

Catholic, woman, mother, young: a pioneer in the Supreme Court



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CATHOLIC, WOMAN, MOTHER, YOUNG: A PIONEER IN THE SUPREME COURT

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Keywords: *Amy Coney Barrett, Supreme Court, Justices, Biography, Catholic, Natural Law.*

Católica, mujer, madre, joven: una pionera en la Suprema Corte

Resumen: Este breve artículo es parte de un proyecto más amplio titulado *Los jueces católicos de la Corte Suprema*, que incluirá una biografía intelectual de todos y cada uno de los jueces católicos en la historia de la Corte Suprema de los Estados Unidos. Este segmento es sobre Amy Coney Barrett. Primero destaca sus elecciones inusuales en materia educativa; a continuación, se centra en su familia y su trabajo. Respecto de esto último, se analiza tanto su breve paso por la Sala de la Corte Federal de Apelaciones como su aún más breve (al momento de redactar este artículo) en la Corte Suprema. Se concluye que para comprender correctamente la relevancia del catolicismo de este Magistrado de la Corte Suprema, es necesario comprender las enseñanzas de la Iglesia católica sobre la separación de Iglesia y Estado (y de religión y derecho).

Palabras clave: Amy Coney Barrett, Corte Suprema, Jueces, Biografía, Católico, Derecho natural.

Cattolica, donna, madre, giovane: una pioniera alla Corte Suprema

Sommario: Questo breve articolo fa parte di un progetto più ampio intitolato *The Catholic Supreme Court Justices*, che includerà una biografia intellettuale di ogni singolo giudice cattolico nella storia della Corte Suprema degli Stati Uniti. Questo segmento è su Amy Coney Barrett. Innanzitutto evidenzia le sue scelte insolite in materia educativa; successivamente, si concentra sulla sua famiglia e sul suo lavoro. Riguardo a quest'ultima, si analizza sia il suo breve periodo al banco della Corte d'Appello federale, sia quello ancora più breve (all'epoca della stesura di questo contributo) alla Corte Suprema. Si conclude che per comprendere correttamente la rilevanza della cattolicità di questo giudice della Corte Suprema, è necessario comprendere gli insegnamenti della Chiesa cattolica sulla separazione tra Chiesa e Stato (e tra religione e diritto).

Parole chiave: Amy Coney Barrett, Corte Suprema, Giudici, Biografia, Cattolico, Diritto naturale.

To call Amy Coney Barrett “the first Catholic woman in the Supreme Court” –as I did in the original draft title I had penned for this contribution– might have been an overstatement, which is why I dismissed the tentative idea. In the history of the Supreme Court of the United States, out of a handful female Justices, one of them –Sonia Sotomayor– was raised a Catholic by her Puerto Rican family. There is thus no question that Justice Sotomayor could be considered a Catholic –or at least it is not for me to question it– and that the choice of the editor of this

volume to include her in the lineup of “Catholic Justices of the Supreme Court” is not in itself objectionable. Nevertheless, the truth is that Sonia Sotomayor’s record does not show her to have been influenced by the Catholic tradition in any relevant way –which is perhaps why she is not portrayed as a Catholic in the public eye, regardless of ideology.

In what follows, I hope to show that the same is not true of Justice Barrett. I would like to suggest, too, that this is why the public considers Barrett a Catholic justice, again regardless of ideology. I agree with Jim Stoner when he writes in the pages of this volume that “the enforcement of Catholic orthodoxy upon the country in the name of the Constitution” is not what one should expect to differentiate a Catholic Supreme Court justice from his or her colleagues on the bench. Indeed, the enforcement of Catholic doctrine is not what differentiates Justice Barrett from her colleagues, if we are to judge by the few cases in which she has participated so far. Even in the most relevant of them, *Dobbs v. Jackson Women’s Health Organization*, the majority opinion that she endorsed stands or falls regardless of the Catholic faith. If it is true that *Roe v. Wade* was wrong under the Constitution and if it is true that the rules of *stare decisis* were correctly applied, the *Dobbs* majority opinion, joined by Justice Barrett, stands. Otherwise, it falls –which is the dissent’s position: the majority’s view falls because *Roe* is correct and, at any rate, there is no (valid) reason to overrule it. Nevertheless, the dissent *never* accuses Justice Barrett and her four companions of enforcing Catholic orthodoxy. From the point of view of the Catholic faith the reasoning of the majority in *Dobbs* is “agnostic”: it does not pass religious judgment on the question at stake.

It is of course the Catholic faith itself that, in normal circumstances, mandates this attitude—detached, on the surface, from the faith; an attitude respectful of the law. But that is a topic for another article, one that Justice Barrett wrote many years ago, published when she was a newly minted law school graduate. The piece, published in 1998 in the *Marquette Law Review*, was coauthored with John H. Garvey, who signs first notwithstanding alphabetical precedence of Coney (her only name then, as she was still single when she wrote this article) over Garvey, perhaps because he was already a major professor, then teaching at Notre Dame Law School. Anyone who reads “Catholic Judges in Capital Cases” will notice the enormous deference that the young Coney granted positive law in the context of adjudication, while preserving, at the same time, the religious convictions of the Catholic judge imagined in the article (in whom one can easily imagine her future self). The take of the coauthors is nuanced, and their position on the question whether Catholic judges should recuse themselves in capital cases varies depending on context and circumstance. But the alluded to deference defended in their piece is aptly summed up in the following coauthored words: “Catholic judges will not want to shirk their judicial obligations”[1].

Now that Amy Vivian Coney has become Justice Barrett her position in life has changed dramatically from the time she co-wrote the *Marquette* piece; it has changed substantially even since her relatively recent service as a judge of the federal Court of Appeals. Under the right circumstances, she now has, as a Justice, the power to declare what the Constitution means. When her vote makes it possible (together with others’ votes) to change a past precedent that is deemed constitutionally wrong, she is not imposing her convictions over and above the

law but imposing... the higher law, i.e., the Constitution. Notice the contrast with her position as a judge of the Court of Appeals. For Judge Barrett, *Roe v. Wade* was the law and, if anything, she could have recused herself (perhaps along the precisely articulated lines offered in her coauthored piece). Justice Barrett, instead, has the constitutional ability to decide, together with her colleagues whether *Roe* shall remain the law[2]. In *Dobbs*, a majority of the Supreme Court did just that: it overruled *Roe*, having reasoned that the 1973 case constituted an erroneous interpretation of the Constitution[3].

This is a good place to take issue with the main line of argument of one of Justice Barrett's purportedly most pervading critiques. An essay in *The New Yorker*, titled "Amy Coney Barrett's Long Game", argues that it is hard "to accept that a judge who views abortion as the slaughter of innocents (or who considers it a linchpin of women's freedom) can easily banish such a conviction".[4] This is both true and also irrelevant. The question is not one of *banishing* convictions; the convictions, if they are there in a certain person, will still be there in the judge. What matters for a Justice of the Supreme Court (and for any judge and lawyer) is that her reasoning from the bench ought to be legal –that it will have the law as its starting point, not moral or religious convictions.

In what follows I will look into Amy Coney Barrett's life –into the little we know of her life, as she was never a public figure until recently– to try to illuminate the problem that one could clumsily call "her Catholicity" as a Justice of the Supreme Court.

Retrospectively unusual choices in educational matters

Amy Coney was educated at St. Mary's Dominican High School in New Orleans, founded in 1860 as the Dominican Female Academy to teach the children of the Irish immigrants. The seven Dominican nuns who had come from Ireland to found the new school had been trained in the humanities and the fine arts. The humanities have ever since been the focus of the school Amy Coney attended, and it would seem that the humanities have made a profound impact in her life. Indeed she went on to study literature and modern languages at Rhodes College, in Memphis (Tennessee), whose highest priorities are, according to its self-description, "a commitment to the liberal arts" and "intellectual engagement"[5]. This step in her life, other than reaffirming an inclination to the humanities, is rather extraordinary in retrospect for someone who thirty years later would become a Justice of the Supreme Court. Most Justices attend Ivy League (or Ivy League-equivalent) schools for college and, in the unlikely event that they go to a liberal arts college for undergraduate, they attend one of the top *liberal* ones.

The next step in Amy Barrett's education was, in retrospect, equally unusual (perhaps even shocking for the intelligentsia): she did not go to any of the Ivy League (or Ivy League-equivalent) law schools but instead went to Notre Dame Law School. At this point I need to disclose two facts. First, I am a Visiting Professor at Notre Dame Law School, where I frequently teach a short course on Comparative Constitutional Law. Second, in that capacity I have interacted with Amy Barrett and I learned to admire her as a person, before she joined the Supreme Court. Having disclosed these facts, and as much as I am very proud of Notre Dame, it is quite obvious that my beloved Law School is not even "top 14".

Still, when it came to shaping her legal education, the home of the Fighting Irish was the school of choice of the future Justice Barrett.

The first thing the “oldest Catholic law school in the United States” shares in its self-description is that Notre Dame is “educating a different kind of lawyer” and that “students are trained to explore the moral and ethical dimensions of the law”[6]. At Notre Dame Law School, Amy Coney sat in a compulsory course on philosophy of law (a class called “Jurisprudence”) and she took an elective course on the moral, political, and legal thought of Thomas Aquinas, with Professor John Finnis. The Oxford leading proponent of natural law theory (who concurrently held a chair at Notre Dame) remembers his student as quite exceptionally able and engaged. More than a quarter-century later he remembers exactly the back corner classroom seat from which she launched her questions.

It would seem that, as a Justice, Amy Barrett shows with deeds that she is content, looking backwards, with the education she received at Notre Dame. Not only has she returned a few times in her new capacity as a Justice to teach a seminar or to give a lecture[7] but also she has fished some of her own Supreme Court law clerks from the Notre Dame Law School pond[8]. This attitude, yet again, contrasts with the typical fashion of Supreme Court Justices, the majority of whose clerks graduated from Ivy League law schools (Justice Antonin Scalia, one of Justice Barrett’s mentors, had a similar attitude when about twenty years earlier he hired as a clerk a young woman hailing from Notre Dame Law School).

It would therefore seem that Patrick Deneen, a Professor of Constitutional Studies at the University of Notre Dame, is right when he concludes from the observation of her educational background that “Amy Coney Barrett has not had her soul shaped by the places and people governed by the dominant liberal ethos of our age”[9].

Family and work

It is easy to speculate without wandering farther afield that Amy Coney’s years at Dominican and Rhodes College, coupled with her education at Notre Dame Law School, laid the foundations of her personal ethics. Let us now have a cursory look at her family life, considering that it is true that –independently of her profession at any given point in life– professor, Judge of the Court of Appeals, Justice of the Supreme Court –Barrett has always kept her family at the heart of the way she lives out her Catholic vocation.

The person whom she chose to marry, Jesse Barrett, received a similar graduate education to hers: a South Bend, Indiana native, Mr. Barrett was two years below Amy Coney at Notre Dame Law School. Together they established a large, multifaceted family (which was subjected to intense scrutiny by the media, during Amy Barrett’s two nominations).

Barrett returned to Notre Dame Law School as a tenure track faculty after clerking for Judge Laurence Silberman of the Court of Appeals and for Justice Antonin Scalia of the Supreme Court and then working for three years at a law firm specialized in litigation, based in Washington D.C. She taught full-time in her *alma mater* for fifteen years, from 2002 to 2017[10] –difficult classes, ranging from Evidence to Federal Courts– as her family grew at a pace that most would

find intimidating today. As a teacher she was famously successful, received several teaching awards, and got significant tokens of recognition from her students.

When I first met her, around ten years ago, she had already turned forty and was pregnant with her seventh child –by then she had given birth to four and had adopted two from Haiti. When I saw her that first time the words one of her colleagues at the Law School had uttered shortly before, immediately came to my mind: “When Amy Barrett started teaching here –so young, so beautiful– all the guys taking her class were enraptured”. He had said this in jest, but we all know that jokes are often subtle ways of conveying the truth.

A couple of years after that first encounter, I met with Professor Barrett for tea at the Law School’s cafeteria, during one of my many visiting trips. I learned from her that the alluded to seventh child (a boy) had been born with Down syndrome. My memory goes back to the following anecdote and I am certain that she would absolve me of sharing it. She said that the other kids were so elated with the birth of a new sibling, that one time, as she was driving them all to school, one of the younger ones asked, proudly and cheerfully: “Mom, can we tell everyone that we have a brother with Down syndrome?” This story calls to mind another I heard her tell much later, at a keynote lecture she gave in South Bend at the annual Symposium of the Notre Dame Law Review, in February 2022. After acknowledging that she was the first woman (but not the first Justice, she clarified) with school-age children to sit in the Supreme Court, she told us that she was likely the only member of the Court who hummed “Encanto” on the way to her chambers, the direct result of listening endlessly to that movie’s soundtrack in a car full of kids[11].

In 2016 my colleague Amy invited me and a handful other Notre Dame faculty for dinner at the Barretts’ home in South Bend. The reason I mention this otherwise unremarkable fact in this article is to sum up in one word what I found in that house: “normal”, is what I saw. The scene I witnessed was not altogether different from what I find each time I visit my younger sister’s house in Florida. Mind you, my sister has eight kids (and Amy, seven) so when I say “normal” I don’t mean *any* normal...

The seventh circuit

The story of the nomination of Professor Barrett to the Court of Appeals for the Seventh Circuit in 2017 is well known. Perhaps the most salient aspect of that saga was her exchange with Senator Dianne Feinstein. The Senator’s “the dogma lives loudly within you” line became so famous that I can omit that story without risk of alienating the reader. I will only say that those hearings put in the limelight, in a rather extraordinary way, the religion of a person who only three years later would become a Justice of the Supreme Court. Barrett held firm to her convictions and to her faith, without ever giving in to pressure; but at the same time, she made it clear that –to paraphrase Stoner, from the piece I quoted earlier– she was not being appointed to enforce “Catholic orthodoxy upon the country in the name of the Constitution”. When insistently asked about the *Marquette* article she had coauthored twenty years prior, she made it clear that her “personal church affiliation or [her] religious belief would not bear on the discharge of [her] duties”[12].

I think that Barrett’s own reaction to the experience of living in the limelight is well captured by a brief letter she sent me almost a year after she had joined the Court of Appeals, when her name was floated in media coverage as a possible replacement for Justice Kennedy. [The email letter is dated July 9, 2018, the very day in which (a few hours later) Brett Kavanaugh was nominated instead.] Not without some emotion, I will share here that item of my file. When Judge Barrett’s name started to circulate rather firmly, in those days after Justice Kennedy’s retirement, I was in Kenya, teaching a short course on “Law and Religion”. It occurred to me to send her a note wishing her the best and offering my prayers. “I hope it happens”, I added.

Her reply:

“I am pretty confident it will not, which, truthfully, will be a bit of a relief. The last week has been tough; several months more of it would be brutal. Hard to be sad about not having to be like Frodo crossing the plains of Mordor!”

This exquisite note, which reveals a certain mastery of Tolkien’s work, stands in stark contrast with the “long game” that the essay in the *The New Yorker* attributes to Amy Barrett. The essay relies on several unjustified suppositions and assumptions. At the center of the essay is the idea that Justice Barrett “isn’t just another conservative –she’s the product of a Christian legal movement that is intent on remaking America”[13]. Only God knows what the interior purposes of Amy Barrett (and of anyone!) are; we can only judge external facts, and even those only up to a certain point. This is why I thought that in retrospect the publication of Justice Barrett’s letter to me, throws some light on her “long game”.

During her years at the Court of Appeals, Judge Barrett stayed in the faculty of Notre Dame Law School and continued teaching there. In that period of her tenure she taught a seminar on Constitutional Interpretation, yet more proof of her loyalty to Notre Dame and a further witness to her commitment to the Catholic mission of that institution. While a judge on the Seventh Circuit, she established her chambers at the Federal Courthouse in South Bend, and traveled to nearby Chicago when necessary, for hearings and court functions.

Of her years as an appeals judge, one could say that she lived the principles she had espoused years ago in her *Marquette* article: her Catholicism bore on the discharge of her duties only in so far as the opinions she wrote were well-made, professional, and faithful to the law –what one should expect from a Catholic judge, at least in insofar as she deals with just laws. As explained in the introductory section above, and contrary to the suggestion of *The New Yorker*, from this circumstance it does not follow that her convictions vanished.

The Supreme Court

The hearings that preceded the nomination of Amy Coney Barrett to the Supreme Court in 2020 were less contentious than her Appeals nomination of 2017; the issue of religion was certainly of less prominence. When Justice Ruth Bader Ginsburg died on September 18, 2020, Barrett –whose name, as I pointed out, had been floated in media coverage a couple of years earlier as a replacement for Justice Kennedy– was clearly a possible nominee. By way of contrast with the situation prior to her appointment to the Court of Appeals, she was now better

known and she was already a member of the federal judiciary –not “just a law professor”.

She became an Associate Justice of the Supreme Court on October 27, 2020. After a few months of commuting between South Bend and Washington, D.C. – a situation likely favored by the conditions of the coronavirus pandemic, with the Supreme Court building closed to the public and judicial work mostly online– Justice Barrett moved to the nation’s capital with her family. It was not easy for them. Reflecting on the experience of their years in Indiana, Jesse Barrett stated: “I don’t think we could ever recreate it. There’s only one Notre Dame, there’s only one South Bend, there’s only one set of our current neighbors” [14]. Anyone having spent some time under the golden dome will empathize with Amy Barrett’s husband’s statement.

On the bench, Justice Barrett has not yet had a clear influence on the Supreme Court nor has she been the author of sufficient opinions to warrant a comprehensive assessment of her tenure, let alone its “Catholicity.” There were the pandemic cases in which restrictions to religious freedom received strict scrutiny from the Court. In those cases, she joined the majority that sustained petitions of the Roman Catholic Church and other religious institutions, in defense of their jurisdiction over their houses of worship. There was also a ruling in favor of a Catholic social service agency in the context of adoption by same-sex couples. But, to reiterate my main line of argument throughout, the majority decisions in those cases, which Justice Barrett joined, were based exclusively on constitutional law –not on faith arguments, Catholic or otherwise. They were exercises in legal reasoning, not in moral or religious reasoning.

In June 2022, the Supreme Court handed down its judgment in the famous abortion case, *Dobbs v. Jackson*. The stakes were high for Justice Barrett coming into this case. There were doubts floating in the air about whether Chief Justice Roberts would join the other so-called “conservative Justices” in overruling *Roe* and *Casey*. Those doubts originally stemmed from the generally more centrist approach of the Chief Justice, but also from his stand in the *June Medical* abortion case, which had been decided in 2020, and in which he had parted company with Justices Thomas, Alito, Gorsuch, and Kavanaugh. After the oral argument in *Dobbs*, those doubts grew, as the Chief Justice pressed questions that could lead to the conclusion –which in the end proved to be correct– that he would rather go for a way of deciding *Dobbs* that, while allowing the state of Mississippi to restrict abortion in a way that would have been forbidden and invalid under *Roe-Casey*, would not entail at the same time the overruling of those key abortion precedents.

With these ever-looming doubts, there was an immense expectation as to what Amy Barrett would do in *Dobbs*. She did in fact contribute the fifth vote to a majority that decided to overrule *Roe* and *Casey* –although a more accurate way of putting it would be that she contributed one vote to a slim five-member majority, as “fifth” indicates an order of the votes that does not in reality exist. In this sense, while it would be true to affirm that, given the decision of the Chief Justice not to endorse the opinion that became the majority, Justice Barrett’s vote was crucial, it would also be true (and more accurate) to affirm that, in the light of that decision by the Chief, each one of the five votes in the slim majority were equally crucial for the overruling of the abortion precedents. Still, Justice Barrett

was the junior justice and she had not participated in the alluded to abortion case *June Medical*, in which Thomas, Alito, Gorsuch, and Kavanaugh had joined forces. For this, and other emotional reasons, hers is sometimes considered the “fifth” vote in *Dobbs*.

Conclusion

If you find a tad bit disappointing the conclusion so far, I will add insult to injury, when I bring to bear on our topic something Amy Coney Barrett told us in her keynote for the Law Review Symposium at Notre Dame, in February 2022. I actually think it summarizes aptly her own way of being a “Catholic Supreme Court Justice”. I quote from my own personal notes: “The day I think I am better than the next person in the line in the grocery store... that is a bad day in my life!”[15] One can easily sense the mark of the humanities in that exclamation. “Humanity” –as instantiated in Justice Barrett’s words at her keynote– should be, after all, and above everything, what should characterize a Catholic Justice of the Supreme Court, and indeed everyone.

But as I wrap up my contribution, I find it pertinent to make clear that Amy Coney Barrett is also a person of prayer and a devout Catholic. I can vouch for that, as so can too all those who through the years have partaken with her in Christian, ecumenical fellowship in South Bend. In a relevant sense, *that* is what makes Barrett a Catholic Supreme Court Justice; what one should expect to differentiate her from his or her colleagues on the bench—unless, of course, they share her faith! When it comes to the handling of cases, however, perhaps it is best to describe her as a competent and honest Supreme Court Justice that is *also* a Catholic.

Notas

- [1] Garvey, J. H. and Coney, A. V. (1998). Catholic Judges in Capital Cases. *Marquette Law Review* 81, 302, 302.
- [2] See Legarre, S. and Handy, C. R. (2021). Overruling Louisiana: Horizontal Stare Decis and the Concept of Precedent, *82 Louisiana Law Review* 41.
- [3] See Legarre, S. and Chenevert, A. (2023). A Modified Approach to Overruling for the “Conservative Majority”, forthcoming in *98 Tulane Law Review*.
- [4] Talbot, M. (February 7, 2022). Amy Coney Barrett’s Long Game. *The New Yorker*.
- [5] About Rhodes, <https://www.rhodes.edu/about-rhodes>, last visited on 9 March 2023.
- [6] Educating a Different Kind of Lawyer, <https://law.nd.edu/>, last visited on 9 March 2023.
- [7] Justice Barrett visited Notre Dame Law School once more as recently as February 2023, this time to hear a Moot Court argument: <https://law.nd.edu/news-events/news/2023-moot-court-showcase-argument/>, last visited on 9 March 2023.
- [8] Timothy Bradley ’20 J.D. to clerk for Supreme Court Justice Amy Coney Barrett, <https://law.nd.edu/news-events/news/timothy-bradley-20-jd-supreme-court-clerk-2022-23/>, last visited on 9 March 2023.
- [9] Deneen, P. J. What to Know about Amy Barrett, First Things, <https://www.firstthings.com/web-exclusives/2020/09/what-to-know-about-amy-coney-barrett>, last visited on 9 March 2023.
- [10] Notwithstanding what I state in the text (that Professor Barrett taught full-time in Notre Dame Law School for fifteen years, from 2002 to 2017), the Law

School itself explains that she “joined the faculty as a professor of law in 2002 and remained a Notre Dame faculty member until her confirmation to the Supreme Court in 2020”. Timothy Bradley ’20 J.D. to clerk for Supreme Court Justice Amy Coney Barrett, <https://law.nd.edu/news-events/news/timothy-bradley-20-jd-supreme-court-clerk-2022-23/>, last visited on 9 March 2023.

[11] For details of the alluded to keynote lecture, see U.S. Supreme Court Justice Amy Coney Barrett to speak at ND Law Review symposium, <https://law.nd.edu/news-events/news/2022-law-review-justice-amy-coney-barrett/>, last visited on 9 March 2023.

[12] See “Judicial and Justice Department Pending Nominations”. C-SPAN. Archived from the original on September 22, 2020. Retrieved September 13, 2020.

[13] Talbot, M. (February 7, 2022). Amy Coney Barrett’s Long Game. *The New Yorker*.

[14] Amy Coney Barrett sells South Bend home as family plans to move to Washington, South Bend Tribune, April 18, 2021, <https://www.southbendtribune.com/story/news/local/2021/04/18/amy-coney-barrett-sells-south-bend-home-as-family-plans-move-to-washingto/116628956/>, last visited on 9 March 2023.

[15] An online version of the alluded to keynote can be found in <https://www.youtube.com/watch?v=n0LA-z-SW5w>, last visited on 9 March 2023.

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