

INTRODUCTORY ESSAY FOR THE ISSUE DEVOTED TO THE APPOINTMENT OF AMY CONEY BARRETT TO THE U.S. SUPREME COURT

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On October 26, 2020, at a White House outdoor ceremony, and in accordance with the nation's 231-year-old constitution, Amy Coney Barrett became the 115th Supreme Court Justice.¹ The U.S. Senate vote confirming Barrett was razor thin—52 to 48—and it was “the first time in 151 years that a justice was confirmed without the support of a single member of the minority party.”² Because the nomination and confirmation process resulting in Barrett's appointment shredded historic conventions and accepted norms, it undercuts Barrett's legitimacy as a Justice; it undermines the Supreme Court's public standing at a time when public trust and confidence in the Court is challenged; and it puts a spotlight on how a deeply conservative political minority in the nation now rules the American majority through the presidency, the Senate, and the Supreme Court.

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¹ Amy Davidson Sorkin, *Justice Amy Coney Barrett is Sworn In Under Darkness at the White House*, NEW YORKER (Oct. 27, 2020), <https://www.newyorker.com/news/daily-comment/justice-amy-coney-barrett-is-sworn-in-under-darkness-at-the-white-house> [https://perma.cc/RJ7X-LURH]. The late evening oath taken by Justice Barrett is only the first of two oaths that Justices of the Supreme Court of the United States take before they “may execute the duties” of their new office—the Constitutional Oath and the Judicial Oath. Oaths of Office, SUP. CT. OF U.S., <https://www.supremecourt.gov/about/oath/oathsofoffice.aspx> [https://perma.cc/ZLJ9-9RB3]. The next morning, Justice Barrett recited the Judicial Oath in the East Conference Room of the Supreme Court. Ariane de Vogue & Chandelis Duster, *Associate Justice Amy Coney Barrett Sworn In and Greeted with a Request to Recuse Herself in an Election Case*, CNN (Oct. 27, 2020), <https://www.cnn.com/2020/10/27/politics/justice-amy-coney-barrett-sworn-in-supreme-court/index.html> [https://perma.cc/55VK-5MGY].

² Nicholas Fandos, *Senate Confirms Barrett, Delivering for Trump and Reshaping the Court*, N. Y. TIMES (Oct. 27, 2020), <https://www.nytimes.com/2020/10/26/us/politics/senate-confirms-barrett.html> [https://perma.cc/Y54G-FZXF] (“It was the first time in 151 years that a justice was confirmed without the support of a single member of the minority party, a sign of how bitter Washington's war over judicial nominations has become.”).

The essays in this volume of the *Cardozo Law Review* explore Barrett's jurisprudence, what her appointment may mean for Supreme Court decisions on nationally important legal questions, and what Supreme Court reforms (if any) should be considered in the wake of Barrett's appointment.³

Barrett succeeds the legendary Ruth Bader Ginsburg (RBG), who died on September 18, 2020, just six weeks before the 2020 presidential election. RBG was an indomitable force. As a litigator and as a Supreme Court Justice, RBG's impact was nothing short of monumental. Her life story, as well as her judicial opinions, changed lives and shaped legal norms. In her last years, RBG became something that few, if any, Justices ever become—she became a celebrated public figure who was hailed and honored by a wide cross section of people across the nation and around the globe. She was, as Justice Rosalie Silberman Abella of the Canadian Supreme Court put it, “a judicial juggernaut who was catapulted into international orbit.”⁴

Because of RBG's public prominence and the profound respect accorded her, any individual proposed to succeed her—even in the best of political times, when the dominant political parties at times occupied common ground, and the next presidential election was a year or more in the future—might well face a challenging Senate confirmation process. But RBG died only weeks before the November 3rd presidential election, and that set the stage for a divisive and bitter confirmation process. President Trump not only rushed a nomination before the election, but he also nominated an individual to succeed RBG who was potentially a radical conservative and whose votes and rulings will have a profound impact on the nation for decades. Now, the Supreme Court and the nation are experiencing a struggle that not only undermines the

³ The Democratic Party nominee for president, Joe Biden, announced that he would form a “bipartisan commission to propose changes to the Supreme Court and federal judiciary.” Annie Linskey, *Biden, Squeezed on the Supreme Court, Promises a Commission to Consider Changes*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/politics/biden-promises-commission-on-overhauling-supreme-court/2020/10/22/4465ead6-121d-11eb-ba42-ec6a580836ed_story.html [https://perma.cc/5ADF-2367].

⁴ Rosalie Silberman Abella, Opinion, *A Farewell to Ruth Bader Ginsburg, from a Sister in Law*, GLOBE AND MAIL (Sept. 25, 2020), <https://www.theglobeandmail.com/opinion/article-a-farewell-to-ruth-bader-ginsburg-from-a-sister-in-law> [https://perma.cc/R5RD-26UT] (“When she pursued justice on the Supreme Court, she was not only a judge, she was a judicial juggernaut who was catapulted into international orbit.”).

legitimacy of the Court, but may dilute the legitimacy of the entire governing scheme as it underlines the nation's woefully undemocratic political structures.

The political storm ignited by President Trump's appointment of Barrett has two main roots. First, it is based on how the Senate treated President Obama's nomination of Merrick Garland, the Chief Judge of the Court of Appeals for the District of Columbia, to the Supreme Court.⁵ At the time, March 2016, Senate Majority Leader Mitch McConnell refused to allow the Senate Judiciary Committee to hold confirmation hearings on the ground that the person elected President in November 2016 should select the next Justice. Thereafter, Senator Lindsay Graham, the current chair of the Senate Judiciary Committee, stated that he would unequivocally oppose Supreme Court appointments during an election year, and told the public to quote his words back to him if he waivered.⁶ Against that 2016 public display of political power, McConnell and Graham now reversed themselves to accelerate the Barrett appointment so that it was completed just eight days before the presidential election. Second, the fierce opposition to Barrett is rooted in Barrett's radically conservative views that directly threaten many policies and liberties supported by a majority of Americans.⁷

⁵ Adam Liptak & Sheryl Gay Stolberg, *Shadow of Merrick Garland Hangs over the next Supreme Court Fight*, N.Y. TIMES (Sept. 19, 2020), <https://www.nytimes.com/2020/09/19/us/ginsburg-vacancy-garland.html> [<https://perma.cc/KRK4-7WPZ>].

⁶ Catie Edmondson, *'You Would Do the Same': Graham Is Defiant on Supreme Court Reversal*, N. Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/2020/09/21/us/politics/lindsey-graham-supreme-court-reversal.html> [<https://perma.cc/U9HW-UHCS>]. Edmondson reported:

When Senator Lindsey Graham joined a Republican blockade of President Barack Obama's Supreme Court nominee in 2016, he went out of his way to frame his position that a confirmation to the court should never be allowed in an election year as principled, apolitical and utterly permanent. "I want you to use my words against me," Mr. Graham said then, swearing that he would hold the same stance even if it meant denying a future Republican president the chance to confirm his chosen nominee.

But less than 24 hours after that hypothetical became a reality with the death of Justice Ruth Bader Ginsburg on Friday, Mr. Graham, now the chairman of the Judiciary Committee, made a complete and brazen reversal. He promised that he would push forward immediately to confirm President Trump's pick—seemingly unbothered by the obvious conflict between his position four years ago and his stance now.

"I am certain if the shoe were on the other foot," Mr. Graham wrote Monday to Democrats on the judiciary panel, "you would do the same."

Id.

⁷ Judge Barrett self-describes as an "originalist" who adheres to the jurisprudence of the late Justice Scalia. For my views on Originalism, see David Rudenstine, *Self-Government and the Judicial Function*, 92 Texas L. Rev. 161 (2013); David Rudenstine, *Gorsuch's Adherence to*

The political argument for shredding conventions and norms and rushing the appointment of a profoundly conservative Justice rests on the characterization of the Supreme Court as a bastion of politically far-left leaning Justices who do not hesitate to impose upon a nation their own liberal and radical views. For decades, Republican Party orthodoxy has charged that the high court rulings arise from personal liberal values that not only ride roughshod over the politically accountable branches of government, but unfairly impose upon the nation highly controversial norms. The grist for this well-oiled Republican mill is widely known. For example, the Court permits a woman to make intimate personal decisions that have a direct and immediate impact on the course of her personal life, such as a decision to have an abortion, and it allows the governmental bodies to redress racial discrimination by means of affirmative action programs.⁸

Without knowing more, one might plausibly conclude that during the last decades, very far left-leaning Democratic Party presidents were running the country and selecting Supreme Court Justices. But there is a problem with that critique, and facts are the problem. From the election of President Eisenhower to today, a Republican has been the president for forty of the last sixty-eight years⁹, and during those sixty-eight years, a Republican president has nominated twenty of the twenty-eight Justices¹⁰ to the Supreme Court, as well as the last four Chief Justices.¹¹ In other words, the impact of Republican Presidents and the Republican Party on the membership of the Court has been enormous,

Originalism Should Keep Him from SCOTUS, NAT'L L.J. (Mar. 13, 2017), <https://www.law.com/nationallawjournal/almID/1202781091772/Gorsuch-Adherence-to-Originalism-Should-Keep-Him-From-SCOTUS/?mcode=1202619327776&curindex=3&curpage=ALL> [<https://perma.cc/VR3J-VBQ6>].

⁸ See, e.g., *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016); *Fisher v. Univ. of Texas at Austin*, 136 S. Ct. 2198 (2016).

⁹ See *Presidents of the United States*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Presidents-of-the-United-States-1846696> [<https://perma.cc/3XUE-5HUD>] (Eisenhower – R (8), JFK and LBJ – D (8), Nixon and Ford – R (8), Carter – (D) (4), Reagan and Bush I – R (12), Clinton – D (8), Bush II – R (8), Obama – D (8), Trump – R (4)).

¹⁰ *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/8CZP-9SXX>] (Republican President Nominations: Kavanaugh, Gorsuch, Alito, Roberts, Thomas, Souter, Kennedy, Scalia, Rehnquist, O'Connor, Stevens, Rehnquist, Powell, Blackmun, Burger, Stewart, Whittaker, Brennan, Harlan, Warren. Democratic President Nominations: Kagan, Sotomayor, Breyer, Ginsburg, Marshall, Fortas, Goldberg, White).

¹¹ *Id.* (Warren, Burger, Rehnquist, and Roberts).

and greatly overshadows the impact that Democratic Party presidents have had through their appointments.¹²

The legitimacy of Amy Coney Barrett's appointment to the Supreme Court is undercut by three factors. First, the timing of the nomination and the accelerated hearing and voting schedule undercuts trust and confidence in the appointment.¹³ Second, the razor thin, partisan Senate vote confirming Barrett deepens public distrust of her. Third, Barrett has publicly affirmed that she embraces the fatally flawed originalism espoused by the late Justice Scalia.¹⁴ In sum, in the eyes of many, Barrett has become a Justice by illegitimate means who advocates a flawed jurisprudence that hides a set of radically conservative, personal positions which are supported by political forces, which constitute a population minority that has promoted her judicial candidacy.

Barrett's appointment also threatens the legitimacy of the Supreme Court. Barrett is only the latest of highly controversial appointments to the Court. Four others of the current eight members of the Court were confirmed with the slimmest of margin: Justice Thomas was confirmed by a vote of 52–48; Justice Alito by a vote of 58–42; Justice Gorsuch by a vote of 54–45, and Justice Kavanaugh by a vote of 50–48. Although these votes, to some extent, reflect the divisions within the Senate, they seem more reflective of the divisiveness of the individual candidate than

¹² Ruth Marcus offers this analysis of the disproportionate Republican Party influence on the Court: "The last time the court had a majority of justices nominated by a Democratic president was in 1969, when Abe Fortas resigned. In the years since, Republican presidents have named 15 of 19 justices. That's right, Democrats have had only four nominees confirmed in the past half-century." Ruth Marcus, Opinion, *Amy Coney Barrett Joins a Supreme Court that's Largely out of Step with the National Consensus*, WASH. POST (Oct. 26, 2020), https://www.washingtonpost.com/opinions/amy-coney-barrett-joins-a-supreme-court-thats-largely-out-of-step-with-the-national-consensus/2020/10/26/5bae1de6-17c5-11eb-aeec-b93bcc29a01b_story.html [<https://perma.cc/Y8N2-AXTB>].

¹³ For an example of one Senator's assessment of the legitimacy of the process and its likely impact on future political developments, consider Senator Angus King, an "independent" Senator representing Maine who votes with the Democrats: "[The Republicans] expect that they're going to be able to break the rules with impunity, and when the shoe maybe is on the other foot, nothing's going to happen." Fandos, *supra* note 2.

¹⁴ See Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921 (2017); Seung Min Kim, Senate confirms Barrett to Supreme Court, cementing its conservative majority, WASH. POST (Oct. 26, 2020), https://www.washingtonpost.com/politics/courts_law/senate-court-barrett-trump/2020/10/26/df76c07e-1789-11eb-befb-8864259bd2d8_story.html [<https://perma.cc/VN28-3JKB>].

of Senate strife. For example, one year before Justice Thomas's narrow confirmation vote, the Senate confirmed Justice Souter by a vote of 90–9, and within the next three years following Justice Thomas's vote, the Senate confirmed Justices Ginsburg and Breyer by an overwhelming vote similar to the vote for Justice Souter (Ginsburg 96–3 and Breyer 87–9).¹⁵ Justice Alito's close confirmation vote is in contrast with the vote confirming Chief Justice Roberts. The Senate confirmed Chief Justice Roberts by a vote of 78–22 on September 6, 2005, and only two months later Justice Alito's received twenty confirming votes less than Justice Roberts.¹⁶ Although the Senate composition has changed between the confirmations of Justices Sotomayor (2009) and Kagan (2010), and those of Justices Gorsuch (2017) and Kavanaugh (2018), the differences in the vote margin is notable.¹⁷

The power of the political minority that is responsible for the Barrett appointment¹⁸ is so out of step with the American public that it underlines in bold the simple fact that a minority of the American population now rules the American majority. Majority rule always has to be mindful of minority rights. But minority rights are a far cry from minority rule, and rule by a minority slams against the fundamental premise of the American governmental scheme—the majority rules. But, as is clear, the majority no longer rules. Because of the undemocratic Electoral College structure, the minority may elect a president, as it did with Donald Trump in 2016, and as it did with George W. Bush in the 2000 presidential election. The Senate apportions power by states and not by population, and as a result a minority of the nation's population exercises overwhelming power in the Senate. And now, one-third of the Supreme Court Justices have been appointed by a minority elected President who selected three Justices because of the expectation that their rulings will be in accord with policy

¹⁵ *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/8CZP-9SXX>].

¹⁶ *Id.*

¹⁷ See generally *Supreme Court Nominations (1789–Present)*, U.S. SENATE, <https://www.senate.gov/legislative/nominations/SupremeCourtNominations1789present.htm> [<https://perma.cc/AM3S-788B>] (listing, inter alia, vote margins of each Supreme Court nominee, including the following Justices: Sotomayor (68–31), Kagan (63–37), Gorsuch (54–45), Kavanaugh (50–48)).

¹⁸ Although the narrow scope of this short essay prevents further exploration of the impact of the Trump presidency on the federal courts, it is worth noting that the substantial impact of the Trump presidency on the federal courts extends to the District Courts and to the Courts of Appeal. As Nicholas Fandos reports, “162 new district judges and 53 appeals court judges” have been appointed during the Trump presidency. Fandos, *supra* note 2.

values preferred by a minority of the nation. As one observer noted, “[t]his is minority rule piled on minority rule.”¹⁹

This volume of the *Cardozo Law Review* is devoted to the controversy surrounding President Trump’s nomination of Barrett to succeed RBG²⁰ as an Associate Justice of the Supreme Court.

The Articles discuss a variety of important issues. Brian L. Frye provides a synopsis of “court packing” since 1789.²¹ Rivka Weill argues that the framers of the Constitution anticipated “court packing” as an “antidote” to a “partisan takeover of the Supreme Court during election time, as part of the inherent checks and balances of a popular sovereignty system.”²² Tyler Cooper contends that because Supreme Court Justices “wield too much power, and they wield that power for too long,”²³ they should be subject to a “nonrenewable eighteen-year term.”²⁴ Jill M. Fraley suggests that there are “no excellent arguments against court packing” except that it will not “create a path to secure constitutional rights,” and as a consequence, if matters are to be properly altered, the constitution must be amended.²⁵ Daniel Kiel’s essay “seeks to contextualize modern Supreme Court transitions from 1953 to Present,”²⁶ and concludes that the confirmation of Barrett will likely “rank among the most impactful” of Supreme Court appointments.²⁷ Sam Solomon urges that the Constitution be amended to require that the confirmation process be expanded to include the

¹⁹ Marcus, *supra* note 12 (“This is minority rule piled on minority rule, albeit counter-majoritarian rules enshrined in the constitution.”).

²⁰ The *Cardozo Law Review* published a similar volume when President Reagan’s nomination of Robert H. Bork was before the senate in 1987. See 9 CARDOZO L. REV. 1; *Washington Talk: Briefing, a Law Review on Bork*, N. Y. TIMES (Oct. 2, 1987), <https://www.nytimes.com/1987/10/02/us/washington-talk-briefing-a-law-review-on-bork.html> [<https://perma.cc/manage/create?folder=46833-105758>].

²¹ Brian L. Frye, *Court Packing Is a Chimera*, 42 CARDOZO L. REV. 2697 (2021).

²² Rivka Weill, *Court Packing as an Antidote*, 42 CARDOZO L. REV. 2705, 2705 (2021).

²³ Tyler Cooper, Amanda Dworkin, Dylan Hosmer-Quint & Amanda Pesovitz, *Retiring Life Tenure: On Term Limits and Regular Appointments at the Supreme Court*, 42 CARDOZO L. REV. 2763, 2764 (2021).

²⁴ *Id.*

²⁵ Jill M. Fraley, *Against Court Packing, or a Plea to Formally Amend the Constitution*, 42 CARDOZO L. REV. 2777, 2781–82 (2021).

²⁶ Daniel Kiel, *A Bolt of Lightning: Measuring the Impact of Modern Transitions on the Supreme Court*, 42 CARDOZO L. REV. 2813, 2815 (2021).

²⁷ *Id.* at 2847.

House of Representatives to ensure “representative-democratic principles” as opposed to the “existing counter-majoritarian system of exclusive reliance on the Senate.”²⁸ Jeremy N. Sheff offers an unusual proposal, that “the selection of a case for the Supreme Court’s discretionary appellate docket . . . be performed by a different group of judicial officers than those who hear and decide that case.”²⁹ Jacob Bronsther and Guha Krishnamurthi focus on political ethical norms and argue that a common justification for certain political conduct premised on the claim that one’s political opponents would engage in such conduct if the power differential was altered “is dangerous and that we ought to excise it from the menu of political justifications.”³⁰ Mark P. Nevitt addresses possible consequences of the Barrett nomination for climate change litigation and regulation,³¹ and Brian Farkas focuses on what the Barrett appointment may mean for arbitration.³² Jonathan L. Entin explores Supreme Court appointments in a presidential election year by reviewing Woodrow Wilson’s 1916 nomination of John Hessin Clarke and submits “An Appreciation” of RBG for whom he clerked.³³

²⁸ Sam Solomon, *Contra Publius: The House as Cure for the Complaisance and Venality of the Senate*, 42 CARDOZO L. REV. 2863, 2863 (2021).

²⁹ Jeremy N. Sheff, *I Choose, You Decide: Checking the Judiciary from Within*, 42 CARDOZO L. REV. 2869, 2873 (2021).

³⁰ Jacob Bronsther & Guha Krishnamurthi, *The Iron Rule*, 42 CARDOZO L. REV. 2889, 2891 (2021).

³¹ Mark P. Nevitt, *The Remaking of the Supreme Court: Implications for Climate Change Litigation & Regulation*, 42 CARDOZO L. REV. 2911 (2021).

³² Brian Farkas, *Arbitration at the Supreme Court: The FAA from RBG to ACB*, 42 CARDOZO L. REV. 2927 (2021).

³³ Jonathan L. Entin, *Supreme Court Appointments in Presidential Election Years: The Case of John Hessin Clarke*, 42 CARDOZO L. REV. 2961 (2021).