New American

Written by **C. Mitchell Shaw** on November 6, 2020

Published in the November 23, 2020 issue of the New American magazine. Vol. 36, No. 22

So What Will Amy Coney Barrett Do?

AP Images

AP Images

With the confirmation of Justice Amy Coney Barrett to the Supreme Court, Democrats have suffered a great defeat, and President Trump has won a major victory. Barrett's confirmation was approved by a vote of 52 to 48 on October 26. Her confirmation seemed all but certain from day one of the hearings.

In fact, Senator Lindsey Graham (R-S.C.) — who serves as chairman of the Judiciary Committee — opened the first day of hearings with, "The hearing to confirm Judge Amy Coney Barrett to the Supreme Court," rather than saying it was a hearing to consider her qualifications. Graham added that the hearing was "probably not about persuading each other unless something really dramatic happens." He went on to predict that "all the Republicans will vote yes, all the Democrats will vote no." In the end, that is almost exactly what happened, with one Republican, Susan Collins of Maine, voting against Barrett with the Democrats.

On Thursday, October 22, the Senate Judiciary Committee voted unanimously to send Barrett's confirmation to the full Senate. All 12 Republicans on the committee voted to advance the nomination, while all 10 Democrats — knowing they could not prevail — boycotted the vote. It appears that Democrats hold to an idea that says, "If you can't beat them, stay home and whine about it."

And while the Democrats on the Judiciary Committee spent days grilling Barrett on a variety of topics, and Barrett answered the majority of those questions clearly and concisely, the question for many remains — what type of justice will she be?

While there are no guarantees (after all, Reagan-appointee Sandra Day O'Connor was a nightmare of liberalism, helping to slant the court more and more to the Left during her time as a justice), it is a maxim that the past is the best indicator of the future. A good look at Barrett's work as a circuit judge on the U.S. Court of Appeals for the Seventh Circuit should be a pretty good predictor of how she will behave as a justice on the highest court in the land.

Besides looking at her record as a jurist, this article looks at Barrett's formation as a jurist by examining her career leading up to her appointment as an appellate judge.

New American
Written by C. Mitchell Shaw on November 6, 2020
Published in the November 23, 2020 issue of the New American magazine. Vol. 36, No. 22

The Making of Justice Barrett

Barrett's journey to the Supreme Court began in the 1990s. After graduating *magna cum laude* fromRhodes College in 1994, she earned a full-tuition scholarship to the Notre Dame Law School where — in 1997 — she graduated top of her class and *suma cum laude*, earning her law degree. During her time at Notre Dame, Barrett served as an executive editor of the *Notre Dame Law Review*.

Partisan politics: Amy Coney Barrett underwent days of confirmation hearings during which she was grilled on a litany of questions. Democrats implied that she was lying and was not fit for the appointment to the Supreme Court. *(Photo credit: AP Images)*

After two years of clerking for Judge Laurence Silberman and then Justice Antonin Scalia (described by Barrett as her mentor), Barrett practiced law at Miller, Cassidy, Larroca, and Lewin, a law firm in Washington, D.C. After that firm merged with the Houston, Texas-based law firm Baker Botts in 2001, Barrett worked on *Bush v. Gore*, the lawsuit stemming from the Florida recount fiasco that led to much confusion over who had actually won the 2000 election. Baker Botts represented George W. Bush, and Barrett's work on the case focused on research and briefing assistance.

Then, after serving as a visiting associate professor at George Washington University Law School for one year, Barrett returned to her alma mater, Notre Dame Law School, in 2002, where she taught constitutional law, federal courts, and statutory interpretation. In 2007, she served as a visiting professor at the University of Virginia School of Law, and in 2010, she was made a professor of law there. From 2014 to 2017, she was the Diane and M.O. Miller II Research Chair of Law. In that capacity she focused on constitutional law, originalism, statutory interpretation, and *stare decisis* — the doctrine that previous court decisions can be used in deciding similar cases with similar circumstances. Barrett's career is marked by recognitions, awards, and appointments. For instance, she was thrice named "Distinguished Professor of the Year" during her time at Notre Dame, and was invited to speak on constitutional law at Blackstone Legal Fellowship. Named after Sir William Blackstone — the famed 18th-century English jurist whose writings heavily influenced the Founding Fathers — the Blackstone Legal Fellowship is a summer program for law school students developed and facilitated by the Alliance Defending Freedom. The stated purpose of the program is to foster a "distinctly Christian worldview in every area of law." Before her appointment to the appellate court, perhaps her highest achievement was when, in 2010, Chief Justice John Roberts appointed her to the Advisory Committee for the Federal

Rules of Appellate Procedure.

In 2017, she was nominated by President Trump to fill the vacancy left on the U.S. Court of Appeals for the Seventh Circuit after Judge John Daniel Tinder took senior status — a form of semi-retirement.

That is a pretty solid formation for a Supreme Court justice.

Two Confirmations, One Theme

That confirmation hearing was a precursor of the recent hearings. It is almost as if the same script were used.

Barrett's religion (Barrett is described as an orthodox Catholic) was front and center in her grilling. Senator Dianne Feinstein (D-Calif.) pressed Barrett as to how — as a Catholic — she would rule on legal issues related to abortion. Barrett responded, saying, "My personal church affiliation or my religious belief would not bear on the discharge of my duties as a judge" and "It is never appropriate for a judge to impose that judge's personal convictions, whether they arise from faith or anywhere else, on the law." Feinstein, appearing dissatisfied with an answer contrary to her liberal agenda, pulled out all stops, retorting, "The dogma lives loudly within you, and that is a concern."

Questions of religious fidelity also appeared in the recent confirmation hearing. After the issue had been alluded to in questions from Democrats, Senator Graham gave Barrett a chance to answer directly, saying, "You're a Catholic. I think we've established that." He went on to ask, "The tenets of your faith mean a lot to you personally, is that correct?" When Barrett answered, "That is true," Graham asked Barrett if she has chosen to raise her children as Catholics. Barrett again answered in the affirmative. Graham then asked Barrett, "Can you set aside whatever Catholic beliefs you have regarding any issue before you?" Her answer was direct and immediate: "I can. I have done that in my time on the Seventh Circuit. If I stay on the Seventh Circuit, I'll continue to do that. If I'm confirmed to the Supreme Court, I'll do that still."

While at first blush it may seem like Barrett is willing to compromise her religious beliefs, that is not the case. As a Supreme Court justice, she will take an oath to defend the Constitution, and nothing in it is anti-religious. And as a justice, she is not supposed to make laws — wherein morals would matter — but is instead expected to decide legal matters based on what the law is, regardless of whether she agrees with the law. In fact, it would be anti-Catholic and anti-Christian — as well as the height of hypocrisy — for her to steal a play from the Left and legislate from the bench in direct contradiction to the Constitution. That Barrett has maintained a consistent position on that is commendable.

Of course, even legislators are supposed to be hemmed in by the Constitution and are not able to make whatever laws they may choose, but only those that are allowed by the Constitutions of either their state (for state legislators) or the United States (for federal legislators).

Barrett's answer that she could "set aside whatever Catholic beliefs" she may have is also in perfect keeping with her remarks in her opening statement during her confirmation hearings for her appointment to the Supreme Court. In that statement, Barrett addressed the root of the problem of activist judges legislating from the bench, stating, "Courts have a vital responsibility to enforce the rule of law, which is critical to a free society. But courts are not designed to solve every problem or right every wrong in our public life." She added, "The policy decisions and value judgments of government must be made by the political branches elected by and accountable to the people. The public should not

expect courts to do so, and courts should not try."

So would a Justice Barrett decide to overturn *Roe v. Wade*? If she evaluates the Constitution as an originalist, on the basis of the intent of the lawgiver, then she should not be able to find in the "penumbra" of the Constitution a right to privacy protecting a right to have an abortion, as did a majority of the justices in the court's January 22, 1973 *Roe v. Wade* decision. And perhaps this is the real reason why the Left is opposed to Barrett's nomination. That is, they likely do not fear that she will impose *Catholicism* from the bench (which she could not do); they instead fear that she will impose *constitutionalism* (which she could do and has promised to do).

Barrett: An Originalist and Textualist

That this is the more likely cause for the Left's fear is bolstered both by her answers during the hearings and by her rec-ord as a jurist.

On Monday, October 12, the first day of her confirmation hearings, Barrett stated that she is an "originalist." The next day, Graham asked her to explain "in English" what that means. Barrett answered, "In English, that means that I interpret the Constitution as a law, that I interpret its text as text, and I understand it to have the meaning that it had at the time people ratified it — so that meaning doesn't change over time and it's not up to me to update it or infuse my own policy views into it."

Leftists' religious litmus test: Senator Dianne Feinstein (D-Calif.), who had previously said that Barrett was one in whom religious "dogma lives loudly," used much of her time during the confirmation hearings to grill Barrett about her position on *Roe v. Wade*. *(Photo credit: AP Images)*

In this clear "English" answer, the Left can hear the bell toll for their "living document" argument of interpreting the Constitution. Furthermore, Barrett describes herself as a "textualist." In a 2013 article she wrote on the topic, Barrett wrote that textualism "has distinguished itself from other interpretive approaches" by insisting that "federal courts cannot contradict the plain language of a statute." Barrett simply believes that words have meaning and that meaning cannot be either overlooked or altered to suit political agendas. No wonder Senate Democrats did all they could to prevent her confirmation.

But how has that played out in the performance of her duties as a jurist? In other words, is Barrett actually an originalist and textualist or is that just her branding with no real bearing on how she has ruled (and would continue to rule) on cases before her? Fortunately, the answer to that question is

easily found in the 79 majority opinions, four concurring opinions, and six dissenting opinions she wrote during her time on the Seventh Circuit. The space allotted to this article does not allow for an examination (or even listing) of all of those opinions; indeed, that would require a book. However, a look at just a few of those opinions should suffice to answer the question.

In 2019, the Seventh Circuit heard an appeal of *Smith v. Illinois Department of Transportation.* Smith — a black employee of the Illinois Department of Transportation — had been dismissed from his job during a probationary period. The reason for his firing was given as "poor performance." Smith had failed to practice basic safety standards, causing danger to himself and other employees. He had also been written up as having a "serious issue" with challenging instructions. Smith claimed "racial discrimination" and claimed that his supervisor (also black) had called him a "stupid a** n****r."

When the case was originally heard, the court decided against Smith. He appealed and the case wound up in the Seventh Circuit, where Barrett sat on the three-judge panel that heard the appeal. As the Associated Press reported:

> Barrett wrote for a unanimous three-judge panel in 2019 that upheld the dismissal of a workplace discrimination lawsuit by Terry Smith, a Black Illinois transportation employee who sued after he was fired. Smith's claims included that he was called a racial slur by supervisor Lloyd Colbert.
>
> "The n-word is an egregious racial epithet," Barrett wrote in *Smith v. Illinois Department of Transportation*. "That said, Smith can't win simply by proving that the word was uttered. He must also demonstrate that Colbert's use of this word altered the conditions of his employment and created a hostile or abusive working environment."
>
> Barrett went on to say that Smith "introduced no evidence that Colbert's use of the n-word changed his subjective experience of the workplace. To be sure, Smith testified that his time at the Department caused him psychological distress. But that was for reasons that predated his run-in with Colbert and had nothing to do with his race. His tenure at the Department was rocky from the outset because of his poor track record."

Refusing to be blown off track by the prevailing winds of extreme anti-racism, Barrett was able to see that while the "n-word" — even when used by a black man to refer to another black man — "is an egregious racial epithet," the text of the law did not allow for Smith's claim. In short, Smith was well documented as a lousy, dangerous employee and would have been fired even if his supervisor never uttered that word. The opinion — written by Barrett — is clear and concise and leans on her love of and adherence to textualism.

In another case from 2019, Barrett again wrote a unanimous three-judge panel decision of a case before the Seventh Circuit. *John Doe v. Purdue University* stems from a 2016 sexual assault case at the university. As the Associated Press reported, "The case involved allegations by a female student at Purdue University that her boyfriend had sexually assaulted her. The students were identified in court documents as John and Jane Doe."

According to the introduction to that opinion, written by Barrett:

> After finding John Doe guilty of sexual violence against Jane Doe, Purdue University

> suspended him for an academic year and imposed conditions on his readmission. As a result of that decision, John was expelled from the Navy ROTC program, which terminated both his ROTC scholarship and plan to pursue a career in the Navy.
>
> John sued the university and several of its officials, asserting two basic claims. First, he argued that they had violated the Fourteenth Amendment by using constitutionally flawed procedures to determine his guilt or innocence. Second, he argued that Purdue had violated Title IX by imposing a punishment infected by sex bias. A magistrate judge dismissed John's suit on the ground that he had failed to state a claim under either theory. We disagree. John has adequately alleged violations of both the Fourteenth Amendment and Title IX.

In finding for John Doe, Barrett and her colleagues ruled that Purdue's process was unfair and allowed his lawsuit to continue. In the decision, Barrett wrote, "The case against him boiled down to a 'he said/she said' — Purdue had to decide whether to believe John or Jane." Barrett also criticized the Purdue University official who ended up siding with the female student, writing, "Her basis for believing Jane is perplexing, given that she never talked to Jane. Indeed, Jane did not even submit a statement in her own words."

Fear adherence: Democrats did all in their power to prevent Barrett's confirmation, saying that the integrity of issues such as the Affordable Care Act and *Roe v. Wade* are at stake. The reality is that they fear Barrett's principles of originalism and textualism — that the Constitution means what it says. *(Photo credit: AP Images)*

Again, this is an example of standing against the prevailing winds — this time, that of the #MeToo movement — and looking only at the text. The decision makes this clear. Before recounting John's account of the events leading up to the case, Barrett writes, "We are reviewing the magistrate judge's decision to dismiss John's complaint for failing to state a claim. That means that we must recount the facts as he describes them, drawing every inference in his favor." After recounting those events, Barrett writes about the method the three-judge panel used to decide the appeal. "We begin with procedural due process. According to John, he was punished pursuant to a process that failed to satisfy the minimum standards of fairness required by the Due Process Clause." Here, we see Barrett and her colleagues looking at "procedural due process" not through the lens of the #MeToo claim that women never lie about sexual assault, but through that of the Due Process Clause of the Constitution in its

original meaning.

Finally, while Barrett has never ruled directly on abortion, she has served on cases peripherally related to abortion. Besides the three cases so hated by the Left — where Barrett sided with the minority of her court to uphold laws requiring parental consent for minors to have an abortion, banning abortions based on the sex, rac; or developmental disability of the unborn child; and requiring the remains of unborn children (whether through abortion or miscarriage) to receive either a funeral or cremation — Barrett weighed in on a case that is much more controversial than those. And while many conservatives did not like her decision, constitutionalists did.

That case, *Price v. Chicago*, is a great example of how Barrett's promise to apply the Constitution and the laws pursuant to it is not empty. The unanimous decision, written by a colleague of Barrett's, states:

> Pro-life "sidewalk counselors" sued to enjoin Chicago's "bubble zone" ordinance, which bars them from approaching within eight feet of a person in the vicinity of an abortion clinic if their purpose is to engage in counseling, education, leafletting, handbilling, or protest. The plaintiffs contend that the floating bubble zone is a facially unconstitutional content-based restriction on the freedom of speech. The district judge dismissed the claim, relying on *Hill v. Colorado*, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), which upheld a nearly identical Colorado law against a similar First Amendment challenge.

The appeals court ruled that the decision in *Hill v. Colorado*, upholding a nearly identical law, was not only constitutional, but also applied in the case of *Price v. Chicago*. Thus, the court — including Barrett — ruled that the law would stand. If the "bubble zone" requiring eight feet of distance were a violation of the First Amendment's protection of free speech, then the law would be unconstitutional. However, if it is an issue not of free speech, but of "preserving clinic access and protecting patients from unwanted speech," then the law would stand.

In joining in the unanimous decision, Barrett again applied textualism and originalism. The abortion clinic is private property. This writer does not have to like that, but it is true nonetheless. The people going into the clinic have the right not to be engaged if they so choose. Again, I don't have to like that.

In deciding the way she did, Barrett did her duty as a judge, and refused — as she promises to continue to do — to impose her own beliefs.

Given her record for integrity and her strong textualist and originalist formation, President Trump could not have chosen better in his effort to keep his promise that he would appoint a justice who could help overturn *Roe v. Wade*. If a case stemming from a state law to ban abortion should make it to the Supreme Court, *Roe* could very well be overturned.

Democrats' efforts to prevent Barrett's appointment to the Supreme Court signify their hatred of the principles that guide her. Textualism and originalism are diametrically opposed to the concept — so loved by the Left — that the Constitution is a "living, breathing document" that they can get to say what they want.

Written by **C. Mitchell Shaw** on November 6, 2020
Published in the November 23, 2020 issue of the New American magazine. Vol. 36, No. 22