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The Existential Threat of Amy Coney Barrett

By Mike Tully

Amy Coney Barrett is a radical jurist whose extremist interpretation of the Constitution could jeopardize the very unborn lives she seeks to protect. In 2013, she told an audience, "The Constitution does not expressly protect a right to privacy." The right to choose guaranteed by *Roe* v *Wade* is based on the right to privacy – a right Barrett does not believe in.

Barrett was mentored by the late Antonin Scalia, whom she characterizes as a Constitutional "originalist" and a "textualist." Adherents to that view interpret the Constitution through its original text and the original understanding of the Founding Fathers. For example, they try to regulate AR-15s through the eyes of men who lived in the era of musketry, and analyze the Internet from the perspective of those whose lives predated the telegraph.

The Right to Privacy

The Constitutional right to privacy was initially advocated by Samuel D. Warren and Louis D. Brandeis in 1890 in *The Harvard Law Review*, applying it to "personal appearance, sayings, acts, and to personal relation, domestic or otherwise." In 1965, in *Griswold* v. *Connecticut*, the U.S. Supreme ruled the Constitution includes a right to privacy and upheld the right of married couples to acquire and use contraceptives – the kind of "personal relation" Warren and Brandeis referred to.

Barrett On Judges: Life and Death Decisions

Judge Barrett will rule against the right to privacy because that's how to overturn *Roe* v *Wade* – which she will, if appointed to the Court. She made her intent clear in a 1998 law review article entitled, "Catholic Judges in Capital Cases," co-authored with John H. Garvey, currently the President of the Catholic University of America. The article addressed the dilemma facing Catholic judges in capital cases, since the Catholic Church disapproves of capital punishment. They wrestled with whether judges could participate in capital cases, resulting in the dancing-on-a-pinhead conclusion that they may preside over a trial, but not the sentencing.

Barrett found the issue of abortion much simpler.

For example, Barrett distinguished capital punishment and abortion by stating, "criminals deserve punishment for their crimes; aged and unborn victims are innocent." That's a relatively prosaic observation, but a quotation later in the article shows how it may influence Barrett's vote on retaining *Roe* v *Wade*. After discussing how the Church's position on capital punishment evolved over the years, Barrett wrote this: "The proclamations at issue here are not flat

prohibitions like the ban on abortion, which (properly defined) is always immoral." Barrett and Garvey did not elaborate on what "properly defined" means. Would Barrett uphold the right to choose before a fetus is viable? Given Barrett's declarations that she believes life begins at conception, that's unlikely. Senators should ask Barrett what "properly defined" means to her and how it could impact her analysis of an abortion case.

Barrett and Garvey wrote, "we believe that Catholic judges (if they are faithful to the teaching of their church) are morally precluded from enforcing the death penalty." That brings up this question: what is a Catholic judge to do if assigned to a criminal case that could result in the death penalty? "The legal system has a solution for this dilemma," they wrote, "it allows (indeed it requires) the recusal of judges whose convictions keep them from doing their job."

Barrett on Recusal

Would Barrett recuse herself from an abortion case? She cited a law review article by Michael Paulsen, currently a Distinguished University Chair and Professor of Law at St. Thomas University. "Michael Paulsen makes an argument much like this in connection with abortion" she wrote in a footnote. "He concludes that 'where there is no honest, legitimate alternative for deciding the case but to follow positive law supporting the right to commit an abortion,' the judge should recuse himself."

Barrett and Garvey swatted away Paulsen's recommendation like a fly. "The abortion case is a bit easier, we think. Both the state and the unborn child's mother are (at least typically) acting with gross unfairness to the unborn child, whereas the moral objection to capital punishment is not that it is unfair to the offender." If abortion is always immoral and grossly unfair to the unborn child, wouldn't Barrett strike down a ruling that allows it – at least under her unspecified "properly defined" interpretation?

Would Barrett Respect Judicial Precedent?

Would Barrett overturn *Roe* v *Wade*, which is based on the right to privacy, or would she respect precedent and retain it?

The answer, based on an article she wrote for the *Texas Law Review* in 2013: she is unlikely to honor precedent. First of all, she states, "constitutional cases are the easiest to overrule." Regarding whether a Justice should honor *stare decisis* (Supreme Court precedent), Barrett frames the issue this way: "The doctrine has its greatest bite, however, when it constrains a justice from deciding a case the way she otherwise would. In this situation, a justice must decide, to paraphrase Justice Brandeis, whether it is better for the law to be settled or settled right." It's not hard to predict Barrett selecting the "settled right" option.

Later, in the same article, comes this shot across the bow: "Challenges to precedent generally originate with litigants and are a means of pushing back against the proposition that the Constitution embodies the principles the Court says it does—for example, that the right to terminate a pregnancy is a fundamental one..." Expect Barrett to "push back."

The Unintentional Consequences of Overturning Roe v Wade

Those who advocate the "right to life" position oppose *Roe* v *Wade* because it protects the right of a woman to choose to have an abortion. But it also protects the right of a woman to choose not to have an abortion. The case protects both aspects of the decision whether to terminate or perpetuate a pregnancy because the right to privacy covers both options.

Consider this hypothetical: Uncontrolled climate change results in a Malthusian event and there's not enough food to sustain the population. (Far-fetched? It's already happening.) The government might want to limit the birthrate. The Constitutional right to privacy currently prevents that. If Barrett eliminates the right, she eliminates protection available to women who want to preserve a pregnancy the government prefers to terminate. If the Court eliminates the right to privacy and overturns *Roe* v *Wade*, the result could be compulsory abortions.

The Existential Danger of Amy Coney Barrett

If Barrett is elevated to the Supreme Court and succeeds in overturning *Roe* v *Wade* by undermining the right to privacy, she will do more than endanger future pregnancies. Elimination of the right would change the balance of power between the state and the individual in favor of the state. Presidential candidate Pete Buttigieg noted that China is "using technology to perfect dictatorship." China doesn't have a right to privacy. If our right to privacy is invalidated, we could become more like China than America.

We live in a time when search engines and social networks monetize our privacy and phones track us like migrating geese. Imagine Congress passing a law that permits the federal government to have access to your smart phone or home security network. If that sounds like a bad idea, then you should do whatever you can to protect the Constitutional right to privacy – from Barrett.