



## Amy Coney Barrett a perfect choice for half of America

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Kristen Clarke: Judge Amy Coney Barrett's nomination raises grave questions around civil rights

One can't ignore the unprecedented nature of this nomination. Never before in our nation's history has a president put forward a Supreme Court nomination and called on the Senate to commence confirmation hearings as voters were actively casting ballots in a general election. This fact alone makes this nomination the most politicized ever.

Moreover, Judge Amy Coney Barrett sided with Republicans who refused to fill Justice Antonin Scalia's seat in 2016 until after the election because, in her view, it would "dramatically flip the balance of power" on the Court. Given that position, you would expect that Barrett would ask that her nomination not be considered until the completion of the election.

This marks the first time in decades (since the nomination of Thurgood Marshall in 1967) that the Court has been without a justice who fought for civil rights during his or her career.

For those who care about fair interpretation and application of civil rights laws and the Constitution, Barrett's record raises grave questions. By way of example, she has called the Miranda doctrine, the principle that all criminal suspects must be advised of their rights upon arrest, an example of "the court's choice to overenforce a constitutional norm" that goes beyond constitutional meaning and claimed that this canon "inevitably excludes from evidence even some confessions freely given."

Furthermore, she has expressed criticism of Justice John Robert's decision upholding the Affordable Care Act and appears poised to entertain challenges to Roe v. Wade based on her strong views regarding conception.

Barrett also declined the EEOC's request for an en banc review in the case EEOC v. AutoZone, involving allegations that AutoZone intentionally segregated employees into different stores based on race. A three-judge panel ruled in favor of AutoZone because, they said, the segregated facilities did not diminish Black employees' "pay, benefits or job responsibilities."

Just weeks away from the close of the general election, there is one part of Barrett's resume that likely really caught the eye of President Donald Trump -- she was a member of the then-Governor George W. Bush's legal team in the historic Bush v Gore case in 2000. Given President Trump's suggestion that the vacancy must be filled before the election, this further contributes to the politicized nature of this nomination. The integrity of the Court is on the line and, as over

1,500 attorneys across our nation have called for, Barrett's nomination should be suspended until the voters have had their say on how this vacancy should be handled.

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Ilya Shapiro: Judge Barret could be an intellectual leader on the Supreme Court

Judge Amy Coney Barrett has the potential not simply to be another originalist voice, or a vote for conservative outcomes, but to be an intellectual leader on the Supreme Court. She has excelled at all stages of her career, including winning teaching awards and mentoring students, and has done so while raising a beautiful family and being universally liked and respected. We saw some of that grace and poise in her Rose Garden remarks, and those kind of "soft skills" shouldn't be underestimated in terms of a justice'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 the court's jurisprudence.

But we don't have to guess at Barrett's jurisprudence either. She has a long paper trail of academic and judicial writings, which display a thoughtful and scholarly approach to both legal substance and the prudential aspects of judging. On legal theory she's very much like her own mentor, Justice Antonin Scalia, in her originalism and textualism, applying constitutional and statutory provisions according to their public meaning at enactment instead of seeing that meaning change over time or trying to divine a legislative purpose. When it comes to the 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.

Barrett has also shown a willingness to hold government officials' feet to the constitutional fire, although one law review article suggests that she's not willing to go as far as, say, Justice Neil Gorsuch in questioning the justifications for economic regulations. But regardless, if Barrett is confirmed, John Roberts' short stint as the median justice will end, and we can expect a Supreme Court jurisprudence that, like it or not, will be more principled.

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Erwin Chemerinsky: How Dems must handle Barrett's confirmation hearing

Judge Amy Coney Barrett is one of the most conservative federal judges in the United States. Senate Democrats cannot block her confirmation, but they must use the confirmation hearings to communicate a message of outrage at how the Republicans are packing the Supreme Court and what it will mean for people's lives.

The Republicans' hypocrisy in rushing through the confirmation of Judge Barrett is stunning. Just four years ago, in refusing to hold a hearing or a vote on Barack Obama's nomination of

Chief Judge Merrick Garland, Senator Majority Leader Mitch McConnell said, "The American people should have a voice in the selection of their next Supreme Court Justice. Therefore, this vacancy should not be filled until we have a new president." Many other Republicans, including on the Senate Judiciary Committee, said the same thing. Their words should be quoted often by Democrats during the hearings.

Moreover, through their questions, Democrats should show the implications of Barrett's very conservative views. For example, Barrett well could be the decisive vote to strike down the Patient Protection and Affordable Care Act. After the Supreme Court upheld the Act in 2012, Barrett attacked the decision and said, "Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute." The issue of the constitutionality of the Affordable Care Act is back before the Court this November and Barrett could be the decisive vote to strike it down. As many as 21 million people would lose their health insurance in the midst of a pandemic.

Barrett is a self-professed originalist, believing that a constitutional provision means the same thing today as when it was adopted. Democrats need to point out that originalists long have argued that *Roe v. Wade* was wrongly decided and that Barrett almost certainly will be the fifth vote to overrule that landmark decision. Originalists reject any protection of gay and lesbians rights under the Constitution. Barrett, before becoming a judge, expressed opposition to same-sex marriage and she seems sure to vote to allow businesses and employers, based on a claim of religious freedom, to discriminate against gays and lesbians.

Barrett, of course, will refuse to answer questions about these topics. Democratic Senators need to quote her words and explain the dire implications of them to the American people.

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Raul A. Reyes: Barrett's rushed nomination is a loss for justice

On procedural and on substantive grounds, Judge Amy Coney Barrett's nomination is troubling. Multiple polls have shown that a majority of Americans believe that nominating the next Court justice should be left to the winner of November's presidential election. That Trump and his allies are moving to ram through this nomination signals its partisan nature. Rushing this process is inexcusable, given that Barrett, 48, will likely serve for decades.

Barrett's narrow views on reproductive rights, immigrant rights and other issues raise questions about whether she can impartially administer justice for all. As an appeals judge since 2017, she has heard two abortion cases and voted against abortion rights on both. On immigration, she dissented in a case where the majority blocked the implementation of the "public charge" rule, which penalizes legal immigrants who exercise their right to access certain benefits. This rule has given immigration officials discretion to turn down green card applications from people who used government benefits like housing vouchers and Medicaid -- even though they were eligible for such benefits.

In a 2017 law journal article, she was critical of Chief Justice John Roberts' opinion sustaining the Affordable Care Act. Her position on the ACA is especially worrisome, as the Court will hear arguments on Obamacare on November 10 -- and a conservative majority could strike the law down in the midst of a pandemic.

Barrett describes herself as a "faithful Catholic," and believes it is important "to know, love, and serve God." Yet accepting a nomination from a dishonest, impeached president who will not even commit to a peaceful transition of power speaks volumes about her character.

Trump and his allies will no doubt see Barrett's confirmation as a "win." Sadly, her elevation to Ruth Bader Ginsburg's former seat will be a profound loss for justice -- and for the legitimacy of the Supreme Court.

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Elizabeth Slattery: A triumph of Justice Ginsburg's equality project

Justice Ruth Bader Ginsburg fought to shatter stereotypes about women throughout her career, helping to create a world in which, she said, women can be found "in all places where decisions are being made." She fought for equality for women as individuals, not as a monolithic group that thinks and acts the same. And Ginsburg worked to create the space for women to "develop [their] own talents, whatever they may be."

Women deserve the "equal opportunity to aspire, achieve, participate in and contribute to society based on their individual talents and capacities," she wrote in the landmark ruling, *United States v. Virginia* (1996).

The nomination of Judge Amy Coney Barrett embodies the idea that there isn't just one way for women to think, write and reason about the law. To be sure, Barrett has a different judicial philosophy than Ginsburg had. While Ginsburg believed in a living, evolving Constitution, Barrett believes judges should stick to the original meaning of the Constitution.

But there are some similarities between the "Notorious RBG" and the "Glorious ACB" (as some on Twitter have dubbed the nominee) -- a commitment to family, an equal partnership with their husbands and a dedication to the law.

What's clear is that Ginsburg's trailblazing career has paved the way for women with a range of judicial philosophies to sit on the federal courts. Barrett's nomination to the Supreme Court is truly a triumph of Ginsburg's equality project.

*Elizabeth Slattery is an attorney in Washington who writes about the Supreme Court and the separation of powers.*

Laura Coates: A judicial selection process that sets Lady Justice's blindfold on fire

I'm uncomfortable.

It's not Judge Amy Coney Barrett's qualifications. Her resume has been touted, her academic scholarship displayed. She has specific and recent experience serving as a federal appellate circuit court judge, albeit only for a short tenure.

Still, I'm uncomfortable with any judicial selection process that sets Lady Justice's blindfold on fire. This political trend of justice shopping, a relentless search for a judicial choir member receptive to a presidential preacher, has lit the proverbial match.

Any directive to find a political puppet whose strings can be hidden by the judicial robe should horrify the American people and enrage the entire judiciary at the very suggestion. It should especially enrage a nominee who must now prove there are indeed no strings attached, particularly if that string is a requirement to overturn longstanding precedent on a political whim.

Is Trump the first to seek or even nominate a Supreme Court justice whose record, personal or ideological convictions are music to the ears of even the most partisan politician? Of course not. Democratic presidents have been as invested in the ideological composition of the court as Republican presidents. Frankly it's baked into the constitutional recipe.

If the framers of the Constitution did not intend for this to be political, the president, an officeholder selected through a national election, would not have been chosen to nominate a justice, and the Senate would not have been expressly empowered to advise and consent on that nomination. Of course, if true representation were the goal, both chambers of Congress would have been included in the process.

In a presidential administration with a reputation for breaking norms critical to our republic, judicial shopping is one such norm that I actually wish would be broken.

The problem is not about the political novelty of a president acting in his party's own interest but rather the continual erosion of the separation of powers. The erosion of even professed objectivity and the normalizing of the expectation that a Supreme Court justice's opinion is a foregone conclusion -- before a litigant has been identified, any case or controversy has arisen.

Talk about putting the cart before the horse.

Then again, what can you expect when Senate Majority Leader Mitch McConnell proclaimed earlier this week to have the votes needed to confirm a nominee days before a nominee had even been named. McConnell may be willing to say the quiet part out loud, but don't expect the nominee to follow suit.

During the confirmation process, each nominee is savvy enough to parrot impartiality. Each has refused and, in the case of Barrett, likely will refuse to reveal how they intend to decide cases in advance -- and will state a deference to the concept of stare decisis, a concept whereby the judiciary respects Supreme Court precedent -- hedging just enough to placate Senate Judiciary Committee members eager to interpret that hedge as a wink and a nod, and just enough to aggravate members who see the insincerity but have no recourse to prove it.

But a profession by a judge that she will be impartial hardly serves as a guarantee. And that's precisely what Trump seems to be banking on: promise apolitical impartiality, deliver partisan predictability.

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Paul Callan: Amy Coney Barrett has the head, heart and history to fill the SCOTUS seat

Amy Coney Barrett, a 48-year-old judge at the United States Court of Appeals for the Seventh Circuit in Chicago, has the head, heart, and history to be an outstanding Supreme Court justice.

**Head:** Judge Barrett is a summa cum laude graduate of Notre Dame Law School, where she served as the executive editor of the law journal. After graduation, she worked as a law clerk to Judge Laurence Silberman of the US Court of Appeals for the District of Columbia Circuit and later as a law clerk to the late Supreme Court Justice Antonin Scalia. These prestigious clerkships are probably among the most competitive in the US.

After briefly practicing law at the firm of Miller, Cassidy, & Larroca, Barrett returned to Notre Dame Law School in 2002 to teach constitutional law, federal court practice and statutory interpretation. In 2010, she was named as a law professor and later was honored as "distinguished professor of the year" on three occasions. Barrett was also awarded the Diane and M.O. Research Chair of Law. She published numerous articles for law journals and elsewhere during her 15-year academic career.

**Heart:** She is married to Jesse Barrett, also a Notre Dame Law School alum, and they have seven children under the age of 20. She is known to be an active participant at her children's school activities. Her qualities of selflessness, empathy and heart are demonstrated in her and her husband's decision to adopt two children from hurricane and strife-torn Haiti and to raise a child with Down Syndrome, her youngest Benjamin, who she has described as the children's "favorite sibling."

**History:** A jurist of formidable intellect, Barrett has authored more than 100 opinions, including some spirited dissents, since being named to the Seventh Circuit Court of Appeals in 2017. She is respected by conservatives as an originalist who looks to determine what the founders intended when they wrote the Constitution.

She is also a textualist, meaning a judge who tries to stick to the actual words used in a statute rather than imposing her own views. Those "living document" proponents of constitutional law should not worry. She would undoubtedly agree with the statement of her mentor, Justice Scalia, who described his judicial philosophy as, "I'm an originalist and a textualist, not a nut."

Sadly, the controversial decision of the Republicans to proceed with a Supreme Court nomination on the eve of the presidential election will undoubtedly inspire a bitter and rancorous response from Democrats at the Senate confirmation hearing. Nonetheless, given Barrett's stellar

credentials, strong sense of faith and big supportive family, she promises to be a worthy successor to another woman of intellect, empathy and heart, the Honorable Ruth Bader Ginsburg.

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Elliot Williams: If Republicans insist on flouting norms, they should be prepared for the consequences

Judge Amy Coney Barrett should not be confirmed as a Supreme Court Justice.

This statement has nothing to do with Barrett's record. It has everything to do with how the confirmation of any replacement for the late Justice Ruth Bader Ginsburg represents a flagrant insult to the basic norms of integrity and decency that should govern our country.

In February 2016, some nine months before Election Day, Senate Majority Leader Mitch McConnell started a blockade of Judge Merrick Garland, President Barack Obama's selection to fill a Supreme Court vacancy. McConnell rationalized that "[t]he American people should have a voice in the selection of their next Supreme Court justice. Therefore, this vacancy should not be filled until we have a new president."

What a difference four years makes. Within hours of Ginsburg's death, McConnell proclaimed that the Senate would immediately consider a Trump nominee, noting that Garland's nomination was different because the president and Senate were of different parties. It was a laughable level of hair-splitting that the framers never intended.

An even more impressive about-face came from Senate Judiciary Committee Chairman Lindsey Graham, who said in 2016, "I want you to use my words against me. If there's a Republican president in 2016 and a vacancy occurs in the last year of the first term, you can say Lindsey Graham said, 'Let's let the next president, whoever it might be, make that nomination.'" His moment of aw-shucks candor also had a 4-year expiration date.

If shamelessness and mendacity were virtues, most Senate Republicans would have secured their places in heaven this week.

There are many reasons not to proceed with this nomination, and any one of them should be dispositive: polls demonstrate consistently and clearly that the public wants the winner of the election to select the nominee; the Senate has never confirmed a Supreme Court nominee this close to an election; the President has sown doubt about election results and made clear that he wants a hand-picked justice in place to resolve disputes about his own re-election. And on and on.

That the President and his allies can ram through a nomination now doesn't mean they should. While the prospect of a 6-3 Supreme Court majority is surely intoxicating, Republicans ought to proceed with caution. Democrats have noted that "everything is on the table" for possible reforms to the Senate or federal courts, should they take power.

If Republicans insist on flouting norms and twisting the truth to get a nominee through, they should be prepared for the consequences that await them. At this point, they've forfeited any right they will have to complain.

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Ilyse Hogue: Barrett's nomination threatens more than a woman's right to choose

Donald Trump's nomination of Amy Coney Barrett to the US Supreme Court is no surprise to those of us who watched closely as he courted the conservative, anti-abortion movement during his 2016 campaign.

What appeared to many as an unlikely alliance was in fact an ideologically coherent union — grounded in racism and misogyny — that resulted in Trump's electoral victory. His down payment to them was his promise to nominate justices dedicated to ending legal abortion in this country.

Undermining reproductive freedom and allowing politicians to interfere in decisions about pregnancy with no regard for personal circumstances is a terrifying prospect to most people. That's why 77% of Americans want Roe preserved, according to an NPR/PBS NewsHour/Marist poll from 2019 — a fact the Republican Party knows all too well. When you're on the wrong side of public opinion, you resort to undemocratic means to get your way. Their decades-long campaign to take over the judicial branch by installing conservative judges is one way they achieve what they cannot accomplish through popular will.

That's precisely why they are operating in such haste. Senate Majority Leader Mitch McConnell and his Republican minions know they are in a race against the clock. They can't afford to do what they promised they would four years ago when stonewalling Merrick Garland, President Barack Obama's pick to replace Justice Antonin Scalia: Let the people decide.

Barrett's record, and the resulting 6-3 conservative majority on the bench should she be confirmed, means Trump will almost certainly fulfill his promise to end Roe. But the threat she presents hardly stops there. The right-wing's hostility toward abortion rights is a proxy for other forms of progress and equity. Her confirmation will also pose a dire threat to healthcare, LGBTQ rights, civil rights and racial justice, and voting rights.

This is not news. It's precisely what Trump has signaled he would do from day one.

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Barbara Perry: A Catholic court? What Amy Coney Barrett's nomination means

Presuming Senate confirmation for President Donald Trump's third Supreme Court nomination, Judge Amy Coney Barrett would become the sixth Roman Catholic on the nation's highest court, joining John Roberts, Clarence Thomas, Samuel Alito, Sonia Sotomayor, and Brett Kavanaugh.



Neil Gorsuch was raised Catholic but attends an Episcopal church. Stephen Breyer and Elena Kagan are Jewish.

For most of the court's history, it has been distinctly Protestant. As Catholic immigrants arrived on our shores, especially in the mid- to late-19th century, however, presidents saw an opportunity to court their votes by naming one of their faith to the high bench.

From 1894 to the present, there has rarely been a time when at least one Roman Catholic didn't sit on the Supreme Court. Presidents informally created a "Catholic seat" there, as they would a "Jewish seat," in 1916, with Woodrow Wilson's appointment of Louis Brandeis.

Usually these justices passively represented their religions, simply making the court look slightly more like America, though no racial minorities or women would be nominated until 1967 and 1981, respectively. After John F. Kennedy's 1960 election as the first Catholic president, his co-religionists felt more included in government, and the "Catholic seat" concept ebbed.

By 1988, three Catholics served (William Brennan, Antonin Scalia and Anthony Kennedy), and they represented three distinct segments of the ideological spectrum -- liberal, conservative, and moderate, which informed their positions on the leading cultural controversy of their time. Brennan supported *Roe v. Wade*, Scalia wanted it overturned and Kennedy shaped a middle ground, upholding the right to abortion but allowing for more regulations.

Under Ronald Reagan, George W. Bush and Donald Trump, a nominee's Catholic affiliation became shorthand for his or her desire to repeal reproductive rights. If and when Barrett takes her seat on the Supreme Court, that 40-year-old Republican policy goal may well come to fruition.

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Shan Wu: Trump is sending a clear message: Make America White again

What strikes me about President Donald Trump's choice of Amy Coney Barrett is who he didn't pick. On his short list were several persons of color: Kentucky Attorney General Daniel Cameron, former Solicitor General Noel Francisco, and sitting judges James Ho, Amul Thapar and Barbara Lagoa.

Lagoa -- thought to be the runner-up -- seemed to be a particularly strong candidate. A worshipper at former Justice Antonin Scalia's altar of originalism and a child of Cuban exiles, she was the first Hispanic woman appointed to the Florida Supreme Court. Her nomination could have endeared Trump to more voters in Florida, as well as Hispanic communities in Nevada and Arizona.

But he didn't choose her or any person of color.

Instead, President Trump reaffirmed his commitment to reject diversity and inclusion by choosing a white Catholic during an unprecedented moment of racial awareness in America. His message could not be clearer: Make America White Again.

Barrett personifies the end product of Trump's assembly line of Federalist Society-approved judicial nominations. Her record of about 100 written opinions leaves zero doubt that she is an ideologically and politically motivated judge. This is exactly what Trump needs in an election that the United States Supreme Court may end up deciding.

There's little danger here of a Justice Neil Gorsuch-like streak of independent thinking ruining an otherwise perfectly good replay of the Supreme Court's Bush v. Gore decision that awarded the presidency to George W. by judicial fiat. No, she is a jurist who can be depended on to elevate political ideology over legal analysis.

In picking Barrett, Trump promises his base a return to an earlier, whiter, more Christian America. So it was. So it shall be.

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Elie Honig: Obamacare could be the first casualty of a newly aligned court

The first and most important thing you need to know about President Donald Trump's selection of Amy Coney Barrett as the next justice of the Supreme Court is this: 6-3.

The cold, hard math tells the tale. Once Barrett is confirmed by the Senate, which seems all but certain, given the Republican party's 53-47 Senate majority, the court will consist of six traditionally conservative justices and three liberal ones.

Even before Justice Ruth Bader Ginsburg passed away, the Supreme Court was already tilted in favor of the conservative bloc, with a 5-4 split. Chief Justice John Roberts repeatedly bucked traditional ideological alignment and emerged as an unpredictable swing vote, joining with the liberal justices in key rulings on LGBTQ rights, immigration, the census, and Trump's financial records. But Roberts still has long conservative roots, and a 6-3 slant means even his crossover vote won't be enough to swing the outcome on pivotal cases.

The first casualty of the newly-aligned court could be the Affordable Care Act, the biggest case on the docket. The ACA barely survived in 2012 by a 5-4 vote, with Roberts joining the four liberal justices. And even if Barrett is not confirmed in time for the ACA case, a tie vote of 4-4 would uphold a lower court ruling, which struck down the ACA's individual mandate, putting the entirety of the law in jeopardy. And if the ACA falls, millions of Americans would lose health coverage.

Ginsburg understood perhaps better than anyone that Supreme Court decisions impact real lives. We could soon see that play out in a very tangible way.

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Caroline Polisi: This nomination sounds a death knell for abortion rights

If conservative jurist Brett Kavanaugh's confirmation to the Supreme Court created a realistic threat to the safety of abortion rights in America, President Donald Trump's nomination of Amy Coney Barrett is surely its death knell.

For years, anti-abortion activists have chosen an incremental strategy designed to chip away at *Roe v. Wade* through a mosaic of legal decisions. States led by conservative lawmakers enacted unconstitutional laws restricting access to safe and legal abortions, often with the hopes that they would face a legal challenge that would go all the way to the Supreme Court, where it might be upheld.

This strategy allowed even the most conservative of justices to maintain a façade of respect for precedent, while simultaneously advancing anti-abortion legislation.

Justice Brett Kavanaugh, for example, fended off accusations of partisanship by emphasizing judicial restraint, the idea that judges should honor the principle of stare decisis -- or precedent -- and overturn cases in only the most compelling of circumstances. But Barrett has endorsed a unique and more radical stance on judicial restraint: she's willing to forego it when she thinks that precedent is unconstitutional.

In a 2013 law review article, she wrote that "Stare decisis is not a hard-and-fast rule in the court's constitutional cases," and went on to add, "If anything, the public response to controversial cases like *Roe* reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle rather than desire that precedent remain forever unchanging."

This, along with her record on the bench and other writings, almost undoubtedly means she would vote to overturn *Roe* in one fell swoop.

Her appointment is all the more devastating given who she is replacing. Justice Ruth Bader Ginsburg, in expressing her most fervent dying wish, knew that the only hope the court had of not rolling back the clock on the decades-long battle for sex equality she and others fought so hard for was another progressive justice to fill her seat.

Barrett's confirmation will cement a conservative majority on the court, the inevitable consequence of which could make Trump the most anti-abortion president in history. This is a legacy that will unfortunately endure even beyond his most shocking failures over the past nearly four years. And it is a legacy that will have a real-world impact on women for decades to come.

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