



August 29, 2017

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OPPOSE THE CONFIRMATION OF AMY C. BARRETT TO THE U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Dear Senator:

On behalf of The Leadership Conference on Civil and Human Rights, a coalition of more than 200 national organizations committed to promoting and protecting the civil and human rights of all persons in the United States, I am writing in opposition to the confirmation of Amy C. Barrett to the U.S. Court of Appeals for the Seventh Circuit. The Leadership Conference urges the Senate to reject this nomination.

Professor Barrett's statements and writings reveal a strong bias against reproductive freedom and LGBT rights. Her record demonstrates a dangerous lack of deference to long-standing precedent and judicial restraint.

Women's Health: Professor Barrett has criticized *Roe v. Wade* and expressed the view that abortion is "always immoral."¹ In a 2013 speech entitled "*Roe* at 40: The Supreme Court, Abortion and the Culture Wars that Followed,"² she used extreme rhetoric to describe the *Roe* decision, stating: "The framework of *Roe* essentially permitted abortion on demand, and *Roe* recognizes no state interest in the life of a fetus."³ In this speech, she also declared that "Republicans are heavily invested in getting judges who will overturn *Roe*."⁴ Professor Barrett has been a member of the "University Faculty for Life," which is open to any faculty, administration, or staff member at the University of Notre Dame who "respects the sacred value of human life from its inception to natural death" and is "committed to the legal and societal recognition of the value of all human life."⁵

Professor Barrett wrote a law review article called "Catholic Judges in Capital Cases" in which she made the provocative argument that observant Catholic judges must recuse in death penalty cases because their religious faith, which counsels against taking a life, was more important than following the law when the two conflict. She and her co-author wrote: "[W]e believe that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty. This means that they can neither themselves sentence criminals to death nor enforce jury recommendations of death."⁶

¹ Amy V. Coney & John H. Garvey, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 316 (1998).

² [https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ\(PUBLIC\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Barrett%20SJQ(PUBLIC).pdf).

³ <http://ndsmcobserver.com/2013/01/law-professor-reflects-on-landmark-case/>.

⁴ Id.

⁵ <http://ufl.nd.edu/about-ufl/constitution/>.

⁶ 81 MARQ. L. REV. at 305.

Although the article focused on the death penalty, it briefly discussed abortion and suggested the case for recusal was even stronger in that context. She and her co-author wrote: “The abortion case is a bit easier, we think. Both the state and the unborn child’s mother are (at least typically) acting with gross unfairness to the unborn child, whereas the moral objection to capital punishment is not that it is unfair to the offender.”⁷ They also wrote: “The prohibitions against abortion and euthanasia (properly defined) are absolute; those against war and capital punishment are not.”⁸

In light of Professor Barrett’s personal commitment to church teachings – she signed a letter in 2015 that stated: “[W]e the undersigned Catholic women . . . wish to express our love for Pope Francis, our fidelity to and gratitude for the doctrines of the Catholic Church, and our confidence in the Synod of Bishops as it strives to strengthen the Church’s evangelizing mission”⁹ – she must follow her own directive to recuse in any case involving the death penalty or abortion because, using her own standard, she is “morally precluded” from deciding such cases. Senators must obtain such a commitment from Professor Barrett at her hearing.

Professor Barrett must also commit to recusing in cases involving contraception. In 2012, she signed a letter entitled “Unacceptable” that protested the Obama administration’s good faith effort to create a compromise in carrying out the contraception mandate under the Affordable Care Act. Professor Barrett’s letter stated: “This is a grave violation of religious freedom and cannot stand. It is an insult to the intelligence of Catholics, Protestants, Eastern Orthodox Christians, Jews, Muslims, and other people of faith and conscience to imagine that they will accept an assault on their religious liberty if only it is covered up by a cheap accounting trick.”¹⁰ This strident letter is a skewed and misleading representation of a careful compromise that would have ensured women’s access to contraception as well as accommodated religious liberty interests by requiring insurance companies, rather than religious employers, to provide the contraceptive coverage. As a signatory to this letter, Professor Barrett demonstrated a strong bias against women making their own healthcare decisions.

LGBT Rights: Professor Barrett has also expressed deeply held opposition to marriage equality, signing on to an October 2015 letter that stated: “We give witness that the Church’s teachings – on the dignity of the human person and the value of human life from conception to natural death; on the meaning of human sexuality, the significance of sexual difference and the complementarity of men and women; on openness to life and the gift of motherhood; and on marriage and family founded on the indissoluble commitment of a man and a woman – provide a sure guide to the Christian life.”¹¹ This language, embraced by Professor Barrett, is in direct conflict with the Supreme Court’s June 2015 decision, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which established a constitutional right to marriage equality in America. Professor Barrett’s bias on LGBT issues would require her to recuse in all cases involving LGBT equality and must be explored at her hearing.

⁷ Id. at 343.

⁸ Id. at 307.

⁹ <https://eppc.org/synodletter/>.

¹⁰ <http://www.becketlaw.org/media/unacceptable/>.

¹¹ <https://eppc.org/synodletter/>.

Judicial Philosophy: Professor Barrett, a Federalist Society member, is an ideological devotee of Justice Scalia, for whom she served as a law clerk. In a recent article, she sided with Justice Scalia over Chief Justice Roberts on the question of whether the Affordable Care Act passed constitutional muster.¹² She wrote: “Chief Justice Roberts pushed the Affordable Care Act beyond its plausible meaning to save the statute. He construed the penalty imposed on those without health insurance as a tax, which permitted him to sustain the statute as a valid exercise of the taxing power; had he treated the payment as the statute did – as a penalty – he would have to invalidate the statute as lying beyond Congress’s commerce power.”¹³ Her narrow vision of the Commerce Clause and congressional authority is shared by Justice Scalia and the extreme right.

Even more troubling is her criticism of judicial restraint. In the context of her criticism of the *NFIB v. Sebelius* decision, which upheld the Affordable Care Act, Professor Barrett wrote: “[Randy] Barnett [a conservative constitutional law scholar] vehemently objects to the idea that a commitment to judicial restraint – understood as deference to democratic majorities – can justify a judicial refusal to interpret the law as written. Barnett is surely right that deference to a democratic majority should not supersede a judge’s duty to apply clear text.”¹⁴ She also wrote: “The Constitution’s meaning is fixed until lawfully changed; thus, the court must stick with the original public meaning of the text even if it rules out the preference of a current majority. It is also true, however, if the relevant text is a statute.”¹⁵ Taking a final swipe at Chief Justice Roberts, she wrote: “Justice Scalia, criticizing the majority’s construction of the Affordable Care Act in *NFIB v. Sebelius* and *King v. Burwell*, protested that the statute known as Obamacare should be renamed ‘SCOTUScare’ in honor of the Court’s willingness to ‘rewrite’ the statute in order to keep it afloat. For Justice Scalia and those who share his commitment to uphold text, 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.”¹⁶

Professor Barrett’s activist ideology can also be seen in her disregard for the importance of established precedent and stare decisis, the bedrock principle of the rule of law. In a 2013 law review article, she wrote: “Does the Court act lawlessly – or at least questionably – when it overrules precedent? I tend to agree with those who say that a justice’s duty is to the Constitution and that it is thus more legitimate for her to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”¹⁷ Professor Barrett likely has in mind *Roe v. Wade*, which she stated could not be considered “on the superprecedent list because the public controversy about *Roe* has never abated.”¹⁸ Her disrespect for judicial precedent is a dog whistle to the far right and reflects the judicial philosophy of the most extreme Supreme Court justices. As Professor Barrett noted, “statistics show that each of the two

¹² Amy Coney Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMM. 61 (2017).

¹³ *Id.* at 80.

¹⁴ *Id.*

¹⁵ *Id.* at 82.

¹⁶ *Id.* at 84.

¹⁷ Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711 (2013).

¹⁸ *Id.* at 1735 n.141.

self-identified originalists, Justices Thomas and Scalia, urged and joined in overruling precedents more than any other justice during the last eleven years of the Rehnquist Court.”¹⁹

Professor Barrett’s rejection of the stare decisis principle applies not only to the Supreme Court but appellate courts as well, and even more so. She has written: “By virtue of both their internal structure and position in the judicial hierarchy, the courts of appeals should be more open than the Supreme Court to departing from precedent.”²⁰ Although her theory is limited to statutory precedent (courts’ interpretation of federal statutes), it represents another troubling example of her lack of deference to the rule of law and congressional will. It strongly suggests she would be an activist judge willing to reverse precedential decisions with which she simply disagreed.

History: Finally, this nomination represents another disturbing example of President Trump taking advantage of Republican obstruction. The Seventh Circuit vacancy to which Professor Barrett was nominated became vacant on February 18, 2015, two and a half years ago. President Obama nominated a well-respected former Indiana supreme court justice, Myra Selby, to this vacancy on January 12, 2016, but Senator Coats blocked the nomination by refusing to return his blue slip, thereby denying Justice Selby a hearing and vote. She would have been the first African American and the first woman from Indiana to serve on the Seventh Circuit.

For the foregoing reasons, The Leadership Conference urges you to reject the nomination of Amy Barrett to the U.S. Court of Appeals for the Seventh Circuit. Thank you for your consideration of our views. If you have any questions or would like to discuss this matter further, please contact Mike Zubrensky, Chief Counsel and Legal Director, at (202) 466-3311.

Sincerely,



Vanita Gupta
President & CEO

¹⁹ Id. at 1724.

²⁰ Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 350 (2005).