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# The brilliance lives loudly within her

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When Amy Coney Barrett came before that microphone in the Rose Garden to make her official introduction to the wider public, you knew you were getting a different sort of Supreme Court nominee. This wasn't polished civics instructor Neil Gorsuch or earnest political operator Brett Kavanaugh. Here was a joyous, American-as-apple-pie judge next door.

" I love the United States, and I love the United States Constitution," she said on that Saturday afternoon at the White House. "I am truly humbled by the prospect of serving on the Supreme Court." What a breath of fresh air amid the 2020 miasma, disarming critics and even dispelling some of the toxic clouds over Washington.

Barrett's resume is impressive: Latin honors in college and law school, a Supreme Court clerkship, a distinguished professorial career with prolific scholarship. Yet the unassuming nature of this Notre Dame professor-turned-7th Circuit judge sets her apart from the Ivy-festooned club she's set to join. As the mother of seven, including two adopted from Haiti, she would become the first female justice with school-age children. "The president has asked me to become the ninth justice, and, as it happens, I am used to being in a group of nine — my family," Barrett quipped, in a twist on Kavanaugh's "team of nine" moniker.

Indeed, how she and her husband Jesse, also a successful lawyer, juggle it all is as remarkable as Barrett's accomplishments. The shot of their gaggle getting into a minivan to fly to Washington, with the nominee driving, was the icing on the cake. While some loft-dwelling coastal elites may have turned up their noses at the large family and its bourgeois habits, my wife and I looked at our comfortable but harried suburban existence and marveled at how this couple made both personal and professional achievement look so effortless.

But the Barretts might have stayed in their college-town idyll were it not for the Democrats on the Senate Judiciary Committee. As one of Donald Trump's earliest circuit court nominees, Amy Coney Barrett faced a barrage of bigoted attacks on her religiosity. "Do you consider yourself an orthodox Catholic?" Dick Durbin queried, as if praying the rosary were a disqualifier. "The dogma lives loudly within you," added Dianne Feinstein, in what sounds like a rejected line from Star Wars.

"My personal church affiliation or my religious belief would not bear on the discharge of my duties as a judge," Barrett responded to this line of questioning, as anyone could've expected. But the fact that she faced that kind of attack angered conservative elites and mainstream voters alike. By the time she was confirmed in October 2017, she had become a martyr, for lack of a better term, and the odds-on favorite for Ruth Bader Ginsburg's seat if it became available while Trump occupied the White House. "I'm saving her for Ginsburg," the president said less than a year later after picking Kavanaugh to replace Anthony Kennedy.

This wasn't affirmative action for Midwestern women. Barrett already had a long record of academic writings, to which she would add 84 judicial opinions in less than three years, displaying a thoughtful and scholarly approach to both legal substance and the prudential aspects of judging. She was also universally liked and respected, winning teaching awards and mentoring students.

**An originalist like Scalia**

On jurisprudence, she's much like her own mentor, Justice Antonin Scalia, in her originalism and textualism, applying constitutional and statutory provisions according to their public meaning at the time of enactment instead of seeing that meaning change over time or trying to divine a legislative purpose. In a 2010 law review article, she argued that any departure from the text's most natural reading can only be justified if the substantive canons being employed are "constitutionally inspired" rather than designed to pursue particular social values.

At the 2019 Federalist Society lawyers convention, Barrett stated that "one ought to be an originalist because the Constitution, no less than a statute, is law." She went on to say that "the original Constitution, along with each of its amendments, was adopted in an exercise of popular sovereignty. ... If a constitutional provision became authoritative because the people consented to it, then we need to know what they consented to. To discern that, we look at the meaning the text had at the time it was drafted and ratified."

"I clerked for Justice Scalia more than 20 years ago, but the lessons I learned still resonate," Barrett explained during those pithy remarks when President Trump announced his pick. "His judicial philosophy is mine, too. A judge must apply the law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold."

Barrett may well have inherited her former boss's way with words, albeit without the acerbic flourishes. "Tolstoy said that every unhappy family is unhappy in its own way, and that observation rings true here," she began the opinion in a bizarre case involving a police-assisted conspiracy to resolve a child-custody dispute.

Also like Scalia, Barrett is not always deferential to law enforcement, as are Justice Samuel Alito or some other judges on Trump's list of Supreme Court potentials. Barrett doesn't uniformly please public defenders either.

In *United States v. Terry* (2019), she reversed a conviction obtained after DEA agents searched a suspect's apartment based on the consent of a woman who didn't live there. "Is it reasonable for officers to assume that a woman who answers the door in a bathrobe has authority to consent to a search of a male suspect's residence?" Barrett asked. "The officers could reasonably assume that the woman had spent the night at the apartment, but that's about as far as a bathrobe could take them." And in *United States v. Watson* (2018), she wrote an opinion concluding that an anonymous tip did not provide reasonable suspicion for police to stop a car.

But in *Sims v. Hyatte* (2019), she dissented from the grant of habeas corpus in a case involving the withholding of evidence and the effect that evidence might have had on the testimony after its introduction, arguing that her colleagues in the majority weren't deferential enough to state court determinations under the law governing federal review of state convictions. And in *McCottrell v. White* (2019), she dissented from a ruling that went against police officers who fired shotgun shells at the ceiling of a prison to control inmates, because they didn't intend to hit

anyone and "deliberate indifference" isn't enough for a constitutional violation in the prison context.

Still, Barrett has held government officials' feet to the constitutional fire in various ways. In *Rainsberger v. Benner* (2019), for example, she wrote for the court to deny qualified immunity to a detective who falsified information for a probable cause affidavit. Her opinion emphasized how extreme the actions were, leading a falsely accused man to spend two months in jail, and how "a competent officer would not even entertain the question whether it was lawful for him to lie." And in *Doe v. Purdue University* (2019), she ruled for a student who alleged that college administrators violated his due process rights in the course of adjudicating sexual assault allegations. In the course of describing the various ways in which Purdue had pursued a kangaroo process, Barrett noted that "withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair."

In her most famous case, *Kanter v. Barr* (2019), Barrett defended the right of nonviolent felons to own guns, focusing on the Framers' understanding of the right to keep and bear arms. She wrote a stinging 37-page dissent to a 27-page majority opinion that maintained a categorical bar on felon dispossession without the government's having to prove dangerousness. (Rickey Kanter had pleaded guilty to one count of mail fraud regarding false claims he had made about shoe inserts.) She stressed that the Second Amendment "confers an individual right, intimately connected with the natural right of self-defense and not limited to civic participation." Her opinion goes beyond *District of Columbia v. Heller*, the 2008 Supreme Court case, and adds common sense to a historical record dating to the founding (and beyond) that establishes that the government can't bar gun ownership arbitrarily.

**Stare decisis and abortion**

When it comes to the much-discussed doctrine of stare decisis, the idea that sometimes erroneous precedents should be left untouched because correcting them would cost more in societal disruption than getting them right would benefit, she's somewhere between Scalia and Justice Clarence Thomas — who rarely, if ever, lets legal dogs lie. On the one hand, Barrett wrote in the *Texas Law Review*, "A new majority cannot impose its vision with only votes. It must defend its approach to the Constitution and be sure enough of that approach to warrant unsettling reliance interests." On the other, "less rides on the strength of stare decisis than is commonly supposed." Moreover, there are "superprecedents" such as *Brown v. Board of Education*, so-termed because they are uncontested and the Supreme Court would never overturn them, while other longstanding cases remain in dispute. The continued debate over abortion, for example, "shows that the Court is quite incapable of transforming precedent into superprecedent by *ipse dixit*" (assertion alone).

This doesn't mean that Barrett is all set to overturn *Planned Parenthood v. Casey* or *Roe v. Wade*; at a 2013 luncheon, she said "it is very unlikely at this point that the court is going to overturn *Roe*, or *Roe* as curbed by *Casey*. The fundamental element, that the woman has a right to choose abortion, will probably stand." And in a 2016 lecture at Jacksonville University, Barrett said that although there could be changes in the ways that states are allowed to restrict abortion, the core holding of *Roe* is unlikely to change.

That nibbling around the edges has already been borne out in her judicial opinions. In *Commissioner v. Planned Parenthood of Indiana* (2018), Barrett dissented from denial of

rehearing after a three-judge panel struck down an Indiana law banning abortions for reasons related to sex, race, or disability: "Using abortion to promote eugenic goals is morally and prudentially debatable. ... None of the Court's abortion decisions holds that states are powerless to prevent [such] abortions." In *Box v. Planned Parenthood of Indiana* (2019), she joined another dissent from denial of rehearing regarding a parental-notice law, because the law was enjoined before it took effect and thus violated the principle of federalism. In other words, having Barrett on the court would likely allow some abortion regulations to survive that would previously be struck down, but both pro-life and pro-choice activists are overselling the case that she represents a threat to *Roe* — because there aren't already four votes to overturn.

Allegations that Barrett would upset the apple cart on a host of economic regulations are similarly fanciful. Her critique of Randy Barnett's book *Our Republican Constitution*, which calls for judges to be more skeptical of the motive behind liberty-infringing laws, is a case in point. "Barnett's emphasis on the importance of recovering the legislature's true purpose understates the complexity of identifying legislative intent," she writes. Although Barrett acknowledges that enhanced judicial scrutiny is proper when analyzing statutes implicating fundamental rights or suspect classes, in other contexts, the highly deferential approach known as "rational basis review" properly "reflects the judgment that a more searching inquiry would pull judges into terrain they are not good at navigating." In other words, a Neil Gorsuch or (5th Circuit Judge) Don Willett she ain't, at least not in terms of questioning the justifications for protectionist or self-serving regulation.

**A new leader for the court?**

Judge Amy Coney Barrett has the potential not simply to be another originalist voice, or a vote for conservative (if not always libertarian) outcomes, but to be an intellectual leader on the Supreme Court. She has excelled at all stages of her career and made friends along the way. We saw some of that grace and poise in her Rose Garden remarks; such "soft skills" shouldn't be underestimated in terms of a jurist's influence. Justice Byron White used to say that each new justice makes for a new court, and it's this internal dynamic that a Justice Barrett could affect as much as the court's jurisprudence.

If confirmed, Barrett would move the Supreme Court in a principled direction, as there would not be a need to account for Chief Justice John Roberts's strategery to achieve a majority. No longer would a five-justice (or more) bloc need to be cobbled together like a piece of compromise legislation. I look forward to the court finally starting to flesh out the scope of the right to keep and bear arms, for example, and putting an end to treating people differently based on the color of their skin in college admissions. While Barrett isn't known for administrative law, I hope also that she would join fellow Trump nominees Gorsuch and Kavanaugh in reining in the bureaucracy and forcing Congress to make tough decisions about conflicting policy views. That's ultimately the only way we'll start dissipating the toxic cloud surrounding judicial nominations.

Once you get past the social (and mainstream) media smears about Barrett's religion — apparently, she belongs to a cult of handmaids whose husbands force them to be judges and had to settle for serving on the Supreme Court because of a lack of abortion access — you find a genuine and warm person who also happens to be one of the finest lawyers in the land, a servant-leader. "If confirmed, I would not assume that role for the sake of those in my own circle and

certainly not for my own sake," she concluded her introductory remarks. "I would assume this role to serve you."

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