REPORT ON THE NOMINATION OF JUDGE AMY CONEY BARRETT

New York City Bar Association

October 23, 2020

I. Executive Summary

On September 18, 2020, after a distinguished 27-year tenure as an Associate Justice of the Supreme Court preceded by decades of ground-breaking gender-equality advocacy, Ruth Bader Ginsburg died, leaving an open seat on the Court. On September 26, 2020, President Donald Trump nominated Judge Amy Coney Barrett of the United States Court of Appeals for the Seventh Circuit to fill the vacancy.

Despite concerns the City Bar expressed in an October 11, 2020, statement addressing the decision of the President to nominate a candidate for a Supreme Court seat weeks before the election, and the Senate majority's decision to consider that nomination after Presidential voting had already begun, the New York City Bar Association (the City Bar), through its Board of Directors and Judiciary Committee, has evaluated Judge Barrett's qualifications to serve as an Associate Justice of the Supreme Court.

We gathered and analyzed information from a variety of sources: Judge Barrett's written opinions from her nearly three years serving on the Seventh Circuit; her speeches and articles; her testimony from her 2017 confirmation hearings concerning her nomination to the Seventh Circuit; the confirmation hearings on her nomination to become a Supreme Court Justice taking place during the week of October 12, 2020; the Senate questionnaire she completed for this nomination; interviews with practitioners who appeared before her during her tenure on the Seventh Circuit; and comments received from the City Bar's members and committees.

We have evaluated Judge Barrett's record using eight evaluative criteria to determine whether she is qualified to serve on the Court: (1) exceptional legal ability; (2) extensive experience and knowledge of the law; (3) outstanding intellectual and analytical talents; (4) maturity of judgment; (5) unquestionable integrity and independence; (6) a temperament reflecting a willingness to search for a fair resolution of each case before the court; (7) a sympathetic understanding of the Court's role under the Constitution in the protection of the personal rights of individuals; and (8) an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive.

Judge Barrett is an extremely talented lawyer and judicial writer, and unquestionably meets the first three of the City Bar's evaluation criteria: she has (1) exceptional legal ability; (2) extensive experience and knowledge of the law; and (3) outstanding intellectual and analytical talents.

Despite these strengths, we have significant concerns over the remaining evaluative criteria.

Judge Barrett's refusal during her Senate confirmation hearing to answer whether she believed climate change was happening, responding instead that she would not address the topic because it was "politically controversial" and a "very contentious matter of public debate," raises concerns as to whether she meets criteria 4 through 6. Judge Barrett's rejection of settled science calls into question not only whether she has "maturity of judgment," but also whether she has "unquestionable integrity and independence" and lacks the "temperament … to search for a fair resolution of each case…." Judge Barrett's rejection of accepted science on the grounds that it was controversial also raises concerns that she is not independent from the Executive Branch that nominated her and held and aggressively advocated the same views.

While Judge Barrett has shown respect for precedent in her time on the Seventh Circuit, the entirety of her record leaves room to doubt whether she meets criterion 7, "a sympathetic understanding" of the Supreme Court's unique role "in the protection of the personal rights of individuals." A decade of Judge Barrett's scholarly writings suggests an eagerness to overrule long-settled and revered Supreme Court precedents guaranteeing individual rights in *Loving v. Virginia, Griswold v. Connecticut, Roe v. Wade, Planned Parenthood v. Casey,* and *Obergefell v Hodges*. Then-Professor Barrett's refusal to include, at a minimum, *Loving, Griswold,* and *Roe* in her list of super precedents—i.e., Supreme Court decisions that "no serious person would propose to undo even if they are wrong"—was a warning that those individual-rights protections were at risk. Her deflection that super precedents were not at risk because the issues presented in them were procedurally unlikely to make it back to the Court was hardly reassuring.

Other nominees have refused to answer questions that touched on issues that might come before the Court. But none of those nominees had a background that showed open hostility to the Court's long-settled individual-rights precedents. Judge Barrett's disagreement with those precedents on originalist grounds, her refusal to endorse the continuing validity of those decisions at her Senate confirmation hearings, and the hostility to immigrants reflected in her Seventh Circuit opinions, show that Judge Barrett may not have the sympathetic understanding of the Court's role in protecting individual rights required by the City Bar's evaluation criteria.

We have reservations as to whether Judge Barrett meets criterion 6, "a temperament reflecting a willingness to search for a fair resolution of each case." Judge Barrett is a self-described originalist. Her scholarly writings, her Seventh Circuit opinions, and her Senate testimony revealed the depths of that judicial philosophy. Judge Barrett's willingness to question the correctness of even the Supreme Court's oldest and most venerated decisions protecting individual rights calls into question whether she would decide constitutional questions solely by employing her originalist philosophy to the exclusion of an individualized search for a fair resolution of each case.

Judge Barrett's record raises doubts as to whether she meets criterion 8, "an appreciation for the historic role of the Supreme Court as the final arbiter of the meaning of the United States Constitution, including a sensitivity to the respective powers and reciprocal responsibilities of the Congress and Executive." In her Senate testimony, Judge Barrett refused to take any stand or answer any question that might reflect a disagreement with President Trump. She described the settled science of climate change as a "contentious matter of public debate," mirroring the views of the administration. She dodged questions about the Affordable Care Act. Judge Barrett refused to answer whether voter intimidation was a crime, whether a president can unilaterally delay an election, and whether a president could pardon himself. As shown by the letter from the City Bar's Immigration and Nationality Law Committee, on issues of immigration, Judge Barrett's opinions reflect near absolute deference to the Executive branch.

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The City Bar rates candidates as "Highly Qualified," "Qualified," or "Not Qualified" to serve as a Supreme Court Justice. Despite attributes that would undoubtedly serve Judge Barrett well on the Court, including her intellect, knowledge, experience, work ethic, and collegiality, Judge Barrett's legal scholarship, Seventh Circuit opinions, and testimony at her Senate confirmation hearings do not, as discussed herein, foreclose uncertainty as to whether Judge Barrett meets evaluation criteria 4 through 8. While Judge Barrett's record does not dispel doubt, these stated concerns do not demonstrate that she will not rise to the level of these evaluative goals.

Due to unique concerns addressed below, we have determined that Judge Barrett is "Qualified to Serve as a Supreme Court Justice, with Reservations."

II. The City Bar's Ratings and Guidelines

The City Bar is among the oldest bar associations in the United States and, at present, consists of over 25,000 members, many of whom are from other parts of the country. The City Bar has been evaluating judicial candidates for approximately 150 years in a non-partisan manner based on the nominees' competence and merit. Although the City Bar had evaluated several Supreme Court candidates over the course of its history, in 1987, it determined to evaluate every candidate nominated to the Supreme Court.

In 2007, the City Bar's Executive Committee (later renamed the Board of Directors) moved from a two-tier evaluation system in which candidates were found to be either "qualified" or "not qualified", to a three-tier evaluation system.[1] The ratings and the criteria that accompany them are as follows:

> **"Highly Qualified."** The nominee is qualified, to an exceptionally high degree, such that the nominee is likely to be an outstanding Justice of the United States

[1]. In 2015, the rating system for New York Court of Appeals candidates was changed back from a three-tier to a two-tier system. The rating system for U.S. Supreme Court candidates remains a three-tier system.

Supreme Court. This rating should be regarded as an exception, and not the norm, for United States Supreme Court nominees.

"Qualified." The nominee possesses the legal ability, experience, knowledge of the law, intellectual and analytical skills, maturity of judgment, common sense, sensitivity, honesty, integrity, independence, and temperament appropriate to be a Justice of the United States Supreme Court. The nominee also respects precedent, the independence of the judiciary from the other branches of government, and individual rights and liberties.

"Not Qualified." The nominee fails to meet one or more of the qualifications above.

III. Findings

a. Highlights of Judge Barrett's Background

Judge Barrett's background has been documented extensively elsewhere. This summary is included to place our review in context.

Judge Barrett was born in New Orleans, Louisiana in 1972, the oldest of seven children. Her father was an attorney employed by Shell Oil, her mother a French teacher. She grew up in Matairie, a New Orleans suburb. Barrett attended St. Mary's Dominican High School, in New Orleans, and Rhodes College, a liberal arts college in Memphis, Tennessee, where she majored in English literature and minored in French. In 1994, she graduated *magna cum laude* and was inducted into the Phi Beta Kappa honor society. Judge Barrett attended Notre Dame Law School where she was an executive editor of the Notre Dame Law Review and from which she graduated first in her class in 1997.

Upon her graduation, Judge Barrett clerked first for Judge Lawrence Silberman of the United States Court of Appeals for the DC Circuit from 1997 to 1998, and then for United States Supreme Court Justice Antonin Scalia from 1998 to 1999.

For the two years spanning 1999 to 2001, Judge Barrett practiced law in Washington, D.C., first with the firm of Miller, Cassidy, Larroca & Levin, and then with Baker Botts LLP when those firms merged.

From 2001 through 2017, Judge Barrett taught law in various full-time capacities. From 2001 to 2002, she was a John M. Olin Fellow in Law, and member of the adjunct faculty at George Washington University Law School. From 2002 through 2017, she was a Professor of Law at Notre Dame Law School. She was a visiting Associate Professor of Law at University of Virginia Law School during its 2007 Fall Semester. Beginning in 2017, with her appointment to the Seventh Circuit Court of Appeals, she became an Adjunct Professor of Law at Notre Dame. At Notre Dame, Judge Barrett taught Civil Procedure, Constitutional Law, Evidence, Federal Courts, and seminars in Modern Constitutional Theory and Statutory Interpretation.

After her nomination by President Trump, and confirmation by the Senate, Judge Barrett was appointed to the United States Court of Appeals for the Seventh Circuit on November 2, 2017. The Seventh Circuit covers the states of Wisconsin and Indiana, and Illinois.

Judge Barrett has been involved in a number of activities outside the law school classroom and the courtroom. She served on, among other things, the Advisory Committee on Federal Rules of Appellate Procedure from 2010 through 2016; various Sections of the American Association of Law Schools from 2008 through 2017; the American Law Institute and its Torts: Defamation and Privacy Subcommittee, from 2018 to present; and the Federalist Society for Law and Public Policy Studies of the American Law Institute from 2005 to 2006, and 2014 through 2017. Judge Barrett served on the board of the Trinity Schools, a group of independent Christian schools located in Indiana, Minnesota, and Virginia, and has been a member of the Morris Park Country Club in South Bend, Indiana, and the Union League Club of Chicago.

Judge Barrett is married to Jesse M. Barrett, an attorney, and fellow Notre Dame Law School graduate. The Barretts have seven children.

b. Judge Barrett's Opinions from the Seventh Circuit

We reviewed 90 opinions written by Judge Barrett during her tenure on the Seventh Circuit. The opinions covered a wide range of subjects, including diverse questions of criminal, civil rights, constitutional, immigration, and commercial law.

The following analysis of Judge Barrett's opinions focuses on her writing abilities, judicial approach, knowledge of various areas of law, and intellectual and other skills.

1. Writing abilities

Judge Barrett is a gifted judicial writer. Without exception, she writes with clarity and precision. Her opinions show mastery of the facts and law, which she capably marshals to support her conclusions. Her writing is direct and approachable; she writes in plain English. She understands the value of a topic sentence and employs them effectively. She makes complex ideas seem simple. She is brief when no more is required, but unafraid to delve into lengthy historical and analytical developments when that support is necessary. Her tone is appropriately judicious, even when dissenting.

The work of a United States Supreme Court Justice is among the most challenging of any profession. Judge Barrett's collective decisions show that she has the intellectual ability, work ethic, and legal training necessary to take on the Court's most difficult appeals and make decisions and write opinions that clarify the law.

2. Judicial Approach and Role of the Courts

Judge Barrett's opinions reflect her conservative approach to the law which would tend to align her with the Supreme Court's majority. The vast majority of the cases before the Seventh Circuit during Judge Barrett's tenure called for the routine application of precedent, a task she has undertaken without controversy. But the eleven opinions that Judge Barrett identified in her

Senate Judiciary Committee Questionnaire as her most significant decisions demonstrate a markedly conservative perspective:

- *Kanter v. Barr*, 919 F.3d 437 (2019) (dissenting) (concluding that the Second Amendment countenanced legislatures to prohibit dangerous people from possessing guns, but not those convicted of nonviolent felonies);

- *Yafai v. Pompeo*, 912 F.3d 1018 (7th Cir.), *rehearing en banc denied*, 924 F.3d 969 (2019)(addressing denial of rehearing *en banc*)(holding that, absent a showing of bad faith, so long as a consular official cites to any statute when issuing a visa denial, there is no place for judicial review);

- *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020) (dissenting) (concluding that Trump administration's interpretation of the term "public charge" was well-supported by statute even if the federal agency had previously interpreted the term more restrictively for purposes of determining inadmissibility of aliens for visas and green card);

- *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019) (finding that plaintiff-appellant, who sued his former university alleging violations of due process and Title IX relating to sexual-assault complaint against him, had a protected liberty interest and adequately alleged use of unfair procedures determining his guilt and had adequately alleged sex bias);

- *Grussgott v. Milwaukee Jewish Day School*, 882 F.3d 655 (7th Cir. 2018)(holding that suit by teacher against Jewish Day School, her employer, for violating the Americans with Disabilities Act was barred by the ministerial exception protected by the First Amendment);

- *Wallace v. Grubhub Holdings, Inc.*, 970 F.3d 798 (7th Cir. 2020)(holding that food-delivery drivers were not exempt from the Federal Arbitration Act, and were required to engage in arbitration to resolve their claims that their employer violated the Fair Labor Standards Act by failing to pay them overtime, because the workers were not engaged in the movement of goods in interstate commerce);

- *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019)(holding that person who alleged violation of Fair Debt Collection Practices Act for improper debt collections practices did not have Article III standing because he did not satisfy the concreteness requirement for proof of injury in fact).

Two were neutral as to ideology:

- *A.F. Moore & Associates, Inc. v. Pappas*, 948 F.3d 889 (7th Cir. 2020)(holding that Equal Protection Clause entitled similarly situated taxpayers a right to roughly equal tax treatment and that the Tax Injunction Act did not bar taxpayers from pursuing their constitutional claims in Federal Court because they had no remedies in state court).

- *EEOC v. Costco Wholesale Corp.*, 903 F.3d 618 (7th Cir. 2018)(holding that the Equal Employment Opportunity Commission can recover back pay on an employee's behalf if an employer permitted a work environment that was so hostile that she was forced to take unpaid leave).

Only one was inconsistent with traditionally conservative principles:

- *Rainsberger v. Benner*, 913 F.3d 640 (7th Cir. 2019)(where person charged with murdering his mother, for whom charges were ultimately dropped, sued, among others, detective who built the case against him, and alleged that detective had knowingly or recklessly made false statements in a probable cause affidavit, holding that detective was not entitled to qualified immunity because he used deliberately falsified allegations).

Judge Barrett's decidedly conservative perspective is also shown in other decisions in which she participated on the Seventh Circuit. While Judge Barrett has not had the opportunity to hear any appeals directly involving abortion rights, she has twice joined dissents from applications for rehearing *en banc* of abortion rights appeals:

- In *Planned Parenthood of Indiana and Kentucky, Inc. v. Box*, 949 F.3d 997 (7th Cir. 2019), Judge Barrett joined Judge Kanne's dissent that would have granted rehearing *en banc* of the grant of a preliminary injunction to an abortion provider that had alleged that Indiana's parental consent and judicial bypass statutes for unemancipated minors unconstitutionally burdened minors' rights to abortions, asserting that *en banc* review was warranted because "[p]reventing a state statute from taking effect is a judicial act of extraordinary gravity", --U.S._--, 2020 WL 3578672 (remanding for further consideration in light of *June Medical Services LLC v. Russo*, 591 U.S. --, 140 S.C.t 2103 (2020));

- In *Planned Parenthood of Indiana and Kentucky, Inc. v. Commissioner of Indiana State Department of Health*, 917 F.3d 532 (7th Cir. 2018), Judge Barrett joined Judge Easterbrook's dissent that would have granted rehearing *en banc* on the question of whether an Indiana law requiring that funerals be held for fetal remains after an abortion or miscarriage unduly burdened abortion rights), *reversing in part sub. nom*, *Box. v. Planned Parenthood of Indiana and Kentucky, Inc.*, --U.S.--, 139 S.Ct. 1780 (2019) (holding that Indiana law regulating the disposal of fetal remains was supported by a rational basis).

Judge Barrett's abortion-related decisions are not uniform. In *Price v. City of Chicago*, 915 F.3d 1107 (7th Cir. 2019), she joined a unanimous decision written by Judge Sykes that upheld a Chicago ordinance that forbids anti-abortion sidewalk counselors from approaching a person within eight feet of an abortion clinic for the purpose of engaging in counseling and education because the restriction was narrowly tailored to serve significant governmental interests, and thus did not violate anti-abortion sidewalk counselors' First Amendment rights).

On issues of criminal justice, Judge Barrett has reliably, but not exclusively, sided with, and has been deferential to, the police and the state:

- In *Schmidt v. Foster*, 891 F.3d 302 (7th Cir. 2018), a majority of the Seventh Circuit found that Schmidt had been denied his Sixth Amendment right to counsel at an *ex parte* hearing at which a state trial court judge had questioned him regarding evidence of his affirmative defense because it was a critical stage of the proceedings. In dissent, Judge Barrett would have ruled that the state court's decision rejecting petitioner's claims could not have been "contrary to" or "an unreasonable application of" clearly established federal law—the standard for habeas relief—because the Supreme Court had never addressed a claim that a defendant has a right to counsel in a pretrial hearing like the one at issue in this case. While the Supreme Court might ultimately hold that a defendant was entitled to counsel at such a proceeding, Judge Barrett concluded that federal law prohibited the federal courts from intervening absent an on-point ruling from the Supreme Court. On *en banc* review, a majority of the Seventh Circuit agreed with Judge Barrett. 911 F.3d 469.

- In *Sims v. Hyatte*, 914 F.3d 1078 (7th Cir. 2019), Judge Barrett dissented from a decision in which the majority found that petitioner's state court attempted murder conviction should be vacated, because authorities had violated their *Brady* obligations by failing to disclose impeachment evidence that the complaining witness had been hypnotized before trial to enhance his recollection of the crime. The majority had found both that the state court's finding that the suppressed impeachment evidence was not material to prisoner's guilt was contrary to clearly established Supreme Court precedent, and that the state court's determination that the suppressed impeachment evidence was not material to prisoner's guilt, was an unreasonable application of clearly established Supreme Court precedent. Judge Barrett would have found that inadequate deference had been paid the state courts.

But see:

- In *United States v. Terry*, 915 F.3d 1141 (7th Cir. 2019), Judge Barrett, writing for a unanimous court, held that Drug Enforcement Administration agents had violated an apartment resident's Fourth Amendment rights when searching his apartment because the officers had been granted entry by someone who answered the door but did not live there. The facts known to the DEA agents did not support the agents' conclusion that the woman who answered the door had authority to consent to a search of the apartment.

On issues of immigration, Judge Barrett's opinions reflect near absolute deference to the Executive branch. The previously noted opinions in *Yafai v. Pompeo*, 912 F.3d 1018 (7th Cir.), *rehearing en banc denied*, 924 F.3d 969 (2019), and *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020), are the most obvious examples of this deference, but there are others as well. For example, Judge Barrett has repeatedly denied review of Executive Office for Immigration Review's denials of humanitarian defenses to deportation. *See, e.g., Alvarenga-Flores v. Sessions*, 901 F.3d 922 (7th Cir. 2018)(finding, over an impassioned dissent, that substantial evidence supported an immigration judge's denial of relief based on an adverse credibility determination); *Herrera-Garcia v. Barr*, 918 F.3d 558 (7th Cir. 2019)(affirming immigration judge's denial of request for relief under UN Convention Against Torture, finding no proof of torture because, among other things, petitioner's childhood interactions with El Salvadoran guerillas may have been stressful, but did not rise to the level of "severe pain or suffering"). The

sole immigration opinion drafted by Judge Barrett that was not completely deferential to the Department of Homeland Security found, on procedural grounds alone, that an immigration judge had improperly ordered removal, requiring a remand back to the immigration judge for a new determination as to whether petitioner should be afforded a continuance or administrative closure. *Meza Morales v. Barr*, 973 F.3d 656 (7th Cir. 2020).

Judge Barrett's opinions in commercial and administrative law opinions do not involve particularly complex issues or facts, but they do reveal, among other things, that she is a textualist in the conservative mold, which, in her words, means that she believes that statutory "words mean what they say, not what a judge thinks that they ought to say." Barrett, "Assorted Canards of Contemporary Legal Analysis," Case W. Res. L. Rev., Volume 70, Issue 4, p. 856 (2020).

Judge Barrett's opinion in *Casillas v. Madison Ave. Assocs., Inc.*, 926 F.3d 329 (7th Cir. 2019), demonstrates the point. There, Madison Avenue Associates (MAS) sent a letter to the plaintiff demanding payment on a debt that the plaintiff allegedly owed. The Fair Debt Collection Practices Act (FDCPA) required MAS to inform the plaintiff about the process for seeking verification of the alleged debt. MAS was also required to inform the plaintiff that any request for such verification would need to be made in writing. MAS complied with the first requirement but failed to comply with the second. As a result, the plaintiff filed a class action lawsuit against MAS.

Writing for a unanimous panel, Judge Barrett began by stating that the mere "fact that Congress has authorized a plaintiff to sue a debt collector who 'fails to comply with any requirement [of the FDCPA]' does not mean that [a particular plaintiff] has standing" to bring a specific action because Article III's standing requirements must still be satisfied. 926 F.3d at 333. As a result, Judge Barrett concluded that the plaintiff lacked standing to bring her lawsuit because she "did not allege that [MAS'] actions harmed or posed any real risk of harm to her interests under the [FDCPA]." *Id.* at 334. Judge Barrett also concluded that the plaintiff had not suffered any alleged "informational injury" because the cases recognizing such an injury for standing purposes involve "sunshine laws" that "protect the public's interest in evaluating matters of concern to the political community," which is quite distinct from the interests protected under the FDCPA. *Id.* at 337-38. In dissent from the denial of *en banc* review, Seventh Circuit Judge Wood wrote that Judge Barrett's decision wrongly categorized MAS' omission as a "'bare procedural injury'" because the panel's opinion would "make it much more difficult for consumer to enforce the protections against abusive debt collection practices that Congress conferred in the [FDCPA]." *Id.* at 339-40. Judge Wood also stated that Judge Barrett's decision was inconsistent with Supreme Court and Seventh Circuit precedent holding that "intangible harms defined by Congress can qualify as injury-in-fact," and that standing can be established by alleging "imminent" harm. *Id.* at 341-42.

3. Knowledge of the Law

While Judge Barrett's three-year tenure on the Seventh Circuit and her roughly 90 opinions fall short of the judicial experience of recent candidates, those opinions span a broad array of legal subjects. Her well-crafted opinions provide no basis for assailing her knowledge of the law. Those opinions show that she neither avoids nor unduly focuses upon particular topics.

Judge Barrett has shown a willingness to undertake the thorough historical analysis that would be required of her as a Supreme Court justice. Her training as a law professor serves her well in this role.

Her dissenting opinion in *Cook County v. Wolf*, 962 F.3d 208 (7th Cir. 2020) serves as a prime example. There, the Seventh Circuit majority affirmed the district court's preliminary injunction in an Administrative Procedure Act (APA) action against Department of Homeland Security (DHS), challenging its new public-charge rule requiring consideration of minimal or temporary non-cash public benefits in determining whether an alien was a public charge and thus inadmissible under Immigration and Nationality Act (INA).

In a 20-page dissent, Judge Barrett concluded that the district court and majority incorrectly interpreted the term "public charge" to mean those primarily and permanently dependent on government assistance. Judge Barrett assembled her argument by working forward from nineteenth century definitions of "public charge," including roots dating back to New York's 1847 Commissioners of Emigration. *Id.* at 239. Her analysis rested on primary sources including nineteenth century Treasury Department correspondence. She concluded that the majority's interpretation of public charge was inconsistent with the Welfare Reform Act, Pub. L. No. 104-193 (1996), and the Illegal Immigration Reform and Immigrant Responsibility Act, Pub. L. No. 104-208 (1996). According to Judge Barrett, those statutes reflect "Congress's … reluctance to admit immigrants whose need for help is predictable upon arrival." *Id.* at 248. Right or wrong, Judge Barrett's scholarship in *Cook* is formidable.

The depth of historical analysis in Judge Barrett's dissent in *Kanter v. Barr*, 919 F.3d 437, 452 (7th Cir. 2019), is similarly impressive. There, Judge Barrett reviewed the history of firearms dispossession laws and confronted defendants' arguments that the Second Amendment allowed such dispossession laws because there was some evidence that founding era legislatures deprived those convicted of felonies of the right to bear arms, that because states put those convicted of certain felonies to death at the time of the founding, no one would have questioned their authority to take guns from those convicted of felonies, too, and that founding-era legislatures permitted only virtuous citizens to have guns. Judge Barrett developed her counter arguments using an impressive array of primary 18th and 19th century materials and modern law review articles gathering that research. Again, regardless of whether Judge Barrett was ultimately correct in her conclusions, her ability to marshal those materials in support of those arguments was impressive.

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In sum, we have identified no concerns about Judge Barrett's intellectual strength, or comprehensiveness and persuasiveness in opinion writing. Those opinions do, however, reflect an abiding conservative approach and an originalist philosophy. Judge Barrett's Seventh Circuit opinions shed little light on the respect she would show for stare decisis as a Supreme Court Justice, when she would no longer be sitting on an intermediate appellate court.

c. Review of Judge Barrett's Law Review and Journal Articles and Speeches

Judge Barrett has written prolifically and shared her opinions and perspectives outside the courtroom, including law review articles and speeches. Several topics extremely relevant to the role of the Supreme Court permeate her scholarship: originalism, stare decisis, and super precedent.

Judge Barrett has written extensively about originalism and super precedent. Judge Barrett has described herself as an originalist, which she defined in her hearing testimony last week: "In English, that means I interpret the Constitution as a law. The text is text, and I understand it to have the meaning that it had at the time people ratified it. It does not change over time, and it is not up to me to update it or infuse my own views into it." Her testimony was consistent with the definition she contained in her essay, "Originalism and Stare Decisis," published in 2018 in the *Notre Dame Law Review*. 92 Notre Dame L. Rev. 1921.

Concurrent with her belief in originalism as a judicial philosophy, Judge Barrett has stated that "[s]tare decisis is a sensible rule because, among other things, it protects the reliance interests of those who have structured their affairs in accordance with the Court's existing cases." *Id.* at 1921. Addressing the tension between originalism and stare decisis, Judge Barrett has often referred to Justice Scalia, for whom she clerked from 1998 to 1999, who described stare decisis as a "pragmatic exception" to originalist theory. *Id.* at 1928.

In her article "Congressional Originalism," written in 2017 with fellow Notre Dame Law Professor John Copeland Nagle for the University of Pennsylvania's *Journal of Constitutional Law*, the professors discussed the challenge of reconciling originalism with super precedents, which they described as Supreme Court decisions that "no serious person would propose to undo even if they are wrong." Barrett and Nagle identified the cases that "appear most frequently on lists of super precedents" as *Marbury v. Madison, Martin v. Hunter's Lessee, Helvering v. Davis*, the Legal Tender Cases, *Mapp v. Ohio*, *Brown v. Board of Education*, and "the Civil Rights Cases." *Id.* at 14. They pointed out, in a footnote, that the question of whether other prominent decisions, specifically identifying *Roe v. Wade* were super precedent, "remain[ed] disputed." *Id.* at 14, n.43.

Professors Barrett and Nagle offered that judges could avoid being forced to reconcile originalism with super precedent, wrongly decided through the lens of originalism, by effective judicial agenda control. "No Supreme Court Justice will have to face the question whether paper money is constitutional or whether *Brown v. Board of Education* was rightly decided," because "the rules of adjudication keep the question of their validity off the table." *Id.* at 17. Because judges are never asked to revisit super precedents, by Judge Barrett's reckoning, even an originalist will not be called upon to correct them. In Judge Barrett's opinion, super precedent protects a handful of the Supreme Court's most significant rulings, only because the Supreme Court is unlikely to confront them.

These same topics are a consistent theme during her speeches and more informal panel presentations. In a February 25, 2019, speech at Villanova University School of Law, on the topic of "Constitutional Originalism and Continuity," Judge Barrett spoke at length about her

views on originalism as a theory of the Constitution that gives meaning to the text based on how it was understood when the text was ratified. She expressed her belief that rooting interpretation in the text "fixes the law" – giving it a set meaning, giving people notice of their rights, and giving them the means to hold officials accountable. The Constitution should tie the hands of officials to protect the rights of the minority when the text so provides. While all officials have the obligation to interpret and uphold the Constitution, Judge Barrett asserted, judicial review provided a safeguard.

d. Review of Judge Barrett's Senate Confirmation Proceedings

Judge Barrett testified before the Judiciary Committee of the United States Senate (the "Committee") on two occasions: on September 6, 2017, before being appointed to the Seventh Circuit, and on October 12-15, 2020, in connection with her Supreme Court nomination. Professor Amy Barrett was confirmed as a Court of Appeals judge for the Seventh Circuit by a 55-43 vote in the Senate on October 31, 2017. At the time this report was written, Judge Barrett's nomination remained before the Senate Judiciary Committee.

1. Nomination to the Seventh Circuit

In response to Chairman Grassley's inquiry about the role of faith, referencing her law review article addressing the issue of recusal of Catholic trial judges in capital cases, then Professor Barrett stated that it was never appropriate to put personal views or faith above the law. The Chairman also asked the nominee about her views about precedent and stare decisis. She responded that as a Circuit Court judge, she would be bound to follow Supreme Court precedent and the precedent of the Seventh Circuit. When the Chairman asked whether she would follow Supreme Court precedent on abortion, the nominee responded that she "absolutely" would.

Senator Feinstein asked the nominee why she had not included *Roe v. Wade* in her list of super precedents in her scholarly writings. The nominee responded that because *Roe* continued to be challenged in the courts, despite its being reaffirmed in the last 40 years, it did not fit the definition of super precedent. The nominee also explained that *Roe* had survived all challenges to it and she had no interest in challenging *Roe* as a precedent. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), recognized that *Roe* was a decision on which women relied for making reproductive choices and she accepted that. Senator Feinstein asked the nominee to address how she would respond if a Supreme Court precedent conflicted with the Constitution's original meaning. The nominee stated that she would follow the Supreme Court precedent. Senator Feinstein concluded, with a now-famous statement to the nominee: "religion has its own dogma, Professor Barrett, when you read your speeches, dogma lives loudly within you and that is of concern."

Senator Blumenthal also asked the nominee about *Roe* and *Casey*. The nominee responded that she embraced Supreme Court precedent and would do so as a Court of Appeals judge. Blumenthal asked the nominee whether there was a right to privacy under the Constitution. The nominee responded that the Supreme Court had held that there was.

Senator John Kennedy asked the nominee whether there were unenumerated rights under the Constitution. The nominee responded that the Supreme Court has said that there are. She

declined to express a personal view as to whether the Constitution in fact has unenumerated rights. Senator Kennedy asked the nominee whether there was a right to privacy and asked her about *Griswold*. Senator Kennedy asked her to explain what she thought about it but not whether she would follow it, because he knew that she would. The nominee responded that her views on *Griswold* were immaterial and that she would put aside any personal views that she held with regard to the issues implicated in *Griswold*.

Senator Durbin posed several questions about *Obergefell v Hodges*, 576 U.S. 2584 (2015), in which the Supreme Court had held that the right to marry was a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty. Senator Durbin asked the nominee about Justice Scalia's dissent, in which he said the Court's ruling was the furthest extension of the Court's power to create liberties that the Constitution neglected to mention, and her own personal views. The nominee responded that her religious beliefs did not affect her ability to adhere to and apply *Obergefell.* She stated that sometimes judges were required to apply laws with which they disagreed.

2. Nomination to the Supreme Court

Judge Barrett was asked to address questions on several recurring topics:

i. *The Affordable Care Act*. Chairman Graham asked Judge Barrett to explain the doctrine of severability, which is at issue in the case of *Texas v. California*, an appeal from a Circuit decision which is scheduled for argument in the Court on November 10. After explaining the doctrine, Judge Barrett noted that the presumption was always in favor of severability. In response to questioning from Senator Klobuchar, Judge Barrett stated that she had "no animus or agenda for the Affordable Care Act."

ii. *The dissent in Kanter v. Barr*. Judge Barrett was repeatedly questioned about her views on the Second Amendment arising from her 37-page dissent in *Kanter v. Barr*. She was also repeatedly questioned about the difference between the Second Amendment, which she called an individual right, and the right to vote, which she called a community right. In a particularly effective line of questioning by Senator Durbin, he argued that it was hard to understand why it was not acceptable for a person convicted of a felony to lose the right to vote or sit on a jury but was unacceptable for such a person to lose the right to possess a firearm. Judge Barrett accused the Senator of distorting her position.

iii. *Roe v. Wade*. Judge Barrett evaded questions about *Roe*. She responded to questioning from Chairman Graham that, while she was a conservative and personally opposed to abortion, she would not automatically reject Supreme Court precedents, even where she believed the original decision might not have been correctly decided. Judge Barrett refused to comment on *Griswold v. Connecticut*, 381 U.S. 479 (1965), where the Court

concluded that a right to privacy existed and decriminalized birth control, but said she could not imagine it being overturned. Judge Barrett would not answer, arguing that giving her opinion would be inappropriate because abortion cases build on it.

iv. *Stare Decisis*. In response to questioning from Senator Feinstein about the 2013 law review article in which Judge Barrett stated that it would be more legitimate for a Supreme Court justice to enforce the Constitution rather than a precedent she thinks is clearly in conflict with it, Judge Barrett responded that she wanted to clear up the "misunderstanding" about her view on stare decisis. She stated that that single sentence has been misconstrued because the focus of the balance of the article was in defense of Supreme Court doctrine that "accords constitutional precedent weaker stare decisis effect than, say, statutory precedent."

v. *Textualism.* Judge Barrett described her judicial philosophy to Senator Graham: "In English that means that I interpret the Constitution as a law, and 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." She continued, "similarly to what I just said about originalism. For textualism," she said, "the judge approaches the text as it was written, with the meaning it had at the time and doesn't infuse her own meaning into it."

vi. *The power of the President.* Judge Barrett avoided answering any questions relating to President Trump. She would not state whether voter intimidation is a crime, or whether a president can unilaterally delay an election, or whether the president could pardon himself. When asked by Senator Durbin whether President Trump's statement that he had the "right to do whatever" he wanted as president was "legally accurate," Judge Barrett responded that, because the scope of presidential power was a "frequent subject of litigation," it would be inappropriate to "opine" on the matter other than to quote Article II, which provided that "[t]he executive Power shall be vested" in the President.

vii. *Other refusals to answer*. Judge Barrett refused to answer a number of other questions, including whether she believed voting discrimination still existed, and whether climate change was happening, to which Judge Barrett responded that she would "not express a view on a matter of public policy, especially one that is politically controversial."

e. Telephone Interviews with Litigants who Appeared before Judge Barrett in the Seventh Circuit

In past Supreme Court nominee reviews, the City Bar members succeeded in interviewing no less than 20 individuals, including judges and practitioners who have appeared before the nominee.

During this review, the City Bar made the same efforts to interview judges and practitioners. Due to the exceptionally short time frame, the effects of the Coronavirus pandemic, which has many judges and lawyers working from home, and the highly politicized nature of the nomination process, our subcommittee met with little success. It does not appear that that failure is a reflection of the nominee's qualifications.

Those who did respond had only praise for the nominee. She was universally described by the respondents to our interview requests, as well as other reports in the media, as very professional, active, and well-informed during oral arguments. One of the few respondents went so far as to describe her as a judge from "central casting," which was meant as a high compliment. Another described her as "off-the-chart" in terms of her knowledge and ability.

f. Member Comments

The City Bar solicited comments from its membership and working committees, receiving approximately 88 responses. The comments were divided more than two to one against the nomination. Twenty-three members commented that Judge Barrett was qualified to serve as a Supreme Court Justice, 57 members and the Immigration and Nationality Law Committee commented that Justice Barrett should not be confirmed, and seven members expressed concern about the process, but were neutral as to the qualifications of the nominee.