as a "faint-hearted originalist" who would yield to precedent for pragmatic reasons, though he later repudiated his self-characterization.

Nunziata also likened Barrett to former Chief Justice William Rehnquist, a consistent conservative who nonetheless reaffirmed the so-called Miranda requirement that police tell criminal suspects of their right to remain silent. Rehnquist wrote in 2000 that the Miranda rule, named after a 1966 Supreme Court decision, "has become embedded in routine police practice."

"Justice Thomas and some academics have tended to favor a significantly diminished role for stare decisis in constitutional cases," Nunziata said in an email. "Judge Barrett's writings, in contrast, suggest she believes stare decisis (and other practices of the court) continue to play an important role in, among other things, protecting reliance interests and promoting continuity in the law."

Precedent has been a major focus in recent confirmation hearings, often with concerns about Roe at the surface. Roberts gave stare decisis a strong endorsement in 2005, saying that "it is a jolt to the legal system when you overrule a precedent." The newest confirmed member of the court,

Justice Brett Kavanaugh, a Trump nominee, said in 2018 that, among other factors, a precedent must be “grievously wrong” to warrant being overturned. Both so far have been less eager than some of their colleagues to discard past rulings.

With little leverage to stop confirmation -- and the prospect that Barrett might serve for decades -
- Democrats on the Judiciary Committee are vowing to press her on the subject this week.

“She clearly does not consider as a justice she is bound by precedent,” said Democratic Senator Mazie Hirono of Hawaii. “And we don’t know on what basis she will do this.”