

Judge Amy Coney Barrett’s Partial Constitution: A Review of Her Constitutional Jurisprudence

BY DAVID H. GANS[†]

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Introduction

Justice Ruth Bader Ginsburg was a titan in the law, who both on and off the Court spent her life tirelessly devoted to making real for millions of Americans the protections contained in the text, history, and values of our Constitution. To fill the seat previously occupied by Justice Ginsburg, President Donald Trump has nominated Judge Amy Coney Barrett. The ultimate test of a nominee to the Supreme Court is her fidelity to the whole Constitution’s text, history, and values. Unfortunately, based on her record to date, Judge Barrett appears to fail this test. A review of Judge Barrett’s constitutional record, reflected both in her law review articles published during her academic career and judicial opinions during her three-year tenure as a judge on the U.S. Court of Appeals for the Seventh Circuit, strongly suggest that Judge Barrett would undo deeply-rooted protections reflected in the Constitution’s text, history, and values—many that Justice Ginsburg sought to safeguard—and move the Supreme Court even farther to the right.

Judge Barrett presents herself as an originalist in the mold of Justice Antonin Scalia, for whom she clerked. She has said that originalism is “part of our constitutional design.”¹ The Constitution’s meaning, in her words, “was fixed at the time it was written and formally adopted and it stays the same until it is lawfully changed,” requiring fidelity to “the Founders’ law plus lawful changes.”² She has insisted that the “original public meaning of the Constitution is the law” and that “the historical

[†] David H. Gans is the Director of the Human Rights, Civil Rights, and Citizenship Program of the Constitutional Accountability Center.

¹ The Federalist Society, *The 2019 National Lawyers Convention, Showcase Panel II: Why, or Why Not, Be An Originalist?*, (Dec. 11, 2019), <https://www.youtube.com/watch?v=Ef4kZL93kng>.

² *Id.*

meaning of the text is a hard constraint” that is binding on judges.³ But her decisions as a judge on the Seventh Circuit do not clearly reflect this commitment to enforcing the whole Constitution’s deeply rooted meaning. From what we can glean from the judicial decisions she has penned in her short career on the bench, Judge Barrett has been an erratic originalist, at best.

Her academic writings offer more questions than answers about her views on the original meaning of the Constitution. She has recognized the “tension between stare decisis and originalism” and noted that “many claim that originalism cannot account for important precedents, including the New Deal expansion of federal power, the administrative state, and *Brown v. Board of Education*.”⁴ But she has not addressed whether “these cases or any others are in fact inconsistent with the original public meaning.”⁵ She has even raised the alarming question whether the Fourteenth Amendment is “possibly illegitimate” because of the manner of its ratification, again without offering any conclusions one way or the other.⁶ These examples illustrate the extent to which her nomination threatens to unsettle long-settled constitutional freedoms and legal protections.

In some areas, her record suggests that she will upend constitutional doctrine to hamstring government regulation. But in others, she has urged courts to give government a wider berth to regulate, particularly when it comes to the Fourteenth Amendment’s guarantees of liberty and equality. She has written that “more vigorous enforcement of the Due Process and Equal Protection Clauses may increase the risk of overnationalizing policy preferences at the hands of the Supreme Court. Once the Supreme Court weighs in on a constitutional question, the entire nation is bound, and the opportunity for regional differences is extinguished.”⁷ She has stressed “the harm the Court can do” when “it invalidates legislation that it should let stand.”⁸ It is hard not to read these comments as pointed references to *Roe v. Wade*,⁹ a ruling she has long decried.¹⁰

As a jurist, Judge Barrett’s opinions have, in the main, interpreted Supreme Court precedent to move the law sharply to the right. In her judicial opinions, she has sought to vastly expand protections for some rights, while permitting the government to run roughshod over others. While strictly limiting the ability of government to impose reasonable gun regulation, she has indicated a willingness to permit states to restrict abortion access, allow state violence to go unpunished, and turn a blind eye to manifest unfairness in the operation of the criminal justice system. Time and again, Judge Barrett has sought to find a way to avoid enforcing the limits against oppression that the Constitution imposes to better protect liberty, secure equal citizenship, and prevent abuse of government power.

³ Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 Penn. J. Const. Law. 1, 3, 5 (2016); Amy Coney Barrett, *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1924 (2017) (“[O]riginalism prioritizes what we might think of as the original precedent: the contemporaneously expressed understanding of ratified text.”).

⁴ Barrett, *Originalism and Stare Decisis*, *supra* note 3, at 1922, 1925.

⁵ *Id.* at 1926 n.16.

⁶ Barrett, *Congressional Originalism*, *supra* note 3, at 2.

⁷ Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 Const. Commentary 61, 78 (2017) (reviewing Randy E. Barnett, *Our Republican Constitution: Securing the Liberty and Sovereignty of We The People* (2016)).

⁸ *Id.* at 76.

⁹ 410 U.S. 113 (1973).

¹⁰ See *infra* Section I.A.

Judge Barrett’s highly selective view of the Constitution’s commands is especially troubling because she has made clear, in a number of articles that she has authored, that a Supreme Court Justice should be completely free to overrule precedents she thinks are wrongly decided. In a 2013 article, she wrote, “a justice’s duty is to the Constitution” and it is “more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”¹¹ Indeed, she has suggested “the possibility that following precedent might sometimes be unlawful,”¹² claiming that a strict form of *stare decisis* “unconstitutionally deprives a litigant of the right to a hearing on the merits of her claims” in violation of due process principles.¹³ Her views on precedent makes it all the more imperative for the Senate to question her closely about her views on the whole Constitution’s text, history, and values.

This issue brief unfolds as follows. Part I examines a number of areas where Judge Barrett poses a particular threat to Justice Ginsburg’s legacy: the Constitution’s protection of the right to abortion, the authority of government to enact reasonable gun regulations, and the power of the federal government to solve national problems, such as health care. During her tenure on the Court, Justice Ginsburg provided a critical vote on all these questions. Judge Barrett would likely rewrite or overrule the Court’s precedents in this area. Part II turns to examine the areas where Judge Barrett would solidify conservative dominance, areas in which Justice Ginsburg was often in dissent. On a range of critical issues, including state violence and qualified immunity, criminal justice, the role of religion in American life, and immigration, Judge Barrett would join a conservative bloc that has all too often turned a blind eye to our whole Constitution’s text, history, and values.

I. Rights at Risk: The Threat Judge Barrett Poses to Justice Ginsburg’s Legacy

A. Judge Barrett’s Record of Hostility to the Right to Abortion

During her confirmation hearing, Justice Ginsburg told the Judiciary Committee that “the decision whether or not to bear a child is central to a woman’s life, to her well being and dignity. It is a decision she must make for herself. When Government controls that decision for her, she is being treated as less than a fully adult human responsible for her own choices.”¹⁴ While we would welcome the surprise, Judge Barrett is not expected to make a similar affirmation of the Constitution’s promise of true liberty for all at her hearing. She has been an ardent opponent of the Court’s cases protecting the right to abortion and we can only assume by her nomination that she passed President Trump’s anti-abortion litmus test with flying colors.

¹¹ Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 Tex. L. Rev. 1711, 1728 (2013).

¹² Barrett, *Originalism and Stare Decisis*, *supra* note 3, at 1922.

¹³ Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev 1011, 1013 (2003).

¹⁴ Nomination of Ruth Bader Ginsburg, to Be Associate Justice of the Supreme Court, Before S. Comm. on the Judiciary, 103rd Cong. 207 (1993), available at <https://www.loc.gov/law/find/nominations/ginsburg/hearing.pdf>.

Before joining the bench, Judge Barrett signed a letter that argued that “[i]t’s time to put an end to the barbaric legacy of *Roe v. Wade* and restore laws that protect the lives of unborn children.”¹⁵ And in her many academic writings about stare decisis, Judge Barrett has repeatedly rejected the idea that the Supreme Court’s long line of decisions that have held that the Constitution safeguards the right to abortion should be treated as settled law. *Roe v. Wade*, she has repeatedly argued, is not a “super-precedent” because “public controversy about *Roe* has never abated.”¹⁶ In her view, “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.”¹⁷ In her academic writing, she sought to push back against the idea that “reliance interests . . . justify keeping an erroneous decision on the books,” pointing to *Planned Parenthood v. Casey*,¹⁸ as a case that got it wrong.¹⁹ In sum, it is her view that *Roe v. Wade* and the long list of decisions applying it for nearly half a century are ripe for overruling.

During her career on the bench, she has repeatedly voted to uphold or suggested she might be likely to uphold restrictive state abortion laws. In 2018, in *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of the Indiana State Department of Health*,²⁰ Judge Barrett joined Judge Frank Easterbrook’s opinion dissenting from the Seventh Circuit’s refusal to rehear en banc a decision striking down a pair of abortion statutes. The most consequential part of the case involved the validity of a ban on abortion for sex, race, or disability selection. Based on the dissent Judge Barrett joined, she would have upheld the ban because she believed that “[n]one of the Court’s abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children.”²¹ Without wrestling with the fact that the state had sought to impose a flat ban on the exercise of a constitutional right because of state disagreement with the individual’s choice, the dissent she joined simply said, “[w]e ought not impute to the Justices decisions they have not made about problems they have not faced.”²² She also would have voted to uphold the state’s requirement that fetal remains be cremated or buried because it was a rational requirement in furtherance of the state’s “legitimate interest in protecting public sensibilities” that did not burden the right to abortion.²³

¹⁵ Sam Stein, *Amy Coney Barrett Signed Letter Urging End of ‘Barbaric’ Roe v. Wade*, Daily Beast (Oct. 1, 2020), <https://www.thedailybeast.com/amy-coney-barrett-signed-letter-urging-end-of-barbaric-roe-v-wade>.

¹⁶ Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 11, at 1735 n.141; Barrett, *Originalism and Stare Decisis*, *supra* note 3, at 1932 n.52 (same).

¹⁷ Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 11, at 1727.

¹⁸ 505 U.S. 833 (1992). *Casey* reaffirmed that the Constitution’s guarantee of individual liberty to protect the right to choose abortion, but also stressed, in its stare decisis calculus, “that for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.” *Id.* at 856.

¹⁹ Barrett, *Stare Decisis and Due Process*, *supra* note 13, at 1029 & n. 70; *id.* at 1064 (arguing that reliance “should count much less, if at all, when a litigant convinces a court that precedent conflicts with the statutory or constitutional provision that it purports to interpret”).

²⁰ 917 F.3d 532 (7th Cir. 2018).

²¹ *Id.* at 536 (Easterbrook, J., dissenting from the denial of rehearing en banc).

²² *Id.*

²³ *Id.* at 537.

Ultimately, the Supreme Court refused to review the decision striking down the ban on abortion for sex, race, or disability selection, over a bitter dissent by Justice Clarence Thomas, and it summarily reversed the invalidation of the fetal remains provision.²⁴

In 2019, in *Planned Parenthood of Indiana and Kentucky v. Box*,²⁵ Judge Barrett joined Judge Michael Kanne’s dissent from the refusal of the full Seventh Circuit to rehear a decision preliminarily enjoining an Indiana law regulating minors’ access to abortion. The dissent she joined argued that a preliminary injunction preventing an unconstitutional state law from taking effect presented “an important and recurring issue of federalism.”²⁶ The dissent insisted that “[p]reventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure.”²⁷ But the dissent never squared this view with our actual constitutional structure: the Fourteenth Amendment protects fundamental constitutional rights and requires courts to ensure that states do not impose unnecessary barriers to the constitutional promise of real freedom for all.

While her record on the bench is relatively sparse due to her short time on the bench, it suggests Judge Barrett is inclined to give states broad authority to impose barriers to access to abortion. If she is confirmed, she could continue down this path, effectively overruling *Roe* without having to say so by making abortion too difficult to access or provide. Or, as her academic writing suggests, she could vote to squarely overrule *Roe*, a precedent that she clearly does not deem deserving of respect.

B. Judge Barrett’s Attack on Reasonable Gun Regulation

In *Kanter v. Barr*,²⁸ a 2019 ruling, Judge Barrett dissented from a ruling holding that the federal government may prohibit the possession of firearms by persons convicted of felonies, including nonviolent crimes such as mail fraud. *Kanter* demonstrates that she has a sweeping view of the individual right to bear arms that would, if she is confirmed, threaten the authority of government to enact reasonable gun regulations. As her only originalist, or at the very least quasi-originalist, opinion during her tenure on the bench, *Kanter* demands close attention.

In *Kanter*, the Seventh Circuit held that the federal ban on possession of firearms by a person convicted of a felony could be constitutionally applied to Rickey Kanter, who pled guilty to committing mail fraud, a felony under federal law that carries with it a prison sentence. In an opinion by Judge Joel Flaum and joined by Judge Kenneth Ripple, both of whom were nominated to the court of appeals by President Ronald Reagan, the court explained that, according to most scholars, “the founders conceived of the right to bear arms as belonging only to virtuous citizens,” placing “even nonviolent felons like Kanter . . . outside the scope of the Second Amendment.”²⁹ But the court did not rest its conclusion on that ground, preferring not to resolve a dispute about “the historical scope of the Second Amendment.”³⁰ Instead, the majority held that, even assuming that the Second Amendment was

²⁴ *Box v. Planned Parenthood of Ind. & Ky.*, 139 S. Ct. 1780 (2019).

²⁵ 949 F.3d 997 (7th Cir. 2019).

²⁶ *Id.* at 999 (Kanne, J., dissenting from the denial of rehearing en banc).

²⁷ *Id.*

²⁸ 919 F.3d 437 (7th Cir. 2019).

²⁹ *Id.* at 446.

³⁰ *Id.* at 447.

implicated, the law survived constitutional scrutiny, reasoning that the ban on possession of a firearm by a convicted felon is “substantially related to the important governmental objective of keeping firearms away from those convicted of serious crimes.”³¹

Judge Barrett dissented. Her central argument was that the government’s justification for depriving Kanter of the right to bear arms was not a deeply rooted one. As her opinion began, “[h]istory is consistent with common sense: it demonstrates that legislatures have the power to prohibit dangerous people from possessing guns. But that power extends only to people who are *dangerous*. Founding-era legislatures did not strip felons of the right to bear arms simply because of their status as felons.”³²

Judge Barrett’s approach misunderstands the way originalism should work: the Second Amendment does not limit us to the gun laws of the Founding generation. Governments act in innovative ways all the time, and there is no principle of constitutional law that says that the government must show that its particular method of regulating is deeply rooted in Framing-era history. Government must respect our constitutional rights, but it also has broad authority to pass and enforce reasonable gun regulation to protect public safety.

In *District of Columbia v. Heller*, Justice Scalia wrote that “nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons,”³³ but Judge Barrett insisted this was not dispositive because “judicial opinions are not statutes, and we don’t dissect them word-by-word as if they were.”³⁴ Essentially, in her view, Scalia’s formulation was wrong.

She would have held that the Second Amendment allows a legislature only to “disarm those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety.”³⁵ Thus, “[a]bsent evidence that Kanter would pose a risk to the public safety if he possessed a gun, the governments cannot permanently deprive him of his right to keep and bear arms.”³⁶ To reach this result, her opinion offered a deep-dive into Founding-era history and historical practice. Her opinion is long and dense, but what stands out is that she never really offered any evidence that affirmatively supports her own reading of the Second Amendment. Most of her opinion is directed to refuting the relevance of various pieces of historical evidence, not establishing that her own view was constitutionalized in the Second Amendment. Judge Barrett has argued that the Constitution’s original public meaning is law. But her *Kanter* dissent offered virtually nothing affirmative about the original public meaning of the Second Amendment.

Significantly, the original public meaning of the Second Amendment gives government leeway to enact reasonable gun regulations to limit gun violence. As Justice Scalia recognized in *Heller*, the Second Amendment “right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose.”³⁷

³¹ *Id.* at 451.

³² *Id.* at 451 (Barrett, J., dissenting).

³³ 554 U.S. 570, 626 (2008).

³⁴ *Kanter*, 919 F.3d at 454 (Barrett, J., dissenting).

³⁵ *Id.*

³⁶ *Id.* at 469.

³⁷ *Heller*, 554 U.S. at 626.

Judge Barrett’s analysis of the historical record seems questionable in number of respects. Don Kates, who has been called the “father of the modern Second Amendment revival,”³⁸ wrote in a 1983 law review article that “[a]ll the ratifying convention proposals which most explicitly detailed the recommended right-to-arms amendment excluded criminals and the violent.”³⁹ One of these proposals affirmed the rights of “peaceable citizens,” while another made clear that “no law shall be passed for disarming the people or any of them *unless for crimes committed, or real danger of public injury from individuals.*”⁴⁰ These seem to strongly support a ban on gun possession by felons, but Barrett discounted them, insisting they only reflect concerns about “threatened violence and the risk of public injury.”⁴¹ Further, while she would have invalidated the federal ban on possession of a firearm by a person convicted of a felony as applied to Kanter as constitutionally overinclusive, the history she recounts is chock full of overinclusive gun regulations, often motivated by animus. For example, she relied on the fact that colonial laws disarmed Black people, Native Americans, and Catholics.⁴² She described these as groups that were “judged to be a threat to the public safety,”⁴³ ignoring that each of these colonial laws was a vastly overinclusive legal disability imposed to subordinate disfavored persons. Her opinion is studiously blind to the racial and religious bias underlying these enactments.

Perhaps the most troubling part of her constitutional analysis is the privileging of the right to bear arms over other fundamental constitutional rights, such as the right to vote. She repeatedly distinguishes between felon disenfranchisement and felon dispossession. In her view, the right to vote, but not the right to bear arms, can be denied to persons who have been convicted of a felony.⁴⁴ This, she said, is because the right to bear arms is an individual right, while the right to vote is in essence a collective right, which can be limited to “virtuous citizens.”⁴⁵ As she argues, “the right to vote is held by individuals, but they do not exercise it solely for their own sake; rather, they cast votes as part of the collective enterprise of self-governance.”⁴⁶ In her view, this justifies limits on the right to vote that do not apply to the right to bear arms, which she stresses is an individual right, “intimately connected with the natural right of self-defense, and not limited to civic participation.”⁴⁷ This disturbing reasoning suggests that Judge Barrett would treat the right to vote as a second-class right, turning a blind eye to

³⁸ Eugene Volokh, *Don Kates, the Father of the Modern Second Amendment Revival, Has Died*, Volokh Conspiracy (Nov. 4, 2016), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/11/04/don-kates-the-father-of-the-modern-second-amendment-revival-has-died/>

³⁹ Don B. Kates, Jr., *Handgun Prohibition and the Original Meaning of the Second Amendment*, 82 Mich. L. Rev. 204, 266 (1983).

⁴⁰ *Kanter*, 919 F.3d at 454-55 (Barrett, J., dissenting) (discussing these proposals) (internal citations omitted).

⁴¹ *Id.* at 456.

⁴² *Id.* at 457-58.

⁴³ *Id.* at 458.

⁴⁴ *Id.* at 462 (“[History does show that felons could be disqualified from exercising certain rights—like the rights to vote and serve on juries—because these rights belonged only to virtuous citizens.”).

⁴⁵ *Id.*

⁴⁶ *Id.* at 463.

⁴⁷ *Id.* at 464.

the fact that no right is protected by more parts of the Constitution than the right to vote.⁴⁸ In her view, the fact that the right to vote is part and parcel of “the collective enterprise of self-governance” gives government more leeway to impose restrictions. Judge Barrett’s theory that the right to vote can be limited to a group of citizens a government body deems “virtuous” is extremely troubling, obviously subject to serious manipulation, and would open the door to blatant forms of voter suppression.

In some cases, Judge Barrett’s stance with respect to the Second Amendment may lead to progressive results. For example, in *United States v. Watson*,⁴⁹ she overturned the conviction of a defendant who had pled guilty to possessing a firearm as a felon, concluding that police officers violated the Fourth Amendment in making the stop that led to the recovery of the defendant’s weapon. Judge Barrett wrote that “citizens should be able to exercise the constitutional right to carry a gun without having the police stop them when they do so.”⁵⁰ She rejected the argument that the stop should be upheld because it occurred in a high-crime neighborhood. “People who live in rough neighborhoods may want and, in many situations, may carry guns for protection. They should not be subject to more intrusive police practices than are those from wealthy neighborhoods.”⁵¹ But overall, Judge Barrett is very likely to move the law governing the Second Amendment very sharply to the right.

During her tenure on the Supreme Court, Justice Ginsburg defended the authority of government to enact reasonable gun regulation. If Judge Barrett occupies Justice Ginsburg’s seat, she will almost certainly vote to impose very strict limits on government regulation in this area.

C. Judge Barrett’s Attack on the Affordable Care Act

Judge Barrett’s record of hostility to the Supreme Court’s precedent upholding the Affordable Care Act appears to satisfy yet another of President Trump’s litmus tests. If confirmed, she would have a chance to strike down the statute in its entirety, as Texas and a host of other states are urging the Court to do this term in *California v. Texas*.⁵²

In her academic writing, Judge Barrett has criticized sharply Chief Justice Roberts’ majority opinion in *National Federation of Independent Business v. Sebelius*,⁵³ in which, she wrote, “Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute.”⁵⁴ She observed that “the measure of a court is its fair-minded application of the rule of law, which means going where the law leads. By this measure, it is illegitimate for the Court to distort either the Constitution or a statute to achieve what it deems a preferable result.”⁵⁵ In her view, that is exactly what Chief Justice Roberts

⁴⁸ See *Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (“[V]oting is of the most fundamental significance under our constitutional structure.”); *Shelby County v. Holder*, 570 U.S. 529, 567 n.2. (2013) (Ginsburg, J., dissenting) (“The Constitution uses the words “right to vote” in five separate places: the Fourteenth, Fifteenth, Nineteenth, Twenty-Fourth, and Twenty-Sixth Amendments.”).

⁴⁹ 900 F.3d 892 (7th Cir. 2018).

⁵⁰ *Id.* at 897.

⁵¹ *Id.*

⁵² 140 S. Ct. 1262 (2020).

⁵³ 567 U.S. 519 (2012).

⁵⁴ Barrett, *Countering the Majoritarian Difficulty*, *supra* note 7, at 80.

⁵⁵ *Id.* at 84.

did in upholding the constitutionality of the Affordable Care Act in *NFIB*. As she wrote, “[b]ecause textualists refuse to depart from clear statutory text, they would consider it wrong to twist statutory text beyond what its meaning will bear to avoid collision with a constitutional barrier.”⁵⁶ In her view, Chief Justice Roberts departed from basic textualist principles rather than properly enforcing the Constitution. In her view, this turned principles of judicial restraint on their head. “[E]xpress[ing] a commitment to judicial restraint by creatively interpreting ostensibly clear statutory text,” she wrote, “is at odds with the statutory textualism to which most originalists subscribe.”⁵⁷

Judge Barrett has not written about her understanding about the proper scope of Congress’ Article I powers to solve national problems. But her critiques of *NFIB* strongly suggest she would have joined the joint dissent in *NFIB*, which would have held the Affordable Care Act unconstitutional. Here, too, if she occupies the seat on the Court previously held by Justice Ginsburg, she could move the law far to the right and undo legal protections Justice Ginsburg fought to secure.

II. Judge Barrett Would Solidify Conservative Dominance of the Supreme Court

A. State Violence and Qualified Immunity

In wake of the killing of George Floyd, Breonna Taylor, and countless others, our nation is grappling with our long and tragic history of racial violence meted out by the police and other government actors. Judge Barrett’s record suggests that she is unlikely to vote to limit state violence and brutality. During her tenure on the Seventh Circuit, Judge Barrett has repeatedly thrown out of court civil rights suits brought to redress wanton state violence.

In *McCottrell v. White*,⁵⁸ a 2019 ruling, Judge Barrett dissented from a decision reversing the grant of summary judgment to two prison guards in an Eighth Amendment excessive force case. According to the plaintiffs, who were hit by buckshot, the guards fired their guns over a crowded prison dining hall after a conflict in the hall had broken up and fired their weapons in a manner purposely designed to harm other prisoners, i.e., consciously shooting away from a safety device designed to prevent bullets from ricocheting. The majority opinion held there was sufficient evidence for the case to go to trial. As the majority concluded, “[a] warning shot taken when there is no need to warn arguably has no legitimate purpose, and one purposely aimed away from a safety device raises an inference of bad faith.”⁵⁹ On the record evidence, the majority held, a jury could find that “the force applied was grossly disproportionate to the force that could plausibly have been thought necessary, again giving rise to an inference of malice and sadism.”⁶⁰

⁵⁶ *Id.* at 83.

⁵⁷ *Id.* at 84; *id.* (expressing “skepticism” of the “Roberts Court’s conception of judicial restraint or its approach to statutory interpretation”).

⁵⁸ 933 F.3d 651 (7th Cir. 2019).

⁵⁹ *Id.* at 665.

⁶⁰ *Id.* at 668.

Judge Barrett dissented. She would have dismissed the case because “[a]n inmate cannot satisfy the ‘malicious and sadistic’ standard without showing that a guard intended to hit or harm someone with his application of force. After all, if the guard did not intentionally apply force to a prisoner, how could he have had a malicious and sadistic intent to cause him pain?”⁶¹ She argued that deliberate indifference to inmate safety did not violate the Eighth Amendment.⁶² The plaintiffs, she claimed, had to show that the guards intended to shoot them and she found no evidence to support that theory. Judge Barrett’s dissent reflects a crabbed, stingy view of the Amendment’s limits on excessive force by prison guards. As Judge Ilanna Rovner’s majority opinion noted, “under the dissent’s version of the test, a guard could blindly unload a shotgun above a crowd of bystanders with impunity because making contact is not a certainty.”⁶³

Earlier this year, in *Estate of Biegert by Biegert v. Molitor*,⁶⁴ Judge Barrett authored the court’s opinion throwing out a suit against Wisconsin police officers, who shot and killed Joseph Biegert, tragically ending the life of a troubled man who had a history of depression and suicide attempts. Officers arrived at Biegert’s house at the request of his family, but rather than try to defuse a tense situation with a plainly depressed man, the officers acted in an aggressive, combative manner and patted down Biegert in a painful manner. Ultimately, a scuffle ensued, Biegert grabbed a knife and stabbed one of the officers, and the officers shot and killed him. Judge Barrett’s opinion held that the officers acted reasonably and did not violate the Fourth Amendment.

Judge Barrett rejected the argument that the “officers acted unreasonably by creating the conditions that precipitated the violent encounter.”⁶⁵ The “officers’ creation of a dangerous situation,” she wrote, did not “constitute an independent violation of Biegert’s constitutional rights. The officers might have made mistakes, and those mistakes might have provoked Biegert’s violent resistance. Even if so, however, it does not follow that their actions violated the Fourth Amendment.”⁶⁶ The patdown, Judge Barrett held, was permissible, because “[r]estraining an individual may be appropriate in ‘inherently dangerous situations,’ even where the officers do not suspect the restrained individual of a crime.”⁶⁷

Judge Barrett held the use of deadly force was constitutionally reasonable as well. She reasoned that “[e]ven if the defendants’ actions exacerbated the danger,” the shooting and killing of Mr. Biegert was reasonable because “the situation requiring them to use deadly force was not primarily of their own making.”⁶⁸ Judge Barrett’s opinion concluded that it was reasonable for the officers to shoot to kill Biegert because “[t]he officers . . . indisputably faced an immediate threat to their physical safety” and “the imminent threat of deadly harm posed by an aggressive, armed assailant justified the defendants’ use of lethal force.”⁶⁹

⁶¹ *Id.* at 672 (Barrett, J., dissenting).

⁶² *Id.* at 671.

⁶³ *Id.* at 665 (majority opinion).

⁶⁴ 968 F.3d 693 (7th Cir. 2020).

⁶⁵ *Id.* at 698.

⁶⁶ *Id.*

⁶⁷ *Id.* at 699 (quoting *Muehler v. Mena*, 544 U.S. 93, 100 (2005)).

⁶⁸ *Id.* at 698.

⁶⁹ *Id.* at 700.

In *Biegert*, Judge Barrett’s opinion rejected the constitutional claim on the merits. In other cases, she has invoked qualified immunity doctrine to throw suits against the police out of court.

In *Torry v. City of Chicago*,⁷⁰ a 2019 ruling, Judge Barrett wrote the court’s opinion dismissing a suit against police officers arising out of a *Terry* stop of three Black men, a Fourth Amendment seizure that, pursuant to the Supreme Court’s landmark decision in *Terry v. Ohio*,⁷¹ requires a showing of reasonable suspicion that criminal activity is afoot. On the morning of the encounter, police officers received reports of a drive-by shooting at a school early that morning. The police reports indicated that the shooter was in a grey SUV, which contained three Black men. Later that afternoon, half a mile from the school, police officers stopped Marcus Torry, who was driving a grey car with two friends, all Black men. The car was a sedan, not an SUV.

The plaintiffs argued that the police lacked reasonable suspicion to make the stop, but Judge Barrett’s opinion concluded that the doctrine of qualified immunity protected the officers from suit. Judge Barrett explained that “to win, the plaintiffs must show not only that the stop was unlawful, but also that the unlawfulness of the stop was clearly established at the time that it occurred. Because the plaintiffs cannot make the latter showing, we need not consider whether the stop violated the Fourth Amendment.”⁷² Qualified immunity attached, Judge Barrett wrote, because “plaintiffs partially matched the description of suspects involved in a drive-by shooting . . . in number, race, and car color.”⁷³ And, she noted, while the “discrepancies may weigh against the officers’ suspicion, they don’t clearly overcome it.”⁷⁴ She concluded that “a reasonable officer could have concluded that the investigative *Terry* stop of the plaintiffs comported with the Fourth Amendment.”⁷⁵

B. Fundamental Fairness in the Criminal Justice System

In civil suits seeking to redress police abuse of power, Judge Barrett has invoked qualified immunity to close the courthouse doors on plaintiffs, insisting that the requirement that the right in question be clearly established is a “demanding standard.”⁷⁶ Her opinions in the habeas context have made similar arguments, repeatedly denying relief to prisoners challenging deprivations of the right to counsel and other kinds of fundamental unfairness in the criminal justice system on the grounds that the legal principles they invoked were not clearly established.

In *Schmidt v. Foster*,⁷⁷ a 2018 ruling, Judge Barrett dissented from the court’s ruling that held that the trial judge in the case violated the Sixth Amendment’s guarantee of a right to counsel by questioning the defendant *ex parte* regarding his defense and preventing his counsel from participating. Following the panel ruling granting a writ of habeas corpus, the Seventh Circuit reheard the case *en banc* and, in

⁷⁰ 932 F.3d 579 (7th Cir. 2019).

⁷¹ 392 U.S. 1 (1968).

⁷² *Torry*, 932 F.3d *d.* at 586.

⁷³ *Id.* at 587.

⁷⁴ *Id.* at 588.

⁷⁵ *Id.*

⁷⁶ *Id.* at 587 (quoting *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018)).

⁷⁷ 891 F.3d 302 (7th Cir. 2018).

an opinion by Judge Amy St. Eve, agreed with Judge Barrett’s conclusion that Schmidt was not entitled to habeas relief.⁷⁸

At trial, Schmidt offered a defense of “adequate provocation” to mitigate the crime from first-degree homicide to second-degree homicide. The trial judge questioned Schmidt in a pretrial hearing on that substantive issue, but did not allow his counsel to participate or speak. After the hearing, based on Schmidt’s rambling testimony, the judge held the defense was unavailable. The majority held that this was a violation of the clearly established rule that a defendant is entitled to assistance of counsel in all critical stages of a criminal case. “It is clearly established that criminal defendants are entitled to counsel at all critical stages of the criminal process, and the case law on which stages are critical is extensive.”⁷⁹ As the panel commented, “[w]e cannot imagine that the Supreme Court would tolerate a procedure in which the trial judge, without a valid waiver of the right to counsel, took the defendant alone into chambers for questioning on the record on any substantive issue. The result is no different here, where the lawyer was physically present but prohibited from speaking or otherwise participating.”⁸⁰

Judge Barrett dissented. She disagreed that “clearly established Supreme Court precedent dictates the resolution of Schmidt’s Sixth Amendment claim.”⁸¹ In her view, “[e]xisting Supreme Court precedent addresses a defendant’s right to counsel in certain adversarial confrontations with a prosecutor, the police, or an agent of either. No Supreme Court precedent addresses the question presented by this case: whether a defendant has the right to counsel when testifying before a judge in a nonadversarial proceeding.”⁸² The panel majority, she wrote, was guilty of “stat[ing] the rule at too high a level of generality.”⁸³ While the majority insisted that the use of an “unprecedented procedure” in which “defense counsel is silenced,” was “not compatible with the American judicial system,”⁸⁴ Judge Barrett stressed that, in her view, the record did not show that “the judge ever functioned as a surrogate prosecutor.”⁸⁵ In Judge Barrett’s view, the standard for relief in a habeas case “is intentionally difficult” and “precludes us from disturbing a state court’s judgment on the ground that a state court decided an open question differently than we would—or, for that matter, differently than we think the Court would.”⁸⁶ In her dissent in *Schmidt*, Judge Barrett took a crabbed view of what constituted clearly established law. This suggests that, if confirmed, she will take a broad view of limits on habeas and qualified immunity and seek to narrow remedies for constitutional violations.

Likewise, Judge Barrett joined the court’s majority opinion in *Reynolds v. Hepp*,⁸⁷ which involved a prisoner’s claim that Wisconsin violated the Sixth Amendment’s guarantee of effective assistance of

⁷⁸ 911 F.3d 469 (7th Cir. 2018) (en banc).

⁷⁹ *Schmidt*, 891 F.3d at 310.

⁸⁰ *Id.* at 313.

⁸¹ *Id.* at 321 (Barrett, J., dissenting).

⁸² *Id.* at 322.

⁸³ *Id.*

⁸⁴ *Id.* at 311 (majority opinion).

⁸⁵ *Id.* at 327 (Barrett, J., dissenting).

⁸⁶ *Id.* at 330, 326.

⁸⁷ 902 F.3d 699 (7th Cir. 2018).

counsel when it stopped paying his court-appointed lawyer during his direct appeal. Reynolds insisted that the lawyer’s financial interest created a conflict of interest that denied him the effective assistance of counsel, but the court disagreed.

The majority reasoned that “the Supreme Court has not yet extended its multiple-representation decisions to financial conflicts of interest between attorney and client, let alone provided clear guidance as to whether or under what circumstances a financial conflict of interest between attorney and client violates a defendant’s right to counsel. That silence presents a nearly insurmountable obstacle to this claim on a federal petition for a writ of habeas corpus.”⁸⁸ In a dissenting opinion, Chief Judge Diane Wood would have granted the writ. She would have held that “there was an actual conflict of interest between [Reynolds] and his lawyer, and he has shown that the conflict had an adverse effect on his lawyer’s performance, insofar as the lawyer limited the scope of his representation to the matters he already had researched and flatly refused to look into anything else.”⁸⁹ “[F]inancial conflicts of interest, she stressed, “can destroy the integrity of a relationship.”⁹⁰

In *Sims v. Hyatte*,⁹¹ a 2019 ruling, Judge Barrett dissented from a decision that granted a writ of habeas corpus in a case arising out of a prosecutor’s failure to turn over information favorable to the accused’s case in violation of due process principles first enunciated in *Brady v. Maryland*.⁹² Sims was convicted of attempted murder, but the prosecutor failed to disclose that the victim, Shane Carey, the only witness who had identified Sims as the shooter, did so after being hypnotized. The panel concluded that this was powerful, material impeachment evidence that undermined the reliability of Sims’s conviction. As the panel observed, without the “identification of Sims as the shooter, the prosecution had no case. . . . The fact that Carey had been hypnotized would have undermined his credibility and changed his cross-examination quite dramatically.”⁹³ The majority concluded that “the prosecutor’s deliberate concealment of the hypnosis evidence undermined confidence in the verdict that has kept Sims in prison for more than twenty years” and required granting the writ.⁹⁴

Judge Barrett dissented. She argued that the majority erred by failing to defer to the state court’s legal conclusions. “Even though I think that the undisclosed evidence of Carey’s hypnosis constitutes a *Brady* violation, it was neither contrary to, nor an unreasonable application of, clearly established federal law for the Indiana Court of Appeals to conclude otherwise.”⁹⁵ She argued that the case was not an open and shut one. Reasonable jurists could have concluded that “Carey’s contemporaneous description and prehypnosis identifications were independently reliable and consistent with his in-court identification.”⁹⁶ In her view, the state court’s stance that the impeachment evidence was not

⁸⁸ *Id.* at 707.

⁸⁹ *Id.* at 714 (Wood, C.J., dissenting).

⁹⁰ *Id.* at 712.

⁹¹ 914 F.3d 1078 (7th Cir. 2019).

⁹² 373 U.S. 83 (1963).

⁹³ *Sims*, 914 F.3d at 1089.

⁹⁴ *Id.* at 1092.

⁹⁵ *Id.* at 1092 (Barrett, J., dissenting).

⁹⁶ *Id.* at 1098.

material for *Brady* purposes “was [not] ‘so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’”⁹⁷

C. The Religion Clauses and Religious Exemptions

Justice Ginsburg wrote powerful dissents when the Supreme Court rewrote free exercise principles to mandate religious exemptions that allowed employers to extinguish their employees’ critically important federally protected rights. In what proved to be her final dissenting opinion on the Supreme Court last July, in *Little Sisters of the Poor Saints Peter and Paul Home v. Pennsylvania*,⁹⁸ she took the Court to task for “allow[ing] the religious beliefs of some to overwhelm the rights and interests of others who do not share those beliefs.”⁹⁹ The majority in that case, she charged, “casts totally aside countervailing rights and interests in its zeal to secure religious rights to the nth degree.”¹⁰⁰ Judge Barrett’s record in this area is the polar opposite of Justice Ginsburg’s. Judge Barrett has repeatedly urged that employers be granted sweeping religious exemptions even if doing so allows employers to impose their religious beliefs on their employees.

Before she joined the bench, Judge Barrett signed a letter that attacked the religious accommodation contained in the regulations implementing the Affordable Care Act’s contraceptive coverage mandate as an “assault on religious liberty and the rights of conscience.”¹⁰¹ Although the accommodation made it very easy for an employer to shift its legal obligation to a third party, the letter Barrett signed insisted that the accommodation was an effort to “cover[] up” an “assault on [their] religious liberty” with a “cheap accounting trick.”¹⁰² The letter argued that that religious entities and individuals should be entitled to an unconditional religious exemption from the ACA’s requirement to provide contraceptive coverage.

Her record on the appeals court further suggests that, if confirmed, she will seek to move the law to the right by granting businesses new religious exemptions from laws designed to protect the rights of their employees.

In *Grussgott v. Milwaukee Jewish Day School, Inc.*,¹⁰³ Judge Barrett joined the court’s opinion holding that the First Amendment barred a teacher’s claim that she was fired from her job in violation of the Americans with Disabilities Act. The opinion Judge Barrett joined took a very broad view of the ministerial exemption, which bars the application of antidiscrimination laws to religious employers in relation to their ministers. Grussgott was a grade-school teacher, who taught Hebrew and Jewish studies at a Jewish school. That made her a minister for purposes of the First Amendment, according to the court. The court explained, “[h]er integral role in teaching her students about Judaism and the school’s motivation in hiring her, in particular, demonstrate that her role furthered the school’s

⁹⁷ *Id.* at 1099 (quoting *Harrington v. Richter*, 562 U.S. 86, 103 (2011)).

⁹⁸ 140 S. Ct. 2367 (2020).

⁹⁹ *Id.* at 2400 (Ginsburg, J., dissenting).

¹⁰⁰ *Id.*

¹⁰¹ See Letter from John Garvey, et al., *Unacceptable*, at 1 (Apr. 11, 2012), available at <https://s3.amazonaws.com/becketpdf/Unacceptable-4-11.pdf>.

¹⁰² *Id.*

¹⁰³ 882 F.3d 665 (7th Cir. 2018).

religious mission.”¹⁰⁴ Grussgott claimed that “her teaching was historical, cultural, and secular, rather than religious.”¹⁰⁵ The court disagreed, deferring to the school’s characterization of her teaching as religious. The court observed that “there may be contexts in which drawing a distinction between secular and religious teaching is necessary, but it is inappropriate when doing so involves the government challenging a religious institution’s honest assertion that a particular practice is a tenet of its faith.”¹⁰⁶ And, furthermore, it reasoned, “not only is this type of religious line-drawing incredibly difficult, it impermissibly entangles the government with religion.”¹⁰⁷ *Grussgott* suggests that Judge Barrett will defer to claims made by employers that a legal requirement or policy burdens their exercise of religion. This call for automatic deference is troubling. Courts play an essential role in evaluating claims that a government practice substantially burdens religious exercise. By automatically deferring to claim of a burden on religion, courts cut short the analysis necessary to properly evaluate an employer’s claim that it is constitutionally entitled to a religious exemption.

D. Immigration

In *Trump v. Hawaii*,¹⁰⁸ the Supreme Court upheld President Trump’s Muslim travel ban, moving in the direction of giving the federal government a nearly unfettered power over the constitutional rights of immigrants at the border. Judge Barrett’s record suggests she would likely help push the law even further to the right in this area.

In *Yafai v. Pompeo*,¹⁰⁹ a 2019 ruling, Judge Barrett authored the court’s opinion that held that a consular officer’s decision to deny an immigrant visa to a Yemeni citizen was unreviewable. Mohsin Yahfai, a United States citizen, sought to obtain an immigrant visa for his wife. The consular officer denied the visa, claiming that she had sought to smuggle her two children into the United States. Yahfai claimed the consular officer refused to reunite his family based on a lie and that the children had tragically drowned.

Judge Barrett’s opinion held that the courts had no power to review the denial of the visa. She wrote that “Congress has delegated the power to determine who may enter the country to the Executive Branch, and courts generally have no authority to second-guess the Executive’s decisions.”¹¹⁰ Even “if the denial of [the] visa application implicated a constitutional right of Yafai’s,” the court lacked the authority to review a consular officer’s “facially legitimate and bona fide” decision based on allegations of smuggling.¹¹¹ Judge Barrett observed that “[i]t is unclear how much latitude—if any—courts have to look behind a decision that is facially legitimate and bona fide to determine whether it was actually made in bad faith.”¹¹² But even if there is a bad-faith exception, she concluded that Yafai failed to offer

¹⁰⁴ *Id.* at 657.

¹⁰⁵ *Id.* at 659.

¹⁰⁶ *Id.* at 660.

¹⁰⁷ *Id.*

¹⁰⁸ 138 S. Ct. 2392 (2018).

¹⁰⁹ 912 F.3d 1018 (7th Cir. 2019).

¹¹⁰ *Id.* at 1020.

¹¹¹ *Id.* at 1021.

¹¹² *Id.* at 1022.

any showing of bad faith. “[T]he fact that the officer did not believe Ahmed and Yafai’s evidence does not mean that the officer was dishonest or had an illicit motive. The officer could have honestly concluded that Ahmed and Yafai’s testimony was not credible and that the documents they provided did not substantiate it.”¹¹³

Judge Ripple dissented. He argued that the majority’s “view of the [consular non-reviewability] doctrine sweeps more broadly than required by the Supreme Court and our own precedent, and deprives Mr. Yafai of an important constitutional right.”¹¹⁴ Judge Ripple would have held that “an American citizen has a liberty interest in living with his or her spouse. This interest requires that any exclusion of a citizen’s spouse be imposed fairly and evenhandedly.”¹¹⁵ He stressed that Yafai’s case presented a question of “fundamental fairness”: “the evidence submitted by Mr. Yafai raises the distinct possibility that the consular officer, contrary to his representations made to Mr. Yafai’s counsel, never considered the evidence submitted.”¹¹⁶ Stressing that “Congress has given the Judiciary the obligation to curb arbitrary action,” Judge Ripple argued that “we show no respect for the Constitution or for Congress by taking cover behind an overly expansive version of a judge-made doctrine.”¹¹⁷

Conclusion

The Senate, in considering Judge Amy Coney Barrett’s nomination to our nation’s highest court, has the constitutional duty to ensure that Judge Barrett will be faithful to the whole Constitution’s text, history, and values. Based on her record thus far, and in light of the litmus tests President Trump has promised to apply to any Supreme Court nominee he advances, she unfortunately appears to fail that basic test of constitutional fidelity. As her record demonstrates, she is deeply committed to protecting some constitutional rights, while turning a blind eye to other deeply rooted constitutional guarantees and structural features of our Constitution. It is not enough for a judge to be faithful to a part of our Constitution. To serve on the Supreme Court, a judge must honor the entire Constitution, including the Amendments that have sought to guarantee to all in America the Constitution’s promise of true freedom, equality, fundamental fairness, and democracy. Justice Ginsburg fought to make these constitutional promises real for all. To date, Judge Barrett has not.

¹¹³ *Id.* (citation omitted).

¹¹⁴ *Id.* at 1023 (Ripple, J., dissenting).

¹¹⁵ *Id.* at 1024.

¹¹⁶ *Id.* at 1028.

¹¹⁷ *Id.* at 1030.