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Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court

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SUMMARY

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Judge Amy Coney Barrett: Her Jurisprudence and Potential Impact on the Supreme Court

On September 26, 2020, President Donald J. Trump announced the nomination of Judge Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit to the Supreme Court of the United States to fill the vacancy left by the death of Justice Ruth Bader Ginsburg on September 18, 2020. Judge Barrett has been a judge on the Seventh Circuit since November 2017, having been nominated by President Trump and confirmed by the Senate earlier that year. The nominee earned her law degree from Notre Dame Law School in 1997, and clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit and Supreme Court Justice Antonin Scalia. From 2002 until her appointment to the Seventh Circuit in 2017, Judge Barrett was a law professor at Notre Dame Law School, and she remains part of the law school faculty. Her scholarship has focused on topics such as theories of constitutional interpretation, stare decisis, and statutory interpretation. If confirmed, Judge Barrett would be the fifth woman to serve as a Supreme Court Justice.

During Judge Barrett's September 26 Supreme Court nomination ceremony, she paid tribute to both Justice Ginsburg and her former mentor, Justice Scalia. "Should I be confirmed," Judge Barrett said, "I will be mindful of who came before me," stating that Justice Ginsburg's trailblazing career in the law "has won the admiration of women around the country, and indeed all over the world." In describing the "incalculable influence" that Justice Scalia, in particular, had on her life, Judge Barrett remarked: "His judicial philosophy is mine too: A judge must apply the law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold." In her academic writings, the nominee has frequently explored aspects of that judicial philosophy, including the use of an originalist approach to constitutional interpretation tempered by pragmatic considerations and a textualist approach to statutory interpretation.

Notwithstanding the difficulty of predicting how a nominee may vote in a particular case, a judge's prior judicial decisions, writings, and statements may provide insight into her approach to resolving legal questions. Such assessments, however, may prove particularly challenging with Judge Barrett: because she became a judge in 2017, she has written fewer judicial opinions compared to recent nominees who served on the bench for more time. And although her scholarly publications expound theories of constitutional and statutory interpretation, her engagement with these topics from an academic standpoint may not necessarily predict whether she would adopt any particular methodology as a Supreme Court Justice.

This report provides an overview of Judge Barrett's jurisprudence and scholarship and discusses how the Supreme Court might be affected by her confirmation. It first explores the nominee's views on three cross-cutting issues—the role of the judiciary, constitutional construction, and statutory interpretation. The report then addresses the nominee's jurisprudence in six areas of law where the Supreme Court has been closely divided or where the nominee has issued significant opinions, particularly in cases where she disagreed with other jurists. These areas of the law were identified primarily by reviewing Judge Barrett's written judicial opinions and academic scholarship. The report concludes with a number of tables that catalog and briefly describe each of the roughly 90 majority, concurring, and dissenting opinions authored by Judge Barrett during her 35-month tenure on the federal bench.

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Introduction

On September 26, 2020, President Donald J. Trump announced the nomination of Judge Amy Coney Barrett of the U.S. Court of Appeals for the Seventh Circuit (Seventh Circuit) to fill the vacancy on the Supreme Court of the United States left by the death of Justice Ruth Bader Ginsburg on September 18, 2020.[1] Judge Barrett has been a judge on the Seventh Circuit since November 2017, having been nominated by President Trump and confirmed by the Senate earlier that year.[2] Judge Barrett earned her law degree from Notre Dame Law School in 1997.[3] After graduating from law school, Judge Barrett clerked for Judge Laurence H. Silberman of the U.S. Court of Appeals for the D.C. Circuit[4] (D.C. Circuit) and Supreme Court Justice Antonin Scalia.[5] After her clerkships, she worked in private practice for about two years before entering academia,[6] initially teaching at the George Washington University Law School.[7] From 2002 to 2017, Judge Barrett was a law professor at Notre Dame Law School, and she remains on the school's faculty.[8] If confirmed, Judge Barrett would be the fifth woman to serve as a Supreme Court Justice.[9] If neither confirmed nor rejected, Judge Barrett's nomination would likely remain effective until the current term of Congress ends (or if the Senate recesses for more than 30 days).[10]

In her remarks during the September 26 Supreme Court nomination ceremony, Judge Barrett paid tribute to both Justice Ginsburg and her former mentor, Justice Scalia.[11] "Should I be confirmed," Judge Barrett said, "I will be mindful of who came before me," stating that Justice Ginsburg's

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[1] Press Release, President Donald J. Trump Announces Intent to Nominate Judge Amy Coney Barrett to the Supreme Court of the United States (Sept. 26, 2020), https://www.whitehouse.gov/presidential-actions/president-donald-j-trump-announces-intent-nominate-judge-amy-coney-barrett-supreme-court-united-states. Judge Barrett's nomination was formally received by the Senate three days later. *See* PN2252, Amy Coney Barrett—Supreme Court of the United States, 116th Cong. (received Sept. 29, 2020), https://www.congress.gov/nomination/116th-congress/2252.

[2] *Barrett, Amy Coney*, FED. JUD. CTR., https://www.fjc.gov/history/judges/barrett-amy-coney (last visited Sept. 30, 2020) [hereinafter *Judge Barrett Biography*].

[3] *Id.*

[4] *Id.*; *see Laurence H. Silberman*, U.S. CT. OF APPEALS D.C. CIR., https://www.cadc.uscourts.gov/internet/home.nsf/Content/VL+-+Judges+-+LHS (last visited on Sept. 29, 2020).

[5] *Judge Barrett Biography*, *supra* note 2; *see also* CRS Report R44419, *Justice Antonin Scalia: His Jurisprudence and His Impact on the Court*.

[6] *Judge Barrett Biography*, *supra* note 2.

[7] *Id.*

[8] *Hon. Amy Coney Barrett*, UNIV. OF NOTRE DAME L. SCH., https://law.nd.edu/directory/amy-barrett (last visited Oct. 5, 2020). To distinguish the nominee's time on the Seventh Circuit from her prior academic career, this report often refers to the nominee as "Judge Barrett" when discussing the nominee's views after she was appointed to the bench, and "then-Professor Barrett" when discussing her writings and speeches before she became a judge.

[9] *See Levels of Office: U.S. Supreme Court*, CTR. FOR AM. WOMEN & POL., https://cawp.rutgers.edu/facts/levels_of_office/us_supreme_court (last visited Sept. 30, 2020).

[10] SENATE R. XXXI, ¶ 6. ("Nominations neither confirmed nor rejected during the session at which they are made shall not be acted upon at any succeeding session without being again made to the Senate by the President; and if the Senate shall adjourn or take a recess for more than thirty days, all nominations pending and not finally acted upon at the time of taking such adjournment or recess shall be returned by the Secretary to the President, and shall not again be considered unless they shall again be made to the Senate by the President."); *see also* CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*, by Elizabeth Rybicki, at 14.

[11] Judge Amy Coney Barrett, Remarks by President Trump Announcing His Nominee for Associate Justice of the Supreme Court of the United States (Sept. 26, 2020), https://www.whitehouse.gov/briefings-statements/remarks-president-trump-announcing-nominee-associate-justice-supreme-court-united-states/ [hereinafter *Remarks*].

trailblazing career "has won the admiration of women around the country, and indeed all over the world."[12] In describing the "incalculable influence" that Justice Scalia, in particular, had on her life, the nominee remarked: "His judicial philosophy is mine too: A judge must apply the law as written. Judges are not policymakers, and they must be resolute in setting aside any policy views they might hold."[13]

Judge Barrett's identification with the judicial philosophy of Justice Scalia might suggest some contrast with the approach taken by Justice Ginsburg. For example, in one 2015 appearance made jointly with Justice Scalia, Justice Ginsburg suggested that she ascribes to the idea of a "living" Constitution, in which the meaning of a provision may evolve over time,[14] in contrast to Justice Scalia's conception of an "enduring" Constitution that is more firmly rooted in a provision's meaning at the time of ratification.[15] As Justice Ginsburg and Justice Scalia were frequently (though not uniformly) on opposing sides of closely divided cases,[16] Judge Barrett's identification with Justice Scalia's judicial philosophy may provide some insight into how the nominee may affect the Court's approach to certain matters. As discussed later in this report, however, any such predictive assessments must be made with caution.[17]

This report provides an overview of Judge Barrett's legal philosophy, as revealed by her time on the federal bench and her academic scholarship,[18] and discusses how her confirmation might affect the Supreme Court. In attempting to ascertain how Judge Barrett might influence the High Court, however, it is important to note that it is difficult to predict accurately an individual's likely contributions to the Court based on her prior experience. The first section of this report, titled *Predicting a Nominee's Future Court Decisions*, provides a broader context and framework for evaluating how determinative a nominee's prior record may be in predicting her future votes

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[12] *Id.*

[13] *Id.*

[14] Nina Totenberg, *Justices Ginsburg and Scalia: A Perfect Match Except for Their Views on the Law*, NPR (Feb. 13, 2015, 4:21 PM), https://www.npr.org/sections/thetwo-way/2015/02/13/386085342/justice-ginsberg-admits-to-being-tipsy-during-state-of-the-union-nap.

[15] Julyssa Lopez, *Justices Ginsburg and Scalia: An Unlikely Bond*, GW TODAY (Feb 13, 2015), https://gwtoday.gwu.edu/justices-ginsburg-and-scalia-unlikely-bond-0.

[16] In the Roberts Court era, for example, Justices Scalia and Ginsburg were commonly on opposing sides in 5-4 Court opinions on both constitutional and statutory matters. *See generally* CRS Report R45256, *Justice Anthony Kennedy: His Jurisprudence and the Future of the Court*, by Andrew Nolan, Kevin M. Lewis, and Valerie C. Brannon, app. [hereinafter *CRS Kennedy Report*] (identifying cases during the Roberts Court era where Justice Anthony Kennedy was a deciding vote in closely divided Supreme Court cases and the majority and dissenting Justices in each of these cases); CRS Report R46546, *Justice Ruth Bader Ginsburg as a Deciding Vote on the Supreme Court: Select Data*, by Michael John Garcia and Kate R. Bowers [hereinafter *CRS Ginsburg Report*] (listing cases in which Justice Ginsburg was a deciding vote on the Court from the October 2005 Term until her passing, along with the composition of Justices comprising the majority and dissent).

[17] *See* discussion *infra* in *Predicting a Nominee's Future Court Decisions*.

[18] *See* CRS Legal Sidebar LSB10539, *Judge Amy Coney Barrett: Selected Primary Material*, by Julia Taylor [hereinafter *CRS Barrett Sidebar*]. While this report discusses many of Judge Barrett's nonjudicial writings, it does not address anything written by the nominee in a representative capacity for another party, such as work prepared for a client while she was in private practice, because those materials may provide limited insight into the advocate's personal views on the law. *See Confirmation Hearing on Federal Appointments: Hearing Before the S. Comm. on the Judiciary Part 1*, 108th Cong. 419 (2003) (statement of John G. Roberts Jr.) ("I do not believe that it is proper to infer a lawyer's personal views from the positions that lawyer may advocate on behalf of a client in litigation."); *but see* William G. Ross, *The Questioning of Lower Federal Court Nominees During the Senate Confirmation Process*, 10 WM. & MARY BILL RTS. J. 119, 161 (2001) (suggesting that, "[a]lthough it is unlikely that judges would permit positions that they advocated as attorneys to directly bias their judicial decisions," and "most lawyers advocate positions about which they hold indifferent or conflicting opinions," it "often may" be possible to "discern a nominee's political predilections from the types of clients and cases that a nominee has had as an attorney").

on the Supreme Court.[19] The next sections of the report explore Judge Barrett's views on three cross-cutting issues—the role of the judiciary,[20] constitutional construction,[21] and statutory interpretation.[22] The report then addresses the nominee's jurisprudence in six areas of law, arranged in alphabetical order from abortion[23] to the Second Amendment.[24] These selected issues are areas where either the Supreme Court has been closely divided (particularly on a matter where Justice Ginsburg provided a fifth or deciding vote[25]), or where the nominee has disagreed with a colleague on a Seventh Circuit panel or with a position taken by a different circuit court. Accordingly, when discussing Judge Barrett's cases and votes, the report highlights cases in which the sitting three-judge panel or en banc court was divided and the nominee authored a separate opinion (i.e., dissent or concurrence).[26] The report concludes with a number of tables that catalog and briefly describe judicial opinions authored by Judge Barrett during her 35-month tenure on the federal bench.[27]

Other CRS products discuss various issues related to the Supreme Court vacancy. For an overview of Justice Ginsburg's legacy, a compilation of cases in which she provided a fifth or otherwise deciding vote, and a study of procedural issues related to the High Court proceeding with eight Justices, see CRS Legal Sidebar LSB10537, *The Death of Justice Ruth Bader Ginsburg: Initial Considerations for Congress*;[28] CRS Report R46546, *Justice Ruth Bader Ginsburg as a Deciding Vote on the Supreme Court: Select Data*;[29] and CRS Report R46550, *The Death of Justice Ruth Bader Ginsburg: Procedural Issues on an Eight-Justice Court*.[30] For a shorter overview of Judge Barrett's jurisprudence, see CRS Legal Sidebar LSB10540, *President Trump Nominates Judge Amy Coney Barrett: Initial Observations*.[31] For a list of primary resources on Judge Barrett's biography, judicial and nonjudicial writings, prior nomination

[19] *See* discussion *infra* in *Predicting a Nominee's Future Court Decisions*.

[20] *See* discussion *infra* in *The Role of the Judiciary*.

[21] *See* discussion *infra* in *Modes of Constitutional Interpretation*.

[22] *See* discussion *infra* in *Approach to Statutory Interpretation*.

[23] *See* discussion *infra* in *Abortion*.

[24] *See* discussion *infra* in *Second Amendment*.

[25] These areas are identified in *CRS Ginsburg Report*, *supra* note 16.

[26] *See* Aaron L. Nielson, *D.C. Circuit Review—Reviewed: Brooding Spirits*, YALE J. ON REG.: NOTICE & COMMENT (Jan. 30, 2016), http://yalejreg.com/nc/d-c-circuit-review-reviewed-brooding-spirits-by-aaron-nielson ("[I]f you really want to understand an appellate judge, look to his or her separate writings. Of course, most separate opinions don't say much about the judge's philosophy or personality; sometimes a judge thinks the panel just got it wrong. Even so, despite the fact that not all separate writings are windows to the soul, it is still true that reading opinions that judges don't have to write can be telling."); *see also* Jonathan H. Adler, *What Happened When Merrick Garland Wrote for Himself*, VOLOKH CONSPIRACY (Mar. 21, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/03/21/what-happened-when-merrick-garland-wrote-for-himself ("The best way to get a handle on a circuit judge's judicial philosophy is to look at the judge's concurrences and dissents.").

[27] *See infra Tables & Data: Judge Barrett's Judicial Opinions*.

[28] CRS Legal Sidebar LSB10537, *The Death of Justice Ruth Bader Ginsburg: Initial Considerations for Congress*, by Valerie C. Brannon, Michael John Garcia, and Caitlain Devereaux Lewis.

[29] *CRS Ginsburg Report*, *supra* note 16.

[30] CRS Report R46550, *The Death of Justice Ruth Bader Ginsburg: Procedural Issues on an Eight-Justice Court*, by Caitlain Devereaux Lewis.

[31] CRS Legal Sidebar LSB10540, *President Trump Nominates Judge Amy Coney Barrett: Initial Observations*, by Victoria L. Killion.

materials, and more, see CRS Legal Sidebar LSB10539, *Judge Amy Coney Barrett: Selected Primary Material*.[32]

In addition, CRS has several products that focus on the Supreme Court nomination and confirmation process. Article II of the U.S. Constitution gives the President the authority to appoint judges to the Supreme Court with the Senate's advice and consent.[33] For a discussion of the President's selection of Supreme Court Justices, see CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*.[34] For a detailed examination of the Senate's role in the confirmation process, see CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*;[35] CRS Report R45300, *Questioning Judicial Nominees: Legal Limitations and Practice*;[36] CRS Report RL31980, *Senate Consideration of Presidential Nominations: Committee and Floor Procedure*; and CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*.[37]

The Supreme Court's October 2020 Term began on October 5 with only eight Justices on the bench.[38] However, if Judge Barrett is confirmed and appointed to the Supreme Court, the Court's past practice indicates she may immediately begin participating in the Court's work.[39]

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[32] *CRS Barrett Sidebar*, *supra* note 18.

[33] U.S. CONST. art. II, § 2, cl. 2.

[34] CRS Report R44235, *Supreme Court Appointment Process: President's Selection of a Nominee*, by Barry J. McMillion; *id.* at 8 ("Virtually every President is presumed to take into account a wide range of political considerations when faced with the responsibility of filling a Supreme Court vacancy. For instance, most Presidents, it is assumed, will be inclined to select a nominee whose political or ideological views appear compatible with their own.").

[35] CRS Report R44236, *Supreme Court Appointment Process: Consideration by the Senate Judiciary Committee*, by Barry J. McMillion; *id.* at 2 ("While the U.S. Constitution assigns explicit roles in the Supreme Court appointment process only to the President and the Senate, the Senate Judiciary Committee, throughout much of the nation's history, has also played an important, intermediary role . . . . Since the late 1960s, the Judiciary Committee's consideration of a Supreme Court nominee almost always has consisted of three distinct stages—(1) a pre-hearing investigative stage, followed by (2) public hearings, and concluding with (3) a committee decision on what recommendation to make to the full Senate.").

[36] CRS Report R45300, *Questioning Judicial Nominees: Legal Limitations and Practice*, by Kevin M. Lewis and Valerie C. Brannon [hereinafter *CRS Judicial Nominees Report*].

[37] Rybicki, *supra* note 10; CRS Report R44234, *Supreme Court Appointment Process: Senate Debate and Confirmation Vote*, by Barry J. McMillion.

[38] Amy Howe, *Court Releases October Calendar*, SCOTUSBLOG (July 13, 2020, 4:22 PM), https://www.scotusblog.com/2020/07/court-releases-october-calendar-3. The oral arguments the Court has scheduled for October 2020 were originally scheduled for March or April 2020, but were postponed due to the COVID-19 pandemic. *Id.* The Court will hear oral arguments by telephone conference because of the ongoing COVID-19 pandemic. Press Release, Sup. Ct. of the U.S., Press Release Regarding October Oral Argument Session (Sept. 16, 2020), https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_09-16-20 ("The Court will hear all oral arguments scheduled for the October session by telephone conference, following the same format used for the May teleconference arguments.").

[39] To cite recent examples, the Senate confirmed Justice Gorsuch on April 7, 2017, and he started hearing cases on April 17, 2017, with *Perry v. Merit Systems Protection Board*. *See Roll Call Vote 115th Congress - 1st Session*, U.S. SENATE (Apr. 7, 2017), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm? congress=115 &session=1&vote=00111; Oral Argument, Perry v. Merit Sys. Prot. Bd., 137 S. Ct. 1975 (2017) (No. 16-399), https://www.supremecourt.gov/oral_arguments/audio/2016/16-399. Similarly, the Senate confirmed Justice Kavanaugh on October 6, 2018, several days after the October 2018 Term commenced, and he heard his first case as an Associate Justice, *Stokeling v. United States*, on October 9, 2018. *See Roll Call Vote 115th Congress - 2nd Session*, U.S. SENATE (Oct. 6, 2018), https://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm? congress=115&session=2&vote=00223; Oral Argument, Stokeling v. United States 139 S. Ct. 544 (2018) (No. 17-5554), https://www.supremecourt.gov/oral_arguments/audio/2018/17-5554.

Predicting a Nominee's Future Court Decisions

At least as a historical matter, attempting to predict how Supreme Court nominees might approach their work on the High Court is a task fraught with uncertainty.[40] For example, Justice Felix Frankfurter, who had a reputation as a "progressive" legal scholar prior to his appointment to the Court in 1939,[41] disappointed[42] some early supporters by subsequently becoming a voice for judicial restraint and caution when the Court reviewed laws that restricted civil liberties during World War II[43] and the early Cold War era.[44] Similarly, President Richard Nixon originally considered Justice Harry Blackmun, who served on the U.S. Court of Appeals for the Eighth Circuit for just over a decade prior to his appointment to the Court in 1970,[45] to be a "strict constructionist" in that he viewed the judge's role as interpreting the law, rather than making new law.[46] In the years that followed, however, Justice Blackmun authored the majority opinion in *Roe v. Wade*, which recognized a constitutional right to terminate a pregnancy.[47] And he was generally considered one of the more liberal voices on the Court when he retired in 1994.[48] Justice Anthony Kennedy, appointed by President Ronald Reagan, was often characterized as the Court's "swing

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[40] Christine Kexel Chabot & Benjamin Remy Chabot, *Mavericks, Moderates, or Drifters? Supreme Court Voting Alignments, 1838–2009*, 76 MO. L. REV. 999, 1040 (2011) ("[U]ncertainty is empirically well-founded. It is borne out by Justices' overall voting records since at least 1838. The president's odds of appointing a Justice who sides with appointees of his party have been no better than a coin flip."); *id.* at 1021 (listing Justices William J. Brennan Jr., Tom C. Clark, Felix Frankfurter, Oliver Wendell Holmes Jr., John McLean, James Clark McReynolds, Stanley Forman Reed, David Souter, John Paul Stevens, Earl Warren, and James Moore Wayne as examples of jurists who "disappointed" the expectations of the President who appointed them to the Court); *see also The Judicial Nomination and Confirmation Process: Hearings Before the Subcomm. on Admin. Oversight & the Courts, S. Comm. on the Judiciary*, 107th Cong. 195 (2001) (statement of Douglas W. Kmiec, Dean & St. Thomas More Professor of Law, The Catholic University of America) (similar).

[41] *See* Joseph L. Rauh Jr., *An Unabashed Liberal Looks at a Half-Century of the Supreme Court*, 69 N.C. L. REV. 213, 220 (1990) ("When Frankfurter took his seat on the Supreme Court in January 1939, almost everyone assumed that he would become the dominant spirit and intellectual leader of the new liberal Court. After all, he had been, in the words of Brandeis, 'the most useful lawyer in the United States': defender of Tom Mooney, the alien victims of the Palmer Red Raids, the striking miners of Bisbee, Arizona, Sacco and Vanzetti, and too many others to mention."); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA 13–16, 46–47 (1989) (noting fears in some political circles that Justice Frankfurter was a Communist or Communist sympathizer, "inspir[ing] American conservatives to label Frankfurter a dangerous radical"); *see generally* NOAH FELDMAN, SCORPIONS: THE BATTLES AND TRIUMPHS OF FDR'S GREAT SUPREME COURT JUSTICES 14, 21–27 (2010).

[42] *See, e.g.*, Rauh, *supra* note 41, at 220 ("But . . . a deep belief in judicial restraint in all matters overtook even [Justice Frankfurter's] lifelong dedication to civil liberties.").

[43] *See, e.g.*, Korematsu v. United States, 323 U.S. 214, 225 (1944) (Frankfurter, J., concurring) (contending that the validity of the Japanese-American civilian exclusion order was the "business" of Congress and the Executive, not the Court); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting) (arguing for the constitutionality of a World War II-era law requiring students to salute the flag).

[44] *See, e.g.*, Dennis v. United States, 341 U.S. 494, 556 (1951) (Frankfurter, J., concurring) (upholding the conviction of three defendants under the Smith Act for conspiracy to organize the Communist Party as a group advocating the overthrow of the U.S. government by force).

[45] *See Blackmun, Harry Andrew*, FED. JUD. CTR., https://www.fjc.gov/history/judges/blackmun-harry-andrew (last visited Sept. 30, 2020).

[46] *See* BOB WOODWARD & SCOTT ARMSTRONG, THE BRETHREN: INSIDE THE SUPREME COURT 97 (1979) ("Nixon found Blackmun's moderate conservatism perfect . . . . [Blackmun] had a . . . predictable, solid body of opinions that demonstrated a levelheaded, strict-constructionist philosophy . . . . Blackmun was a decent man, consistent, wedded to routine, unlikely to venture far.").

[47] 410 U.S. 113 (1973).

[48] *See* LINDA GREENHOUSE, BECOMING JUSTICE BLACKMUN 235 (2005) (declaring that, by 1994, "Harry Blackmun was, by wide consensus, the most liberal member of the Supreme Court").

vote" in his later years on the bench,[49] frequently aligning with the more conservative wing of the Court, but sometimes joining the more liberal wing in closely divided cases, including decisions establishing a constitutional right to federal[50] and state[51] recognition of same-sex marriage and barring the use of capital punishment against juvenile offenders.[52]

Even when a Justice with a lengthy judicial career prior to nomination adheres to his stated judicial philosophy, it can sometimes lead to results that may not be in line with the Justice's perceived ideology. For example, another of President Trump's nominees to the High Court, Justice Neil Gorsuch, served on the U.S. Court of Appeals for the Tenth Circuit for just over a decade prior to his nomination.[53] Recently, commentators expressed "surprise" when Justice Gorsuch—"widely considered one of the more conservative justices on the Supreme Court"—wrote the majority opinion in *Bostock v. Clayton County*,[54] which held that a federal law prohibiting employment discrimination on the basis of sex also protected gay and transgender employees.[55] Some scholars, however, saw Justice Gorsuch's opinion as driven by a textualist approach to statutory interpretation[56] and were "not surprised" by the outcome in the case.[57]

The nature of the lower federal courts' dockets may also complicate efforts to predict a Supreme Court nominee's potential votes on the Supreme Court. Judges on the circuit courts of appeals are bound by Supreme Court and circuit precedent[58] and, therefore, are typically not in a position to espouse freely their views on particular legal issues in the context of their judicial opinions.[59]

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[49] *See generally CRS Kennedy Report*, supra note 16.

[50] United States v. Windsor, 570 U.S. 744 (2013).

[51] Obergefell v. Hodges, 576 U.S. 644 (2015).

[52] Roper v. Simmons, 543 U.S. 551 (2005).

[53] CRS Report R44778, *Judge Neil M. Gorsuch: His Jurisprudence and Potential Impact on the Supreme Court* [hereinafter *CRS Gorsuch Report*].

[54] *See* Harper Neidig & John Kruzel, *Gorsuch Draws Surprise, Anger With LGBT Decision*, THE HILL (June 15, 2020), https://thehill.com/regulation/court-battles/502834-gorsuch-draws-surprise-anger-with-lgbt-decision; Robert Barnes, *Neil Gorsuch? The Surprise Behind the Supreme Court's Surprising LGBTQ Decision*, WASH. POST (June 16, 2020), https://www.washingtonpost.com/politics/courts_law/neil-gorsuch-gay-transgender-rights-supreme-court/2020/06/16/112f903c-afe3-11ea-8f56-63f38c990077_story.html.

[55] 140 S. Ct. 1731, 1737 (2020); CRS Legal Sidebar LSB10496, *Supreme Court Rules Title VII Bars Discrimination Against Gay and Transgender Employees: Potential Implications*, by Jared P. Cole.

[56] *See, e.g.*, Jonathan Skrmetti, *The Triumph of Textualism: "Only the Written Word Is the Law"*, SCOTUSBLOG (June 15, 2020, 9:04 PM), https://www.scotusblog.com/2020/06/symposium-the-triumph-of-textualism-only-the-written-word-is-the-law. *But see* Josh Blackman, *Justice Gorsuch's Legal Philosophy Has a Precedent Problem*, THE ATLANTIC (July 24, 2020), https://www.theatlantic.com/ideas/archive/2020/07/justice-gorsuch-textualism/614461 (arguing that Justice Gorsuch's "interpretation was shaded by" precedent that was "inconsistent with textualism").

[57] Ezra Ishmael Young, *Bostock is a Textualist Triumph*, JURIST (June 25, 2020, 3:53 PM), https://www.jurist.org/commentary/2020/06/ezra-young-bostock-textualist-triumph.

[58] *See, e.g.*, Brewster v. Comm'r of Internal Revenue, 607 F.2d 1369, 1373–74 (D.C. Cir. 1979) (explaining that future panels are bound to follow precedent set by previous panels until the en banc court or Supreme Court overrules that precedent); *see generally* Tuan Samahon, *The Judicial Vesting Option: Opting Out of Nomination and Advice and Consent*, 67 OHIO ST. L.J. 783, 816 n.160 (2006) ("Vertical stare decisis binds hierarchically inferior federal appellate judges to follow the Supreme Court's on-point precedent. The relationship is vertical, or between inferior and superior.").

[59] *See* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (2009) ("Supreme Court decisions bind the courts of appeals in a way in which they do not bind the Court itself, and therefore narrow considerably the scope for those courts to exercise choice."); *see also* DAVID ALISTAIR YALOF, PURSUIT OF JUSTICES: PRESIDENTIAL POLITICS AND THE SELECTION OF SUPREME COURT NOMINEES 171 (1999) (claiming that the nature of a judge's work on a federal court of appeals allows "most circuit judges [to] chart a course of moderation" and "more often than not, a circuit judge's opinions tend to betray outsiders' perceptions of that judge as a sharp ideological extremist").

Moreover, unlike the Supreme Court, which enjoys "almost complete discretion" in selecting its cases, the federal courts of appeals are required to hear many appeals as a matter of law.[60] As a result, the circuit courts, such as the Seventh Circuit upon which Judge Barrett sits, consider "many routine cases in which the legal rules are uncontroverted."[61] Because lower court judges are often bound by Supreme Court and circuit precedent, the majority[62] of federal appellate opinions are unanimous and the majority of cases considered by three-judge panels of federal circuit courts are decided without dissent.[63]

Even in closely contested cases where concurring or dissenting opinions are filed, it may still be difficult to determine a nominee's preferences if she did not write an opinion in the case.[64] The act of joining an opinion authored by another judge does not necessarily reflect full agreement with the underlying opinion.[65] For example, in an effort to promote consensus on a court, some judges will decline to dissent unless the underlying issue is particularly contentious.[66] As one commentator notes: "[T]he fact that a judge joins in a majority opinion may not be taken as indicating complete agreement. Rather, silent acquiescence may be understood to mean something more like 'I accept the outcome in this case, and I accept that the reasoning in the majority opinion reflects what a majority of my colleagues has agreed on.'"[67]

Using caution when interpreting a judge's vote isolated from a written opinion may be particularly important with votes on procedural matters. For example, a judge's vote to grant an

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[60] Louis J. Sirico Jr. & Beth A. Drew, *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 n.8 (1991); *see generally* POSNER, *supra* note 59, at 367 ("[M]ore of the work of [the federal appellate] courts really is technical . . . . Most of the appeals they get can be decided uncontroversially by the application of settled principles.").

[61] *See* Sirico & Drew, *supra* note 60, at 1052 n.8.

[62] *See* Harry T. Edwards, *Collegial Decision Making in the U.S. Courts of Appeals* (N.Y.U. Sch. of Law, Pub. Law & Legal Theory Research Paper Series, Working Paper No. 17-47, Nov. 2017).

[63] *See* FRANK B. CROSS, DECISION MAKING IN THE U.S. COURTS OF APPEALS 160 (2007) (noting the "relative paucity of circuit court panel dissents"); Neil M. Gorsuch, *Law's Irony*, 37 HARV. J.L. & PUB. POL'Y 743, 753 (2014) ("Over ninety percent of the decisions issued by [the Tenth Circuit] are unanimous; that's pretty typical of the federal appellate courts.").

[64] *See* Bert I. Huang & Tejas N. Narechania, *Judicial Priorities*, 163 U. PA. L. REV. 1719, 1754–55 (2015) (suggesting that the "presence of a concurrence or dissent serves as a signal" that the case before the court is a "hard case"); *see generally* Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U. CHI. L. REV. 1371, 1412–15 (1995) (noting the motivations that prompt judges to write concurring or dissenting opinions); Diane P. Wood, *When to Hold, When to Fold, and When to Reshuffle: The Art of Decisionmaking on a Multi-Member Court*, 100 CAL. L. REV. 1445, 1451–57 (2012) (describing the considerations that prompt judges to author separate opinions).

[65] *See* Irin Carmon, *Opinion, Justice Ginsburg's Cautious Radicalism*, N.Y. TIMES (Oct. 24, 2015), http://www.nytimes.com/2015/10/25/opinion/sunday/justice-ginsburgs-cautious-radicalism.html (quoting Justice Ginsburg as remarking that "an opinion of the court very often reflects views that are not 100 percent what the opinion author would do, were she writing for herself").

[66] *See* Sanford Levinson, *Trash Talk at the Supreme Court: Reflections on David Pozen's Constitutional Good Faith*, 129 HARV. L. REV. F. 166, 174 (2016) (declaring the assumption that "all adjudicators are splendidly isolated" is "foolish," and arguing that it may be "incumbent" upon judges to engage in "intellectual compromise[s]" "to serve the public weal"). There is an academic debate as to whether the decision to join a concurrence or dissent signals complete agreement with that opinion. *Compare* Robert H. Smith, *Uncoupling the "Centrist Bloc"—An Empirical Analysis of the Thesis of A Dominant, Moderate Bloc on the United States Supreme Court*, 62 TENN. L. REV. 1, 10 n.36 (1994) (arguing that "decisions to join or not join others' opinions may in fact be influenced by a number of factors" outside of a judge's agreement with that decision), *with* Jason J. Czarnezki et al., *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 CONST. COMMENT. 127, 143 (2007) ("[A] decision to join a special opinion is a more finely tuned tool, one that almost certainly indicates agreement not just with the outcome but also with the reasoning.").

[67] *See* Steven D. Smith, *Lessons from Lincoln: A Comment on Levinson*, 38 PEPP. L. REV. 915, 924 (2011).

extension of time for a party to submit a filing generally does not signal agreement with the party's substantive legal position. And while a vote to rehear a case en banc could signal disagreement with a panel decision's legal reasoning,[68] it could also be prompted by a judge's desire to resolve an intracircuit conflict among panel decisions, or may be indicative of the judge's view that the issue is of such importance as to merit consideration by the full court.[69] Further, as one federal appellate judge noted in a dissent from a decision denying a petition for a rehearing en banc:

> Most of us vote against most such petitions . . . even when we think the panel decision is mistaken. We do so because federal courts of appeals decide cases in three judge panels. En banc review is extraordinary, and is generally reserved for conflicting precedent within the circuit which makes application of the law by district courts unduly difficult, and egregious errors in important cases.[70]

Consequently, a vote for or against rehearing a case en banc or on other procedural matters does not necessarily equate to an endorsement or repudiation of a particular legal position.[71]

An important distinction between Judge Barrett and President Trump's other nominees to the Supreme Court—Justices Gorsuch and Brett Kavanaugh—is the length of her judicial career. Justices Gorsuch and Kavanaugh each served for over a decade on the federal bench before their nominations,[72] and during that time authored hundreds of judicial opinions on a diverse range of topics frequently considered by the Supreme Court, from environmental law to the separation of powers to the First Amendment.[73] Because of her comparatively short tenure on the bench—slightly less than three years—Judge Barrett has authored fewer opinions than those earlier nominees, around 90, on a narrower range of topics.[74]

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[68] *See* Patricia M. Wald, *The Problem with the Courts: Black-Robed Bureaucracy, or Collegiality Under Challenge?*, 42 MD. L. REV. 766, 784 (1983) ("Some judges vote routinely for rehearings en banc on all cases with which they disagree.").

[69] *See* Stephen L. Wasby, *Why Sit En Banc?*, 63 HASTINGS L.J. 747, 762–73 (2012).

[70] *See* United States v. Weitzenhoff, 35 F.3d 1275, 1293 (9th Cir. 1994) (Kleinfeld, J., dissenting from denial of rehearing en banc); *see also* Bartlett v. Bowen, 824 F.2d 1240, 1244 (D.C. Cir. 1987) (Edwards, J., concurring in denial of rehearing en banc) ("By declining to rehear a case, 'we do not sit in judgment on the panel; we do not sanction the result it reached' . . . . We decide merely that . . . review by the full court is not justified.").

[71] *See* Mitts v. Bagley, 626 F.3d 366, 370 (6th Cir. 2010) (Sutton, J., concurring in denial of rehearing en banc) ("No one thinks a vote against rehearing en banc is an endorsement of a panel decision . . . .").

[72] Prior to their nominations to the Supreme Court, Justice Gorsuch served on the Tenth Circuit for just over a decade, *CRS Gorsuch Report*, *supra* note 53, and Justice Kavanaugh served on the D.C. Circuit for 12 years, CRS Legal Sidebar LSB10168, *President Trump Nominates Judge Brett Kavanaugh: Initial Observations*.

[73] As circuit judges, then-Judge Gorsuch authored over 850 majority, concurring, or dissenting opinions, *see* CRS Report R44772, *Majority, Concurring, and Dissenting Opinions by Judge Neil M. Gorsuch*, coordinated by Michael John Garcia [hereinafter *CRS Report on Gorsuch Opinions*], and then-Judge Kavanaugh authored roughly 300 majority, concurring, or dissenting opinions, *see* CRS Report R45269, *Judicial Opinions of Judge Brett M. Kavanaugh*, coordinated by Michael John Garcia [hereinafter *CRS Report on Kavanaugh Opinions*].

[74] *See infra Tables & Data: Judge Barrett's Judicial Opinions*. There is another important distinction between Judge Barrett and then-Judge Kavanaugh, who was nominated to the Supreme Court from the D.C. Circuit. Owing to its location in the nation's capital and the number of federal statutes that give the D.C. Circuit special or even exclusive jurisdiction to review certain agency actions, legal commentators generally agree that the D.C. Circuit's docket, relative to the dockets of other circuits, contains a greater percentage of nationally significant legal matters than other regional circuits. *See, e.g.*, Aaron L. Nielson, *D.C. Circuit Review—Reviewed: The Second Most Important Court?*, NOTICE & COMMENT (Sept. 4, 2015), http://yalejreg.com/nc/d-c-circuit-review-reviewed-the-second-most-important-court-by-aaron-nielson (discussing reasons behind D.C. Circuit's reputation as the "second most important court" after the Supreme Court); John G. Roberts, *What Makes the D.C. Circuit Different? A Historical View*, 92 VA. L. REV. 375, 377 (2006) ("[W]hen you look at the docket. . . you really see the differences between the D.C. Circuit and the other courts.

For this reason, this report takes a somewhat different approach to examining Judge Barrett's record than was taken with those earlier nominees. In addition to discussing Judge Barrett's career on the bench, this report considers scholarly works that Judge Barrett authored during her preceding 15-year career as a law professor.[75] For example, Judge Barrett has written several articles expounding on her preferred modes of constitutional interpretation,[76] her approach to statutory interpretation,[77] and her views on stare decisis.[78] However, as discussed above, her engagement with these topics from an academic standpoint does not necessarily predict whether she would employ the same approach as a Supreme Court Justice.

Notwithstanding the difficulty of predicting a nominee's future behavior, three overarching (and interrelated) considerations may inform an assessment of how a jurist is likely to approach the role of a Supreme Court Justice. First, the nominee's general approach to the craft of judging—the *process* of how a judge approaches key aspects of the job, including writing legal opinions and resolving legal disputes on a multimember court—may be an important consideration in predicting how a jurist would behave on the High Court.[79] Second, the judge's overarching *judicial philosophy*, including how she evaluates legal questions as a *substantive* matter, may also assist in gauging how a nominee may perform.[80] Third, reflecting on a nominee's influences, such as Judge Barrett's mentor, Justice Scalia, who the nominee stated had an "incalculable influence" upon her, may also provide insights to qualities the nominee values.[81] These topics are considered in the next section titled *The Role of the Judiciary*,[82] which is then followed by related discussions of Judge Barrett's approach to constitutional[83] and statutory interpretation.[84]

One-third of the D.C. Circuit appeals are from agency decisions. That figure is less than twenty percent nationwide. About one-quarter of the D.C. Circuit's cases are other civil cases involving the federal government; nationwide that figure is only five percent. All told, about two-thirds of the cases before the D.C. Circuit involve the federal government in some civil capacity, while that figure is less than twenty-five percent nationwide.").

[75] For a comprehensive list of primary sources on Judge Barrett, including her judicial and nonjudicial writings, see *CRS Barrett Sidebar*, *supra* note 18.

[76] *See* discussion *infra* in *Modes of Constitutional Interpretation*.

[77] *See* discussion *infra* in *Approach to Statutory Interpretation*.

[78] *See* discussion *infra* in *Stare Decisis*.

[79] *See* ROBERT A. KATZMANN, COURTS AND CONGRESS 14 (1997) (suggesting that, for Supreme Court nominees with prior judicial experience, Senators "can focus on the way nominees approach the craft of judging: how they identify issues, present facts, apply precedent, address opposing arguments, and state the grounds for decision"); LINDA GREENHOUSE, THE U.S. SUPREME COURT: A VERY SHORT INTRODUCTION 28–29 (2012) (observing that a "judicial record that indicates how a potential nominee approaches the craft of judging" can provide insights into how a nominee may approach the role of Supreme Court Justice).

[80] *See* CHRISTOPHER L. EISGRUBER, THE NEXT JUSTICE: REPAIRING THE SUPREME COURT APPOINTMENTS PROCESS 98 (2007) (declaring "[j]udicial philosophy" to be the "Holy Grail of Senate confirmation hearings").

[81] *See Remarks*, *supra* note 11; *see also* Richard Wolf, *Supreme Court Brett Kavanaugh Likes Conservative, and Some Liberal, Justices and Judges*, USA TODAY (July 13, 2018), https://www.usatoday.com/story/news/politics/2018/07/13/supreme-court-pick-brett-kavanaugh-conservative-liberal-friends-mentor/780256002 (noting, with respect to then-Judge Kavanaugh, that "you can tell a lot about" the nominee based on his judicial friends and mentors).

[82] *See* discussion *infra* in *The Role of the Judiciary*.

[83] *See* discussion *infra* in *Modes of Constitutional Interpretation*.

[84] *See* discussion *infra* in *Approach to Statutory Interpretation*.

The Role of the Judiciary[85]

As noted, Judge Barrett has publicly identified with the "judicial philosophy" of her mentor, Justice Scalia,[86] a philosophy reflected in an originalist approach to constitutional interpretation tempered by pragmatic considerations, and a textualist approach to statutory interpretation, as discussed later in the report.[87] In remarks made during her nomination ceremony, Judge Barrett referenced another principle that she views as a pillar of Justice Scalia's judicial philosophy: the idea that "judges are not policy makers, and they must be resolute in setting aside any policy views that they might hold."[88] This statement alludes to the broader role of the federal judiciary and, perhaps, constitutional limits on federal judicial authority.[89]

While a nominee's views on the role of the judiciary could span a range of issues, this section explores four areas:

1. stare decisis, the doctrine suggesting that courts should generally adhere to prior decisions;[90]
2. separation of powers, the doctrine encompassing the limits that stem from the Constitution's allocation of power among the three branches of the federal government;[91]
3. federalism, the doctrine comprised of the "various principles that delineate the proper boundaries between the powers of the federal and state governments";[92] and
4. the role of the Supreme Court within the system of federal courts.[93]

To consider Judge Barrett's views on these subjects, this report examines her judicial decisions and testimony before Congress, as well as her scholarly writings. As noted, as an appellate judge, the nominee was bound to follow Supreme Court precedent—a concept legal scholars refer to as "vertical stare decisis."[94] As Judge Barrett noted during her 2017 confirmation process, a lower

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[85] CRS Legislative Attorney Victoria L. Killion authored this section of the report.

[86] *Remarks*, *supra* note 11.

[87] *See* discussion *infra* in *Modes of Constitutional Interpretation* and *Approach to Statutory Interpretation*.

[88] *Remarks*, *supra* note 11.

[89] The reference to "policy views" also seems to echo a point that the nominee stressed during her 2017 Seventh Circuit confirmation hearing, when she testified that it is "never appropriate for a judge to impose that judge's personal convictions, whether they derive from faith or anywhere else, on the law." *Confirmation Hearing on the Nomination of Amy Coney Barrett To Be Circuit Judge for the Seventh Circuit: Hearing Before the S. Comm. on the Judiciary*, 115th Cong. (Sept. 6, 2017) (unofficial transcript from *CQ Congressional Transcripts*), https://plus.cq.com/doc/congressionaltranscripts-5875886?0&searchId=hSPpQ63W [hereinafter *2017 Confirmation Hearing Transcript*].

[90] See generally CRS Report R45319, *The Supreme Court's Overruling of Constitutional Precedent*, by Brandon J. Murrill.

[91] *See generally* CRS Report R44334, *Separation of Powers: An Overview*, by Matthew E. Glassman.

[92] CRS Report R45323, *Federalism-Based Limitations on Congressional Power: An Overview*, coordinated by Andrew Nolan and Kevin M. Lewis.

[93] *See generally* CRS Report R43746, *Congressional Power to Create Federal Courts: A Legal Overview*, by Andrew Nolan and Richard M. Thompson II.

[94] *See, e.g.*, Michael T. Morley, *Vertical Stare Decisis and Three-Judge District Courts*, 108 GEO. L.J. 699, 709 (2020) ("Vertical stare decisis is the principle that a court must follow and apply (that is, treat as binding law) the precedents of some other court or courts within the judicial system, even if it disagrees with those precedents or believes them to be wrongly decided."). *See also* discussion *supra* in *Predicting a Nominee's Future Court Decisions*.

court has "no authority to overrule a precedent of the Supreme Court."[95] By comparison, Judge Barrett's articles and essays—most of which were published while she was a law professor at Notre Dame—have explored complex questions involving the role of federal courts and judges and the scope of the Supreme Court's power under the Constitution.[96] Her engagement with these topics from an academic perspective, however, does not mean that she would take the same positions as a Supreme Court Justice deciding live controversies on the basis of an appellate record.[97] Nevertheless, these writings may provide insight into the nominee's thoughts on issues such as stare decisis and the Supreme Court's supervisory powers.

Stare Decisis

One core concept in Supreme Court jurisprudence is stare decisis: "in English, the idea that today's Court should stand by yesterday's decisions."[98] The Court generally adheres to its prior decisions absent "a 'special justification'—over and above the belief 'that the precedent was wrongly decided.'"[99] But the Court has also emphasized that stare decisis is not "an inexorable command,"[100] especially in constitutional cases, where the need to reconsider a ruling may be stronger because Congress cannot "abrogate" an erroneous constitutional interpretation as it could a decision involving a statute.[101] For the Court, whether to overrule a prior decision involves consideration of numerous factors, including

- the quality of the opinion's reasoning;
- the workability of the rule it established;
- its consistency with other decisions;
- developments since the decision; and
- reliance interests on the decision.[102]

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[95] *See* Nomination of Amy Coney Barrett to the Seventh Circuit Court of Appeals, Questions for the Record Submitted September 13, 2017 from Sen. Feinstein, at 2, https://www.judiciary.senate.gov/imo/media/doc/Barrett%20 Responses%20to%20Feinstein%20QFRs.pdf [hereinafter *Questions for the Record from Sen. Feinstein*]. Circuit court panels are also bound by the law of the circuit, typically reflected in decisions rendered by the full circuit sitting en banc. In addition, one three-judge panel cannot "overrule" another three-judge panel's decision. *See* Niazi v. St. Jude Med. S.C., Inc., No. 17-CV-183-JDP, 2017 WL 5159784, at *2 (W.D. Wis. Nov. 7, 2017) (explaining that "the general rule is that '[o]ne panel of a circuit court cannot overrule another panel,' at least in the absence of an intervening statute or Supreme Court decision" and that in the Seventh Circuit, "when one panel disagrees with a previous panel's decision, the proper procedure is to seek approval from the full court to overrule the earlier decision" (citing 7th Cir. R. 40(e))).

[96] *See CRS Barrett Sidebar*, *supra* note 18.

[97] *See* discussion *supra* in *Predicting a Nominee's Future Court Decisions*.

[98] Kimble v. Marvel Entm't, LLC, 576 U.S. 446, 455 (2015).

[99] *Id.* at 455–56 (quoting Halliburton Co. v. Erica P. John Fund, Inc., 573 U.S. 258, 266 (2014)).

[100] *See* Janus v. AFSCME, Council 31, 138 S. Ct. 2448, 2478 (2018) (quoting, inter alia, Pearson v. Callahan, 555 U.S. 223, 233 (2009); Lawrence v. Texas, 539 U.S. 558, 577 (2003); State Oil Co. v. Khan, 522 U.S. 3, 20 (1997)).

[101] *See* Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion) (reasoning that the precedent under consideration "involved an interpretation of the Constitution, and the claims of stare decisis are at their weakest in that field, where our mistakes cannot be corrected by Congress").

[102] *Janus*, 138 S. Ct. at 2478–79; *see also* CRS Legal Sidebar LSB10174, *Supreme Court Invalidates Public-Sector Union Agency Fees: Considerations for Congress in the Wake of Janus*, by Victoria L. Killion (discussing how the Court applied these factors in *Janus*).

The Court's general approach to stare decisis, and which factors each Justice may emphasize, are relevant across all areas of the Court's jurisprudence.

The Court issued one decision overruling a Supreme Court constitutional precedent last term,[103] but in its October 2018 Term, the Court overruled four cases spanning a variety of constitutional issues.[104] This Term, the Supreme Court is set to hear argument in *Fulton v. City of Philadelphia*.[105] The *Fulton* appeal asks the Court to revisit *Employment Division v. Smith*,[106] a foundational case interpreting the First Amendment's Free Exercise Clause that has, in recent years, been applied by lower courts to reject claims by religious entities seeking religious exemptions from antidiscrimination laws.[107] To take another example, in recent Supreme Court terms, some Justices have called for the Court to reconsider administrative law cases, such as *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc*.,[108] which instruct courts on when to defer to executive agencies' interpretations of statutes and regulations.[109]

In evaluating a nominee's approach to stare decisis, several questions may arise, including (1) to what extent the nominee believes that Justices should be bound by precedents that they consider to be wrongly decided, and under what circumstances are they justified in overruling such precedents; (2) whether the nominee's approach to stare decisis depends on whether the precedent involves a constitutional or statutory question; and (3) if there are any particular precedents that the nominee has indicated should be overruled. Judge Barrett's testimony before Congress and her academic writings provide insight into the first two questions, but not necessarily the third.

General Approach

As noted, as a judge on the Seventh Circuit, Judge Barrett was bound to follow Supreme Court precedent without the option of reconsidering its validity in a stare decisis analysis.[110]

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[103] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1405–07 (2020) (overruling Apodaca v. Oregon, 406 U.S. 404 (1972) (plurality opinion) and Johnson v. Louisiana, 406 U.S. 356 (1972) (Powell, J., concurring)).

[104] *See Constitution Annotated: Table of Supreme Court Decisions Overruled by Subsequent Decisions*, CONSTITUTION.CONGRESS.GOV, https://constitution.congress.gov/resources/decisions-overruled (last visited Sept. 30, 2020) (listing Franchise Tax Bd. of Calif. v. Hyatt, 139 S. Ct. 1485 (2019); Herrera v. Wyoming, 139 S. Ct. 1686 (2019); Knick v. Twp. of Scott, 139 S. Ct. 2162 (2019); and Rucho v. Common Cause, 139 S. Ct. 2484 (2019)).

[105] *Argument Calendar for the Session Beginning November 2, 2020*, U.S. SUPREME CT., https://www.supremecourt.gov/oral_arguments/argument_calendars/MonthlyArgumentCalNovember2020.pdf. *See generally* Fulton v. City of Philadelphia, No. 19-123 (2019), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-123.html.

[106] Petition for a Writ of Certiorari at i, No. 19-123 (July 22, 2019), https://www.supremecourt.gov/DocketPDF/19/19-123/108931/20190722174037071_Cert%20Petition%20FINAL.pdf; *see also* Emp. Div. v. Smith, 485 U.S. 660 (1988).

[107] *See* CRS Legal Sidebar LSB10311, *Supreme Court Vacates Another Opinion Applying Antidiscrimination Laws to Religious Objectors*, by Valerie C. Brannon. *See also, e.g.*, Matt Fair, *Barrett May Upend Mentor Scalia on Religious Freedom*, LAW360 (Sept. 30, 3030, 7:44 PM), https://www.law360.com/publicpolicy/articles/1315367/barrett-may-upend-mentor-scalia-on-religious-freedom (considering how Judge Barrett might rule in *Fulton*).

[108] Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837 (1984).

[109] *See* CRS Legal Sidebar LSB10204, *Deference and its Discontents: Will the Supreme Court Overrule Chevron?*, by Valerie C. Brannon and Jared P. Cole; CRS Legal Sidebar LSB10322, *Kisor v. Wilkie: Supreme Court Upholds the Auer Doctrine but Clarifies Its Limitations*, by Daniel J. Sheffner. *See also, e.g.*, Randolph J. May, *Justice Ginsburg's Replacement Won't Decimate the Administrative State*, YALE J. REG: NOTICE & COMMENT (Sept. 25, 2020), https://www.yalejreg.com/nc/justice-ginsburgs-replacement-wont-decimate-the-administrative-state-by-randolph-j-may (considering how a nominee might rule on these doctrines).

[110] *Cf., e.g.*, Agostini v. Felton, 521 U.S. 203, 237 (1997) ("[W]e do not acknowledge, and we do not hold, that other courts should conclude our more recent cases have, by implication, overruled an earlier precedent. We reaffirm that 'if a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of

Accordingly, her judicial record does not provide much insight into how she may treat prior Supreme Court cases were she to be confirmed to the High Court.[111] However, she has discussed this issue in other forums.

During her 2017 confirmation hearing prior to her appointment to the Seventh Circuit, Judge Barrett testified that "stability is very important in the law."[112] In response to a question for the record, she also wrote that a judge may follow precedent that conflicts with the Constitution's original meaning.[113] Then-Professor Barrett appeared to take the same position in two articles she wrote responding to critiques of originalism.[114] In *Congressional Originalism*, a 2016 article written with fellow Notre Dame Law Professor John Copeland Nagle, she observed that "a commitment to originalism" does not require Supreme Court Justices to revisit "super precedents" like *Marbury v. Madison* or *Brown v. Board of Education*, regardless of what conclusion an originalist approach might yield.[115] In an earlier article, *Precedent and Jurisprudential Disagreement*, then-Professor Barrett discussed the institutional features of the Supreme Court that, in her view, allow the Court to keep "well-settled questions" off of its docket.[116] These include the Court's "discretionary jurisdiction" to deny certiorari, the four votes required to grant certiorari, and the Court's rule generally limiting review to the questions presented or "fairly included" in the petition.[117]

In addition to exploring the legitimacy of avoiding a confrontation with "nonoriginalist" precedent, Judge Barrett has examined whether the Court acts "lawlessly—or at least questionably—when it overrules precedent."[118] In *Precedent and Jurisprudential Disagreement*, then-Professor Barrett wrote: "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

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decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.'" (quoting Rodriguez de Quijas v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989))).

[111] *Cf.* Groves v. United States, 941 F.3d 315, 325 (7th Cir. 2019) (Barrett, J.) (overruling a "portion of" an earlier panel opinion "holding that mere recertification (or vacatur and reentry) of an order for interlocutory appeal may extend the jurisdictional deadline," reasoning that "the [Supreme] Court's intervening precedent, not to mention our own, has rendered [that holding] an aberration"); *see also id.* ("Nor are we disturbing the reliance interests of litigants, who have minimal reliance interests in procedural and jurisdictional rules."); Chazen v. Marske, 938 F.3d 851, 863 (7th Cir. 2019) (Barrett, J., concurring) ("I join the panel's opinion [with respect to a procedural question involving a "savings clause" in a federal statute] because it has support in our precedent. I write separately, though, to express concern about the state of our precedent. As the opinion observes, the complexity of our cases in this area is 'staggering.'").

[112] *2017 Confirmation Hearing Transcript*, *supra* note 89 (response to Sen. Klobuchar).

[113] *See Questions for the Record from Sen. Feinstein*, *supra* note 95 (Q: "Do you believe it may be unlawful for a judge to follow precedent that conflicts with the Constitution's original meaning." A: "No.").

[114] *See* Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1925 (2017) ("As originalism rose to prominence, its relationship to precedent became an issue. . . . [B]efore originalism recalled attention to the claim that the original meaning of the text constitutes binding law, no one worried much about whether adherence to precedent could ever be unlawful—as it might be if the text's original meaning constitutes the law and relevant precedent deviates from it.").

[115] *See* Amy Coney Barrett & John Copeland Nagle, *Congressional Originalism*, 19 U. PA. J. CONST. L. 1, 20 (2016).

[116] Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1731 (2013).

[117] *Id.* at 1732–33 (quoting SUP. CT. R. 14.1(a)).

[118] *Id.* at 1728 (emphasis added); *see also id.* at 1728–29 (observing that while "our legal culture does not, and never has, treated the reversal of precedent as out-of-bounds," some critics suggest that "overruling is driven by—and therefore tainted by—partisan political preferences").

Constitution rather than a precedent she thinks clearly in conflict with it."[119] The nominee also surmised that "[r]eversal because of honest jurisprudential disagreement is illegitimate only if it is done without adequate consideration of, and due deference to, the arguments in favor of letting the precedent stand."[120] While the former professor has described "the protection of reliance interests" as a "paramount" goal of the Court's stare decisis doctrine,[121] she has also written that "when precedent clearly exceeds the bounds of statutory or constitutional text, reliance interests should figure far less prominently in a court's overruling calculus."[122]

Constitutional Versus Statutory Cases

During her 2017 confirmation process, Judge Barrett observed that the Supreme Court's "longstanding approach to stare decisis . . . carries a strong presumption of continuity but permits overruling in limited circumstances."[123] For Judge Barrett—as for the Court generally[124]—the strength of that presumption may depend on the type of matter before the Court.

In statutory cases, then-Assistant Professor Barrett wrote in 2002 that the Supreme Court has "adopted a 'super strong' presumption of irreversibility."[125] That presumption is based on "the theory that Congress's failure to amend a statute in response to a judicial interpretation of it reflects approval of that interpretation."[126] Professor Barrett explored this presumption, along with another justification for exercising restraint in overruling statutory cases, in a 2005 article.[127] In her view, the "congressional acquiescence" rationale for the Supreme Court's "super-strong" adherence to precedent in statutory cases "is misguided," because Congress's inaction does not necessarily mean that Congress agreed with the Court's decision.[128] Instead, then-Professor Barrett posited that the "most compelling explanation for statutory stare decisis" is respect for the "Constitution's division of power between the legislative and judicial branches," because declining to revisit statutory rulings leaves the resolution of ambiguous laws and the attendant policy considerations to Congress.[129]

By comparison, then-Professor Barrett observed in a 2013 article, *Precedent and Jurisprudential Disagreement*, that the Supreme Court employs a "weak presumption of stare decisis in

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[119] *Id.* at 1728.

[120] *Id.* at 1729.

[121] *Id.* at 1730.

[122] Amy Coney Barrett, *Stare Decisis and Due Process*, 74 U. COLO. L. REV. 1011, 1015 (2003) (reasoning that "the court must also account for the due process rights of individual litigants").

[123] *Questions for the Record from Sen. Feinstein*, *supra* note 95, at 2.

[124] *See, e.g.*, Payne v. Tennessee, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved; the opposite is true in cases such as the present one involving procedural and evidentiary rules." (internal citations omitted)).

[125] Barrett, *Stare Decisis and Due Process*, *supra* note 122, at 1019.

[126] *Id.*

[127] Amy Coney Barrett, *Statutory Stare Decisis in the Courts of Appeals*, 73 GEO. WASH. L. REV. 317, 322–27 (2005) (discussing the "congressional acquiescence" and "separation-of-powers" rationales for statutory stare decisis).

[128] *Id.* at 322, 331; *see also id.* at 326 ("Modern textualists refuse to attribute any significance to congressional inaction following the Supreme Court's interpretation of a statute.").

[129] *Id.* at 325. While the article examined the Supreme Court's approach, its central thesis was that the reasons animating the Court's "super-strong" approach to statutory stare decisis did not justify the same approach in the appellate courts. *Id.* at 351–52. Professor Barrett argued that Congress is "less likely to know about, much less respond to"—and thus less likely to "correct"—an erroneous interpretation of a federal law in the lower courts. *Id.* at 318, 344.

constitutional cases," relative to its approach to statutory precedent.[130] One benefit of this "soft" approach, she wrote, is it "accommodates not only a pluralistic Court, but also a pluralistic society," allowing challenges to controversial decisions "to be aired," whether or not they "should succeed."[131] Identifying another reason to use a "flexible" approach to stare decisis in constitutional cases in a 2003 article, *Stare Decisis and Due Process*, then-Professor Barrett noted that foreclosing a litigant's challenge to an existing decision based on a "rigid application of stare decisis" may violate the litigant's due process "right to an opportunity to be heard."[132] While the article focused on stare decisis in the federal courts of appeals,[133] it also distinguished the Supreme Court in some important respects. For example, then-Professor Barrett observed that although "the possibility of appeal" might "soften[] the rigidity of binding horizontal precedent" in the lower courts, it does not provide the same "escape hatch" for the Supreme Court because "there is no higher court to which a litigant can appeal."[134] However, she also suggested that the Supreme Court would be less likely than appellate courts to encounter a tension between due process and stare decisis, arguing that "[i]t is rare that a litigant is wholly precluded by precedent in the Supreme Court, because the Supreme Court generally grants certiorari only on open questions, or on questions that the Court deliberately selects for reconsideration."[135]

Specific Precedents

Several Senators expressed interest in Judge Barrett's position on specific constitutional precedents during her 2017 Seventh Circuit confirmation hearing. For example, Senator John Kennedy asked the nominee if she thought *Griswold v. Connecticut* was "a well-reasoned opinion."[136] In *Griswold*, the Supreme Court held that a state law prohibiting the use of contraceptives violated the right of marital privacy, "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees."[137] Then-Professor Barrett responded: "whatever I would have thought about [the case] then [upon first reading the opinion as a law student] or whatever I would think about it today wouldn't matter. I would put that aside in the application of that [case]."[138]

Several Senators also asked Professor Barrett about her views on the precedential status of abortion-related decisions, such as *Roe v. Wade* and *Planned Parenthood v. Casey*.[139] In *Roe*, the Court held that the constitutional "right of personal privacy includes the abortion decision," though the "right is not unqualified and must be considered against important state interests in

[130] Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 116, at 1723.

[131] *Id.*

[132] Amy Coney Barrett, *Stare Decisis and Due Process*, *supra* note 122, at 1026.

[133] *Id.* at 1015.

[134] *Id.* at 1045.

[135] *Id.* at 1015–16.

[136] *2017 Confirmation Hearing Transcript*, *supra* note 89 (question from Sen. Kennedy).

[137] Griswold v. Connecticut, 381 U.S. 479, 485 (1965).

[138] *2017 Confirmation Hearing Transcript*, *supra* note 89 (response to question from Sen. Kennedy).

[139] Roe v. Wade, 410 U.S. 113 (1973); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992); *see, e.g.*, Questions for the Record for Professor Amy Coney Barrett Submitted by Sen. Richard Blumenthal 1 (Sept. 13, 2017), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Blumenthal%20QFRs.pdf (asking, among other questions, whether "the reliance interests flowing from *Roe* weigh decisively in favor of upholding" the decision).

regulation."[140] In *Casey*, a majority of the Court reaffirmed *Roe*'s "central holding"[141] based, in part, on stare decisis considerations.[142] And a plurality of the Court (three Justices) set out the "undue burden standard" for evaluating the constitutionality of federal and state abortion restrictions—a standard that the Court still uses today.[143]

Senator Dianne Feinstein, Ranking Member of the Senate Judiciary Committee, asked the nominee how she "evaluate[d] the precedents, plural, with respect to *Roe*."[144] The nominee responded:

> Well, *Roe* and *Casey* and its progeny, as you say, *Roe* has been affirmed many times and survived many challenges in the court. And it's more than 40 years old, and it's clearly binding on all Courts of Appeals. And so it's not open to me or up to me, and I would have no interest in as a Court of Appeals judge challenging that precedent. It would bind.[145]

Senator Mazie Hirono asked the nominee if she would include *Roe* on a list of "super precedents," as *Roe* was not included among the "super precedents" that then-Professor Barrett identified in her 2013 article.[146] The nominee responded that it depended on how "super precedent" was defined.[147] Specifically, she stated that *Roe* "did not satisfy" the definition of super precedent used by the scholars she cited in her article.[148] However, if one defined super precedent as "a precedent that's more than 40 years old and that has survived multiple challenges," she "would include *Roe* on that list."[149]

To summarize, Judge Barrett's testimony and articles suggest that she may hold the following views with respect to stare decisis: (1) stability in the law is important; (2) Supreme Court Justices are not constitutionally obligated to revisit settled decisions using an originalist approach; (3) the Supreme Court has valid mechanisms to avoid any tensions arising from a commitment to both originalism and stare decisis, including denying certiorari; (4) the Supreme Court may revisit decisions it believes were wrongly decided, taking reliance interests into account; and (5) there may be benefits to having a more flexible approach to stare decisis in constitutional cases. Like many nominees before her, Judge Barrett has not committed to reaffirming or overturning any particular decisions should the opportunity arise.

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[140] *Roe*, 410 U.S. at 154.

[141] *See Casey*, 505 U.S. at 860 (discussing how "advances in maternal health care" did not undermine "the validity of *Roe*'s central holding, that viability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions").

[142] The Court reasoned that "the reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of stare decisis." *Id.* at 853.

[143] *See id.* at 877 (plurality opinion) ("A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.").

[144] *2017 Confirmation Hearing Transcript*, *supra* note 89 (question from Sen. Feinstein).

[145] *Id.* (response to Sen. Feinstein).

[146] *Id.* (question from Sen. Hirono).

[147] *Id.* (response to Sen. Hirono).

[148] *Id.* Although Professor Barrett did not restate in her testimony the definition of "super precedent" used in the 2013 article, the article itself describes super precedents as "cases that no justice would overrule, even if she disagrees with the interpretive premises from which the precedent proceeds." Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 116, at 1734 (citing Michael J. Gerhardt, *Super Precedent*, 90 MINN. L. REV. 1204, 1221 (2006) ("Super precedent is a construct employed to signify the relatively rare times when it makes eminent sense to recognize that the correctness of a decision is a secondary (or far less important) consideration than its permanence.")).

[149] *2017 Confirmation Hearing Transcript*, *supra* note 89 (response to Sen. Hirono).

Constitutional Structure

Judge Barrett's judicial philosophy is also reflected in her analysis of structural constitutional constraints—mainly, the allocation of power among the three branches of the federal government, between the federal government and the states, and between the Supreme Court and lower courts.

Separation of Powers

As a Seventh Circuit judge, it appears that Judge Barrett has not resolved an inter-branch dispute (e.g., between Congress and the executive branch) where the court expressly invoked the separation-of-powers doctrine, although some of her decisions allude to separation-of-powers concerns.[150] During her circuit court nomination process, Judge Barrett suggested that an exercise of presidential powers, even in the realm of national security, was not immune from judicial review:

> No person is above the law. In all decisions, including those related to national security, the President is bound by the laws of the United States. If I am confirmed and a question related to executive power in a matter of national security comes before me as part of a case or controversy, I would resolve that issue as I would any other—by engaging in the judicial process, which includes examining the facts, reading the briefs, conducting necessary research, listening to the arguments of litigants, discussing the matter with colleagues, and writing and/or reading opinions.[151]

With respect to the relationship between the federal judiciary and Congress, Judge Barrett has defended a textualist approach to statutory interpretation on separation-of-powers grounds in her scholarly writings. In a 2010 article, she argued that a textualist approach to statutory interpretation respects the division of power between Congress and the courts.[152] By comparison, she reasoned, an approach that considers extratextual evidence of Congress's goals, or judge-made rules that further policies other than those expressed in the statutory text, treads on Congress's lawmaking function.[153] Explaining why, for textualists, "the statutory text is the only reliable indication of congressional intent," then-Professor Barrett wrote:

> The legislative process is path-dependent and riddled with compromise. A statute's language may be at odds with its broad purpose because proponents accept less than they want in order to secure the bill's passage. The language may appear awkward because competing factions agree "to split the difference between competing principles." To respect the deals that are inevitably struck along the way, the outcome of this complex process—

[150] *Cf.* Yafai v. Pompeo, 912 F.3d 1018, 1020 (7th Cir. 2019) (Barrett, J.) ("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."); *id.* at 1023 (deferring to a consular officer's decision to reject a visa application on the grounds that it was "facially legitimate and bona fide"); McCann v. Brady, 909 F.3d 193, 198 (7th Cir. 2018) (Wood, C.J.) (Barrett, J., joining the panel opinion) (stating, in a suit involving "the internal workings of the Illinois State Senate," that it is "emphatically not our job" to "micro-manage exactly which resources, and in what amount, the legislative leaders of the two major political parties dole out to their members," and reasoning that the "separation of powers principle reflected in Article II, section 1 of the Illinois Constitution, and inherent in the federal Constitution, requires us to accept the final output of the legislature without sitting in judgment about how it was produced").

[151] Written Questions for Amy C. Barrett Submitted by Sen. Patrick Leahy 2 (Sept. 6, 2017), https://www.judiciary.senate.gov/imo/media/doc/Barrett%20Responses%20to%20Leahy%20QFRs.pdf.

[152] Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. REV. 109, 112 (2010). *See* discussion *infra* in *Approach to Statutory Interpretation*.

[153] Barrett, *Substantive Canons and Faithful Agency*, *supra* note 152, at 110.

> the statutory text—must control. A judge who reshapes statutory language to alleviate its awkwardness risks undoing the very bargains that made the statute's passage possible.[154]

In recent years, the Supreme Court has also commented on the link between various principles of statutory interpretation and separation-of-powers principles. For example, in 2018, the Court explained that its "rules aiming for harmony over conflict in statutory interpretation grow from an appreciation that it's the job of Congress by legislation, not this Court by supposition, both to write the laws and to repeal them."[155] Viewed in this light, Judge Barrett's Supreme Court nomination remarks that she would apply the law "as written" and that "judges are not policy makers" may reflect her agreement with the Court's statements that have recognized a relationship between these principles.[156]

Federalism

Federalism concerns, which involve the Constitution's allocation of power between the federal government and the states, animate several of Judge Barrett's Seventh Circuit decisions.[157] In some of her dissenting opinions, the nominee argued that the majority did not show sufficient deference to a state court's "reasonable application" of Supreme Court precedent.[158] For example, in *Schmidt v. Foster*, the panel considered whether a state trial court violated the defendant's Sixth Amendment right to counsel by allowing the defendant to present evidence to the judge off the record, without the government's presence, and then barring the participation of the defendant's attorney in that hearing.[159] The panel majority concluded that the defendant met "the stringent standards for habeas corpus relief."[160] Judge Barrett disagreed, arguing that the decision failed to give the state appellate court—which had denied postconviction relief—the "required deference."[161] Applying the same standard of review as the majority, she argued that the state court's decision to uphold the conviction did not violate "clearly established Supreme Court precedent," even though in "retrospect, it may have been better for the judge to decline [the defendant's] request" to present evidence in that manner.[162] On rehearing en banc, the full circuit court agreed with Judge Barrett, concluding that while it did not "endorse the constitutionality of the trial court's unusual *ex parte*, *in camera* examination without counsel's active participation," it could not "brand the state-court decision unreasonable" because the Supreme Court had "'never addressed' a case like this one—factually or legally."[163]

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[154] *Id.* at 112–13 (footnotes omitted).

[155] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1624 (2018) (Gorsuch, J.).

[156] *Remarks*, *supra* note 11.

[157] *See generally* Nolan & Lewis, *supra* note 92.

[158] *See, e.g.*, Sims v. Hyatte, 914 F.3d 1078, 1092, 1099 (7th Cir. 2019) (Barrett, J., dissenting) (stating that if she "were deciding the question de novo, [she] would agree with the majority that the suppressed evidence of hypnosis undermined confidence in the verdict," but that the state court's decision to deny postconviction relief "was neither contrary to, nor an unreasonable application of, clearly established" federal law on *Brady* violations); Schmidt v. Foster, 891 F.3d 302, 328 (7th Cir. 2018), *reh'g en banc granted*, *opinion vacated*, 732 F. App'x 470 (7th Cir. 2018), and *on reh'g en banc*, 911 F.3d 469 (7th Cir. 2018), *cert. denied*, 140 S. Ct. 96 (2019).

[159] *Schmidt*, 891 F.3d at 328.

[160] *Id.* at 306.

[161] *Id.* at 330 (Barrett, J., dissenting).

[162] *Id.* at 321, 327 (Barrett, J., dissenting).

[163] Schmidt v. Foster, 911 F.3d 469, 478 (7th Cir. 2018) (en banc) (quoting Carey v. Musladin, 549 U.S. 70, 76 (2006)), *cert. denied*, 140 S. Ct. 96 (2019).

While arguably of less probative value than cases where Judge Barrett wrote separately, the nominee also joined a dissenting opinion to the denial of a petition for rehearing en banc in *Planned Parenthood of Indiana & Kentucky, Inc. v. Adams*,[164] which involved a federal court's issuance of a pre-enforcement preliminary injunction against a state abortion restriction. Judge Barrett disagreed with the majority, joining Judge Michael S. Kanne's dissenting opinion, which argued that "[p]reventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure."[165]

Federal Court System

In a 2006 law review article, then-Professor Barrett stated that "little agreement exists on either the constitutionally required structure of the judicial branch or the Supreme Court's role within it."[166] The article, *The Supervisory Power of the Supreme Court*, explored what the Constitution's reference to a "supreme" court means for the Court's supervisory authority over lower federal courts.[167] Specifically, it asked whether the Supreme Court may establish rules of procedure for lower courts.[168] Then-Professor Barrett argued that the "Supreme Court has never justified its claim to power over inferior court procedure"—that is, its "power to supervise lower courts by prescribing procedures for them."[169] Delving into the potential sources of this assumed power, Professor Barrett posited that "Article III's grant of 'judicial power'" "surely" vests the Supreme Court with "the power to develop procedures" governing its *own* cases, but does not explain its authority with respect to *lower-court* procedures.[170] The "stronger constitutional basis," then-Professor Barrett hypothesized, is Article III's "designation of the Court as 'supreme' and all other Article III courts as 'inferior' to it."[171]

Applying an originalist methodology like the one discussed in the next part of this report,[172] Judge Barrett first examined a dictionary from the ratification period to determine the possible meaning of the words "supreme" and "inferior," which she found accorded with modern usage.[173] Applying those definitions, she observed that "Article III's distinction between 'supreme' and 'inferior' courts might imply a relationship of subordination, in which the Supreme Court controls inferior courts."[174] But it might also simply refer to "the relative rank or importance of courts."[175] Given this ambiguity, she looked to the surrounding text and constitutional structure, including

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[164] Planned Parenthood of Ind. & Ky., Inc. v. Box, 949 F.3d 997 (7th Cir. 2019) (per curiam), *cert. granted, judgment vacated sub nom.* Box v. Planned Parenthood of Ind. & Ky., Inc., No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020). *See* discussion *infra* in *Abortion*.

[165] *Id.* at 999 (Kanne, J., dissenting) (Barrett, J., joining dissent). The Supreme Court remanded the case in 2020 in light of its decision in a case involving a pre-enforcement challenge to a law requiring abortion providers to have admitting privileges at nearby hospitals. Box v. Planned Parenthood of Ind. & Ky., Inc., No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020).

[166] Amy Coney Barrett, *The Supervisory Power of the Supreme Court*, 106 COLUM. L. REV. 324, 326 (2006).

[167] *Id.* at 324.

[168] *Id.*

[169] *Id.* at 325, 330.

[170] *Id.* at 337.

[171] *Id.* at 342. Article III, section 1 states that the "judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. CONST. art. I, § 3.

[172] *See* discussion *infra* in *Modes of Constitutional Interpretation*.

[173] Barrett, *The Supervisory Power of the Supreme Court*, *supra* note 166, at 345–46.

[174] *Id.* at 346.

[175] *Id.*

how the word "inferior" was used in the Appointments Clause, and "extraconstitutional" evidence in the form of historical understandings of the Supreme Court's supervisory power.[176]

The article concluded that (1) it was "more consistent with the Constitution's structure to interpret the Court's 'supremacy' vis-à-vis inferior federal courts as a limit on the way Congress can structure the judicial branch than to interpret it as a source of inherent authority for the Supreme Court"; and (2) historical practice prior to the 20th century "does not support" the Supreme Court's supervisory power over lower-courts' procedures.[177] The nominee called this conclusion "potentially far-reaching," questioning whether the Supreme Court would then have the authority, through its decisions, to prescribe rules of statutory interpretation, issue preclusion, claim preclusion, or stare decisis for all federal courts.[178] While the article left the resolution of these questions "for another day," it closed by positing that lower "federal courts may have more independence on these matters than is commonly assumed."[179]

Modes of Constitutional Interpretation[180]

During her Seventh Circuit confirmation, Judge Barrett suggested that she approaches constitutional interpretation from an originalist perspective, stating: "If precedent does not settle an issue, I would interpret the Constitution with reference to its text, history, and structure. The basic insight of originalism is that the Constitution is a law and should be interpreted like one. Thus, where the meaning of text is ascertainable, a judge must apply it."[181] Judge Barrett has also evaluated common critiques of originalism in her scholarly writings, seemingly embracing an originalist approach to constitutional interpretation that is tempered by pragmatic considerations.[182] While originalism takes various forms,[183] Judge Barrett has described it as animated by "two core principles": (1) that "the meaning of the constitutional text is fixed at the time of its ratification"; and (2) that the "historical meaning of the text" is legally significant and generally "authoritative."[184] Under this view, the "original public meaning" of a constitutional provision is "the law."[185] If the nominee were to follow this approach to constitutional interpretation as a Supreme Court Justice, she might first examine the Constitution's text, followed by its structure, and then English, Colonial, and Founding-era history for additional insight.[186]

Like Justice Scalia, however, Judge Barrett appears to believe that originalism must be tempered by pragmatism.[187] In a 2016 article coauthored with John Copeland Nagle, then-Professor Barrett

[176] *Id.* at 347–60, 366–76.

[177] *Id.* at 387.

[178] *Id.*

[179] *Id.*

[180] CRS Legislative Attorneys Valerie C. Brannon and Victoria L. Killion authored this section of the report.

[181] *Questions for the Record from Sen. Feinstein*, *supra* note 95.

[182] *See, e.g.*, Barrett, *Originalism and Stare Decisis*, *supra* note 114, at 1922.

[183] *See* CRS Report R45129, *Modes of Constitutional Interpretation*, by Brandon J. Murrill, "Original Meaning."

[184] Barrett & Nagle, *supra* note 115, at 5.

[185] *Id.* at 3, 5 n.6.

[186] *See, e.g.*, Barrett, *The Supervisory Power of the Supreme Court*, *supra* note 166, at 327–28 (using this approach to examine the Supreme Court's supervisory authority over inferior court procedure).

[187] Barrett & Nagle, *supra* note 115, at 16 (stating that Justice Scalia was "willing to adulterate [originalist] principle with pragmatism"). To the extent that Judge Barrett takes a more pragmatic approach to originalism, she might not be as likely as, for example, Justice Clarence Thomas, to depart from prior Supreme Court precedents that evolved from

argued that a "commitment to originalism"[188] does not require judges and Members of Congress to "strip every constitutional question down to the studs" or revisit "super precedents" like *Marbury v. Madison* or *Brown v. Board of Education*, regardless of what conclusion an originalist approach might yield.[189] As a practical matter, the authors wrote, the Supreme Court has institutional features that allow it to avoid constitutional questions that an unwavering commitment to originalism may present; that is, the Court can narrow the questions it will address in cases it chooses to hear.[190] But acknowledging that the Supreme Court has authority to control its docket does not inform how Judge Barrett might approach particular constitutional questions in cases the Court ultimately chooses to hear.

Judge Barrett once observed that however elusive a nominee's judicial philosophy may be "at the nomination stage, her approach to the Constitution becomes evident in the opinions she writes."[191] Although Judge Barrett encountered some constitutional questions on the Seventh Circuit, not all of her opinions involved a textual or historical analysis of the scope of the constitutional provision at issue—though in some cases, this may have been a function of lower courts' adherence to Supreme Court precedent. For example, Judge Barrett wrote the panel opinion in *United States v. Terry*, a Fourth Amendment case involving a warrantless search of a residence.[192] In a three-page analysis based on Supreme Court and Seventh Circuit precedent, the nominee concluded that it was unreasonable for police officers arriving at the apartment of a man they had just arrested to assume that a woman who answered the door had authority to consent to a search of the residence.[193] In another Fourth Amendment decision, Judge Barrett applied factors from the Supreme Court's "most recent anonymous-tip case" to conclude that police did not have "reasonable suspicion" to stop a car with four men sitting inside based on "an anonymous 911 call" from a borrowed phone describing "'boys' 'playing with guns'" near the car.[194]

By comparison, Judge Barrett used an originalist approach in her dissent to the Second Amendment decision in *Kanter v. Barr*, a case that all judges on the Seventh Circuit panel agreed presented a question that could not be answered by looking to prior Supreme Court or Seventh Circuit decisions.[195] Two of the three judges on the panel held that a federal law and a state analog that prohibited felons from possessing firearms were constitutional as applied to the appellant, an individual convicted of mail fraud.[196] Under the applicable Second Amendment test—which

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what an originalist might view as the text's original meaning. *See, e.g.*, Nelson Lund, *Antonin Scalia and the Dilemma of Constitutional Originalism* 14 (George Mason Univ. Legal Studies Research Paper Series, Paper No. LS16-36, 2016), https://papers.ssrn.com/sol3/papers.cfm?abstract_ id=2880578 (comparing Justice Thomas's approach to stare decisis with Justice Scalia's, and saying that Justice Thomas's willingness to "repudiat[e]" rulings that are "inconsistent with the Constitution . . . is what one would expect from a committed originalist"). Judge Barrett quoted Professor Lund's paper in an article seemingly defending Justice Scalia's approach to stare decisis. Barrett, *Originalism and Stare Decisis*, *supra* note 114, at 1929 & n.35.

[188] Barrett & Nagle, *supra* note 115, at 20.

[189] *Id.* at 4, 14. *See* discussion *supra* in *The Role of the Judiciary*.

[190] Barrett & Nagle, *supra* note 115, at 17–19.

[191] Barrett, *Precedent and Jurisprudential Disagreement*, *supra* note 116, at 1717.

[192] 915 F.3d 1141, 1143 (7th Cir. 2020).

[193] *See id.* at 1144–46.

[194] United States v. Watson, 900 F.3d 892, 893, 895–96 (7th Cir. 2018).

[195] *See* 919 F.3d 437, 445 (7th Cir. 2019) (majority opinion) (observing that neither the Supreme Court nor the Seventh Circuit had definitively addressed whether nonviolent felons were outside the Second Amendment's protective scope); *id*. at 453–54 (Barrett, J., dissenting) (similar).

[196] *Id.* at 451 (majority opinion).

called for a "textual and historical inquiry"[197]—the court first asked if "nonviolent felons as a class historically enjoyed Second Amendment rights."[198] Finding the historical evidence "inconclusive," the majority moved to the test's second step, asking whether the law was "substantially related to an important governmental objective," and held that the government met this burden.[199]

In dissent, Judge Barrett posited that the "best historical support for a legislative power to permanently dispossess all felons would be founding-era laws explicitly imposing—or explicitly authorizing the legislature to impose—such a ban."[200] While observing that "scholars ha[d] not been able to identify any such laws," Judge Barrett did not end her analysis with that conclusion, proceeding to survey "ratifying conventions" and "English and early American restrictions on arms possession."[201] In Judge Barrett's view, this historical evidence led to the conclusion that the government can disarm "a category of people that it deems dangerous."[202] She reasoned that the dispossession statutes at issue, however, were not tailored to this interest, and that, "[a]bsent evidence that [the appellant] 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."[203]

Approach to Statutory Interpretation[204]

The two predominant modern theories of statutory interpretation are purposivism and textualism.[205] Purposivists and textualists differ in their theoretical approach to interpreting statutes as well as the tools they use to determine statutory meaning. On a theoretical level, purposivists look to a statute's *purpose*, asking what problem Congress was addressing, and how the resulting statute sought to accomplish that goal.[206] Judges ascribing to purposivism may look to legislative history to determine what Congress meant.[207] Textualists, like Justice Scalia, by contrast, focus on a statute's *text*, seeking to determine how a "reasonable user of words," albeit one familiar with the statutory structure, would read the law's words.[208] Many textualists reject the use of legislative history, given that it is extratextual,[209] and may instead seek to determine the

[197] *Id.* at 441 (quoting Ezell v. Chicago, 846 F.3d 888, 892 (7th Cir. 2017)).

[198] *Id.* at 445.

[199] *Id.* at 447–48.

[200] *Id.* at 454 (Barrett, J., dissenting).

[201] *Id.* at 454–58.

[202] *Id.* at 464.

[203] *Id.* at 469.

[204] CRS Legislative Attorneys Valerie C. Brannon and Victoria L. Killion authored this section of the report.

[205] *See, e.g.*, CRS Report R45153, *Statutory Interpretation: Theories, Tools, and Trends*, by Valerie C. Brannon, "Major Theories of Statutory Interpretation."

[206] *See, e.g.*, ROBERT A. KATZMANN, JUDGING STATUTES 31 (2014); HENRY M. HART JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 1148 (William N. Eskridge Jr. & Phillip P. Frickey eds., 1994).

[207] *See, e.g.*, Stephen Breyer, *On the Uses of Legislative History in Interpreting Statutes*, 65 S. CAL. L. REV. 845, 848 (1992).

[208] Frank H. Easterbrook, *The Role of Original Intent in Statutory Construction*, 11 HARV. J.L. & PUB. POL'Y 59, 65 (1988); *accord, e.g.*, Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 17 (Amy Gutmann ed., 1997).

[209] *See, e.g.*, John F. Manning, *Textualism and Legislative Intent*, 91 VA. L. REV. 419, 420 (2005).

text's ordinary meaning by looking to dictionaries or the statutory "canons of construction" that are said to reflect rules of grammar or long-standing legal conventions.[210]

Some scholars have argued that the divide between proponents of the two systems has narrowed over time. Judicial adherence to a primarily textual approach to statutory interpretation has grown over time,[211] to the point where Justice Elena Kagan observed in 2015 that "we're all textualists now."[212] And even many self-described textualists will look to context beyond the plain words of the law.[213] In a 2017 article, Judge Barrett acknowledged this blurring of lines between textualism and purposivism, observing that the two schools "have moved closer together in the decades since Justice Scalia launched his campaign for textualism."[214] The nominee argued, however, that "fundamental differences" remain between the theories, particularly with respect to "which set of linguistic conventions" judges use.[215]

In particular, then-Professor Barrett noted that while some jurists seek to understand and account for "the realities of the complex legislative process"[216] by placing themselves in the shoes of a "hypothetical legislator—a congressional insider,"[217] textualists "approach language from the perspective of an ordinary English speaker—a congressional outsider."[218] She cited *King v. Burwell* as an example of the "congressional insider" approach.[219] In that decision, a Supreme Court majority interpreted the Affordable Care Act's reference to health care exchanges "established by the State" as including federal exchanges, observing that the Act's complexity and "several features" of its passage produced a bill with "more than a few examples of inartful drafting," making it difficult to rely solely on the text.[220] Then-Professor Barrett concluded that "textualists would reject" the congressional insider approach.[221] According to the nominee, textualists "consider themselves bound to adhere to the most natural meaning of the words at issue because that is the way their principal—the people—would understand them."[222]

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[210] *See, e.g.*, ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 9 (2012) (discussing the authors' "normative" approach to compiling the canons of construction); *id.* at 69 (discussing the "ordinary-meaning rule"); *id.* at 426 (defining "canon of construction" as a "principle that guides the interpreter of a text on some phase of the interpretive process").

[211] For a further discussion of the rise of textualism, including Justice Scalia's influence on its ascent to prominence, see, e.g., Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 COLUM. L. REV. 1, 30 (2006) ("Indeed, textualism has been so successful in altering the views of even nonadherents that it has become increasingly difficult for textualists to identify, let alone conquer, any territory that remains between textualism's adherents and nonadherents."); James J. Brudney & Corey Ditslear, *Liberal Justices' Reliance on Legislative History: Principle, Strategy, and the Scalia Effect*, 29 BERKELEY J. EMP. & LAB. L. 117, 122 (2008) (finding that, between 1986 and 2006, "liberal" Justices seemingly opted not to rely upon legislative history materials in certain majority opinions that Justice Scalia joined because of his well-known opposition to the use of such materials).

[212] Harvard Law School, *The 2015 Scalia Lecture: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015), https://www.youtube.com/watch?v=dpEtszFT0Tg&feature=emb_title.

[213] *See, e.g.*, Molot, *supra* note 211, at 3; Lawrence M. Solan, *The New Textualists' New Text*, 38 LOY. L.A. L. REV. 2027, 2028–29 (2005).

[214] Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2195 (2017).

[215] *Id.* at 2193–94.

[216] *Id.* at 2195.

[217] *Id.* at 2194.

[218] *Id.*

[219] *Id.* at 2198.

[220] King v. Burwell, 576 U.S. 473, 491 (2015).

[221] Barrett, *Congressional Insiders and Outsiders*, *supra* note 214, at 2195.

[222] *Id.*

In another article, then-Professor Barrett expressed doubt as to whether courts can "glean what was 'really' going on behind the scenes of a statute."[223] In her view, deferring to the legislative judgments expressed in the text alone avoids "pull[ing] judges into terrain they are not good at navigating."[224] Further, citing Justice Scalia's dissent in *King v. Burwell*, she stated that for "those who share [Justice Scalia's] commitment to uphold text, . . . it is illegitimate for the Court to distort . . . a statute to achieve what it deems a preferable result."[225]

As mentioned, while Judge Barrett has aligned herself with Justice Scalia's textualist philosophy, stating that a "judge must apply the law as written,"[226] a focus on the text of a statute does not necessarily mean that the nominee would apply a statute's words literally, without reference to any outside context. As in her approach to constitutional originalism, Judge Barrett could be viewed as sometimes embracing a more pragmatic approach to textualism.[227] In a lecture delivered in 2019, she emphasized that textualism does not require "judges to construe language in a wooden, literalistic way."[228] Instead, she stated that text can only be understood in the context of the "shared linguistic conventions among those who speak the language."[229]

Although it is impossible to say definitively how Judge Barrett's rejection of "literalism"[230] would play out in any particular case, for Supreme Court watchers, this phrase may bring to mind last term's *Bostock v. Clayton County* decision, which illuminates how even jurists taking a textualist approach may disagree about when the plain text controls, and when it is appropriate to follow outside contextual understandings.[231] Justice Gorsuch, writing for a majority of the Court in *Bostock*, concluded that Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of sex, also protects gay and transgender employees.[232] In so doing, Justice Gorsuch stated that in "a society of written laws," the Court was "not free to overlook" the "broad language" of Title VII.[233] Writing in dissent, however, Justice Kavanaugh accused the majority of taking an improperly "literalist"[234] approach to interpreting the statute, rather than looking to the law's "ordinary meaning."[235] In Justice Kavanaugh's view, "common parlance and

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[223] Amy Coney Barrett, Book Review, 32 CONST. COMMENTARY 61, 70 (2017).

[224] *Id.* at 73–74.

[225] *Id.* at 84.

[226] *Remarks*, *supra* note 11.

[227] *See* Amy Coney Barrett, *Assorted Canards of Contemporary Legal Analysis: Redux*, 70 CASE W. RES. 855, 856 (2020).

[228] *Id.*

[229] *Id.* at 857.

[230] *Id.* at 856.

[231] *Compare* Bostock v. Clayton Cty., 140 S. Ct. 1731, 1745 (2020) (noting that a conversational speaker is likely to focus on the "most relevant" or "direct cause rather than list literally every but-for cause," and so may be likely to say they were fired "because they were gay or transgender, not because of sex," but ruling that "these conversational conventions do not control Title VII's legal analysis"), *with id.* at 1828 (Kavanaugh, J., dissenting) (stating that "[a]s to common parlance, few in 1964 (or today) would describe a firing because of sexual orientation as a firing because of sex").

[232] *Id.* at 1737 (majority opinion).

[233] *Id.* at 1754. Justice Gorsuch wrote that, logically, "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex," and if a person's sex was a "but-for cause" of a prohibited employment action, that constitutes discrimination "because of" sex under Title VII. *Id.* at 1739–41.

[234] *Id.* at 1824–25 (Kavanaugh, J., dissenting).

[235] *Id.* at 1828.

common legal usage treat sex discrimination and sexual orientation discrimination as two distinct categories of discrimination."[236]

In the 2019 lecture mentioned above, Judge Barrett highlighted this precise interpretive question—whether Title VII prohibits discrimination on the basis of sexual orientation—noting that in the Seventh Circuit, two textualist judges disagreed on how to resolve the issue.[237] She did not give any hints as to how she would have resolved the dispute, but cited it as an example of how textualist judges will not "always agree on what language means in context."[238] Accordingly, even if the Supreme Court were composed of a majority of Justices who share a generally textualist approach to interpreting statutes, that would not ensure that they would always agree on how to resolve specific disputes.

Turning to the tools Judge Barrett may use in statutory interpretation, she has emphasized that "ordinary meaning" is paramount, and dictionary definitions generally will not control over "the plain communicative content of the words" in the context in which they were used.[239] Asked during her 2017 confirmation hearing about when a judge should consult legislative history, the nominee testified that "when the text is clear, I would see as a judge no reason to consult [legislative history]."[240] In a 2010 article, moreover, then-Professor Barrett explored whether the use of the so-called substantive canons of construction, which generally embody legal norms rather than rules of grammar, are consistent with textualism.[241] Discussing the rule of lenity—the canon that ambiguous criminal statutes should be construed in favor of the criminal defendant[242]—she noted that this canon could be in tension with textualism to the extent that a judge would be looking outside the statutory text for the law's meaning.[243] Judge Barrett concluded, however, that because the Supreme Court will not invoke the canon unless the statute is ambiguous, the canon could be seen as "respecting the outer limits of the text."[244] Then-Professor Barrett suggested that substantive canons may be further justified to the extent that they enforce constitutional norms, "guard[ing] against the inadvertent congressional exercise of extraordinary constitutional powers."[245] Nonetheless, she cautioned that courts "cannot" apply these canons "at the expense of a statute's plain language."[246]

On the Seventh Circuit, Judge Barrett has taken a textualist approach to interpreting and applying federal law, which at times has resulted in vivid critiques of congressional enactments. In one case, she remarked that the wording of a provision in the Telephone Consumer Protection Act was

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[236] *Id.* Justice Gorsuch, in response, believed that his reading was consistent with "the ordinary public meaning of the statute's language at the time of the law's adoption": "An employer violates Title VII when it intentionally fires an individual employee based in part on sex," regardless of whether "other factors besides the plaintiff 's sex contributed to the decision." *Id.* at 1741 (majority opinion).

[237] Barrett, *Assorted Canards*, *supra* note 227, at 859.

[238] *Id.*

[239] *Id.*

[240] *Judicial and Justice Department Pending Nominations*, C-SPAN (Sept. 6, 2017), https://www.c-span.org/video/?433501-1/amy-coney-barrett-testifies-seventh-circuit-confirmation-hearing-2017. In 2020, Judge Barrett joined an opinion stating that where the text of a statute is unambiguous, the court would not resort to legislative history. *See* Preston v. Midland Credit Mgmt., 948 F.3d 772, 783 (7th Cir. 2020).

[241] Barrett, *Substantive Canons and Faithful Agency*, *supra* note 152, at 110.

[242] *See id.* at 128.

[243] *Id.* at 110.

[244] *Id.* at 166–67.

[245] *Id.* at 176.

[246] *Id.* at 181.

"enough to make a grammarian throw down her pen."[247] The nominee's opinion for the court noted there were "at least four ways" to read the relevant definitional provision.[248] Writing for the panel, Judge Barrett adopted the first reading, which was "the most natural" based on sentence construction and grammar, although it did not seem to square with "ordinary usage" and created surplusage by rendering another term redundant.[249] The second reading avoided these problems, but was inconsistent with "the grammatical structure of the sentence," and required the court "to insert a significant word into the statute."[250] Judge Barrett's opinion rejected the third option because it asked the court "to contort the statutory text almost beyond recognition" and would have had "far-reaching consequences," creating broad liability that she said was "inconsistent with the statute's narrower focus."[251] And the fourth reading ignored a comma in the statutory definition—one she believed was significant because it "seem[ed] to be ungrammatical" and "a deliberate drafting choice."[252]

Judge Barrett has sometimes parted ways with her Seventh Circuit colleagues over matters of statutory interpretation. In *Cook County v. Wolf*, the panel majority upheld a preliminary injunction against a Trump Administration rule concerning the "public-charge" provision in the Immigration and Nationality Act (INA).[253] The INA provision deems "inadmissible" "[a]ny alien" who, "in the opinion of the Attorney General at the time of application for admission or adjustment of status," is "likely at any time to become a public charge" based on a non-exhaustive list of factors.[254] In 2019, the U.S. Department of Homeland Security (DHS) issued a rule defining "public charge" as "an alien who receives one or more" specified "public benefits," including Medicaid and subsidized housing assistance, for "more than 12 months in the aggregate within any 36-month period," with the receipt of multiple benefits in a single month counting as separate months.[255]

Applying the Supreme Court's two-step *Chevron* framework for analyzing agency rules,[256] the circuit panel held that, although DHS was authorized to interpret "public charge,"[257] its rule was not a reasonable interpretation of the INA.[258] The majority reasoned that the rule "penalize[d] disabled persons in contravention of the Rehabilitation Act" and "conflict[ed] with Congress's affirmative authorization for designated immigrants to receive the benefits the Rule targets."[259] The majority further criticized the DHS rule by saying that "it does violence to the English

[247] Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 460 (7th Cir. 2020).

[248] *Id.* at 463.

[249] *Id.* at 464–65.

[250] *Id.* at 465–66.

[251] *Id.* at 466–67. Judge Barrett rejected the plaintiff's arguments that this reading was consistent with the statutory structure and subsequent congressional actions. *Id.*

[252] *Id.* at 468.

[253] 962 F.3d 208, 215 (7th Cir. 2020). Circuit courts have divided over the rule's validity, with some lower courts issuing preliminary injunctions that the Supreme Court or appellate courts have stayed pending resolution of the appeals. *See* Wolf v. Cook Cnty., 140 S. Ct. 681 (2020) (mem.); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).

[254] 8 U.S.C. § 1182.

[255] Inadmissibility on Public Charge Grounds, 84 Fed. Reg. 41,292, 41,501 (Aug. 14, 2019) (to be codified at 8 C.F.R. § 212.21(a)).

[256] *See generally* CRS Report R44954, *Chevron Deference: A Primer*, by Valerie C. Brannon and Jared P. Cole.

[257] *Cook Cnty.*, 962 F.3d at 226.

[258] *Id.* at 229.

[259] *Id.* at 228.

language and the statutory context to say that [public charge] covers a person who receives only *de minimis* benefits for a *de minimis* period of time."[260] Judge Barrett dissented from the panel opinion.[261] In her view, the majority understood "public charge" to "mean something only slightly broader than 'primarily and permanently dependent,'" but her review of the provision's history and the statutory scheme led her to conclude that it was "a much more capacious term"—broad enough to justify the rule's definition.[262] Judge Barrett also rejected the plaintiffs' attempt to assert what the nominee termed "the reenactment canon,"[263] a substantive canon of statutory interpretation suggesting that when Congress reenacts a law, it also ratifies any settled judicial or administrative understandings of that law.[264] Relying on an opinion in which Justice Scalia discussed this canon, the nominee concluded that the plaintiffs had not met the "high" bar for showing there was a settled judicial interpretation of the term "public charge" at the time of reenactment.[265]

Judge Barrett also dissented from an en banc opinion in *United States v. Uriarte*,[266] involving what one judge later described as "a difficult question of statutory interpretation"[267] as to whether the revised penalties under the First Step Act apply to resentencing. Enacted in 2018, the First Step Act provided that contemporaneous convictions for using a firearm during a crime of violence no longer triggered a 25-year mandatory minimum sentence.[268] The amendment applied retroactively "if a sentence for the offense has not been imposed as of such date of enactment."[269] A majority of the Seventh Circuit sitting en banc held that the defendant, who was initially sentenced before the First Step Act became law, was "entitled to be sentenced under the provisions of the Act" because he was awaiting resentencing on the date of enactment.[270]

Writing for the three dissenting judges, Judge Barrett reasoned that the "more persuasive" reading of Congress's "use of the present-perfect tense in the phrase 'has not been imposed'" was that a criminal sentence is "imposed" when the district court hands down the initial sentence, even if that sentence is later reconsidered, vacated, or appealed.[271] The nominee relied on the "specific words" used in the statute, including its reference to "'a sentence,' not 'the sentence.'"[272] Judge Barrett also faulted the majority for relying too heavily on its view of what Congress must have

[260] *Id.* at 229.

[261] *Id.* at 234 (Barrett, J., dissenting).

[262] *Id.* at 248.

[263] *Id.* at 243.

[264] *See id.* at 242 ("The plaintiffs have a backup argument: even if the term was unsettled in the late nineteenth century, they claim that it became settled in the twentieth. . . . [T]he plaintiffs say, whatever uncertainty may have surrounded the term in 1882, there was no uncertainty when Congress reenacted the provision."); *see generally* Brannon, *supra* note 205 (discussing the presumption of legislative acquiescence).

[265] *Cook Cnty.*, 962 F.3d at 242–43 (Barrett, J., dissenting) ("The bar for establishing a settled interpretation is high: at the time of reenactment, the judicial consensus must have been 'so broad and unquestioned that we must presume Congress knew of and endorsed it.'" (quoting Jama v. Immigr. & Customs Enf't, 543 U.S. 335, 349 (2005) (Scalia, J.))).

[266] No. 19-2092, 2020 WL 5525119, at *7 (7th Cir. Sept. 15, 2020) (en banc) (Barrett, J., dissenting).

[267] United States v. Bethany, No. 19-1754, 2020 WL 5525404, at *8 (7th Cir. Sept. 15, 2020) (Scudder, J., concurring) (expressing agreement with Judge Barrett's *Uriarte* dissent, but noting that "*Uriarte* is now the law of the Circuit").

[268] *Uriarte*, 2020 WL 5525119, at *3 (majority opinion).

[269] *Id.*

[270] *Id.* at *1.

[271] *Id.* at *8 (Barrett, J., dissenting).

[272] *Id.* at *8–9.

considered in passing the law, rather than on "the plain text of the statute."[273] In a footnote, Judge Barrett further said that the rule of lenity did not apply "because the traditional tools of statutory interpretation yield an answer to the statute's meaning."[274]

Opinions such as these suggest that while Judge Barrett may consult history as part of a *constitutional* analysis (e.g., from the Founding-era or the relevant ratification period), she may take a more strictly textualist approach to *statutory* interpretation, focusing on the language and structure of the law at issue. As mentioned, the nominee's approach to textualism is tempered by pragmatism; she has said that textualism is not literalism,[275] and in at least one judicial opinion, she asked whether the practical consequences of an interpretation seemed to be in line with the "focus" of the law.[276]

Abortion[277]

As with prior Supreme Court nominations, Congress will likely be interested in Judge Barrett's views on the Court's abortion jurisprudence,[278] particularly given Justice Ginsburg's role in these cases. Justice Ginsburg was a consistent opponent of measures that she viewed as unduly restricting abortion access.[279] In recent years, Justice Ginsburg was part of five-Justice majorities in cases that struck down various state regulations of abortion providers.[280] If Judge Barrett adopts the position of many prior nominees to the federal courts—as she did in her 2017 Seventh Circuit confirmation hearing—she may refrain from offering her views on specific Supreme Court decisions.[281] Consequently, in the absence of any express indication of the nominee's position on specific Supreme Court opinions addressing abortion rights, Senators might attempt to determine how Judge Barrett would rule in abortion cases by (1) considering the nominee's general approach to stare decisis[282] because it may inform her decisions on whether to overrule precedents that establish a constitutional right to abortion or delimit the constitutional boundaries

[273] *Id.* at *9–10.

[274] *Id.* at *9 n.4.

[275] Barrett, *Assorted Canards*, *supra* note 227, at 856.

[276] Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 467 (7th Cir. 2020).

[277] CRS Legislative Attorney Victoria L. Killion authored this section of the report.

[278] Judge Barrett's 2017 confirmation hearing examined her views on the Court's abortion cases. *See 2017 Confirmation Hearing Transcript*, *supra* note 89; *see also* discussion *supra* in *Stare Decisis*. In addition, Senators questioned then-Judges Gorsuch and Kavanaugh about their views on the issue during their Supreme Court confirmation hearings. *See* John T. Bennett, *Kavanaugh Signals Landmark Abortion Case* Roe *Is 'Settled' Matter*, CQ ROLL CALL (Sept. 5, 2018), https://www.rollcall.com/2018/09/05/kavanaugh-signals-landmark-abortion-case-roe-is-settled-matter; Matt Ford, *Gorsuch:* Roe v. Wade *Is the 'Law of the Land'*, ATLANTIC (Mar. 22, 2017), https://www.theatlantic.com/politics/archive/2017/03/neil-gorsuch-confirmation-hearing/520425.

[279] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 170–71 (2007) (Ginsburg, J., dissenting).

[280] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020); Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[281] *Cf. 2017 Confirmation Hearing Transcript*, *supra* note 89 (response to Sen. Feinstein) ("As for your question about *Roe*, I think that the line that other nominees before the committee have drawn in refraining from comment about their agreement or disagreement or the merits or demerits of any Supreme Court precedent is a prudent one, because I would commit if confirmed to follow unflinchingly all Supreme Court precedent, and I would not want to leave the impression that I would give some precedents less weight than others because of any kind of, you know, academic disagreement with one."); *see generally CRS Judicial Nominees Report*, *supra* note 36.

[282] *See* discussion *supra* in *Stare Decisis*.

on government regulation of the practice; and (2) examining the nominee's decisions in the few abortion cases that came before her as a circuit judge.

Stare decisis has received sustained attention in the abortion context as commentators discuss whether a newly constituted Supreme Court might accept a case asking the Court to overrule *Roe v. Wade* or change the undue burden standard for evaluating the constitutionality of abortion regulations as set out in *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[283] Stare decisis played a key role in *Casey* and its progeny—including in a decision from the Court's October 2019 Term.[284] In *June Medical Services v. Russo*, decided in June 2020, a narrow majority of the Court ruled that a Louisiana law requiring abortion providers to have admitting privileges at nearby hospitals posed an unconstitutional undue burden on abortion access.[285] The law was "almost word-for-word identical" to a Texas law that the Court invalidated in 2016.[286] Justice Ginsburg was in the majority in both cases,[287] but it was Chief Justice John Roberts who provided the key fifth vote in *June Medical Services*, explaining that although he thought the 2016 case was "wrongly decided," stare decisis required the Court to "treat like cases alike."[288] In these circumstances, the nominee's approach to constitutional stare decisis,[289] discussed earlier in this report, is potentially important if she is confirmed to succeed Justice Ginsburg. Because she may cast the deciding vote in a future case, Judge Barrett's approach would likely be closely watched in the upcoming Supreme Court terms.

As noted above, the joining of a judicial opinion authored by a colleague may not signal full agreement with that opinion. Still, Judge Barrett's participation in en banc panels in two cases involving challenges to abortion regulations, in which she did not author an opinion but joined a colleague's dissent, may lend some insight into her views. In 2018, the Seventh Circuit declined a petition for a rehearing en banc in *Planned Parenthood of Indiana & Kentucky, Inc. v. Commissioner of Indiana State Department of Health*—a case that the Supreme Court later considered during its 2018 Term.[290] The case involved two Indiana statutes—one prohibiting abortions "solely because" of the sex, race, or disability of the fetus,[291] and the other regulating "the disposal of fetal remains after an abortion or miscarriage"—though the petition for rehearing en banc concerned only the disposal statute.[292]

Judge Barrett joined Judge Frank H. Easterbrook's opinion dissenting from the petition's denial.[293] Before turning to the disposal statute, the dissent expressed its "skeptic[ism]" about the panel's conclusion in the underlying opinion that the selective abortion statute was

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[283] *See, e.g.*, Josh Gerstein, *How Amy Coney Barrett Might Rule*, POLITICO (Sept. 26, 2020), https://www.politico.com/news/2020/09/26/how-amy-coney-barrett-might-rule-422055; Bennett, *supra* note 278.

[284] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 853 (1992) ("[T]he reservations any of us may have in reaffirming the central holding of *Roe* are outweighed by the explication of individual liberty we have given combined with the force of *stare decisis*.").

[285] June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2132 (2020).

[286] *Id.* at 2112.

[287] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292 (2016).

[288] *June Med. Servs.*, 140 S. Ct. at 2133–34 (Robert, C.J., concurring in the judgment).

[289] *See* discussion *supra* in *Stare Decisis.*

[290] Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 917 F.3d 532, 533 (7th Cir. 2018) (per curiam); *see also* Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780 (2019), *rev'g in part* Planned Parenthood of Ind. & Ky., Inc. v. Comm'r of Ind. State Dep't of Health, 888 F.3d 300 (7th Cir. 2018).

[291] IND. CODE §§ 16-34-4-4–16-34-4-8.

[292] *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 533 (citing IND. CODE § 16-34-3-4).

[293] *Id.* at 536 (Easterbrook, J., dissenting) (Barrett, J., joining dissent).

unconstitutional.[294] In the dissent's view, "[n]one of the [Supreme] Court's abortion decisions holds that states are powerless to prevent abortions designed to choose the sex, race, and other attributes of children," which the dissent referred to as an "anti-eugenics law."[295] Because Indiana had not sought rehearing on that portion of the panel's decision, however, Judge Easterbrook wrote that he was "content to leave [the question] to the Supreme Court."[296] Next, addressing the disposal statute, the dissent criticized the panel for "invalidat[ing] a statute that would be sustained" under the court's rational basis standard "had it concerned the remains of cats or gerbils."[297] In 2019, the Supreme Court reversed the panel's decision, upholding the disposal statute on rational basis grounds.[298] In dissent, Justice Ginsburg argued that the disposal statute should have been subject to the higher, constitutional "undue burden" standard for abortion regulations.[299]

Similarly, in 2019, Judge Barrett joined a dissent from the en banc court's decision *not* to rehear *Planned Parenthood of Indiana and Kentucky, Inc. v. Adams*, questioning the lower court's remedy rather than its analysis of the state's abortion regulation per se.[300] The original three-judge panel, with one judge dissenting, upheld a district court's preliminary injunction against an Indiana parental notification requirement *before* the law took effect.[301] Judge Barrett joined the four judges who would have reheard the dispute "[g]iven the existing unsettled status of pre-enforcement challenges in the abortion context."[302] The dissent, written by Judge Kanne, reasoned that "[p]reventing a state statute from taking effect is a judicial act of extraordinary gravity in our federal structure."[303] The Supreme Court remanded the case in 2020 in light of its

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[294] *Id.*

[295] *Id. But cf. Planned Parenthood of Ind. & Ky., Inc.*, 888 F.3d at 306 (opinion of three-judge panel) ("The non-discrimination provisions clearly violate this well-established Supreme Court precedent, and are therefore, unconstitutional. The provisions prohibit abortions prior to viability if the abortion is sought for a particular purpose. These provisions are far greater than a substantial obstacle; they are absolute prohibitions on abortions prior to viability which the Supreme Court has clearly held cannot be imposed by the State.").

[296] *Planned Parenthood of Ind. & Ky., Inc.*, 917 F.3d at 537 (en banc) (Easterbrook, J., dissenting) (Barrett, J., joining the dissent).

[297] *Id.*

[298] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (per curiam) (holding that the statute was "rationally related to the State's interest in proper disposal of fetal remains" "even if it [was] not perfectly tailored to that end," and explaining that the case "as litigated" did not "implicate [the Supreme Court's] cases applying the undue burden test to abortion regulations"). The Supreme Court denied certiorari on the second question presented, which challenged the panel's ruling on the selective abortion statute. *Id.* at 1781.

[299] Justice Ginsburg would have denied the petition for certiorari entirely, calling it "'a waste of th[e] [C]ourt's resources' to take up a case simply to say we are bound by a party's 'strategic litigation choice' to invoke rational-basis review alone, but 'everything might be different' under the close review instructed by the Court's precedent." *Id.* at 1793 (Ginsburg, J., concurring in part and dissenting in part) (quoting 917 F.3d at 534, 535 (opinion of Wood, C.J.)).

[300] Planned Parenthood of Ind. & Ky., Inc. v. Adams, 937 F.3d 973 (7th Cir. 2019), *rehearing en banc denied sub nom.* Planned Parenthood of Ind. & Ky., Inc. v. Box, 949 F.3d 997 (7th Cir. 2019) (per curiam), *cert. granted, judgment vacated sub nom.* Box v. Planned Parenthood of Ind. & Ky., Inc., No. 19-816, 2020 WL 3578672 (U.S. July 2, 2020).

[301] *Id.* at 991 (concluding that "Indiana's notice law creates a substantial risk of a practical veto over a mature yet unemancipated minor's right to an abortion" was "likely to impose an undue burden" for those minors, because the state had not supported "its claimed justifications" for the restriction or "undermine[d] with evidence Planned Parenthood's showing about the likely effects of the law").

[302] *Planned Parenthood of Ind. & Ky., Inc.*, 949 F.3d at 999 (Kanne, J., dissenting) (Barrett, J., joining dissent).

[303] *Id.*

decision in a different pre-enforcement challenge—*June Medical Services v. Russo*—discussed above.[304]

Judge Barrett's vote in a third case concerning speech outside of abortion clinics followed binding Supreme Court precedent on the First Amendment, and thus may provide limited, if any, insight into her views on the Court's Fourteenth Amendment, substantive-due-process–based abortion jurisprudence like *Roe* or *Casey*. The Seventh Circuit case, *Price v. City of Chicago*, involved a Chicago ordinance creating a "floating bubble zone" around abortion clinics that prohibited individuals from approaching within eight feet of a person entering the facility.[305] The case implicated the First Amendment's Free Speech Clause, rather than *Casey*'s undue burden standard.[306] The three-judge panel, which included Judge Barrett, concluded that the ordinance was constitutional based on controlling Supreme Court precedent.[307] In an opinion written by Judge Diane Sykes, the court cited *Hill v. Colorado*, in which the Supreme Court upheld another bubble zone that operated in an even larger radius.[308] Although the *Price* panel thought that subsequent First Amendment decisions from the Court had "eroded *Hill*'s foundation"—discussing these rulings at length—it reasoned that "[o]nly the Supreme Court can bring harmony to these precedents."[309] Because the Supreme Court had not overruled *Hill*, the panel concluded that the *Hill* decision "remain[ed] binding" on the Seventh Circuit.[310]

As mentioned, it is unclear whether these three opinions, which Judge Barrett joined but did not author, are reliable indicia of the nominee's position on abortion regulations or the Supreme Court's abortion case law more broadly.[311] The dissent Judge Barrett joined in *Adams* centered on federalism and procedural concerns, rather than disagreement with the Supreme Court's abortion decisions, by questioning the validity of enjoining a state statute before it was enforced.[312] And the *Price* opinion was based on controlling free speech precedent.[313] In *Box*, the Supreme Court ultimately agreed with Judge Easterbrook's dissent (which Judge Barrett joined) that Indiana's disposal statute survived rational basis review.[314] In these circumstances, Judge Barrett's decision to join the dissent in *Box* may be the most instructive of her Seventh Circuit abortion-related rulings—though it too does not predict how the nominee might rule in future abortion cases.

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[304] *Box*, 2020 WL 3578672.

[305] Price v. Chicago, 915 F.3d 1107, 1109 (7th Cir. 2019), *cert. denied*, No. 18-1516, 2020 WL 3578739 (U.S. July 2, 2020).

[306] *Id.*

[307] *Id.* at 1119.

[308] *Id.* at 1110 (citing Hill v. Colorado, 530 U.S. 703 (2000)).

[309] *Id.* at 1111–19.

[310] *Id.* at 1119.

[311] *See, e.g.*, Sarah McCammon, *A Look at Amy Coney Barrett's Record on Abortion Rights*, NPR (Sept. 28, 2020), https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights (interviewing two commentators with different perspectives on what Judge Barrett's "record" in abortion cases signals about how she might rule in abortion cases if confirmed to the Supreme Court).

[312] *Planned Parenthood of Ind. & Ky., Inc.*, 949 F.3d at 999 (Kanne, J., dissenting) (Barrett, J., joining dissent).

[313] Price v. Chicago, 915 F.3d 1107, 1119 (7th Cir. 2019), *cert. denied*, No. 18-1516, 2020 WL 3578739 (U.S. July 2, 2020).

[314] Box v. Planned Parenthood of Ind. & Ky., Inc., 139 S. Ct. 1780, 1782 (2019) (per curiam).

Civil Procedure[315]

The Supreme Court routinely decides cases involving questions of federal court jurisdiction (the power of federal courts to decide cases) and civil procedure (the statutes and rules governing whether and how cases are litigated in federal court). In recent years, many of these decisions have been unanimous, or near-unanimous.[316] But in that period the Court has also closely divided on certain questions,[317] including in ways that perhaps do not align with a conventional view of the Court's 5-4 decisions.[318] In those recent cases where the Court was closely divided, Justice Ginsburg was sometimes part of the majority and other times joined the dissent. From the perspective of a potential party to federal court litigation, the Court's decisions on whether and how a federal court may adjudicate a case can be as important as the Court's cases addressing that party's substantive rights or obligations.

Judge Barrett's judicial writings have addressed federal court jurisdiction and civil procedure issues.[319] Many of these decisions involve fairly routine procedural matters,[320] but a few cases involve emerging legal issues of possible interest to Congress. While the cases provide a small

[315] CRS Legislative Attorney Sean M. Stiff authored this section of the report.

[316] *See, e.g.*, Fort Bend Cnty., Tex. v. Davis, 139 S. Ct. 1843, 1846 (2019) (unanimous) (holding that if not timely raised, an employer may forfeit the argument that a plaintiff's claim under Title VII of the Civil Rights Act of 1964 should be dismissed because, before filing suit, the plaintiff did not file a charge with the Equal Employment Opportunity Commission as the charge-filing requirement is a claim-processing rule only); Frank v. Gaos, 139 S. Ct. 1041, 1046 (2019) (per curiam) (eight-Justice majority remanding to court of appeals to address constitutional standing questions); Nutraceutical Corp. v. Lambert, 139 S. Ct. 710, 715 (2019) (unanimous) (deciding that the 14-day deadline for petitioning a court of appeals for permission to appeal a district court's class certification order is not subject to equitable tolling); New Prime Inc. v. Oliveira, 139 S. Ct. 532, 537, 539 (2019) (seven-Justice majority; Kavanaugh, J., not participating) (explaining that federal courts and not arbitrators should decide whether the FAA's exemption for workers engaged in interstate commerce applies to a given plaintiff and, further, whether the exemption includes independent contractors as well as employees); Henry Schein, Inc. v. Archer & White Sales, Inc., 139 S. Ct. 524, 529 (2019) (unanimous) (holding that when "the parties' contract delegates . . . to an arbitrator" the question of whether an arbitration provision applies to a particular dispute, "a court may not override the contract" even if the court believes an argument that a dispute is arbitrable is wholly groundless).

[317] *See, e.g*., Lamps Plus, Inc. v. Varela, 139 S. Ct. 1407, 1419 (2019) (majority opinion of Roberts, C.J., joined by Thomas, Alito, Gorsuch, and Kavanaugh, JJ.) ("Courts may not infer from an ambiguous agreement that parties have consented to arbitrate on a classwide basis.").

[318] *See* Home Depot U.S.A., Inc. v. Jackson, 139 S. Ct. 1743, 1747–51 (2019) (majority opinion of Thomas, J., joined by Ginsburg, Breyer, Sotomayor, and Kagan, JJ.) (holding that a third-party counterclaim defendant may not remove a case to federal court under either the general removal statute or the Class Action Fairness Act).

[319] Judge Barrett's academic writings address these issues as well. *See, e.g.*, Amy Coney Barrett, *Procedural Common Law*, 94 VA. L. REV. 813 (2008) (examining the existence and theoretical underpinnings of judge-made rules that are concerned with regulation of internal court processes and not substantive rights); Amy Coney Barrett, *Federal Jurisdiction*, *in* 2 ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 193–96 (David S. Tanenhaus ed., 2008) (providing an overview of the Supreme Court's jurisdiction and that of the lower courts); Barrett, *The Supervisory Power of the Supreme Court*, *supra* note 166, *passim* (examining the Supreme Court's claimed inherent authority to regulate inferior court procedure).

[320] *See, e.g*., Shakman v. Clerk of Cir. Ct. of Cook Cnty., 969 F.3d 810, 813–14 (7th Cir. 2020) (dismissing appeal of magistrate judge's order filed by entity that was not a party to the district court litigation); Lexington Ins. Co. v. Hotai Ins. Co., 938 F.3d 874, 884 (7th Cir. 2019) (affirming district court order dismissing complaint for lack of personal jurisdiction); Carter v. City of Alton, 922 F.3d 824, 826 (7th Cir. 2019) (vacating district court dismissal of complaint with prejudice following plaintiff's motion for voluntary dismissal without prejudice as the district court erred in not first allowing the plaintiff an opportunity to withdraw her voluntary dismissal request as required by Seventh Circuit precedent).

sample size, they are nonetheless potentially relevant indicators of Judge Barrett's general approach in this area.

One core jurisdictional issue is standing, which the Supreme Court has described as the "irreducible constitutional minimum" that ensures courts hear only those disputes that are "appropriately resolved through the judicial process."[321] To maintain suit in federal court, a plaintiff must, among other things, point to the invasion of a legally protected interest that is concrete and particularized.[322] Congress may not eliminate this constitutional concrete injury requirement, but the Supreme Court has recognized Congress's power to "define injuries . . . that will give rise to a case or controversy where none existed before."[323] This power is not unbounded, and a statutory cause of action does not automatically carry with it Article III standing. A plaintiff may not, for example, sue for a "bare procedural violation" of a statute.[324]

Judge Barrett's rulings address both aspects of the concreteness inquiry. Writing for the court in *Gadelhak v. AT&T Services, Inc*., the nominee explained that a plaintiff may suffer a concrete injury by receiving unwanted text messages, even though that harm was not actionable at common law.[325] Congress authorized a statutory damages remedy, and the receipt of unwanted text messages was sufficiently analogous to other types of "intrusive invasion of privacy" for which the common law provided a remedy.[326] In so deciding, Judge Barrett disagreed with an Eleventh Circuit decision that found a lack of concrete harm in similar circumstances partly because the common law would have required a "much more substantial imposition" than a few unwanted texts.[327] According to the nominee, however, the Eleventh Circuit's view understated Congress's authority: "while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy."[328]

On the other hand, in *Casillas v. Madison Avenue Associates, Inc.*, Judge Barrett considered a claim that a debt collector failed to follow a statutory command to tell debtors that rights to verify and dispute debts had to be invoked in writing.[329] In a unanimous panel opinion that drew an unsuccessful call for en banc consideration,[330] the nominee affirmed the district court's dismissal for lack of standing.[331] Judge Barrett stated that the omission could put consumers who sought to

[321] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

[322] *Id.*

[323] *Id*. at 580 (Kennedy, J., concurring in part and concurring in the judgment) (quoted with approval in Massachusetts v. EPA, 549 U.S. 497, 516 (2007)).

[324] Spokeo, Inc. v. Robins, 136 S. Ct. 1540, 1549 (2016) ("Article III standing requires a concrete injury even in the context of a statutory violation."); *see also id.* at 1550 (faulting the court of appeals for not considering in its standing analysis whether alleged violations of a credit report statute involved a material risk of harm that the defendant would distribute false information about the plaintiff).

[325] 950 F.3d 458, 462–63 (7th Cir. 2020) (explaining that a "few unwanted automated text messages may be too minor an annoyance to be actionable at common law").

[326] *Id*. (stating that unwanted text messages "pose the same kind of harm that common law courts recognize—a concrete harm that Congress has chosen to make legally cognizable").

[327] *Id*. at 462 ("The Eleventh Circuit treated the injury . . . as abstract partly because common law courts generally require a much more substantial imposition—typically, many calls—to support liability for intrusion upon seclusion.").

[328] *Id*. at 463.

[329] 926 F.3d 329, 332 (7th Cir. 2019).

[330] *Id.* at 340–42 (Wood, C.J., dissenting from denial of rehearing en banc) (stating that the panel opinion showed the "need for a clear test in this circuit" to distinguish between "bare procedural injuries" and those injuries that can support Article III standing, and faulting the panel opinion for applying a too-demanding pleading standard to review the complaint).

[331] *Id*. at 339 (panel opinion).

dispute their debts at risk of waiving a statutory right.[332] But the problem for the plaintiffs was that they themselves alleged no risk; they expressed no plans to dispute their debts.[333] Absent such allegations, the nominee concluded, the plaintiff had only "caught the defendant in a mistake, but it was not one that hurt her."[334] As Judge Barrett noted, *Casillas* conflicts with the Sixth Circuit's decision in *Macy v. GC Services Limited Partnership*,[335] which considered violations of the same in-writing requirement.[336] Since the Seventh Circuit decided *Casillas*, however, the Eleventh Circuit has aligned itself with *Casillas*.[337] Judge Barrett's opinions thus indicate a willingness to recognize concrete harms where none existed before, but also an approach to assessing whether risks of harm accompany violations of procedural requirements that is more stringent than the approach that other judges have applied or would have applied.

Judge Barrett has also contributed to a developing body of case law examining whether a court may compel segments of the gig economy to submit disputes to arbitration rather than to litigation. As a general matter, the Federal Arbitration Act (FAA) requires courts to enforce arbitration agreements "rigorously."[338] But as Section 1 of the FAA clarifies, the Act does not apply to the "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce."[339] In 2001, the Supreme Court explained that the Section 1 exemption applied only to "contracts of employment of transportation workers."[340] Subsequent cases have grappled with whether particular classes of employees are "transportation workers" within the meaning of Section 1 and the Court's precedent.

In *Wallace v. Grubhub Holdings, Inc.*, Judge Barrett confronted this question as to food delivery drivers operating on the Grubhub app.[341] The nominee explained that to fit within the Section 1 exemption, the drivers had to show they were part of "a class of workers actively engaged in the movement of goods across interstate lines."[342] And to "determine whether a class of workers meets that definition, we consider whether the interstate movement of goods is a central part of the class members' job description."[343] The drivers did not meet this test, according to Judge Barrett, because they rested their Section 1 exemption argument on having carried goods that had moved across state lines, which the panel held insufficient.[344] Those examining *Wallace* have debated its precise holding.[345] Other circuits have provided their own view of the Section 1

[332] *Id*. at 336.

[333] *Id*.

[334] *Id*. at 339.

[335] Macy v. GC Servs. Ltd. P'ship 897 F.3d 747 (6th Cir. 2019).

[336] *Casillas*, 926 F.3d at 336 (critiquing *Macy* for not requiring "plaintiffs to allege a risk of harm to themselves").

[337] Trichell v. Midland Credit Mgmt. Co., 964 F.3d 990, 1001–02 (11th Cir. 2020) (characterizing the Seventh Circuit's approach in *Casillas* and the D.C. Circuit's approach in *Frank v. Autovest, LLC*, 961 F.3d 1185, 1190 (D.C. Cir. 2020), as "more faithful" to the Article III standing requirement than the Sixth Circuit's approach in *Macy*).

[338] Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1621 (2018) (Gorsuch, J.).

[339] 9 U.S.C. § 1.

[340] Circuit City Stores v. Adams, 532 U.S. 105, 119 (2001).

[341] 970 F.3d 798, 799 (7th Cir. 2020).

[342] *Id*. at 802.

[343] *Id*. at 801–02 (offering, as contrasting examples, "interstate truckers [who] are plainly transportation workers" and furniture salespeople who are not "transportation workers" even if they might occasionally deliver furniture to customers).

[344] *Id*. at 802; *see also id*. ("[T]o fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods across state or national borders.").

[345] *Compare* Rittman v. Amazon.com, Inc., 971 F.3d 904, 916–17 & n.6 (9th Cir. 2020) (considering the status of "last

exemption standard in cases involving gig economy workers.[346] Though the Seventh Circuit's statement of the standard differs from these other circuits, in this rapidly developing area of law[347] it is unclear whether the exemption claim of a given class of employees would be resolved differently if one circuit's standard were to apply over another's.

Civil Rights[348]

Justice Ginsburg cast a key vote in numerous civil rights cases, particularly in cases involving discrimination based on gender and sexual orientation.[349] Throughout her time on the Court, Justice Ginsburg frequently adopted a broad interpretation of the federal government's ability to prevent and remedy discrimination. For instance, three years after joining the Court, Justice Ginsburg wrote the majority opinion in *United States v. Virginia*, ruling that the Virginia Military Institute violated the Fourteenth Amendment's Equal Protection Clause by refusing to admit women.[350] This past term, in *Bostock v. Clayton County*, she joined the Court's majority in construing the prohibition on sex discrimination in Title VII of the Civil Rights Act of 1964 (Title VII)[351] to cover discrimination based on sexual orientation or gender identity.[352] If confirmed to succeed Justice Ginsburg, Judge Barrett could be pivotal in shaping the Court's civil rights

mile" delivery drivers for Amazon.com) (distinguishing *Wallace* as involving locally prepared food delivered locally and stating that *Wallace* "did not adopt the dissent's proposed interpretation[] that workers must actually cross state lines to be considered 'engaged in interstate commerce'"), *with id.* at 928 (Bress, J., dissenting) ("My interpretation of the FAA aligns with the recent decision in *Wallace*" where "the Seventh Circuit held that to fall within the exemption, the workers must be connected not simply to the goods, but to the act of moving those goods *across state or national borders*." (quotation marks omitted)).

[346] *See, e.g.*, *id.* at 915 ("[W]e conclude that [9 U.S.C. § 1] exempts transportation workers who are engaged in the movement of goods in interstate commerce, even if they do not cross state lines."); Waithaka v. Amazon.com, Inc., 966 F.3d 10, 23 (1st Cir. 2020) (holding that delivery drivers who "haul goods on the final legs of interstate journeys" fit within the exemption "regardless of whether the workers themselves physically cross state lines"); Singh v. Uber Techs. Inc., 939 F.3d 210, 226 (3d Cir. 2019) (remanding to the district court to consider whether plaintiff rideshare drivers belong to a "class of transportation workers . . . engaged in interstate commerce or sufficiently related work"). On one court's reading, the "critical factor" in the recent cases is the nature of their employer's business. *In re* Grice, No. 20-70780, 2020 WL 5268941, at *3 (9th Cir. Sept. 4, 2020) (surveying case law and arguing that the "critical factor" in each case is "not the nature of the item transported in interstate commerce (people or goods) or whether the plaintiffs themselves crossed state lines, but rather the nature of the business for which a class of worker performed their activities"; and denying mandamus relief to set aside district court decision holding that rideshare drivers did not fit the residual category because no controlling precedent forbade the district court's finding (internal quotation marks omitted)).

[347] The First, Seventh, and Ninth Circuits articulated their standards within the span of just over one month. *See Rittman*, 971 F.3d at 921 (9th Circuit) (decided Aug. 19, 2020); *Wallace*, 970 F.3d at 803 (7th Circuit) (decided Aug. 4, 2020); *Waithaka*, 966 F.3d at 35 (1st Circuit) (decided July 17, 2020).

[348] CRS Legislative Attorney Joanna R. Lampe authored this section of the report.

[349] Justice Ginsburg also wrote influential dissents in several civil rights cases. For example, in *Shelby County v. Holder*, 570 U.S. 529 (2013), she dissented from a Supreme Court decision striking down portions of the Voting Rights Act of 1965. And in *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618 (2007), she dissented from a decision imposing strict statute-of-limitations constraints on claims of race and gender pay discrimination under Title VII of the Civil Rights Act of 1964. Congress later legislatively overruled *Ledbetter* by enacting the Lilly Ledbetter Fair Pay Act of 2009, Pub L. No. 111-2, 123 Stat. 5 (2009).

[350] 518 U.S. 515, 519 (1996).

[351] 42 U.S.C. § 2000e-2.

[352] 140 S. Ct. 1731, 1737 (2020). *See also* Babb v. Wilkie, 140 S. Ct. 1168, 1171 (2020) (Alito, J.) (Ginsburg, J., joining majority opinion) (holding that the federal-sector provision of the Age Discrimination in Employment Act demands that federal personnel actions be untainted by any consideration of age).

jurisprudence. However, Judge Barrett's record on civil rights law is limited, making it difficult to assess how she might vote in future civil rights matters.

Civil rights cases may arise either under various federal statutes or under constitutional provisions, typically the Fourteenth or Fifth Amendments.[353] Judge Barrett's approach to analyzing *constitutional* civil rights claims is particularly difficult to discern given her limited participation in equal protection cases.[354] That is, the nominee's most significant civil rights cases have involved federal statutory claims. For example, in *Doe v. Purdue University*, Judge Barrett authored a unanimous opinion ruling that a male university student pleaded sufficient facts to pursue claims that the university violated Title IX of the Education Amendments of 1972 (Title IX)[355] and infringed his right to due process under the Fourteenth Amendment by suspending him for "sexual violence."[356] Judge Barrett held that the district court erred in dismissing the student's due process claim because he "adequately claimed that Purdue used fundamentally unfair procedures in determining his guilt" by, among other things, imposing a lengthy disciplinary suspension without disclosing the full evidence against him.[357] She further wrote that the student's Title IX claim was wrongly dismissed because, taken together, his "allegations raise a plausible inference that he was denied an educational benefit on the basis of his sex."[358]

In another case, *Smith v. Rosebud Farm, Inc.*, Judge Barrett wrote a unanimous opinion ruling in favor of a male grocery store employee who brought a Title VII claim based on sexual harassment by his male colleagues.[359] Judge Barrett cited Justice Scalia's unanimous opinion in *Oncale v. Sundowner Offshore Services., Inc.*[360] for the dual propositions that "Title VII is an anti-discrimination statute, not an anti-harassment statute," but that a plaintiff alleging same-sex sexual harassment may prevail under Title VII by "offer[ing] direct comparative evidence about how the alleged harasser[s] treated members of both sexes in a mixed-sex workplace."[361] The

[353] Both the Fifth Amendment, applicable to the federal government, and the Fourteenth Amendment, applicable to the states, protect persons from the deprivation of "life, liberty or property, without due process of law." U.S. CONST. amends. V and XIV, § 1. Although the Fifth Amendment does not have a provision corresponding to the Fourteenth Amendment's Equal Protection Clause, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," *id*. amend. XIV, § 1, this obligation is understood to apply with equal force to the federal government by way of the Fifth Amendment's Due Process Clause. *See* Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 217 (1995) (noting that, under Supreme Court case law, "the equal protection obligations imposed by the Fifth and the Fourteenth Amendments [are] indistinguishable").

[354] A Westlaw search for cases in which Judge Barrett participated that contain the phrase "equal protection" yielded two results, neither of which addressed claims of discrimination based on protected characteristics such as race or gender. *See* A.F. Moore & Assocs., Inc. v. Pappas, 948 F.3d 889, 891 (7th Cir. 2020) (holding that the Tax Injunction Act did not bar an equal protection challenge to certain property tax assessments); Acevedo v. Cook Ctny. Officers Electoral Bd., 925 F.3d 944, 946–47 (7th Cir. 2019) (holding that an Illinois law requiring candidates for county office to obtain a certain number of signatures to appear on the ballot did not violate equal protection or the right to freedom of association).

[355] 20 U.S.C. § 1681(a).

[356] 928 F.3d 652, 656 (7th Cir. 2019).

[357] *Id.* at 663–64. The court held that the plaintiff pleaded sufficient facts to state a claim that the University deprived him of a protected *liberty* interest in pursuing his chosen career by causing his expulsion from the Navy ROTC program. *Id.* at 661–63. In considering whether the plaintiff's suspension deprived him of a protected *property* interest, however, the panel ruled against the plaintiff. *See id.* at 659–60. The court further limited the plaintiff's ability to recover damages against the defendants in their individual capacities, and to obtain prospective injunctive relief. *See id.* at 664–66.

[358] *Id.* at 670.

[359] 898 F.3d 747, 749 (7th Cir. 2018).

[360] 523 U.S. 75 (1998).

[361] *Smith*, 898 F.3d at 752.

nominee distinguished *Smith* from prior unsuccessful Title VII claims of same-sex sexual harassment on the ground that the *Smith* plaintiff "offered direct comparative evidence that only men, and not women, experienced the kind of treatment that he did" in his workplace.[362]

Judge Barrett also participated in two important employment discrimination cases where she cast a vote but did not author an opinion. In *Kleber v. CareFusion Corp.*, the Seventh Circuit sitting en banc held that § 4(a)(2) of the Age Discrimination in Employment Act,[363] which prohibits employment practices that have a disparate impact based on age, does not protect outside job applicants.[364] Judge Barrett joined the majority opinion, which emphasized that the plain language of the relevant statutory provision applied to "employees."[365] In another case, *Equal Employment Opportunity Commission v. Autozone, Inc.*, a Seventh Circuit panel ruled that a business's practice of intentionally assigning employees of different races to different stores did not violate Title VII.[366] Judge Barrett was not on the panel that initially decided *Autozone*, but joined a majority of the full court in denying rehearing en banc over a dissent.[367]

In civil rights suits by prisoners and arrestees, Judge Barrett has authored opinions ruling both for and against plaintiffs.[368] Perhaps notably, the nominee twice wrote separately in prisoner civil rights suits, arguing in both cases that the prisoner-plaintiffs had to satisfy more stringent standards than those applied by the majority.[369]

Few clear themes emerge from the civil rights decisions that Judge Barrett has authored during her relatively short time on the bench.[370] As noted, beyond the procedural due process claim at

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[362] *Id.*

[363] 29 U.S.C. § 623(a)(2).

[364] 914 F.3d 480, 481 (7th Cir. 2019) (en banc).

[365] *Id.* at 482–83. Several judges dissented, arguing that the statutory text was ambiguous, and that the better construction was to interpret the provision at issue to apply to job applicants. *See id.* at 488–89 (Easterbrook, J., dissenting); *id.* at 489–508 (Hamilton, J., dissenting).

[366] 860 F.3d 564, 566 (7th Cir. 2017). Specifically, the panel held that a Black employee's transfer out of a store that served a mostly Hispanic clientele to make it a "'predominantly Hispanic' store" did not adversely affect the transferred employee's employment opportunities or status. *See id.* at 568.

[367] Equal Emp. Opportunity Comm'n v. Autozone, Inc., 875 F.3d 860 (7th Cir. 2017) (en banc).

[368] *Compare* Pittman *ex rel.* Hamilton v. Cnty. of Madison, 970 F.3d 823, 825–26 (7th Cir. 2020) (holding that a pretrial detainee who attempted suicide was entitled to a new trial in his 42 U.S.C. § 1983 (Section 1983) suit after a jury instruction erroneously directed the jury to evaluate the plaintiff's Fourteenth Amendment claim according to a subjective rather than an objective standard), *and* Walker v. Price, 900 F.3d 933, 935 (7th Cir. 2018) (holding that the district court abused its discretion in denying a pro se prisoner plaintiff's motion to recruit counsel), *with* Crosby v. Chicago, 949 F.3d 358, 359 (7th Cir. 2020) (holding that a settlement agreement in the plaintiff's prior excessive force suit under Section 1983 barred the plaintiff from bringing malicious prosecution and wrongful conviction and imprisonment claims). For additional discussion of the doctrine of qualified immunity and suits under Section 1983 raising Fourth Amendment Claims, see discussion *infra* in *Criminal Law & Procedure*.

[369] *See* Williams v. Wexford Health Sources, Inc., 957 F.3d 828, 835–36 (7th Cir. 2020) (Barrett, J., concurring) (concluding that while plaintiff properly prevailed where defendants conceded he exhausted his administrative remedies, an inmate's reasonable mistake about a prison's grievance procedures did not excuse a failure to exhaust remedies before filing a Section 1983 suit); McCottrell v. White, 933 F.3d 651, 672 (7th Cir. 2019) (Barrett, J., dissenting) (concluding that a mental state standard "much higher than . . . criminal recklessness" applied in an excessive force claim brought by a prisoner against prison officials).

[370] In addition to the foregoing cases, Judge Barrett has authored several unanimous civil rights decisions. *See* Purtue v. Wis. Dep't of Corr., 963 F.3d 598, 600 (7th Cir. 2020) (affirming summary judgment against a prison guard on her claim that her firing for filing a false incident report was pretext for discrimination based on sex); Vega v. Chi. Park Dist., 954 F.3d 996, 1002 (7th Cir. 2020) (upholding a jury verdict for a Title VII plaintiff who alleged national origin discrimination and affirming the district court's judgment as a matter of law against plaintiff on her Section 1983 claim); Smith v. Ill. Dep't of Transp., 936 F.3d 554, 556 (7th Cir. 2019) (affirming summary judgment in favor of

issue in *Doe v. Purdue University*, most of the civil rights cases heard by Judge Barrett during her tenure have centered on questions of statutory interpretation, rather than constitutional construction. As discussed elsewhere in this report, Judge Barrett has often promoted a textualist approach to statutory interpretation.[371] But, as evidenced by Justice Scalia's opinion on *Oncale*[372] and Justice Gorsuch's opinion in *Bostock*,[373] a commitment to textualism in interpreting civil rights statutes has sometimes yielded results that arguably diverge from a Justice's perceived ideological leanings. For these reasons, it is difficult to predict with any precision how Judge Barrett would affect the Supreme Court's civil rights jurisprudence if confirmed, and may very well depend on the precise language of the statute at issue.

Criminal Law and Procedure[374]

Criminal law and procedure is an area where Supreme Court alignments are often not divided neatly between the Court's more conservative and liberal wings, and Justice Ginsburg was an important vote in many criminal cases. Beyond authoring several of the Court's opinions on criminal sentencing matters,[375] she cast deciding votes for each of the controlling opinions in *United States v. Booker* that together held that the federal sentencing guidelines' mandatory enhancements were unconstitutional and the remaining guidelines were thereby rendered "effectively advisory."[376] She also joined majority opinions in closely divided cases recognizing Eighth Amendment limitations on the use of capital punishment for juvenile offenders[377] and the mentally disabled,[378] and on mandatory life without parole sentences for juveniles.[379] And she frequently joined Fourth Amendment opinions constraining the government's ability to conduct warrantless searches.[380] Given the closely divided nature of many Supreme Court decisions on criminal law matters, the nominee could play a consequential role in guiding the direction of the Court's jurisprudence.

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employer on a claim of racial harassment and retaliation under Title VII); Carello v. Aurora Policemen Credit Union, 930 F.3d 830, 832 (7th Cir. 2019) (affirming dismissal for lack of standing of Americans with Disabilities Act claim); Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp., 903 F.3d 618, 621 (7th Cir. 2018) (upholding jury verdict in favor of sexual harassment victim).

[371] *See* discussion *supra* in *Approach to Statutory Interpretation*.

[372] Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998) ("The critical issue, Title VII's text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed." (internal quotation marks omitted) (quoting Harris v. Forklift Sys., Inc., 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring))).

[373] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest. Only the written word is the law, and all persons are entitled to its benefit.").

[374] CRS Legislative Attorney Joanna R. Lampe authored this section of the report.

[375] *See, e.g.*, Oregon v. Ice, 555 U.S. 160 (2009); Kimbrough v. United States, 552 U.S. 85 (2007); Cunningham v. California, 549 U.S. 270 (2007); Ring v. Arizona, 536 U.S. 584 (2002).

[376] 543 U.S. 220, 243–45 (2005) (opinion of Stevens, J., joined by Scalia, Souter, Thomas, and Ginsburg, JJ.); *id.* at 245 (opinion of Breyer, J., joined by Rehnquist, C.J., and O'Connor, Kennedy, and Ginsburg, JJ.).

[377] Roper v. Simmons, 543 U.S. 551 (2005).

[378] Atkins v. Virginia, 536 U.S. 304 (2002).

[379] Miller v. Alabama, 567 U.S. 460 (2012).

[380] *See, e.g.*, Carpenter v. United States, 138 S. Ct. 2206 (2018); United States v. Jones, 132 S. Ct. 945 (2012); Kyllo v. United States, 533 U.S. 27 (2001).

Fourth Amendment

Judge Barrett has authored multiple opinions while on the Seventh Circuit that address Fourth Amendment issues. These opinions evince case-by-case consideration of the relevant law and facts, without any clear overarching trend toward either expanding or narrowing Fourth Amendment protections. For instance, in *United States v. Kienast*, Judge Barrett wrote a unanimous opinion rejecting a Fourth Amendment challenge to the FBI's use of computer code to gather identifying information from computers that accessed a child pornography forum.[381] Judge Barrett's opinion explained that even if the digital searches in question violated the Fourth Amendment, they were subject to the good-faith exception to the exclusionary rule, which generally provides that evidence obtained by means of an unlawful search will not be excluded from trial if police acted under a reasonable, good faith belief that their conduct was lawful.[382] And in *United States v. Terry*, Judge Barrett authored an opinion holding in relevant part that it was unreasonable "for officers to assume that a woman who answers the door in a bathrobe has authority to consent to a [warrantless] search of a male suspect's residence."[383] While the officers could reasonably infer the woman had spent the night in the apartment, the court held that "it was unreasonable for them to conclude that she and the suspect shared access to or control over the property."[384]

Most of Judge Barrett's decisions on Fourth Amendment issues have been unanimous.[385] One key exception is *United States v. Wilson*, where the nominee wrote a separate concurrence to an opinion that rejected a Fourth Amendment claim alleging an unlawful stop.[386] The majority held that it was a "close call" whether police officers had reasonable suspicion to seize the defendant when they initially approached him, but that the defendant's subsequent "unprovoked, headlong flight from police in a high-crime area put any lingering doubt to rest."[387] The nominee wrote separately to express her view that the defendant was not seized when an officer walked up to him, but only after he fled and was apprehended.[388] She therefore asserted that the court need not consider whether reasonable suspicion existed when the officer initially approached the defendant.[389]

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[381] 907 F.3d 522, 525 (7th Cir. 2018). The FBI obtained a warrant for the searches in *Kienast*, but the defendants argued the warrant was invalid because it extended to people and property located outside the district of the magistrate judge who issued it. *See id.* at 527.

[382] *Id.*

[383] 915 F.3d 1141, 1143 (7th Cir. 2019).

[384] *Id.* The panel in *Terry* separately held that the defendant knowingly waived his rights under *Miranda v. Arizona* by speaking to law enforcement agents during a post-arrest interview. *See id.* at 1146.

[385] In addition to the opinions discussed in this section, see Biegert v. Molitor, 968 F.3d 693, 696 (7th Cir. 2020) (holding that police officers did not violate the Fourth Amendment where they reasonably restrained an individual while responding to a report that he was suicidal, and officers reasonably resorted to lethal force after the individual threatened them and stabbed one officer); United States v. Vaccaro, 915 F.3d 431, 434 (7th Cir. 2019) (holding that the defendant's behavior gave police grounds to conduct a pat-down search after stopping his vehicle, and safety concerns supported their decision to handcuff the defendant during the encounter and then search his car). *But see* United States v. Watson, 900 F.3d 892, 893 (7th Cir. 2018) (Barrett, J.) (holding that an anonymous call to police about seeing boys playing with guns in a parking lot did not give officers reasonable suspicion to block the defendant's car and search it); *id.* at 898 (Hamilton, J., concurring) (raising doubts about a prior Seventh Circuit case on reasonable suspicion in light of "recent expansions of legal rights to possess and display firearms").

[386] 963 F.3d 701, 702 (7th Cir. 2020).

[387] *Id.* at 704.

[388] *Id.* (Barrett, J., concurring).

[389] *Id.*

Judge Barrett has also considered Fourth Amendment issues in the context of qualified immunity claims that typically arise in defense to claims brought under 42 U.S.C. § 1983 (Section 1983), a statute allowing individuals to sue state officials who violate their constitutional rights. The doctrine of qualified immunity provides that "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."[390] In *Torry v. City of Chicago*, the Seventh Circuit considered Section 1983 claims against officers who stopped three men who partially matched the description of suspects in a drive-by shooting.[391] Judge Barrett wrote a unanimous panel decision holding that the officers were entitled to qualified immunity because the stop did not violate clearly established Fourth Amendment law.[392] By contrast, in *Rainsberger v. Benner*, the nominee authored a unanimous opinion holding that, viewing the evidence in a light most favorable to the plaintiff, which was necessary given the case's procedural posture, a detective who allegedly "submitted a probable cause affidavit that was riddled with lies and undercut by the omission of exculpatory evidence" was not entitled to qualified immunity.[393] Specifically, the court held that the detective's misstatements violated the Fourth Amendment because they were material to a finding of probable cause, and that "[t]he unlawfulness of using deliberately falsified allegations to establish probable cause could not be clearer."[394]

Sixth Amendment

Judge Barrett has written opinions in two cases involving Sixth Amendment claims. In *United States v. King*, a criminal defendant challenged his conspiracy conviction in part by arguing that the introduction of a statement by a nontestifying codefendant violated his rights under the Sixth Amendment's Confrontation Clause.[395] Judge Barrett authored a unanimous opinion rejecting the challenge and affirming the conviction.[396] The court held that the confession of a nontestifying codefendant is not categorically inadmissible in a bench trial, and that the district court did not impermissibly rely on the confession.[397] In *Schmidt v. Foster*, a panel of the Seventh Circuit reversed the denial of habeas corpus relief to a defendant who participated in a pretrial hearing without assistance of counsel.[398] Judge Barrett dissented from the panel opinion, arguing (1) clearly established Supreme Court precedent did not dictate the resolution of the Sixth Amendment claim; (2) the judge who conducted the pretrial hearing did not function as a "surrogate prosecutor" to create an adversarial proceeding where a right to counsel would attach; and (3) the Wisconsin Court of Appeals did not unreasonably apply federal law in deciding

[390] Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Qualified immunity applies to government officials outside the law enforcement context, but has recently garnered significant attention in the context of discussions around police reform. For more information on qualified immunity, see the "Qualified Immunity" sections of CRS Report R46530, *Police Reform and the 116th Congress: Selected Legal Issues*, by April J. Anderson, Joanna R. Lampe, and Whitney K. Novak.

[391] 932 F.3d 579, 581 (7th Cir. 2019).

[392] *Id.* at 586.

[393] 913 F.3d 640, 642 (7th Cir. 2019).

[394] *Id.* at 653.

[395] 910 F.3d 320, 324 (7th Cir. 2018). The Sixth Amendment's Confrontation Clause provides that the accused in a criminal prosecution has the right "to be confronted with the witnesses against him." U.S. CONST. amend. VI.

[396] *Id.* For analysis of another claim raised in *King*, see discussion *infra* in *Other Criminal Matters*.

[397] *See King*, 910 F.3d at 328–29.

[398] 891 F.3d 302, 321 (7th Cir. 2018), *vacated*, 732 Fed. App'x 470 (2018). The Sixth Amendment establishes a right "to have the Assistance of Counsel" in defense of a criminal prosecution. U.S. CONST. amend. VI.

whether the proceeding risked substantial prejudice to the defendant.[399] The full Seventh Circuit later granted rehearing en banc, vacated the panel decision, and affirmed the conviction.[400] Judge Barrett joined the majority of the en banc court, which noted that the pretrial hearing at issue was "constitutionally dubious," but concluded that the state court did not unreasonably apply clearly established law in rejecting the defendant's constitutional claims.[401]

Other Criminal Matters

Several additional criminal cases may be of interest in analyzing Judge Barrett's criminal law jurisprudence. In *United States v. Uriarte*, the Seventh Circuit, sitting en banc, held that a criminal defendant was entitled to a reduced sentence under the First Step Act because at the time the Act was passed, the defendant's initial criminal sentence had been vacated and he was awaiting resentencing.[402] As discussed in the section on her approach to statutory interpretation,[403] Judge Barrett dissented, focusing on a close grammatical analysis of the statutory text to dispute that the defendant's sentence "ha[d] not been imposed" on the date of enactment.[404]

Judge Barrett has also occasionally written separately in habeas corpus cases.[405] In *Chazen v. Marske*, the Seventh Circuit affirmed a grant of habeas relief on the ground that the defendant's prior convictions no longer counted as "violent felonies" for purposes of the Armed Career Criminal Act.[406] The nominee joined the panel opinion, but wrote separately to express her concern that Seventh Circuit precedent applying 28 U.S.C. § 2241 (the relevant habeas corpus provision) was "plagued by numerous complex issues" that the court should resolve in a future case.[407] And in *Sims v. Hyatte*, the Seventh Circuit held that a prisoner was entitled to habeas corpus relief because the state court in which he was convicted unreasonably applied established federal law under *Brady v. Maryland* in ruling that suppressed evidence that a key witness was hypnotized was not material.[408] Judge Barrett dissented, arguing that the majority opinion failed to accord the state court appropriate deference.[409] In another case, *United States v. King*, Judge Barrett rejected a *Brady* challenge on the merits, writing on behalf of a unanimous panel that the defendants' *Brady* claim failed because the evidence at issue was not material.[410]

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[399] *See Schmidt*, 891 F.3d at 321 (Barrett, J., dissenting).

[400] Schmidt v. Foster, 911 F.3d 469, 473 (7th Cir. 2018) (en banc).

[401] *Id.* at 473.

[402] No. 19-2092, 2020 WL 5525119 (7th Cir. Sept. 15, 2020) (en banc).

[403] *See* discussion *supra* in *Approach to Statutory Interpretation*.

[404] *Uriarte*, at *7–10 (Barrett, J., dissenting).

[405] *See also* Schmidt v. Foster, 891 F.3d 302, 321 (7th Cir. 2018) (Barrett, J., dissenting). As noted, a majority of the Seventh Circuit sitting en banc later vacated the panel decision from which Judge Barrett dissented in *Schmidt. See* Schmidt v. Foster, 911 F.3d 469, 473 (7th Cir. 2018) (en banc).

[406] 938 F.3d 851, 853 (7th Cir, 2019).

[407] *Id.* at 866 (Barrett, J., concurring).

[408] Sims v. Hyatte, 914 F.3d 1078, 1080 (7th Cir. 2019). In *Brady v. Maryland*, the Supreme Court held that withholding material exculpatory evidence from a criminal defendant violates due process. 373 U.S. 83, 87 (1963).

[409] *Sims*, 914 F.3d at 1092 (Barrett, J., dissenting). Judge Barrett noted, however, "if I were deciding the question de novo, I would agree with the majority that the suppressed evidence of hypnosis undermined confidence in the verdict." *Id.* at 1099.

[410] 910 F.3d 320, 326–28 (7th Cir. 2018). For analysis of another claim raised in *King*, see discussion *supra* in *Sixth Amendment*.

Judge Barrett has not authored opinions in cases involving the death penalty on the Seventh Circuit, but some observers have looked to her academic writing for insight on how she might approach such cases. In 1998, the nominee coauthored a law review article arguing that "Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty"[411] and therefore, in some circumstances, may need to recuse themselves.[412] However, the article asserted that recusal was not morally required in all capital cases, concluding in particular that it is "exceedingly difficult to pass moral judgment on the appellate review of sentencing."[413] Given its age and the fact that the nominee cowrote it with a professor while the nominee was a law student (although the article was published after her graduation), it is unclear whether the article reflects her current thinking on this matter.[414] In response to questions about the article following her nomination to the Seventh Circuit, Judge Barrett noted that she participated in capital cases as a law clerk to Justice Scalia and stated: "I cannot think of any cases or category of cases, including capital cases, in which I would feel obliged to recuse on grounds of conscience if confirmed."[415]

Ultimately, as noted, criminal law and procedure is an area where Supreme Court decisions may not track perceived divisions between the Court's liberal and conservative wings. Moreover, these cases are often heavily fact-dependent. The Supreme Court is slated to hear several high-profile criminal cases in the upcoming term, including *Jones v. Mississippi*, considering whether the Eighth Amendment requires a sentencer to make a finding that a juvenile is permanently incorrigible before imposing a sentence of life without parole;[416] *Torres v. Madrid*, considering whether an unsuccessful attempt to detain a suspect by use of physical force is a "seizure" under the Fourth Amendment;[417] *Borden v. United States*, considering mental state standards under the Armed Career Criminal Act;[418] and *Van Buren v. United States*, considering the scope of the Computer Fraud and Abuse Act.[419] The nominee's decisions on the Seventh Circuit show a

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[411] John H. Garvey & Amy V. Coney, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 305 (1998).

[412] *Id.* at 303.

[413] *Id.* at 329.

[414] Amy Coney Barrett, *Responses to Questions from Senator Feinstein* 6 (Sept. 13, 2017) ("I co-wrote this article with one of my professors twenty years ago, during my third year of law school. As I also stated at my hearing, I cannot say that this article, in its every particular, captures how I would think about these questions if I revisited them today, with twenty more years of experience. But I continue to subscribe to the article's core point that a judge may never twist the law to align it with her personal convictions, no matter how deeply held they may be.").

[415] *Id.* at 5. Judge Barrett has joined opinions in cases involving the death penalty during her time on the Seventh Circuit. *See* Peterson v. Barr, 965 F.3d 549 (7th Cir. 2020); Lee v. Watson, 964 F.3d 663 (7th Cir. 2020). In *Peterson*, the court vacated a preliminary injunction halting a federal execution based on claims by the victims' family members that the decision to schedule the execution "failed to adequately account for the effect of the [COVID-19] pandemic on their right to attend." 965 F.3d at 551. The unanimous opinion in *Peterson* concluded that the Bureau of Prisons had "unconstrained discretion to choose a date for the execution," provided minimal regulatory constraints were observed, and that the family members had "no statutory or regulatory right to attend the execution." *Id.* at 553. Just days earlier, in *Lee*, the court affirmed a decision denying a habeas petition and motion for a stay of execution filed by the same federal inmate, concluding that the relevant habeas corpus provision barred relief because the primary procedural vehicle for such claims was not "inadequate or ineffective" to test the legality of his detention. 964 F.3d at 667.

[416] *See generally* Jones v. Mississippi, No. 18-1259 (2019), https://www.supremecourt.gov/search.aspx? filename=/docket/docketfiles/html/public/18-1259.html.

[417] *See generally* Torres v. Madrid, No. 19-292 (2019), https://www.supremecourt.gov/search.aspx? filename=/docket/docketfiles/html/public/19-292.html.

[418] *See generally* Borden v. United States, No. 19-5410 (2019), https://www.supremecourt.gov/search.aspx? filename=/docket/docketfiles/html/public/19-5410.html.

[419] *See generally* Van Buren v. United States, No. 19-783 (2019), https://www.supremecourt.gov/search.aspx? filename=/docket/docketfiles/html/public/19-783.html.

willingness to consider arguments by both the government and criminal defendants carefully, but offer only limited guidance on how the nominee may rule in specific criminal cases if confirmed.

Immigration[420]

Many of the Supreme Court's recent decisions in immigration matters have been closely divided, with Justice Ginsburg sometimes in the majority and other times in dissent. Accordingly, Justice Ginsburg's successor could conceivably shift some case outcomes in this area, particularly in those cases calling for application of general legal doctrines not unique to immigration law. Such cases often concern non-U.S. citizens (aliens) in the United States' interior, as opposed to aliens seeking entry.

With one exception, Justice Ginsburg was a dissenting vote in recent decisions about entry restrictions or limitations on access to asylum at the border. She dissented in the 2018 case *Trump v. Hawaii*, where a five-Justice majority rejected challenges to the so-called "Travel Ban" proclamation that restricted the entry of categories of aliens from mostly Muslim-majority countries.[421] The majority reaffirmed the Court's doctrine of deferring to executive exclusion policies, even where some evidence suggested that the executive branch may have acted for an unconstitutional purpose.[422] Justice Ginsburg also dissented from a 2020 decision upholding the constitutionality of a statute that curtailed judicial review of negative credible fear determinations for asylum seekers encountered at or near the border.[423] With respect to executive branch policy on asylum processing at the border—a major area of focus for the Trump Administration—Justice Ginsburg registered her dissent from one of two pivotal stay orders that the Court issued without opinion in late 2019 and 2020.[424] These stay orders allowed the Trump Administration to implement two restrictive policies while litigation concerning their legality continues.[425] Whether Justice Ginsburg voted to grant the second stay is unclear.[426] In contrast, in a 2018 case, a five-Justice majority that included Justice Ginsburg declined to grant the government a stay that would have allowed it to implement a policy rendering aliens ineligible for asylum if they enter the

[420] CRS Legislative Attorney Ben Harrington authored this section of the report.

[421] 138 S. Ct. 2392, 2423 (2018).

[422] *Id*. at 2420.

[423] Dep't of Homeland Sec. v. Thuraissigiam, 140 S. Ct. 1959, 1963 (2020).

[424] Wolf v. Innovation Law Lab, 140 S. Ct. 1564 (2020) (mem.) (granting stay of preliminary injunction against the Migrant Protection Protocols and noting the disagreement of Justice Sotomayor only); Barr v. E. Bay Sanctuary Covenant, 140 S. Ct. 3 (2019) (mem.) (granting stay of preliminary injunctions against the "transit rule" for aliens who pass through third countries, with signed dissent by Justice Sotomayor joined by Justice Ginsburg). The relevance of these policies has arguably waned in light of other executive branch policies implemented during the pandemic. *See* CRS Legal Sidebar LSB10439, *Entry Restrictions at the Northern and Southern Borders in Response to COVID-19*, by Kelsey Y. Santamaria and Ben Harrington (Apr. 27, 2020). Also, a district court has since issued a summary judgment ruling that blocks implementation of the transit rule notwithstanding the stay of the preliminary injunction that the Supreme Court granted in *East Bay Sanctuary Covenant*. *See* Capital Area Immigrants' Rights Coal. v. Trump, Nos. 19-2117 & 19-2530, 2020 WL 3542481, at *23 (D.D.C. June 30, 2020).

[425] *See E. Bay Sanctuary Covenant*, 140 S. Ct. at 4 (Sotomayor, J., dissenting) (reviewing the lower court orders that restricted implementation of the transit rule); CRS Legal Sidebar LSB10420, *Supreme Court Grants Stay in MPP Case*, by Ben Harrington and Hillel R. Smith (Mar. 18, 2020) (explaining the impact of the Migrant Protection Protocol stay).

[426] *Wolf*, 140 S. Ct. at 1564 (noting only Justice Sotomayor's dissent from the unsigned order).

country unlawfully.[427] That policy remains subject to a preliminary injunction blocking its implementation.[428]

Justice Ginsburg's role as a dissenter was less consistent in recent cases where the Supreme Court assessed challenges to statutes and executive branch policies concerning aliens in the interior of the United States.[429] The Court has tended to analyze these recent interior cases under legal doctrines of broader applicability, as opposed to the immigration-specific doctrine it applies in exclusion cases such as *Trump v. Hawaii*.[430] Some (but not all) of the interior cases have produced majority and dissent configurations that do not track the more familiar conservative-liberal configuration from *Trump v. Hawaii*.[431] To wit, Justice Ginsburg formed part of a five-Justice majority holding that the Trump Administration's rescission of the Deferred Action for Childhood Arrivals (DACA) initiative violated procedural laws.[432] She was also in a five-Justice majority that struck down as unconstitutionally vague a provision of the INA that rendered aliens removable for being convicted of "crimes of violence."[433]

Judge Barrett has written opinions in only a handful of immigration cases. The nominee's analysis in one case indicates that, like the majority in *Trump v. Hawaii*, she may take a broad view of the reach of executive authority to exclude aliens mostly free from judicial oversight.[434] The nominee's other cases concern issues relevant primarily to aliens in the interior; somewhat like the Supreme Court's own opinions in this area, her decisions in these cases do not reveal a clear trend favoring either aliens or the government. On the one hand, the nominee has opined that the DHS public charge rule does not violate the INA.[435] Judge Barrett also favored denial of individual aliens' requests for relief from orders of removal in two cases that prompted disagreement from colleagues.[436] On the other hand, in a third removal case, she wrote a majority opinion granting an alien relief and rejecting an Attorney General interpretation of U.S. Department of Justice (DOJ) immigration regulations.[437]

In the exclusion context, Judge Barrett authored a panel opinion in *Yafai v. Pompeo*, rejecting a U.S. citizen's challenge to the denial of his wife's visa by a consular officer at the U.S. embassy

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[427] Trump v. E. Bay Sanctuary Covenant, 139 S. Ct. 782 (2018) (mem.) (noting the dissent of Justices Thomas, Alito, Gorsuch, and Kavanaugh).

[428] E. Bay Sanctuary Covenant v. Trump, 950 F.3d 1242, 1259 (9th Cir. 2020) (affirming preliminary injunction).

[429] *See, e.g.*, Dep't of Homeland Sec. v. Regents of the Univ. of Calif, 140 S. Ct. 1891, 1901 (2020).

[430] *See id*. at 1910 (applying "arbitrary and capricious" standard under the Administrative Procedure Act); Sessions v. Dimaya, 138 S. Ct. 1204, 1210 (2018) (applying criminal law precedent to hold provision of removal statute unconstitutionally vague).

[431] *Compare Regents of the Univ. of Calif.*, 140 S. Ct. at 1901 (majority of Roberts, C.J., and Ginsburg, Breyer, Kagan, and Sotomayor, JJ.), *and Dimaya*, 138 S. Ct. at 1210 (majority of Ginsburg, Breyer, Kagan, Sotomayor, and Gorsuch, JJ.), *with* Barton v. Barr, 140 S. Ct. 1442, 1443 (2020) (majority of Roberts, C.J., and Thomas, Alito, Gorsuch, and Kavanaugh, JJ.).

[432] *Regents of the Univ. of Calif.*, 140 S. Ct. at 1901.

[433] *Dimaya*, 138 S. Ct. at 1210.

[434] 912 F.3d 1018, 1019 (7th Cir. 2019) ("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.").

[435] Cook Cnty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020) (Barrett, J., dissenting).

[436] Alvarenga-Flores v. Sessions, 901 F.3d 922, 924 (7th Cir. 2018); Ramos v. Barr, 771 F. App'x 675, 675 (7th Cir. 2019) (unpublished).

[437] Morales v. Barr, 963 F.3d 629 (7th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom.* Meza Morales v. Barr, No. 19-1999, 2020 WL 5268986, at *9 (7th Cir. June 26, 2020).

in Yemen.[438] The record in the case did not indicate what evidence led the consular officer to deny the visa, and Judge Barrett's opinion did not require the government to supply such evidence.[439] A dissenting judge would have required the government to "point to some factual support for the consular officer's decision."[440] Under Supreme Court precedent, however, visa denials are subject to only a very limited level of review by federal courts, even when U.S. citizens challenge the denials on constitutional grounds.[441] Federal courts almost never disturb such denials.[442] Nonetheless, Supreme Court precedent is arguably unclear about the circumstances in which courts should check for factual support before rejecting challenges to visa denials.[443] Judge Barrett's decision in *Yafai*—while offering only one data point—may suggest that she takes an expansive view of executive exclusion authority and a narrower view of the federal judiciary's role in reviewing exercises of that authority.[444]

In a later opinion commenting upon the full Seventh Circuit's decision *not* to rehear *Yafai*, Judge Barrett defended her opinion as consistent with Supreme Court precedent forbidding courts to look behind visa denials in all but exceptional cases.[445] A group of three judges dissented from the denial of rehearing and argued that Judge Barrett's opinion misinterpreted the Supreme Court cases by "allow[ing] a consular officer to offer a naked citation to a statute, thereby concealing whatever reasons [the officer] may have for her decision."[446]

Turning to the non-exclusion cases, perhaps the most prominent immigration issue Judge Barrett has addressed on the Seventh Circuit is the legality of the 2019 DHS public charge rule.[447] That rule lowers the threshold of reliance on public assistance that may render an alien ineligible for a green card under the INA.[448] Judge Barrett dissented from a panel decision holding that the rule likely violated the INA and the Administrative Procedure Act.[449] (By a five-to-four vote, with Justice Ginsburg in the minority, the Supreme Court had already stayed preliminary injunctions issued by federal district courts against the rule in this and other cases, allowing the rule to take effect while proceedings about its legality continue.[450]) Judge Barrett acknowledged that, in contrast to prior agency policy, "the rule reaches dependence [on public assistance] that is

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[438] *Yafai*, 912 F.3d at 1019.

[439] *Id*. at 1020 n.2, 1022.

[440] *Id*. at 1030 (Ripple, J., dissenting).

[441] See Kleindienst v. Mandel, 408 U.S. 753, 770 (1972). See generally CRS Report R46142, *The Power of Congress and the Executive to Exclude Aliens: Constitutional Principles*, by Ben Harrington, at 42 (Dec. 30, 2019).

[442] *See* Kerry v. Din, 135 S. Ct. 2128, 2141 (2015) (Kennedy, J., concurring) (explaining limited standard of review that applies to visa denials).

[443] *Id*. (concluding that courts may not "look behind" a visa denial "[a]bsent an affirmative showing of bad faith on the part of the consular officer," while appearing to rely on facts disclosed in the challenger's complaint about the visa applicant's Taliban connections to establish that the consular officer did not act in bad faith). *See also* Trump v. Hawaii, 138 S. Ct. 2392, 2420 (2018) (assuming without deciding that courts may review extrinsic evidence of the purposes of an executive exclusion policy when conducting rational basis review of its constitutionality).

[444] *Yafai*, 912 F.3d at 1022 (holding that plaintiff's challenge did not warrant looking behind "the face of the visa denial in evaluating it").

[445] Yafai v. Pompeo, 924 F.3d 969, 970 (7th Cir. 2019) (opinion of Barrett, J., respecting denial of rehearing en banc).

[446] *Id*. at 975 (Wood, J., dissenting from denial of rehearing en banc).

[447] Cook Cnty. v. Wolf, 962 F.3d 208, 234 (7th Cir. 2020) (Barrett, J., dissenting).

[448] See CRS Legal Sidebar LSB10341, *DHS Final Rule on Public Charge: Overview and Considerations for Congress*, by Ben Harrington (Feb. 3, 2020).

[449] *Cook Cnty.*, 962 F.3d at 234 (Barrett, J., dissenting).

[450] Wolf v. Cook Cnty., 140 S. Ct. 681 (2020) (mem.); Dep't of Homeland Sec. v. New York, 140 S. Ct. 599 (2020) (mem.).

supplemental and temporary rather than primary and permanent."[451] However, reviewing the 19th century origins of the INA provision, along with its text and structure, she concluded that the rule fit permissibly within the statutory parameters.[452] Although it endorses the legality of a much-debated DHS policy, this dissent turns primarily upon Judge Barrett's disagreement with the majority over the proper interpretation of an undefined statutory term ("public charge") in light of its history and context.[453] The dissent does not apply interpretive concepts unique to immigration law and, as such, may reveal more about Judge Barrett's textualist approach to statutory interpretation than about any distinct approach to immigration issues.[454]

In the removal context, Judge Barrett wrote a panel opinion upholding an immigration judge's denial of an alien's application for asylum and related protection.[455] The opinion held that the immigration judge had an adequate basis for discrediting the alien's testimony about suffering persecution in El Salvador.[456] One member of the panel dissented, arguing that the immigration judge placed too much weight on "small variations" in the alien's testimony.[457] In a different removal case, Judge Barrett was part of a panel that denied an alien's application for a stay of removal that would have allowed him to challenge the constitutionality of the statutory scheme under which he did not acquire citizenship through his mother.[458] The unpublished panel decision was not signed, but a dissenting judge wrote separately to argue that the stay should have been granted because the constitutional claim had merit.[459]

Judge Barrett ruled against the government in a third removal case. She wrote an opinion for a panel of three judges rejecting the Attorney General's interpretation of DOJ immigration regulations.[460] Under the Attorney General's interpretation, DOJ regulations do not allow immigration judges to grant administrative closure—an action that essentially puts a removal case on hold while the alien pursues collateral relief.[461] Judge Barrett held that the Attorney General's decision was not entitled to judicial deference under Supreme Court precedent and that the regulations do, in fact, authorize administrative closure.[462] Similar to her other immigration

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[451] *Cook Cnty.*, 962 F.3d at 253 (Barrett, J., dissenting).

[452] *Id*. ("The rule's definition is exacting, and DHS could have exercised its discretion differently. The line that DHS chose to draw, however, does not exceed what the statutory term will bear.").

[453] *Id.* at 248 ("The majority seems to understand 'public charge' to mean something only slightly broader than 'primarily and permanently dependent,' but I understand it to be a much more capacious term—not only as a matter of history, but also by virtue of the 1996 amendments to the public charge provision. On my reading, in contrast to the majority's, the statute gives DHS relatively wide discretion to specify the degree of benefit usage that renders someone a 'public charge.'").

[454] *See id.* at 239 (citing Supreme Court precedent for the proposition that statutory terms "should be interpreted as taking their ordinary meaning at the time Congress enacted the statute" (alterations and internal quotation marks omitted)); *see also* discussion *supra* in *Approach to Statutory Interpretation*.

[455] Alvarenga-Flores v. Sessions, 901 F.3d 922, 924 (7th Cir. 2018).

[456] *Id*. at 926 ("The evidence shows that Alvarenga provided conflicting accounts about what happened during the taxi and bus incidents.").

[457] *Id*. at 928 (Durkin, J., concurring in part and dissenting in part).

[458] Ramos v. Barr, 771 F. App'x 675, 675 (7th Cir. 2019) (unpublished).

[459] *Id*. at 675 (Hamilton, J., dissenting) ("Ramos argues that this odd differential treatment in favor of children of naturalized mothers as compared to mothers who are citizens by birth is irrational and violates the equal protection dimension of the Fifth Amendment's due process clause. He might be right.").

[460] Morales v. Barr, 963 F.3d 629 (7th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom.* Meza Morales v. Barr, No. 19-1999, 2020 WL 5268986, at *9 (7th Cir. June 26, 2020).

[461] *Id*. at *7 (discussing *In re* Castro-Tum, 27 I. & N. Dec. 271, 283 (Att'y Gen. 2018)).

[462] *Id*. at *9 ("Because the regulation gives a single right answer, *Auer* deference is unwarranted. The Attorney General may amend these rules through the proper procedures. But he may not, under the guise of interpreting a regulation,

decisions outside of the exclusion context, this decision may speak more to Judge Barrett's approach to administrative law than to any distinct view on immigration matters.[463]

Second Amendment[464]

Although Justice Ginsburg was not a prominent author of decisions involving the Second Amendment, she was part of a four-Justice bloc that dissented from the Court's ruling in *District of Columbia v. Heller*,[465] which held that the Second Amendment protects an individual (as opposed to a collective) right to bear and keep arms. Justice Ginsburg also joined the dissenting Justices two years later in *McDonald v. City of Chicago*, where the Court held that the Second Amendment applied to state and local governments through the Fourteenth Amendment.[466] Justice Ginsburg later joined other Justices in declining opportunities to revisit *Heller*'s application, including in the denial of 10 certiorari petitions this past term that called for the Court to review (and possibly invalidate) challenged state concealed-carry laws, handgun permit requirements, and so-called "assault weapons" and handgun restrictions.[467] That said, only four votes are needed to grant review. Judge Barrett could therefore play an important role in deciding whether the Supreme Court adds another Second Amendment case to its docket.[468]

Judge Barrett has authored one opinion addressing the Second Amendment—a dissent in *Kanter v. Barr*.[469] Her opinion in that case signals an approach to the Second Amendment that may differ somewhat from that employed by some federal courts, but which may align with the views of several sitting Justices, suggesting that she could have a notable impact in an area where the Roberts Court has been closely divided.

Recent jurisprudence on the Second Amendment mainly derives from the Supreme Court's decision in *Heller*, where a five-Justice majority held that the Second Amendment protects an individual right to possess firearms for historically lawful purposes.[470] The *Heller* majority provided some guidance on the scope of the right, noting that it "is not unlimited" and clarifying that "nothing in [the] opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill," among other "presumptively lawful"

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create *de facto* a new regulation that contradicts the one in place." (internal citations, quotation marks, and alterations omitted)).

[463] *Id.* at *7 ("We can defer [to an agency's interpretation of its own regulation] only if careful application of the 'traditional tools of construction' yields no definitive answer.").

[464] CRS Legislative Attorney Michael A. Foster authored this section of the report.

[465] 554 U.S. 570, 595 (2008).

[466] 561 U.S. 742, 791 (2010) (plurality opinion) (holding that the Second Amendment is incorporated through the Due Process Clause of the Fourteenth Amendment); *id*. at 855 (Thomas, J., concurring) (concluding that the Second Amendment is incorporated through the Fourteenth Amendment's Privileges or Immunities Clause).

[467] *See* Amy Howe, *After Ruling in New York Gun Rights Case, More Second Amendment Cases Set for Friday Conference*, SCOTUSBLOG (Apr. 28, 2020), https://www.scotusblog.com/2020/04/after-ruling-in-new-york-gun-rights-case-more-second-amendment-cases-set-for-friday-conference (describing these ten cases).

[468] *See* Marcia Coyle, *Amy Coney Barrett's Broad View of 2nd Amendment Could Energize Gun Rights Challenges*, NAT'L L.J. (Sept. 28, 2020), https://www.law.com/nationallawjournal/2020/09/28/amy-coney-barretts-broad-view-of-2nd-amendment-could-energize-gun-rights-challenges (noting that "court scholars and others" have speculated that the four Justices may be "reluctant to grant review because they were uncertain of a fifth vote for a final ruling in a granted case").

[469] 919 F.3d 437 (7th Cir. 2019).

[470] *Heller*, 554 U.S. at 595.

regulations.[471] Since *Heller*, the Court has substantively addressed the Second Amendment on two other occasions,[472] leaving key questions unanswered, including what methodology courts should generally use to address Second Amendment challenges to firearms regulations.

Lacking further Supreme Court guidance, lower federal courts have typically adopted a two-step framework for reviewing federal, state, and local gun regulations under the Second Amendment.[473] At step one, a court asks whether the law at issue burdens conduct protected by the Second Amendment, which generally involves an inquiry into the historical meaning of the right.[474] If the law does not burden protected conduct, it is upheld.[475] If it does burden protected conduct, a court next applies either intermediate or strict means-ends "scrutiny" to determine whether the law is nevertheless constitutional.[476] Using this two-step framework, the federal circuit courts have upheld many, but not all, firearms regulations,[477] often after concluding that intermediate scrutiny should be applied and thus that the law must merely be "reasonably adapted to a substantial governmental interest"[478] to be constitutional.

Multiple Supreme Court Justices, however, have signaled they may not fully agree with the two-step methodology or some of the results the lower courts have reached. For instance, Justice Kavanaugh wrote while a judge on the D.C. Circuit that courts should "assess gun bans and regulations based on text, history, and tradition" alone.[479] More recently, in *New York State Rifle & Pistol Ass'n v. City of New York*,[480] the Supreme Court was asked to consider a Second Amendment challenge to a city ordinance, but ruled that challenge moot after the ordinance was amended.[481] Justice Kavanaugh wrote separately to express "concern that some federal and state courts may not be properly applying" the Court's Second Amendment precedents.[482] Additionally,

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[471] *Id.* at 626–27 & n.26.

[472] *See* McDonald v. Chicago, 561 U.S. 742, 750 (2010) (concluding Second Amendment applies to state and local governments through the Fourteenth Amendment); Caetano v. Massachusetts, 136 S. Ct. 1027, 1028 (2016) (per curiam) (vacating as inconsistent with *Heller* a Massachusetts Supreme Court decision upholding law prohibiting possession of stun guns).

[473] *E.g.*, United States v. McGinnis, 956 F.3d 747, 753 (5th Cir. 2020) ("Post-*Heller*, we—like our sister circuits—have adopted a two-step inquiry for analyzing laws that might impact the Second Amendment." (internal quotation marks omitted)).

[474] *Id.* at 754.

[475] *Id.* Courts at step one have sometimes recognized a safe harbor for the kinds of "longstanding" and "presumptively lawful" regulations the Supreme Court in *Heller* appeared to insulate from doubt. *E.g.*, United States v. Bena, 664 F.3d 1180, 1183 (8th Cir. 2011) ("It seems most likely that the Supreme Court viewed the regulatory measures listed in *Heller* as presumptively lawful because they do not infringe on the Second Amendment right."). In a variation, some courts have treated such regulations not as de facto constitutional, but merely as being entitled to a presumption of constitutionality. *E.g.*, Tyler v. Hillsdale Cty. Sheriff's Dep't, 837 F.3d 678, 686 (6th Cir. 2016) ("*Heller* only established a presumption that such bans were lawful; it did not invite courts onto an analytical off-ramp to avoid constitutional analysis.").

[476] *McGinnis*, 956 F.3d at 754.

[477] *E.g.*, *id.* at 758; Silvester v. Harris, 843 F.3d 816, 827–29 (9th Cir. 2016); N.Y. State Rifle & Pistol Ass'n v. Cuomo, 804 F.3d 242, 261–63 (2d Cir. 2015).

[478] Kolbe v. Hogan, 849 F.3d 114, 133 (4th Cir. 2017). Courts sometimes state the standard in different ways. *E.g.*, *N.Y. State Rifle & Pistol Ass'n*, 804 F.3d at 261 (indicating that intermediate scrutiny requires that statutes be "substantially related to the achievement of an important governmental interest").

[479] Heller v. District of Columbia (*Heller II*), 670 F.3d 1244, 1272 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

[480] N.Y. State Rifle & Pistol Ass'n, Inc. v. New York, 139 S. Ct. 939 (2019) (order granting petition for writ of certiorari).

[481] N.Y. State Rifle & Pistol Ass'n, Inc. v. New York, 140 S. Ct. 1525, 1526 (2020) (per curiam).

[482] *Id.* at 1527 (Kavanaugh, J., concurring).

Justice Samuel Alito, in a dissent joined by Justice Gorsuch and, in part, by Justice Thomas, decried the mode of review used by the lower courts as "cause for concern" and argued that the laws at issue in the case were unconstitutional under a historical analysis or means-ends scrutiny.[483]

In *Kanter v. Barr*, the Seventh Circuit case in which Judge Barrett dissented, the majority opinion applied the two-step inquiry described above to federal and state laws prohibiting felons from possessing firearms, concluding that the laws were constitutional as applied to an individual convicted of the nonviolent offense of mail fraud.[484] At step one, the majority looked to whether "nonviolent felons as a class historically enjoyed Second Amendment rights" and noted disagreement as to whether the right to bear arms historically belonged only to "virtuous citizens" (which would arguably exclude all felons) or also to those not considered dangerous (which could include some nonviolent felons).[485] Ultimately, the majority deemed it unnecessary to resolve the "difficult issue regarding the historical scope" of the Second Amendment, as it concluded that the statutes would survive scrutiny at step two regardless.[486] In the second step, the majority applied intermediate scrutiny and held that the government met its burden, showing a substantial relationship between the felon dispossession prohibitions and the "important governmental objective" of "preventing gun violence by keeping firearms away from persons, such as those convicted of serious crimes, who might be expected to misuse them."[487] The majority viewed the prohibitions as substantially related to the stated interest given statistical evidence and judicial recognition of a connection between nonviolent offenders and a risk of future violent crime—even as applied to nonviolent felons like the appellant.[488] As such, at least with respect to those convicted of "serious federal felon[ies] for conduct broadly understood to be criminal," the majority concluded that the challenged provisions withstood Second Amendment scrutiny.[489]

Dissenting in *Kanter*, Judge Barrett resolved the "difficult issue regarding the historical scope of the Second Amendment" identified by the majority.[490] The nominee framed the inquiry as whether history and tradition gave the legislature "the power to disable the exercise of a right that [all Americans] otherwise possess."[491] Based on a lengthy examination of Founding-era laws, proposals made in state ratifying conventions, and state constitutional provisions, among other sources, Judge Barrett concluded that history did not support the proposition that "the legislature can permanently deprive felons of the right to possess arms simply because of their status as felons."[492] However, she believed it did support the legislature's ability to disarm "a category [of people] simultaneously broader and narrower than 'felons'"—namely, "those who have demonstrated a proclivity for violence or whose possession of guns would otherwise threaten the public safety."[493]

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[483] *Id.* at 1541, 1544 (Alito, J., dissenting).

[484] 919 F.3d 437, 451 (2019).

[485] *Id.* at 445–47.

[486] *Id.* at 447.

[487] *Id.* at 448.

[488] *Id.* at 448–49.

[489] *Id.* at 451.

[490] *See id.* at 448.

[491] *Id.* at 453 (Barrett, J., dissenting).

[492] *Id.* at 454.

[493] *Id.*

Having concluded that felons do not lose their Second Amendment rights "solely because of their status as felons" but that "the state can take the right to bear arms away from a category of people that it deems dangerous," Judge Barrett turned to the fit between the felon possession bans and the governmental interest in public safety.[494] The nominee took issue with the level of scrutiny applied by the majority, stating that because the bans severely burdened "the whole" of a fundamental right by permanently disqualifying a broad category of people from possessing firearms, even in the home for self-defense, she would apply a closer means-ends fit than the intermediate scrutiny the majority opinion employed.[495] And although Judge Barrett recognized that "the interest identified by the governments and supported by history—keeping guns out of the hands of those who are likely to misuse them—is very strong,"[496] she did not believe the state and federal governments had shown that disarming nonviolent felons like the appellant substantially advanced that interest.[497] According to Judge Barrett, the wholesale felon bans were "wildly overinclusive" in that they encompassed "an immense and diverse category" of offenses with no connection to violence, making it "virtually impossible" for the governments to show the bans were "closely tailored to the goal of protecting the public safety."[498] Additionally, Judge Barrett said there was insufficient evidence of a link between the individual's mail fraud conviction and a risk of future violence, noting there was no evidence this specific appellant would pose a risk to public safety by possessing a gun.[499] Accordingly, Judge Barrett would have held the felon bans unconstitutional as applied to the appellant.[500]

Judge Barrett's opinion in *Kanter* suggests that her confirmation could affect how the Supreme Court approaches future Second Amendment challenges to firearms regulations. The opinion suggests that the nominee would place a heavy emphasis on historical evidence as reflective of the scope of a legislature's authority to regulate firearms. She may also be more exacting in her scrutiny of governmental justifications for firearms laws than some federal courts arguably have been. Judge Barrett's approach could be seen as consistent with the views expressed by other Justices in recent concurring and dissenting opinions that lower courts may be reviewing some firearms laws in too lax a manner.[501]

That said, it may be premature to assess how Judge Barrett, if confirmed, would rule on any particular Second Amendment challenge that came before the Supreme Court. The nominee made clear in her dissent in *Kanter* that Supreme Court precedent and history support the constitutionality of "some categorical bans on the possession of firearms" based on "present-day judgments about categories of people whose possession of guns would endanger the public safety."[502] Further, she emphasized that laws "tailored to serve the governments' undeniably compelling interest in protecting the public from gun violence" would "stand on solid footing,"[503]

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[494] *Id.* at 464–65.

[495] *Id.* at 465.

[496] *Id.*

[497] *Id.* at 469.

[498] *Id.* at 466, 468.

[499] *Id.* at 468–69.

[500] *Id.* at 469.

[501] *See supra* notes 463–73 and accompanying text; *Kanter*, 919 F.3d at 469 (Barrett, J., dissenting) (arguing that upholding the ban as applied on the record before the court treated the Second Amendment as a "second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees" (quoting McDonald v. Chicago, 561 U.S. 742, 780 (2010)).

[502] *Kanter*, 919 F.3d at 454, 464 (Barrett, J., dissenting).

[503] *Id.* at 451.

citing favorably possession bans for domestic violence misdemeanants and controlled-substance addicts (among others).[504] As such, Judge Barrett's dissent in *Kanter* does not suggest that she would necessarily view every firearm law or restriction as suspect under the Second Amendment. More generally, given that the nominee has only authored one Second Amendment opinion, it is difficult to draw definitive conclusions as to how she would evaluate particular firearms measures or what approach to Second Amendment questions she might ultimately employ as a Justice.

[504] *Id.* at 466.

Tables and Data: The Seventh Circuit[505]

Judge Barrett has served as an appellate judge on the Seventh Circuit since November 2, 2017.[506] During her tenure on the bench, she adjudicated more than 620 cases in which an opinion was issued,[507] either as a member of a three-judge panel or on the en banc court.[508] The nominee has authored opinions—either on behalf of a panel or separately (i.e., a concurrence or dissent)—in roughly 90 cases.[509]

The Seventh Circuit generally reviews appeals from district courts located within the geographic region over which it has jurisdiction—the states of Illinois, Indiana, and Wisconsin.[510] The Seventh Circuit has a relatively small caseload as compared to some of its sister regional U.S. Courts of Appeals.[511] Specifically, during the 12-month period ending December 31, 2019, of the 11 regional circuit courts, the Seventh Circuit had the third-fewest appeals filed (2,629), followed by the Tenth Circuit (1,792) and the First Circuit (1,326).[512] In addition, during the 12-month period ending December 31, 2019, of the 11 regional circuit courts, the Seventh Circuit issued the third-fewest number of signed and unsigned written opinions (113), followed by the Sixth Circuit (99) and the Tenth Circuit (79).[513]

While the Seventh Circuit hears appeals involving a number of legal issues, its docket predominantly consists of cases involving criminal matters, prisoner petitions, and civil suits between private parties.[514] Of the appeals filed with the Seventh Circuit during the 12-month

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[505] CRS Section Research Manager Michael John Garcia and Legislative Attorney Kate R. Bowers authored this section of the report.

[506] *Judge Barrett Biography*, *supra* note 2.

[507] On October 1, 2020, CRS searched the Westlaw legal database profile of Judge Barrett, which listed 623 cases that were identified by Westlaw editors as cases in which Judge Barrett sat on a judicial panel (including, but not limited to, those cases where she wrote an opinion). A search of federal cases in the LEXISAdvance legal database, using the search strategy *judges(Amy Barrett)* retrieved 757 results. The significant discrepancy in results appears mainly because the LEXISAdvance database search retrieved many brief judicial orders on routine procedural motions that were not retrieved using Westlaw, and which are not included in this report's tables.

[508] To date, Judge Barrett has not sat by designation on any other federal court. *See* 28 U.S.C. § 291(a) (providing that the Chief Justice of the U.S. Supreme Court "may, in the public interest, designate and assign temporarily any circuit judge to act as circuit judge in another circuit upon request by the chief judge or circuit justice of such circuit"); *id.* § 2284 (providing for three-judge district court panels to be convened with respect to certain actions, including challenges to the constitutionality of the apportionment of congressional districts or state legislative bodies, and that at least one judge on the panel be a circuit judge).

[509] One of these opinions, *Emmis Communications Corp. v. Illinois National Insurance Co.*, 937 F.3d 836 (7th Cir. 2019), concerning an insurance policy dispute, was subsequently withdrawn and replaced with a per curiam opinion. In two cases, opinions issued by the panel were subsequently reissued with minor amendments. Morales v. Barr, 963 F.3d 629 (7th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom.* Meza Morales v. Barr, No. 19-1999, 2020 WL 5268986 (7th Cir. June 26, 2020); Crosby v. Chicago, 949 F.3d 358 (2020), *substituted for amended opinion*, Nos. 18-3693 & 19-1439, 2020 U.S. App. LEXIS 7035 (amended Mar. 6, 2020).

[510] *About the Court*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR., http://www.ca7.uscourts.gov/about-court/about-court.htm (last visited Oct. 1, 2020).

[511] *U.S. Court of Appeals Summary—12-Month Period Ending December 31, 2019*, at 1, USCOURTS.GOV (Dec. 31, 2019), https://www.uscourts.gov/sites/default/files/data_tables/fcms_na_appsumary1231.2019.pdf [hereinafter *2019 Circuit Court Statistics*].

[512] *Id.*

[513] *Id.*

[514] *Id.* The cases commonly heard in the Seventh Circuit and other regional circuits differ from those typically heard by the D.C. Circuit. Accordingly, compared to the two newest Supreme Court Justices—Justices Gorsuch (previously of the Tenth Circuit) and Kavanaugh (previously of the D.C. Circuit)—Judge Barrett's appellate caseload more closely

period ending December 31, 2019, 51.1% (1,343 cases) were criminal law matters or petitions from federal or state prisoners;[515] approximately 45.3% were private civil disputes, such as cases on labor, insurance, contract, and tort law;[516] while 3.6% were administrative agency appeals.[517] While most of these cases involve questions of federal law, like other federal courts, the Seventh Circuit may hear cases that involve questions of state law when the claims are related to federal claims properly before the court, and occasionally cases that turn entirely on matters of state law if the plaintiff and defendant are from different states and other justiciability criteria are met.[518] Perhaps indicative of the nature of intermediate appellate work, in which courts hear "many routine cases in which the legal rules are uncontroverted,"[519] the vast majority of cases decided by three-judge panels in the Seventh Circuit are issued without a dissenting opinion.[520]

The Seventh Circuit's composition has changed noticeably in recent years. Just prior to Judge Barrett's arrival, the Circuit had seven judges in active service, the majority of whom had sat on the bench together for more than 20 years.[521] From Judge Barrett's appointment in November 2017 through the end of May 2018, the Circuit saw four new judges join the appellate court, raising the number of judges in active service to 11.[522]

Table 1 and **Table 2** provide a snapshot of how the written opinions of each active-status judge on the Seventh Circuit have been divided since Judge Barrett's arrival. **Table 1** lists, for each judge in active status during the last 35 months, the number of cases heard by that judge that resulted in published opinions (i.e., those cases where the Circuit panel's decision has been published in the *Federal Reporter* and is treated as precedential[523]), as well the number of

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resembles Justice Gorsuch's than it does Justice Kavanaugh's. *Compare CRS Report on Gorsuch Opinions*, *supra* note 73, *with CRS Report on Kavanaugh Opinions*, *supra* note 73.

[515] *2019 Circuit Court Statistics*, *supra* note 511, at 1.

[516] *Id.*

[517] *Id.*

[518] 28 U.S.C. § 1367 (setting forth criteria for federal court's supplementary jurisdiction over certain state law claims related to federal claims properly before the court); *id.* § 2822 (providing for federal court jurisdiction over cases where the matter in controversy exceeds $75,000 and the parties are from different states).

[519] Louis J. Sirico Jr., *The Citing of Law Reviews by the United States Courts of Appeals: An Empirical Analysis*, 45 U. MIAMI L. REV. 1051, 1052 n.8 (1991); *see generally* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 367 (2009) (observing that "more of the work of [the federal appellate] courts really is technical. . . . Most of the appeals they get can be decided uncontroversially by the application of settled principles").

[520] *See* Edwards, *supra* note 62, at 71 (listing total published and unpublished decisions issued by the 12 regional courts of appeals, and indicating that 1.3% of total decisions on the merits involved at least one dissent); *id.* at 67 (observing that between 2011 and 2016, between 3.5% and 5% of each year's published decisions on the merits from the Seventh Circuit drew at least one dissent, and between 1.2% and 1.9% of each year's combined published and unpublished decisions drew at least one dissent); CROSS, *supra* note 63 (noting the "relative paucity of circuit court panel dissents").

[521] Indeed, five of the seven active service judges on the Seventh Circuit were eligible for senior status, and with it (at the senior judge's option), a reduced workload, but have chosen to continue a full-time schedule. *See Judges' Biographies*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR., http://www.ca7.uscourts.gov/judges-biographies/biographies7.htm (last visited Oct. 1, 2020) (linking to biographies and judicial service records for Judges Easterbrook, Flaum, Kanne, Rovner, and Wood); *FAQs: Federal Judges–What Is a Senior Judge?*, U.S. COURTS, https://www.uscourts.gov/faqs-federal-judges#faq-What-is-a-senior-judge? (last visited Oct. 1, 2020) ("Beginning at age 65, a judge may retire at his or her current salary or take senior status after performing 15 years of active service as an Article III judge. . . . Senior judges, who essentially provide volunteer service to the courts, typically handle about 15 percent of the federal courts' workload annually.").

[522] *See Judges' Biographies*, *supra* note 521.

[523] 7TH CIR. R. 32.1(b) ("The court may dispose of an appeal by an opinion or an order. Opinions, which may be signed or per curiam, are released in printed form, are published in the *Federal Reporter*, and constitute the law of the circuit. Orders, which are unsigned, are released in photocopied form, are not published in the *Federal Reporter*, and are not

opinions authored by the judge in those cases, whether writing on behalf of the panel or separately. **Table 2** compares the frequency with which a controlling opinion written by Judge Barrett or another Seventh Circuit judge drew a separate opinion from another member of the court (including a visiting judge or a senior-status judge). In both tables, judges who joined the court *after* Judge Barrett, and thus were not members of the court for the entire period considered, are noted in italics.

During the 35-month period considered, in terms of the number and type of opinions authored and the number of separate opinions issued in response, Judge Barrett's results were not outside the range of her colleagues on the court. The nominee's reported caseload was comparable to colleagues who were comparatively new to the appellate bench. Though Judge Barrett's recorded caseload appears to be lighter than that of many judges who were already on the court, much of this is attributable to lag times between when a case was initially heard by the court and when a decision is published. That is, many opinions published by more senior judges near the beginning of the 35-month period involve cases that were heard prior to Judge Barrett's appointment. Judge Barrett's frequency in issuing dissenting opinions in cases in which she participated, along with the frequency with which her majority opinions drew a concurrence or dissent from her fellow judges, was similarly comparable to her fellow judges.

Perhaps the most significant conclusion that can be drawn from this information is that it would not be a reliable tool for predicting how Judge Barrett will engage with colleagues on the bench over an extended period. In some cases, when a judge has a lengthy record on a multimember court whose composition remains the same, it may be possible to make cautious assessments of the judge's approach to working with colleagues.[524] Those predictions could not be responsibly made using the data included in **Table 1** and **Table 2**. Given the small sample size of these tables, small differences in the numbers of majority, concurring, and dissenting opinions written by each judge could have resulted in a judge appearing to be either a frequent or infrequent dissenter as compared to his or her colleagues.

Moreover, a circuit judge's likelihood of writing for the court or authoring a separate opinion may depend on a variety of factors, including not only the personality and preferences of an individual panel member, but also the nature of the dispute before the court.[525] A panel's composition not only affects *how* that case is decided, but *who* is responsible for authoring the court's opinion. In the Seventh Circuit, opinion assignments are made by the presiding judge—generally either the active-status judge on the panel with the most seniority or the chief judge if she is sitting on the panel.[526] Given the Seventh Circuit's composition, Judge Barrett has not typically been the

treated as precedents.").

[524] See generally CRS Report R45293, *Judge Brett M. Kavanaugh: His Jurisprudence and Potential Impact on the Supreme Court*, at 7-10, 14-16 (discussing the pros and cons of examining a Supreme Court nominee's prior record on a multi-member court to assess the significance of the judge's frequency in joining or authoring unanimous opinions or writing separately); CRS Gorsuch Report, supra note 53, at 2–7 (similar).

[525] *See, e.g.*, Levinson, *supra* note 66, at 174 (declaring the assumption that "all adjudicators are splendidly isolated" is "foolish," and arguing that it may be "incumbent" upon judges to engage in "intellectual compromise[s]" "to serve the public weal"); Eugene Kiely, *Fact Check: Gorsuch's "Mainstream" Measurement*, FACTCHECK.ORG (Apr. 7, 2017), https://www.factcheck.org/2017/04/gorsuchs-mainstream-measurement/ (noting similarities between the dissent rates of Justices Alito, Gorsuch, and Sotomayor in concluding that "[a] circuit court judge's overall dissent rate isn't useful in determining a nominee's ideology"); David C. Vladeck, Keeping Score: *The Utility of Empirical Measurements in Judicial Selection*, 32 FLA. ST. U.L. REV. 1415, 1440 (2005) ("Dissents can (but not always) tell us something about independence, but only a small part of the story.").

[526] U.S. CT. OF APPEALS FOR THE SEVENTH CIR., PRACTITIONER'S HANDBOOK FOR APPEALS 10 (2020) ("The chief judge presides over any panel on which he or she sits. If the chief judge does not sit, the most senior Seventh Circuit active judge on the panel normally presides. The presiding judge assigns the writing of opinions at the conference immediately following the day's oral arguments.").

presiding judge on her assigned panels; accordingly, her written panel opinions were frequently assigned to her by another judge. In other words, the panel opinions that Judge Barrett has authored (and, relatedly, the likelihood that those opinions address topics that may draw a separate opinion from another panelist) may be partially affected by her seniority on the court.

Methodology

To generate these tables, CRS conducted a search over the indicated date range using the LEXIS database for all reported Seventh Circuit decisions (i.e., published in the *Federal Reporter*), including any reported per curiam denials of petitions for rehearings en banc. (Including unreported cases would introduce thousands of additional cases, as LEXIS includes short, unreported per curiam denials of rehearing motions in its database.)

For **Table 1**, the "Number of Cases Resulting in Reported Opinions" was determined by using the LEXIS document segment term JUDGES to screen for cases where a selected judge sat on the reviewing three-judge panel or the en banc court. The "Number of Majority Opinions Authored" was determined by searching the LEXIS database for reported Seventh Circuit cases for "OPINIONBY([Judge's last name])." The "Number of Dissenting Opinions Authored" was determined by searching the LEXIS database for reported Seventh Circuit cases for "DISSENTSBY([Judge's last name])," while the "Number of Separate Opinions Authored" was compiled by adding the tally of the prior category for a particular judge to the tally of opinions written by the judge, which were identified by searching the LEXIS database for reported Seventh Circuit cases for "CONCURBY([Judge's last name])," and subtracting any duplicative results.

Table 2 used the same methodology as **Table 1** to identify "Number of Cases Resulting in Reported Opinions." To determine "Number of Reported Majority Opinions That Drew a Separate Opinion (Concurrence or Dissent)" and "Number of Reported Majority Opinions That Drew a Dissent," CRS searched reported Seventh Circuit cases using "OPINIONBY[Judge's last name] and (concur or concurring or dissent or dissenting)," and then read each returned case to determine if a concurrence or dissent was authored in the case.

For both **Table 1** and **Table 2**, if a judge concurred in part and dissented in part, those opinions are listed as dissents. Both tables also include as dissents those instances where a judge, though not part of the panel that considered the case, dissented from a denial of consideration by Seventh Circuit sitting on en banc. **Table 1** and **Table 2** also exclude cases in which a listed judge sat by designation on a different court.

These searches were conducted on October 1, 2020, and were limited to opinions written by judges who were on active status as circuit judges during the period in which Judge Barrett served: from the date she assumed office as a Seventh Circuit judge (November 2, 2017) through the date that her nomination to the Supreme Court was received by the Senate (September 29, 2020).

Table 1. Reported Opinions Issued by Active Status Judges on the Seventh Circuit (November 2, 2017, to September 29, 2020)

Judge	Number of Cases Resulting in Reported Opinions*	Number of Reported Majority Opinions Authored	Majority Opinion Rate	Number of Separate, Reported Opinions Authored (Dissents and Concurrences)	Separate Opinion Rate	Number of Dissents Authored in Reported Cases (Including Partial Dissents)	Dissent Rate
Barrett, Amy C. (Nov. 2017–present)	272	78	28.68%	8	2.94%	5	1.84%
Brennan, Michael B. (May 2018–present)	*217*	*59*	*27.19%*	*6*	*2.76%*	*5*	*2.30%*
Easterbrook, Frank H. (Apr. 1985–present)	374	124	33.16%	11	2.94%	7	1.87%
Flaum, Joel M. (May 1983–present)	284	91	32.04%	1	0.35%	1	0.35%
Hamilton, David F. (Nov. 2009–present)	432	147	34.03%	28	6.48%	15	3.47%
Kanne, Michael S. (May 1987–present)	369	85	23.04%	3	0.81%	2	0.54%
Rovner, Illana D. (Aug. 1992–present)	339	95	28.02%	12	3.54%	7	2.06%

Scudder, Michael Y. *(May 2018–present)*	*258*	*85*	*32.95%*	*3*	*1.16%*	*1*	*0.39%*
St. Eve, Amy J. *(May 2018–present)*	*233*	*76*	*32.62%*	*2*	*0.86%*	*1*	*0.43%*
Sykes, Diane S. (July 2004–present)	391	122	31.20%	7	1.79%	3	0.77%
Wood, Diane P. (June 1995–present)	352	145	41.2%	12	3.41%	11	3.13%

Source: Congressional Research Service.

Note: As reported in LEXIS. The table is dependent on the coding of the LEXIS database and does not necessarily provide precise numbers of reported opinions authored by Judge Barrett or her Seventh Circuit colleagues. Judges who joined the Seventh Circuit after Judge Barrett, and thus were not members of the court for the entire period considered, are in italics.

Table 2. Opinions Issued by Active-Status Judges on the Seventh Circuit That Drew Dissents and Concurrences in Reported Cases (November 2, 2017, to September 29, 2020)

Judge	Number of Reported Majority Opinions Authored	Number of Reported Majority Opinions That Drew a Separate Opinion (Concurrence or Dissent)	Separate Opinion Rate	Number of Reported Majority Opinions That Drew a Dissent	Dissent Rate
Barrett, Amy C. (Nov. 2017–present)	78	6	7.69%	5	6.41%
Brennan, Michael B. *(May 2018–present)*	*59*	*5*	*8.47%*	*4*	*6.78%*
Easterbrook, Frank H. (Apr. 1985–present)	124	7	5.65%	3	2.42%
Flaum, Joel M. (May 1983–present)	91	6	6.59%	3	3.30%
Hamilton, David F. (Nov. 2009–present)	147	18	12.24%	13	8.84%
Kanne, Michael S. (May 1987–present)	85	4	4.71%	2	2.35%
Rovner, Illana D. (Aug. 1992–present)	95	9	9.47%	5	5.26%

Scudder, Michael Y. *(May 2018–present)*	*85*	*9*	*10.59%*	*6*	*7.06%*
St. Eve, Amy J. *(May 2018–present)*	*76*	*7*	*9.21%*	*6*	*7.89%*
Sykes, Diane S. (July 2004–present)	122	13	10.66%	9	7.38%
Wood, Diane P. (June 1995–present)	145	17	11.72%	7	4.83%

Source: Congressional Research Service.

Note: As reported in LEXIS. The table is dependent on the coding of the LEXIS database and does not necessarily provide precise numbers of reported opinions authored by Judge Barrett or her Seventh Circuit colleagues. Judges who joined the Seventh Circuit after Judge Barrett, and thus were not members of the court for the entire period considered, are in italics.

Tables and Data: Judge Barrett's Judicial Opinions[527]

During her tenure on the Seventh Circuit, Judge Barrett has adjudicated more than 620 cases in which the presiding three-judge panel or en banc court issued an opinion. In the course of these cases, Judge Barrett wrote roughly 90 controlling, concurring, or dissenting opinions (excluding 1 that was withdrawn after being vacated on rehearing en banc). These opinions are listed and categorized into three tables: **Table 3** identifies 74 controlling opinions authored by Judge Barrett for which no member of the court issued a separate opinion (including 2 cases in which the opinion was amended and reissued); **Table 4** contains 6 controlling opinions authored by Judge Barrett in which one or more panelists wrote a separate opinion; and **Table 5** lists 11 cases in which Judge Barrett wrote a concurring or dissenting opinion.[528]

Methodology

The cases included in **Table 3**, **Table 4**, and **Table 5** were compiled from searches in which Judge Barrett was identified as an author using the Seventh Circuit's database.[529] As a cross-check, searches were then conducted of all federal cases in the LEXISAdvance legal database for "writtenby(Amy Barrett)"[530] and all federal cases identified in Westlaw legal database profile of Judge Barrett (Barrett),"[531] along with materials submitted to the Senate Judiciary in conjunction with Judge Barrett's nomination.[532] The LEXISAdvance and Westlaw results were last compared on October 1, 2020. Not every identified result proved relevant. Moreover, in a handful of cases, an opinion authored by Judge Barrett was subsequently republished with minimal, and sometimes only stylistic, changes. In those cases, the most recent published version is prominently listed,

[527] CRS Section Research Manager Michael John Garcia and Legislative Attorneys Kate R. Bowers and Sean M. Stiff authored this section of the report.

[528] A concurring opinion is identified as a "concurrence in the judgment"—that is, an opinion where the author agrees with the ultimate conclusion reached by the majority, but not the manner in which it was reached—only when the concurrence is expressly labeled as such. *See* James F. Spriggs II & David R. Stras, *Explaining Plurality Decisions*, 99 GEO. L.J. 515, 519–20 (2011) ("[A] simple concurring opinion indicates that the [judge] writing separately agrees with the legal rule and its application in the majority opinion but that there is some aspect of the case worthy of further discussion. . . . [A]n opinion concurring in the judgment is the functional equivalent of a dissent from the [controlling opinion's] reasoning even if it represents agreement with the result reached in the case."). The nature of a concurring opinion, including the legal significance that should be given to whether the opinion labels itself a "concurrence" or a "concurrence in the judgment," is a matter of scholarly discussion and occasional judicial importance, particularly in cases where there is a question as to whether a majority of the court shared the same legal rationale to support the court's ruling. *See generally* Sonja R. West, *Concurring in Part & Concurring in the Confusion*, 104 MICH. L. REV. 1951, 1955–56, 1958 (2006) (arguing that "the phrase following the comma" after the authoring judge's name—e.g., "concurring" or "concurring in the judgment"—has been "used in an inconsistent, unclear, and often contradictory manner," which has led to confusion among commentators and courts regarding the degree to which the judge endorses the analysis of the majority opinion).

[529] *Opinions and Nonprecendential Dispositive Orders*, U.S. CT. OF APPEALS FOR THE SEVENTH CIR. (last visited Oct. 1, 2020), http://media.ca7.uscourts.gov/opinion.html.

[530] The "WrittenBy" segment in LexisAdvance restricts searches to the names of the judge(s) writing an opinion, as identified by Lexis editors.

[531] The "WB" or "Writtenby" segment in Westlaw restricts searches to the names of the judge(s) writing an opinion, as identified by Westlaw editors.

[532] Judge Amy Coney Barrett, Nominee to be Associate Justice of the Supreme Court of the United States, Answers to Questionnaire of the Senate Committee on the Judiciary, Submitted Sept. 29, 2020, at Appendix 13C, https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20SJQ%20Appendix%2013.c.pdf.

with a note giving a citation to the earlier version.[533] A withdrawn opinion by Judge Barrett for a three-judge panel is also omitted.[534]

The tables exclude per curiam opinions and other cases where Judge Barrett is not specifically credited as an opinion's author. The tables also do not attempt to identify the various rulings made by Seventh Circuit panels on procedural issues in the midst of the appeal (e.g., granting a party's request for an extension of time to file a brief). Finally, the tables do not address subsequent legal proceedings that may have occurred after a cited decision was issued (e.g., whether a petition for certiorari was later denied by the Supreme Court), except to note where Westlaw or LEXIS editors have indicated that a decision was subsequently overruled or vacated by the Seventh Circuit.

Cases are listed in reverse chronological order based on where the case appears in the *Federal Reporter* (rather than the date the case was actually decided). CRS read each opinion to identify the case's key ruling or rulings, which are succinctly described, and to categorize it using the following legal subject areas (some opinions may fall within more than one category):

- Business & Corporate Law (5 cases)
- Civil Rights Law (21 cases)
- Contracts Law (1 case)
- Criminal Law & Procedure (28 cases)
- Elections Law (1 case)
- Federal Courts & Civil Procedure (17 cases)
- Firearms Law (1 case)
- Freedom of Speech (2 cases)
- Immigration Law (8 cases)
- Labor & Employment Law (11 cases)
- Pension & Benefits Law (2 cases)
- Takings (1 case)
- Tax Law (2 cases)
- Torts (6 cases)

While these categories may prove helpful to readers seeking to locate judicial opinions by Judge Barrett on certain legal topics, these categories do not necessarily capture the full range of legal issues those opinions address.

[533] Morales v. Barr, 963 F.3d 629 (7th Cir. 2020), *opinion amended and superseded on denial of reh'g sub nom.* Meza Morales v. Barr, No. 19-1999, 2020 WL 5268986 (7th Cir. June 26, 2020); Crosby v. Chicago, 949 F.3d 358 (2020), *substituted for amended opinion*, at Nos. 18-3693 & 19-1439, 2020 U.S. App. LEXIS 7035 (amended Mar. 6, 2020).

[534] Emmis Comm'ns. Corp. v. Ill. Nat'l Ins. Co., 937 F.3d 836 (7th Cir. 2019).

Table 3. Opinions Authored by Judge Barrett for a Unanimous Panel

Case Name	Citation	Year	Role	Subject	Holding
United States v. Sparkman	___ F.3d ___, No. 17-3318, 2020 WL 5247575, 2020 U.S. App. LEXIS 28100	2020	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* Section 403 of the First Step Act of 2018, which amended the mandatory minimum sentence for certain firearm offenses, applies to an offense committed before enactment "if a sentence for the offense has not been imposed as of such date of enactment." The Act did not apply to a defendant whose initial sentence had been vacated and who had been resentenced before the statute's enactment.[a]
Burlaka v. Cont. Transp. Servs. LLC	971 F.3d 718	2020	Authored opinion for unanimous panel	Labor & Employment Law	*Affirmed:* Truck drivers, who performed spotting services that involved "driving in interstate commerce," fell within the Motor Carrier Act exemption from overtime pay under the Fair Labor Standards Act.
Protect Our Parks, Inc. v. Chicago Park Dist.	971 F.3d 722	2020	Authored opinion for unanimous panel	Federal Courts & Civil Procedure; Takings	*Affirmed in part, vacated in part, and remanded:* Plaintiffs challenging approval to construct the Obama Presidential Center lacked standing to assert state-law public trust and ultra vires claims in federal court and the district court should have dismissed those claims for lack of jurisdiction. The plaintiffs' Fifth and Fourteenth Amendment takings and procedural due process claims failed on the merits because the plaintiffs lacked a property interest and failed to identify what greater process they were due.
Pittman by and through Hamilton v. Cnty. of Madison, Illinois	970 F.3d 823	2020	Authored opinion for unanimous panel	Civil Rights Law	*Reversed and remanded:* A plaintiff was entitled to a new trial under 42 U.S.C. § 1983 after a jury instruction erroneously directed the jury to evaluate the plaintiff's Fourteenth Amendment claim with a subjective rather than an objective standard.
Shakman v. Clerk of Cir. Ct. of Cook Cnty.	969 F.3d 810	2020	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Appeal dismissed:* The court lacked appellate jurisdiction to consider a union's objection to a magistrate judge's supplemental relief order appointing a special master to monitor compliance with a consent decree, when the union was not a party to the earlier litigation or consent decree.

Case Name	Citation	Year	Role	Subject	Holding
VHC, Inc. v. Comm'r of Internal Revenue	968 F.3d 839	2020	Authored opinion for unanimous panel	Tax Law	*Affirmed:* The Tax Court correctly upheld the IRS's determination that a company's payments to the founder's son were not bona fide debts qualifying for income tax deduction.
Wallace v. Grubhub Holdings, Inc.	970 F.3d 798	2020	Authored opinion for unanimous panel	Labor & Employment Law; Federal Courts & Civil Procedure	*Affirmed:* Food delivery drivers claiming overtime violations of the Fair Labor Standards Act, the Illinois Minimum Wage Law, and a California law failed to establish that they actively engaged in moving goods across interstate lines; because the plaintiffs were not "engaged in foreign or interstate commerce," they were not exempt from compelled arbitration under Federal Arbitration Act.
Estate of Biegert by Biegert v. Molitor	968 F.3d 693	2020	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* Police officers did not violate the Fourth Amendment when they reasonably restrained an apartment resident while responding to a report that he was suicidal; the officers reasonably resorted to lethal force after the resident threatened them and stabbed one officer.
J.S.T. Corp. v. Foxconn Interconnect Tech. Ltd.	965 F.3d 571	2020	Authored opinion for unanimous panel	Business & Corporate Law; Torts	*Affirmed:* Downstream sales of electronic equipment to consumers in forum state were insufficient to establish personal jurisdiction over the plaintiff's competitors, who were building knockoff equipment; "stream of commerce" theory of personal jurisdiction did not apply where downstream sales had only an attenuated connection to the plaintiff's legal claims.
United States v. Kennedy-Robey	963 F.3d 688	2020	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* The district court adequately explained its reasoning for rejecting the defendant's arguments at sentencing regarding her mental health condition and that of other similarly situated defendants. Imposing a sentence that was above the federal guidelines range was substantively reasonable when the district court considered sentencing factors and unique aspects of the defendant's case.
Ruckelshaus v. Cowan	963 F.3d 641	2020	Authored opinion for unanimous panel	Torts	*Affirmed:* Under state law, a legal malpractice claim relating to dissolution and disbursement of a trust was subject to the discovery rule for purposes of determining when the claim accrued; the plaintiff's receipt of documents dissolving the trust triggered the two-year statute of limitations.

Case Name	Citation	Year	Role	Subject	Holding
Purtue v. Wisconsin Dep't of Corrs.	963 F.3d 598	2020	Authored opinion for unanimous panel	Civil Rights Law; Labor & Employment Law	*Affirmed:* A prison corrections officer alleging gender discrimination in violation of Title VII and 42 U.S.C. § 1983 failed to demonstrate that she was fired from her job because of her gender.
Morales v. Barr	963 F.3d 629, reprinted as amended as Meza Morales v. Barr, ____ F.3d ___, No. 19-1999 2020 WL 5268986, 2020 U.S. App. LEXIS 28112	2020	Authored opinion for unanimous panel	Immigration Law	*Petition for review granted, remanded:* An immigration judge's initial waiver of two grounds of inadmissibility to the United States did not preclude the judge from using such grounds subsequently for an order of removal; but the immigration judge wrongly rejected alternative procedures of continuing or administratively closing the petitioner's case instead of ordering removal. The petitioner's appeal did not become moot when he was placed on the U visa waiting list. Note: The panel's original published decision was amended and reprinted following a denial of rehearing en banc, Meza Morales v. Barr, No. 19-1999 2020 WL 5268986, 2020 U.S. App. LEXIS 28112688 F.3d 771, but no significant changes were made to the opinion's substantive legal conclusions.
O'Neal v. Reilly	961 F.3d 973	2020	Authored opinion for unanimous panel	Civil Rights Law; Federal Courts & Civil Procedure	*Affirmed:* A plaintiff who filed a pro se lawsuit asserting 42 U.S.C. § 1983 claims, which the district court dismissed, waived his argument that he was entitled to relief from the lower court's judgment by not invoking the appropriate procedural mechanism for relief until his reply brief. The plaintiff would not have satisfied the requirements for relief because he did not file his motion within a reasonable time.
United States v. Young	955 F.3d 608	2020	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* A district court did not abuse its discretion in denying a criminal defendant's motion for continuance of a trial where the court had already granted two continuances and the defendant elected to proceed pro se three weeks before the scheduled trial date. The court's jury instruction regarding the interstate commerce element of the offense comported with the statutory requirement that the offense occur in or affect interstate commerce; the government had sufficient evidence to prove an interstate commerce element for each count of conviction. The district court properly excluded evidence of the defendant's minor victims' past sexual conduct.

Case Name	Citation	Year	Role	Subject	Holding
Vega v. Chicago Park Dist.	954 F.3d 996	2020	Authored opinion for unanimous panel	Civil Rights Law; Labor & Employment Law	*Affirmed in part, vacated in part, remanded with instructions:* In park supervisor's national-origin discrimination and retaliation action against her former employer under Title VII and 42 U.S.C. § 1983, the plaintiff presented enough circumstantial evidence to prove discrimination in support of Title VII claim; the district court's evidentiary rulings were not an abuse of discretion and did not affect the outcome of the trial; the district court's remittance of plaintiff's damages to the statutory maximum was rationally related to testimony presented at trial and not an abuse of discretion; the district court's award of back pay and benefits was reasonable; and the district court correctly concluded that the plaintiff's evidence of discrimination did not establish a "widespread custom" necessary to satisfy the standard of liability on § 1983 claim. The district court abused its discretion in failing to explain its calculation of the tax component award.
United States v. Geary	952 F.3d 911	2020	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* A district court properly applied a sentencing enhancement to a defendant when there was ample evidence in the record that she permitted her husband to use their daughter to produce child pornography, even though the defendant did not participate or assist in taking the photos. In calculating a restitution amount, the district court was entitled to rely on evidence produced in a codefendant's sentencing.
Gadelhak v. AT&T Servs., Inc.	950 F.3d 458	2020	Authored opinion for unanimous panel	Business & Corporate Law; Federal Courts & Civil Procedure	*Affirmed:* Receipt of an unwanted automated text message can constitute a concrete injury-in-fact for Article III standing purposes. A telecommunications company's use of its customer feedback tool to select numbers from a customer database and generate unwanted text messages was not an automatic telephone dialing system and did not violate the Telephone Consumer Protection Act.

Case Name	Citation	Year	Role	Subject	Holding
Crosby v. City of Chicago	949 F.3d 358, substituted for amended opinion at Nos. 18-3693 & 19-1439, 2020 U.S. App. LEXIS 7035	2020	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* A settlement agreement in the plaintiff's prior 42 U.S.C. § 1983 excessive force action barred the plaintiff from bringing malicious prosecution and wrongful conviction and imprisonment claims against city, arresting officer, and other police officers for torts they committed in the course of covering up the arresting officer's misconduct. The defendant city's requested litigation costs were reasonable. Note: The panel's original published decision was substituted with an amended opinion following a denial of rehearing en banc, Nos. 18-3693 & 19-1439, 2020 U.S. App. LEXIS 7035, but the panel made no significant changes to the opinion's substantive legal conclusions.
A.F. Moore & Assocs., Inc. v. Pappas	948 F.3d 889	2020	Authored opinion for unanimous panel	Federal Courts & Civil Procedure; Tax Law	*Reversed:* The Tax Injunction Act did not strip a district court of subject matter jurisdiction over a lawsuit alleging that the county's method of assessing property taxes violated the Equal Protection Clause. State court procedural rules prevented plaintiffs from bringing the equal protection claim in state court. For the same reason, comity did not permit the district court to decline jurisdiction.
Elston v. Cnty. of Kane	948 F.3d 884	2020	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* The plaintiff, who was attacked by an off-duty sheriff's deputy and won a default judgment against the deputy, could not hold the deputy's employer liable for the default judgment. A jury could not find that the deputy confronted the plaintiff within the time and space limits authorized by the sheriff's office or to benefit the office.
Lett v. City of Chicago	946 F.3d 398	2020	Authored opinion for unanimous panel	Civil Rights Law; Freedom of Speech	*Affirmed:* A plaintiff had no First Amendment retaliation claim based on his allegation that he was fired for refusing to amend a police misconduct report to state that police officers had planted a gun on the victim of a police shooting. In refusing to make the amendment, the plaintiff spoke as a public employee and not as a private citizen.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Allgire	946 F.3d 365	2020	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* Following the defendant's violation of supervised release, the district court did not abuse its discretion in applying a sentence above the guideline range for reimprisonment sentences. The district court did not plainly err by imposing two concurrent terms of reimprisonment as the longer of the two was reasonable.
Green v. Howser	942 F.3d 772	2019	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* There was sufficient evidence for a jury to find that the plaintiff's parents conspired with state law enforcement to take custody of the plaintiff's child, thereby depriving the plaintiff of her constitutional rights. The magistrate judge did not abuse his discretion in excluding evidence generally unfavorable to the plaintiff as a parent. The jury's compensatory and punitive damage awards were not excessive.
Clanton v. United States	943 F.3d 319	2019	Authored opinion for unanimous panel	Torts	*Vacated and remanded:* The district court erred in evaluating the plaintiff's comparative negligence claim under governing state tort law by not considering whether a reasonable person in the plaintiff's condition would have monitored his medical condition as the plaintiff did. The district court did not err in judgment-related determinations.
PMT Mach. Sales, Inc. v. Yama Seiki USA, Inc.	941 F.3d 325	2019	Authored opinion for unanimous panel	Business & Corporate Law	*Affirmed*: Because the plaintiff was not a "dealership" within the meaning of the governing state law, the plaintiff's claim against a manufacturer for breach of an alleged exclusive dealership agreement failed. The plaintiff did not have the right to sell or distribute the defendant's tools, but only facilitated the defendant's sales. The plaintiff made only a de minimis use of the defendant's mark.
Groves v. United States	941 F.3d 315	2019	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Interlocutory appeal dismissed:* The 10-day deadline in Federal Rule of Appellate Procedure 5 for applying to the court of appeals for interlocutory review of a certified order is jurisdictional and not subject to tolling or extension. The plaintiff failed to comply with the deadline, and the district court's later reentry of the certified order could not restart it.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Atwood	941 F.3d 883	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Vacated and remanded for resentencing:* Because the presiding judge in the defendant's criminal case engaged in ex parte communications with the U.S. attorney's office in relation to other matters, he should have recused. The failure to recuse was harmful.
Lexington Ins. Co. v. Hotai Ins. Co., Ltd.	938 F.3d 874	2019	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Affirmed*: The district court lacked personal jurisdiction over Taiwanese insurers, who sued on theories of contribution and equitable subrogation. Provisions in agreements with third parties acknowledging a U.S. manufacturer as an additional insured and providing worldwide coverage were not sufficient contacts between the Taiwanese insurers and the forum state, Wisconsin.
Smith v. Ill. Dep't of Transp.	936 F.3d 554	2019	Authored opinion for unanimous panel	Labor & Employment Law	*Affirmed*: The plaintiff's retaliation claim failed because he could not show that he was meeting his employer's job performance expectations when he was terminated. His hostile workplace claim also failed. Though a supervisor directed a racial slur at the plaintiff, the plaintiff did not show that the slur changed the conditions of his employment or created an abusive environment.
Torry v. City of Chicago	932 F.3d 579	2019	Authored opinion for unanimous panel	Civil Rights Law; Criminal Law & Procedure	*Affirmed*: Because their conduct did not violate clearly established law, police officers had qualified immunity in a suit brought by persons who they had stopped while investigating a nearby shooting. The defendants' failure to remember the stop years later was not a concession of liability.
Mathews v. REV Recreation Grp., Inc.	931 F.3d 619	2019	Authored opinion for unanimous panel	Business & Corporate Law	*Affirmed:* The plaintiffs' breach-of-warranty claims failed because the plaintiffs did not give the recreational vehicle (RV) manufacturer a reasonable opportunity to fix the RV's defects, did not take advantage of the "back-up" warranty remedy of having a third party fix the RV, and could not establish that the warranty limitations were unconscionable.

Case Name	Citation	Year	Role	Subject	Holding
Graham v. Artic Zone Iceplex, LLC	930 F.3d 926	2019	Authored opinion for unanimous panel	Civil Rights Law; Labor & Employment Law	*Affirmed*: A plaintiff's claim that his former employer failed to accommodate his disability foundered on the undisputed fact that the plaintiff did not provide his former employer enough information to make the necessary accommodation. The plaintiff lacked sufficient evidence to show that the former employer's reasons for termination were a pretext for disability discrimination.
United States v. Walker	931 F.3d 576	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Reversed and sentence vacated:* A defendant's conviction for failing to register under the Sex Offender Registration and Notification Act was in error. The underlying sex offense did not have the necessary elements to carry a 25-year registration requirement, but instead triggered a different, 15-year registration requirement that had already lapsed.
Carello v. Aurora Policemen Credit Union	930 F.3d 830	2019	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Affirmed*: The plaintiff, who was blind, lacked standing to sue a credit union under the Americans with Disabilities Act on the grounds that its website was not adequately accessible to the visually impaired. State law prevented the plaintiff from joining the credit union, and he thus suffered no concrete or particularized injury from his inability to use the website easily.
Conroy v. Thompson	929 F.3d 818	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* A district court did not abuse its discretion in concluding that equitable tolling was unwarranted in a case where the plaintiff filed an untimely habeas petition; the plaintiff did not show that his alleged mental illness actually impaired his ability to pursue his claims timely.
Doe v. Purdue Univ.	928 F.3d 652	2019	Authored opinion for unanimous panel	Civil Rights Law	*Reversed and remanded:* The petitioner pleaded facts sufficient to pursue Fourteenth Amendment claims against a university for procedural deficiencies in a disciplinary process that had led to his suspension and loss of scholarship after being found guilty of sexual violence against another student. He also pleaded facts sufficient to pursue a claim under Title IX that the university discriminated against him on the basis of his sex. His claims against individual university employees, however, were properly dismissed.

Case Name	Citation	Year	Role	Subject	Holding
Fessenden v. Reliance Standard Life Ins. Co.	927 F.3d 998	2019	Authored opinion for unanimous panel	Pension & Benefits Law	*Vacated and remanded:* The trial court erred in applying the arbitrary and capricious standard in reviewing a plan administrator's denial of disability benefits. A de novo standard applied, because the plan administrator took too long in rendering a decision and the doctrine of substantial compliance does not excuse missed deadlines.
Acevedo v. Cook Cnty. Officers Electoral Bd.	925 F.3d 944	2019	Authored opinion for unanimous panel	Freedom of Speech; Elections Law	*Affirmed*: The district court did not err in rejecting a challenge to the county-office signature requirement, which was more rigorous than requirements for statewide elections (8,000 signatures compared to 5,000). The county requirement imposed only a slight burden on those submitting nominating petitions, and was justified by the interest in orderly and fair elections. The fact that a petition for statewide office required fewer signatures did not make the county requirement subject to a higher level of scrutiny.
Weil v. Metal Techs.	925 F.3d 352	2019	Authored opinion for unanimous panel	Labor & Employment Law	*Vacated in part, affirmed in part:* In a class and collective action brought by former employees against their employer for overtime and wage deduction violations, a judgment in favor of a class on the deduction claims had to be vacated because an intervening change in state law might retroactively permit the deduction, nullifying plaintiffs' deduction claims. Plaintiffs had no class-wide evidence that they had worked beyond 40 hours in a week, and thus the trial court did not abuse its discretion in decertifying the class for the hours-worked claims.
Varlen Corp. v. Liberty Mut. Ins. Co.	924 F.3d 456	2019	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Affirmed*: A district court did not abuse its discretion in finding that alleged expert testimony, which was offered to prove that certain chemical discharges were "sudden and accidental" and thus did not implicate an insurance policy exclusion, was not based on reliable methods or principles. Because the plaintiff had no other evidence of how the spills occurred, it was proper to dismiss the plaintiff's indemnification claims.
Carter v. City of Alton	922 F.3d 824	2019	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Vacated and remanded:* When plaintiff filed a motion to withdraw her complaint without prejudice, the district court erred by dismissing the complaint with prejudice, without having first given the plaintiff an opportunity to withdraw her motion for voluntary dismissal.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Cherry	921 F.3d 690	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed*: A defendant charged with being a felon in possession of a firearm was not entitled to an "innocent possession" jury instruction, when the Seventh Circuit had never recognized such an instruction and the facts did not support it. The district court did not plainly err in deciding a forfeiture issue without asking the defendant whether the issue should go to the jury.
United States v. Briggs	919 F.3d 1030	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Vacated and remanded for resentencing:* A district court erred by applying a sentencing enhancement without making factual findings that the defendant possessed a firearm in connection with felony possession of drugs.
Williams v. Norfolk S. Corp.	919 F.3d 469	2019	Authored opinion for unanimous panel	Torts	*Affirmed*: A district court did not err in entering a judgment against the plaintiff in a suit against a railway, as he was more than 50% at fault for the injury he suffered when he ran onto train tracks and was struck by a train.
Herrera-Garcia v. Barr	918 F.3d 558	2019	Authored opinion for unanimous panel	Immigration Law	*Petitions denied:* In his first petition, the plaintiff failed to prove that, if he was ordered to return to El Salvador, he would be tortured or persecuted by street gangs with the El Salvadorian government's acquiescence. His second petition was untimely.
Sansone v. Brennan	917 F.3d 975	2019	Authored opinion for unanimous panel	Civil Rights Law; Federal Courts & Civil Procedure; Labor & Employment Law	*Affirmed in part, vacated in part:* A district court did not err in its jury instruction on the parties' respective duties to cooperate in identifying a reasonable accommodation for an employee's disability, but it did err in its jury instruction on the defendant's expert witness, thereby requiring retrial on compensatory damages.
United States v. Terry	915 F.3d 1141	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Reversed in part, vacated conviction, and remanded:* It was unreasonable for police to believe that a woman who answered the door of a male suspect's residence had authority to consent to a search of the residence, and the district court erred in denying a motion to suppress evidence obtained as a result of the search. The district court did not err in deciding that the defendant knowingly waived his right to remain silent during a custodial interrogation.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Moody	915 F.3d 425	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Vacated and remanded:* A district court erred in applying a sentencing enhancement where there was no proof that the defendant knew that individuals to whom he had sold stolen firearms either were prohibited from possessing a firearm or intended to use the firearm for a crime.
United States v. Vaccaro	915 F.3d 431	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed*: A defendant's behavior gave police grounds to conduct a pat-down search after stopping his vehicle. Safety concerns also supported their decision to handcuff the defendant during the encounter and then search his car.
Ruderman v. Whitaker	914 F.3d 567	2019	Authored opinion for unanimous panel	Immigration Law	*Petition granted:* A remand to the Board of Immigration Appeals was appropriate to clarify reasons it believed that an alien had waived an argument that an inadmissibility ground did not apply to him. If the Board concluded that the argument was not waived and the alien was removable, then the appropriate standard for determining his eligibility for relief from removal would be applied, as a more rigid standard had been mistakenly employed initially.
Rainsberger v. Benner	913 F.3d 640	2019	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* Viewing evidence in the light most favorable to the plaintiff, a police detective was not entitled to qualified immunity in a civil action against him, when the detective's knowingly false statements and omission of exculpatory evidence in a probable cause affidavit resulted in the plaintiff's wrongful arrest and incarceration.
Beltran-Aguilar v. Whitaker	912 F.3d 420	2019	Authored opinion for unanimous panel	Immigration Law	*Petition denied*: An alien's conviction under a state domestic violence statute was a "crime of violence" under federal law, rendering him ineligible for cancellation of removal.
United States v. Hagen	911 F.3d 891	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Reversed and remanded for resentencing*: A sentencing court erred when calculating a defendant's sentence using federal guidelines; the defendant's prior truancy-related offenses should not have been considered when calculating the defendant's criminal history score.

Case Name	Citation	Year	Role	Subject	Holding
United States v. King	910 F.3d 320	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* A district court did not abuse its discretion when it concluded that evidence prosecutors shared with criminal defendants just before sentencing was immaterial to their conviction and did not support a retrial. Additionally, while the Confrontation Clause would have barred the prosecution's introduction of a nontestifying codefendant's confession in a jury trial, that rule did not apply to the defendants' bench trial, when the district court did not rely on the confession when finding the defendant guilty. Finally, there was no clear error in the lower court's sentencing decisions.
United States v. Kienast	907 F.3d 522	2019	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* There was no need to address the merits of defendants' arguments that the government's method to identity users of a child pornography website violated the Fourth Amendment. The good-faith exception to the exclusionary rule applied, meaning that, assuming a Fourth Amendment violation, the evidence should not be suppressed, as the police had acted with an objectively reasonable, good-faith belief that their conduct was lawful when obtaining and executing the search warrant.
Herrington v. Waterstone Mortg. Corp.	907 F.3d 502	2018	Authored opinion for unanimous panel	Labor & Employment Law	*Vacated and remanded*: A waiver clause in an arbitration agreement forbidding class or collective arbitration of wage and hour violation claims is lawful; the district court had to decide whether the parties' arbitration agreement, which included a waiver clause, authorized the collective arbitration that had occurred.
Cleven v. Soglin	903 F.3d 614	2018	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed*: A plaintiff alleging a procedural due process violation had an adequate postdeprivation remedy under state law for alleged loss of a property right caused by a city misclassifying him as an independent contractor.

Case Name	Citation	Year	Role	Subject	Holding
Equal Emp. Opportunity Comm'n v. Costco Wholesale Corp.	903 F.3d 618	2018	Authored opinion for unanimous panel	Civil Rights Law; Labor & Employment Law	*Affirmed in part and remanded in part:* In a suit alleging that an employer created a hostile work environment by tolerating a customer's harassment of an employee, a jury could reasonably conclude that the customer's conduct was so severe and pervasive as to render the work environment hostile. Although the employee could not recover back pay for the period after she was fired, the lower court erred in not considering whether back pay was owed for her time on unpaid medical leave.
Beley v. City of Chicago	901 F.3d 823	2018	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* A city's failure to register homeless sex offenders under state sex offender registration law because they could not provide proof of address did not violate their due process rights; the plaintiffs lacked a cognizable liberty interest in being registered under the law.
Walker v. Price	900 F.3d 933	2018	Authored opinion for unanimous panel	Civil Rights Law	*Vacated and remanded:* In pro se case brought by a prisoner alleging civil rights violations, the district court abused its discretion in denying plaintiff's motion to recruit counsel after several requests for assistance to the court. The court did not properly assess the inmate's ability to try the case before a jury and the inmate was prejudiced by that denial of assistance.
United States v. Williams	900 F.3d 486	2018	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* Government expert testimony in a sex trafficking case was not inadmissible character evidence, and the government's likely violation of expert witness disclosure requirements was harmless error given the overwhelming evidence of the defendant's guilt.
Smith v. Rosebud Farm, Inc.	898 F.3d 747	2018	Authored opinion for unanimous panel	Civil Rights Law	*Affirmed:* Evidence supported sex-based employment discrimination claim brought by male employee against his employer on account of treatment he received from male coworkers and supervisor; only men were groped and taunted in mixed-sex workplace, which could lead to the reasonable conclusion that the plaintiff's harassment was based on his sex.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Lee	897 F.3d 870	2018	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* A criminal defendant did not present the sentencing court with a developed, meritorious argument that his sentence would create disparities with similarly situated defendants, and any error by the district court in failing to provide a written statement explaining the reasons for the sentence imposed was harmless.
Wis. Cent. Ltd. v. TiEnergy, LLC	894 F.3d 851	2018	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Affirmed:* In a case a rail carrier brought to recover demurrage, federal appellate jurisdiction existed despite the lower court's failure to issue a separate judgment disposing of all the claims. Even without issuing this separate judgment, the lower court sufficiently showed its intent to dispose conclusively of claims. The district court's judgment on the merits was also correct.
Fiorentini v. Paul Revere Life Ins. Co.	893 F.3d 476	2018	Authored opinion for unanimous panel	Pension & Benefits Law	*Affirmed:* A plaintiff did not qualify for total disability benefits under his occupational disability insurance policy after he resumed exercising full control of his company.
Goplin v. WeConnect, Inc.	893 F.3d 488	2018	Authored opinion for unanimous panel	Federal Courts & Civil Procedure	*Affirmed:* A district court's determination that a plaintiff's employer and the company with whom he entered into an arbitration agreement were two distinct entities was not clearly erroneous. The district court could also properly take judicial notice of the employer's website as confirming evidence that the district court's conclusion was correct.
Dalton v. Teva N. Am.	891 F.3d 687	2018	Authored opinion for unanimous panel	Torts	*Affirmed:* A district court properly ruled that a plaintiff's products liability claim against medical device manufacturer failed under state law because she did not provide expert evidence on issue of causation.
Boogaard v. Nat;l Hockey League	891 F.3d 289	2018	Authored opinion for unanimous panel	Federal Courts & Civil Procedure; Labor & Employment Law	*Affirmed:* A league's substance abuse agreement with a players' union was a component of a collective bargaining agreement governed by the Labor Management Relations Act and preempted state law claims of professional athlete's estate. The district court did not err in finding plaintiffs forfeited other claims by failing to respond to the league's argument that the plaintiffs failed to state a claim.

Case Name	Citation	Year	Role	Subject	Holding
Perrone v. United States	889 F.3d 898	2018	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed:* In habeas petition challenging sentence enhancements on the ground that the petitioner was innocent, the petitioner failed to carry the burden of showing it was more likely than not that no reasonable juror would have found him guilty; other claims were time barred or did not involve an abuse of the district court's discretion.
Walton v. EOS CCA	885 F.3d 1024	2018	Authored opinion for unanimous panel	Business & Corporate Law	*Affirmed:* A debt collector satisfied obligations under the Fair Debt Collection Practices Act to verify a disputed debt when it confirmed that letters to the consumer accurately conveyed information the collector had received from the creditor. The debt collector also satisfied obligations under the Fair Credit Reporting Act to investigate a consumer's dispute about information the collector provided to credit reporting agencies.
United States v. Barnes	883 F.3d 955	2018	Authored opinion for unanimous panel	Criminal Law & Procedure	*Affirmed*: A defendant waived raising on appeal factors considered by sentencing court when his litigation strategy led him not to object during sentencing.

Source: Congressional Research Service.

a. A second Seventh Circuit opinion, *United States v. Uriarte*, No. 19-2092, ___ F.3d ___, 2020 WL 5525119, 2020 U.S. App. LEXIS 29234 (7th Cir. 2020), addresses the applicability of the First Step Act to Hector Uriarte, the codefendant of Tony Sparkman, whose sentence reduction motion was addressed in *United States v. Sparkman*. In *Uriarte*, a majority of the en banc panel held that the First Step Act applied to a defendant who was awaiting resentencing at the time of the statute's enactment. Judge Barrett authored a dissent in that case, and was joined by two other judges. 2020 WL 5525119, at *7 (Barrett, J., dissenting, joined by Brennan and Scudder, JJ.).

Table 4. Controlling Opinions Authored by Judge Barrett for Which Another Judge Wrote a Concurrence or Dissent

Case Name	Citation	Year	Role	Subject	Holding
Chronis v. City of Chicago	932 F.3d 544	2019	Authored majority	Torts	*Majority (Barrett, J.), affirmed:* A pro se plaintiff failed to exhaust administrative remedies before bringing her medical malpractice claim. Her letter to the Centers for Medicare and Medicaid Services (CMS) did not include the required demand for a sum certain. *Dissent (Rovner, J.):* Plaintiff's claim should not have been dismissed because her letter to CMS requested "restitution" and contained sufficient information to count as a demand upon the federal government that exhausted the plaintiff's administrative remedies.
Casillas v. Madison Ave. Assocs., Inc.	926 F.3d 329	2019	Authored opinion for unanimous panel. A minority of the full court's active judges dissented from the denial of petition for rehearing of the appeal en banc[a]	Federal Courts & Civil Procedure	*Unanimous panel opinion (Barrett, J.), affirmed:* Although a debt collector informed the debtor of the process to verify or challenge a debt, it failed to provide notice, which the Fair Debt Collection Practices Act required, that the debtor had to invoke these processes in writing. The plaintiff had a statutory cause of action to sue the debt collector for that failure, but she did not have Article III standing because she did not intend to verify or challenge her debt and thus lacked a concrete harm or an informational injury from the debt collector's omission. *Dissent from denial of rehearing en banc (Wood, C.J.):* The court should have considered the case en banc to distinguish better between bare procedural injuries (which do not support Article III standing) and concrete harms (which do). The panel opinion applied a too-demanding pleading standard, as it was fair to infer from the complaint that not knowing of the in-writing requirement put the debtor at imminent risk of losing the Act's protections.

Case Name	Citation	Year	Role	Subject	Holding
Yafai v. Pompeo	912 F.3d 1018	2019	Authored majority	Immigration Law	*Majority (Barrett, J.), affirmed:* A consular officer's denial of an immigration visa to the Yemeni wife of a U.S. citizen was based on the facially legitimate and bona fide ground that she had tried to smuggle children into the United States, and the district court therefore properly dismissed the plaintiffs' challenge to the denial under the doctrine of consular nonreviewability. The plaintiffs failed to make an affirmative showing that the consular office made the decision in bad faith. *Dissenting (Ripple, J.):* Even under the doctrine of consular nonreviewability, a U.S. citizen has a cognizable liberty interest in a spouse's visa application, requiring a fair evaluation of that application. Here, the record did not show the basis for the consular officer believing the alien spouse had tried to smuggle children into the United States.
Alvarenga-Flores v. Sessions	901 F.3d 922	2018	Authored majority	Immigration Law	*Majority (Barrett, J.), petition denied:* An immigration judge had valid bases to deny relief to an alien who claimed fear of persecution if removed from the United States; substantial evidence supported the immigration judge's adverse credibility finding, given inconsistencies and discrepancies in the alien's story. One basis for relief was also time barred. *Concurring in part and dissenting in part (Durkin, J., sitting by designation):* Although the alien's asylum claim was time barred, the adverse credibility finding was improperly based on inconsistencies over nonessential matters and disregarded corroborating evidence.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Watson	900 F.3d 892	2018	Authored majority	Criminal Law & Procedure	*Majority (Barrett, J.), reversed and remanded:* An anonymous call to police about seeing boys playing with guns in a parking lot did not give officers reasonable suspicion to block defendant's car and search it. The anonymous caller's report was not sufficiently reliable and the reported gun possession was lawful in the state. *Concurring (Hamilton, J.):* The majority did not need to distinguish the case from an earlier decision where the court had upheld law enforcement stopping a large group of people based on reports that some were waving guns. The expansion in legal rights of persons to bear firearms meant that the earlier police stop should not have occurred either.
Webb v. Fin. Indus. Regul. Auth., Inc.	889 F.3d 853	2018	Authored majority	Contracts Law; Federal Courts & Civil Procedure	*Majority (Barrett, J.), vacated and remanded:* The federal court lacked jurisdiction over a breach of contract to arbitrate a dispute. No federal question existed and the dispute did not involve an amount in controversy that satisfied the diversity jurisdiction statute, as governing state law did not allow plaintiffs to recover as damages the legal fees they incurred in arbitration. *Concurring in part and dissenting in part (Ripple, J.):* Although federal question jurisdiction was lacking, the case satisfied the forgiving standard for establishing diversity jurisdiction. The majority erroneously engaged in guesswork to presume how state courts would resolve plaintiffs' claims for recovery of legal fees incurred in arbitration.

Source: Congressional Research Service.

a. *See* 7th Cir. R. 40(e) (requiring circulating any proposed panel opinion that would overrule a prior circuit decision or create a conflict between or among circuits to all active members of the court so that they may vote on whether to rehear the appeal en banc).

Table 5. Concurring and Dissenting Opinions Authored by Judge Barrett

Case Name	Citation	Year	Role	Subject	Holding
United States v. Uriarte	___ F.3d ___, No. 19-2092, 2020 WL 5525119, 2020 U.S. App. LEXIS 29234	2020	Authored dissent	Criminal Law & Procedure	*Majority (en banc, Ripple, J.), affirmed:* Section 403 of the First Step Act of 2018, which amended the mandatory minimum sentence for certain firearm offenses, could be applied to defendants who had not yet been sentenced as of the date of the statute's enactment, and to defendants whose sentences had been vacated and who had not yet been resentenced as of the date of enactment. *Dissenting (Barrett, J.):* The First Step Act did not apply to a defendant who was awaiting sentencing at the time of the statute's enactment because the defendant's initial sentence, although vacated, had been imposed prior to the enactment.[a]
United States v. Wilson	963 F.3d 701	2020	Authored concurrence	Criminal Law & Procedure	*Majority (Manion, J.), affirmed:* Denial of motion to suppress was proper where the defendant did not submit to police authority but ran away from approaching police officers. It was not a seizure for purposes of a Fourth Amendment challenge when the officers approached the defendant and asked him to stand up. The defendant's later seizure after a police officer tackled him was constitutional because officers had reasonable suspicion to seize him through physical force after the defendant behaved evasively and the officers received a dispatch report of armed men selling drugs nearby. *Concurring (Barrett, J.):* Stopping a defendant who ran from the police in a high-crime area was valid under the Fourth Amendment, even if police did not have reasonable suspicion to initially approach the defendant given the identifying information they received in a dispatch call, which did not match defendant's description.

Case Name	Citation	Year	Role	Subject	Holding
United States v. Rutherford	810 F. App'x 464	2020	Authored dissent	Criminal Law & Procedure	*Affirmed (per curiam):* The First Step Act of 2018's ban on successive motions did not bar motion to reconsider modification of sentence; the district court did not abuse its discretion when declining to reduce sentence. *Dissenting (Barrett, J.):* The deadline for appealing a modified sentence expired before the defendant filed notice of appeal, so the court lacked jurisdiction to review resentencing.
Cook Cnty. v. Wolf	962 F.3d 208	2020	Authored dissent	Immigration Law	*Majority (Wood, CJ.), affirmed:* A district court did not abuse its discretion by granting a preliminary injunction against a Department of Homeland Security (DHS) rule, which (1) defined "public charge" in the Immigration and Nationality Act (INA) as a noncitizen who receives a certain amount of cash and noncash government benefits in a specified time period, and (2) identified factors DHS would consider in determining whether an individual was likely to become a public charge and therefore may be denied admission or adjustment of status. On *Chevron* step two analysis, the agency's interpretation conflicted with other statutes, created internal tensions in immigration laws, was not based on a permissible construction of the INA, and was arbitrary and capricious under the Administrative Procedure Act. The plaintiffs, a county government and an immigration nonprofit, had standing and had adequately raised a claim within the "zone of interests" of the INA. *Dissenting (Barrett, J.):* The district court's interpretation of the term "public charge" was flawed; the term is indeterminate enough to leave room for interpretation, but is broad as a matter of history and by virtue of the 1996 INA amendments. DHS's interpretation reasonably included in-kind aid in addition to cash benefits, and set a reasonable benefit-usage threshold of one or more of the designated benefits for more than 12 months in the aggregate within any 36-month period.

Case Name	Citation	Year	Role	Subject	Holding
Williams v. Wexford Health Sources, Inc.	957 F.3d 828	2020	Authored concurrence	Civil Rights Law	*Majority (Wood, C.J.), reversed and remanded:* A prison inmate challenging prison medical service provider's refusal to authorize cataract surgery, and who lodged a grievance and administratively appealed the warden's determination that it was not an emergency, exhausted his remedies under the then-in-effect version of the Illinois Administrative Code, and thus satisfied the Prison Litigation Reform Act's exhaustion requirements for 42 U.S.C. § 1983 suits. *Concurring (Barrett, J.):* An inmate's reasonable mistake about a prison's grievance procedures does not excuse the inmate's obligation to exhaust remedies before filing a § 1983 suit; the plaintiff satisfied exhaustion requirement where defendant conceded that the administrative board's denial without comment of the plaintiff's emergency grievance determination would have exhausted all available administrative remedies.
McCottrell v. White	933 F.3d 651	2019	Authored dissent	Civil Rights Law	*Majority (Rovner, J.), reversed:* Questions of fact precluded entry of summary judgment in favor of prison guards, who struck plaintiffs— bystanders to a fight—with buckshot. There was sufficient evidence that, after other guards defused the fight, defendants fired shotguns into or above a crowd, acting maliciously and sadistically and not to restore order. *Dissenting (Barrett, J.):* The plaintiffs had no evidence that the prison guards fired intending to hit anyone; at most, the evidence showed that the prison guards acted recklessly in shooting into the prison ceiling. Recklessness is not the applicable standard in an excessive force claim brought by a prisoner against prison officials, so plaintiffs' claims should have failed.

Case Name	Citation	Year	Role	Subject	Holding
Chazen v. Marske	938 F.3d 851	2019	Authored concurrence	Criminal Law & Procedure	*Majority (Scudder, J.), affirmed:* A trial court order granting federal prisoner's habeas petition under 28 U.S.C. § 2241 was affirmed, because Supreme Court case law announced a new statutory rule concerning application of the Armed Career Criminals Act. *Concurring (Barrett, J.):* The majority's opinion had support in precedent but underscored the Seventh Circuit's complex case law regarding the application of 28 U.S.C. § 2251(e)'s savings clause and choice of law issues, which should be clarified in a future case.
Yafai v. Pompeo	924 F.3d 969	2019	Authored opinion respecting the denial of rehearing en banc	Immigration Law	*Majority (per curiam), denying petition for rehearing and rehearing en banc:* En banc rehearing of panel decision in *Yafai v. Pompeo*, 912 F.3d 1018 (Barrett, J.), discussed above, was denied. *Respecting the denial of rehearing en banc (Barrett, J.):* The panel decision in *Yafai* was properly decided, and Supreme Court precedent forecloses argument by judges dissenting to denial of en banc rehearing that consular officials must provide a more detailed explanation for visa denial beyond citing to the statutory basis. *Dissenting from the denial of rehearing en banc (Wood, CJ):* The panel decision in *Yafai* adopted an overbroad reading of the doctrine of consular nonreviewability. A U.S. citizen has a cognizable liberty interest in a spouse's visa application, requiring the consular officer's evaluation of that application to comport with basic due process requirements, including the factual basis for denying the visa application; the panel majority's interpretation of the doctrine of consular nonreviewability would permit consular officers to act without accountability and preclude an affected person from showing a visa decision was made in bad faith.

Case Name	Citation	Year	Role	Subject	Holding
Kanter v. Barr	919 F.3d 437	2019	Authored dissent	Firearms Law	*Majority (Flaum, J.), affirmed:* A district court did not err in rejecting a Second Amendment challenge to federal and state statutes that permanently prohibited felons from possessing firearms brought by a nonviolent felon. Such categorical prohibitions are presumptively lawful. Using statistical evidence, government defendants showed that prohibiting nonviolent felons from possessing firearms was substantially related to preventing gun violence. *Dissenting (Barrett, J.):* Historical evidence showed that Founding-era legislatures disarmed persons thought to be a threat to public safety rather than because they were felons. Instances in which felons were prohibited from engaging in civic rights such as voting or jury service are inapplicable to the Second Amendment right, which the Supreme Court held is an individual right. A permanent, categorical denial of the right requires a close means-ends fit, which the government defendants did not meet in a case involving an as-applied challenge by a nonviolent felon.
Sims v. Hyatte	914 F.3d 1078	2019	Authored Dissent	Criminal Law & Procedure	*Majority (Bauer, J.), reversed and remanded with instructions:* A state court should have granted habeas relief to a prisoner, who prosecutors had not informed during trial that the sole identifying witness had been hypnotized to improve his recollection of events, and this information would have been strong impeachment evidence against the witness's credibility. *Dissenting (Barrett, J.):* While the government's suppression of impeachment evidence in a prisoner's initial criminal trial was improper, the deferential standard used in federal review of a state court habeas decision required the panel to sustain the state court's decision, as it was neither contrary to, nor an unreasonable application of, clearly established federal law.

Case Name	Citation	Year	Role	Subject	Holding
Schmidt v. Foster	891 F.3d 302	2018	Authored Dissent	Criminal Law & Procedure	*Majority (Hamilton, J), reversed and remanded:* Pretrial, ex parte evidentiary hearing in which a state judge questioned a criminal defendant about his mitigation defense but the defendant's lawyer could not speak or participate, violated the defendant's Sixth Amendment right to effective assistance of counsel; state courts unreasonably applied Supreme Court precedent in finding otherwise. *Dissenting (Barrett, J.):* Judge's ex parte, in camera questioning of a defendant was neither formally nor functionally an adversarial confrontation to which the Sixth Amendment right to counsel attached. In addition, the state appellate court had not unreasonably applied federal law in deciding that the ex parte hearing did not substantially prejudice defendant. Note: This decision was overruled by the Seventh Circuit on rehearing en banc, 911 F.3d 469 (7th Cir. 2018).

Source: Congressional Research Service.

a. As Judge Barrett pointed out in her dissent in *United States v. Uriarte*, 2020 WL 5247575, at *10, a second Seventh Circuit opinion addresses the sentence of Hector Uriarte's codefendant, Tony Sparkman. *See United States v. Sparkman*, No. 17-3318, ___ F.3d ___, 2020 WL 5247575, 2020 U.S. App. LEXIS 28100 (7th Cir. 2020). Judge Barrett authored the court's unanimous opinion in *Sparkman*, holding that the First Step Act did not apply where the defendant's initial sentence had been vacated and he had already been resentenced.

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