

Don't Be Gaslighted: Amy Coney Barrett Will Destroy *Roe v. Wade*

For more than 45 years, the Supreme Court has recognized our fundamental constitutional right to decide to have an abortion. But that fundamental right is on the line with Amy Coney Barrett, President Trump's nominee to replace Justice Ginsburg. Barrett has made her position against abortion crystal clear: she opposes abortion and wants *Roe v. Wade* overturned.

But, she would not need to overrule *Roe v. Wade* to destroy the constitutional right to abortion—as a Supreme Court justice she could claim to uphold *Roe* while completely eviscerating it. Barrett *will* either overturn *Roe* or completely gut it if confirmed to the Court. Any claim that she would not overrule *Roe* or that it isn't clear what she would do is pure gaslighting.

Any Claims That Barrett Will Respect *Roe v. Wade* Are Disingenuous and Meant to Mislead

In an effort to discredit and silence those who oppose Judge Barrett's nomination, the Trump administration, other anti-abortion politicians, and some news outlets are complaining that concerns she would end *Roe* are overblown.¹ During the presidential debate held on September 29, 2020, President Trump said, "you don't know her view on *Roe v. Wade*."²

But Barrett's view on *Roe v. Wade* is abundantly evident. She has called abortion "always immoral,"³ called *Roe v. Wade* "barbaric," and called for its "end."⁴ And she wrote that it would be legitimate for judges to overturn longstanding precedent that they don't agree with, referring specifically to *Roe*.⁵

Barrett also knows—like other Supreme Court nominees before her—that to openly say in confirmation hearings that she would overturn *Roe* and fulfill Trump's promise would turn Senators and the public against her. So instead, she simply acknowledges *Roe* as precedent.

But this acknowledgment is meaningless. Judge Barrett knows that as a Supreme Court justice, she can claim to uphold *Roe* while effectively ending people's ability to access abortion. Indeed, Judge Barrett has repeatedly explained how to do it.

In 2013, during a lecture at Notre Dame, she said she thought it was “very unlikely at this point that the court is going to overturn *Roe*,” and that the “fundamental element, that the woman has a right to choose abortion, will probably stand.”⁶ But she also went on to say that “whether or not *Roe* gets overturned is irrelevant.”⁷ While *Roe* might stand in name, she said, “[i]t’s a question of abortions will be publicly or privately funded.”⁸ During a 2016 event at Jacksonville University in Florida, Judge Barrett expounded on the same theme, saying, “I don’t think abortion or the right to abortion would change.”⁹ Immediately thereafter she said, “I think some of the restrictions would change.”¹⁰ She went on to say, “States have imposed regulations on abortion clinics, and I think the question is, ‘How much freedom the court is willing to let states have in regulating abortion.’”¹¹

As a sitting judge, Barrett has answered that question already: Her decisions as a judge on the Seventh Circuit Court of Appeals demonstrate that she would be willing to allow states to regulate abortion out of existence.

Judge Barrett herself has issued a warning to be wary of Supreme Court nominees’ vague public statements and has advised that opinions tell the true story: “However cagey a justice may be at the nomination stage, her approach to the Constitution becomes evident in the opinions she writes.”¹² Every ruling Judge Barrett has participated in on abortion in the three years she has been a judge shows her hostility to the constitutional right to abortion and her willingness to alter or ignore current Supreme Court precedent.¹³

Amy Coney Barrett Is Following the Same Playbook as Justices Roberts, Alito, Gorsuch, and Kavanaugh

This gaslighting play is not new. In each of their confirmation processes, Justices Roberts, Alito, Gorsuch, and Kavanaugh made similar statements acknowledging *Roe* exists and claiming vaguely that they would respect precedent. But once on the Court, each of them has voted to uphold extreme and medically unnecessary abortion restrictions that gut the core constitutional right to abortion.

During his confirmation process in 2018, Justice Kavanaugh told Senators that he recognized “the importance of the precedent set forth in *Roe v. Wade*.”¹⁴ In his confirmation hearings in 2017, Justice Gorsuch said that *Roe* was “the law of the land.”¹⁵ In 2006, Justice Alito said during his confirmation hearings that *Roe v. Wade* was “important precedent.”¹⁶ In 2005, during his confirmation hearings, Chief Justice Roberts said that *Roe* was “settled precedent.”¹⁷

But since being confirmed to the Supreme Court, these justices have all repeatedly voted to ignore precedent and uphold extreme abortion restrictions even without calling for *Roe* to be overturned:

- In 2007, in the first abortion case that reached Chief Justice Roberts and Justice Alito after joining the Court, they voted to uphold a federal ban on a safe, approved method of abortion.¹⁸ The decision was in direct conflict with a case decided just seven years earlier,¹⁹ and it overturned core principles of *Roe v. Wade* and other precedent. Yet the decision did not formally overturn *Roe* or even acknowledge the drastic changes it was making to abortion law.
- In 2016, Justice Alito wrote, and Chief Justice Roberts joined, a dissent from the majority opinion in *Whole Woman’s Health v. Hellerstedt*, in which the Court struck down Texas abortion restrictions as unconstitutional.²⁰ If Justice Alito and Chief Justice Roberts had their way, as demonstrated in the trial court, Texas would have been reduced from 40 clinics providing abortion care to eight *at most*, meaning that 2 million women of reproductive age would have lived further than 50 miles from an abortion provider.²¹ Justice Alito and Chief Justice Roberts would have allowed this outcome even without formally overturning *Roe*.
- In 2020, in *June Medical Services v. Russo*, Justices Kavanaugh, Alito, and Gorsuch all dissented from the decision to strike down a Louisiana abortion restriction that was identical to one at issue in *Whole Woman’s Health*.²² Upholding the Louisiana law would have left one or two abortion providers in the entire state, reducing the state’s capacity to provide abortion care to Louisiana women by as much as 70%, and making it essentially impossible for new providers to begin providing abortion care.²³ The dissenting justices could thus have essentially eliminated abortion in Louisiana without ever formally overruling *Roe*. And although Chief Justice Roberts voted in the majority, his concurrence provided a roadmap for how anti-abortion legislators can pass new laws restricting abortion and how lower court judges can water down the constitutional undue burden standard in order to uphold them.²⁴

The Court—Led by Amy Coney Barrett if She Is Confirmed—Can Gut *Roe* in a Number of Ways

There are a number of ways a newly constituted Court could render the constitutional right to abortion utterly empty, without formally overturning *Roe*.

For example, the Court could change the constitutional standard by which it decides if an abortion restriction is unconstitutional. According to longstanding precedent, states may not restrict abortion if those restrictions create an undue burden for women seeking abortion care.²⁵ Under this standard, a regulation on abortion is unconstitutional when it “has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”²⁶ A new interpretation of what counts as an undue burden—as urged by Chief Justice Roberts in *June Medical Services*—could allow more abortion restrictions to stand. Many lower federal courts—increasingly stacked by President Trump with judges hostile to abortion—are already starting to change their interpretation of undue burden in order to uphold abortion restrictions previously struck down.²⁷ Without overturning *Roe*, such a change in standard would allow courts to uphold virtually every abortion restriction, shutting down clinics and rendering the right to abortion meaningless. There are at least a dozen cases in the pipeline to the Supreme Court that could give a Barrett Court this opportunity.²⁸

The Court could also deny abortion providers the right to challenge abortion restrictions on behalf of their patients. There are already four votes on the Court for this position,²⁹ and Barrett could add the fifth. This change would make it nearly impossible to challenge abortion restrictions, meaning more would become effective, and eliminate access to abortion—all without formally overturning *Roe*.

We Know What the Erosion of *Roe* Looks Like: It Has Already Eliminated Abortion for Too Many

We already know what the devastation of *Roe* looks like because it is already happening, and it is devastating to people. The right to abortion is already out of reach for too many, especially people of color, those struggling financially, LGBTQ people, young people, people with disabilities, and those in rural communities, due to the extreme, burdensome, and stigmatizing restrictions that lower courts have permitted to go into effect. As abortion restrictions force providers to close their doors, people are forced to travel farther and wait longer to see a provider, often more than once due to unnecessary requirements in some states—thus eliminating abortion access entirely for those who are unable to travel or wait due to finances, work or family obligations,³⁰ or because they live with an abusive partner,³¹ for example. Deep income inequality and systemic racism in health care mean that abortion restrictions and efforts to strip funding for abortion care fall particularly heavily on women of color, who already face barriers to reproductive and maternal health services.³² If Judge Barrett were to be confirmed to the Supreme Court, access to abortion would become even more precarious—if not non-existent—for more individuals across the country.

Conclusion

Don't be fooled: Amy Coney Barrett poses an existential threat to our constitutional right to abortion, whether or not she votes to overrule *Roe v. Wade*. Her clear record leaves no doubt that she wants to eliminate our constitutional right to abortion.

If Amy Coney Barrett is confirmed to the Supreme Court, it is all too likely that the Supreme Court would permit abortion restrictions to accumulate across the country, effectively eliminating the right to abortion for more and more people. She could easily continue to claim that she is leaving *Roe v. Wade* intact, even as she votes repeatedly to restrict our right to abortion into oblivion.

- 1 See, e.g., Becca Andrews, *Trump Insisting Roe Is “Not on the Ballot” May Be Part of a New Republican Trend*, GROAN., MOTHERJONES.COM (Sept. 30, 2020), <https://www.motherjones.com/2020-elections/2020/09/trump-ernst-debate-roe-amy-coney-barrett/>.
- 2 See Seung Min Kim, *Both sides on abortion certain Barrett would restrict, if not overturn, landmark court decision*, WASH. POST (Oct. 8, 2020), https://www.washingtonpost.com/politics/senate-court-trump-barrett/2020/10/08/a82f4ace-0973-11eb-a166-dc429b380d10_story.html.
- 3 Amy Coney Barrett & John H. Garvey, *Catholic Judges in Capital Cases*, 81 MARQ. L. REV. 303, 316 (1998).
- 4 See Josh Salzman & Kevin McCoy, *Supreme Court nominee Amy Coney Barrett signed 2006 anti-abortion ad in Tribune*, SOUTH BEND TRIBUNE (Oct. 2, 2020), https://www.southbendtribune.com/news/local/supreme-court-nominee-amy-coney-barrett-signed-2006-anti-abortion-ad-in-tribune/article_bbecc3e4-042c-11eb-b1a2-132bb4b716bb.html (providing copy of original ad).
- 5 Amy Coney Barrett, *Precedent & Jurisprudential Disagreement*, 91 TX. L. REV. 1711 (2013) (writing that the “public response to controversial cases like Roe reflects public rejection of the proposition that stare decisis can declare a permanent victor in a divisive constitutional struggle.”).
- 6 See Christian Myers, *Law professor reflects on landmark case*, THE OBSERVER (Jan. 21, 2013), <https://ndsmcobserver.com/2013/01/law-professor-reflects-on-landmark-case/>.
- 7 Andrew Kaczynski & Em Steck, *Amy Coney Barrett initially failed to disclose talks on Roe v. Wade hosted by anti-abortion groups on Senate paperwork*, CNN.COM (Oct. 9, 2020), <https://www.cnn.com/2020/10/09/politics/file-amy-coney-barrett-roe-v-wade-talks/index.html> (citing Erin Stoyell-Muholland, *40 Years of Roe: The legal background*, THE IRISH ROVER (Jan. 26, 2013), <https://irishrover.net/2013/01/40-years-of-roe-the-legal-background/>).
- 8 See Myers, *supra* n.6.
- 9 *Her words: Amy Coney Barrett on faith, precedent, abortion*, ASSOCIATED PRESS (Sept. 26, 2020), <https://apnews.com/article/ruth-bader-ginsburg-us-supreme-court-courts-laws-texas-0565aa9c19f4f28e3bc793646180d5b5>; see also Sarah McCammon, *A Look At Amy Coney Barrett’s Record On Abortion Rights*, NPR.ORG (Sept. 28, 2020), <https://www.npr.org/2020/09/28/917827735/a-look-at-amy-coney-barretts-record-on-abortion-rights> (containing full video of the 2016 Hesburgh Lecture at Jacksonville University).
- 10 *Id.*
- 11 Emily Czachor, *Amy Coney Barrett on Abortion, Roe v. Wade and Judicial Precedent in Her own Words*, NEWSWEEK.COM (Sept. 23, 2020), <https://www.newsweek.com/amy-coney-barrett-abortion-roe-v-wade-judicial-precedent-her-own-words-1533707>.
- 12 Barrett, 91 TX. L. REV. at 1717.
- 13 See *Box v. Planned Parenthood of Ind. & Ky., Inc.*, 139 S. Ct. 1780 (2019); *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 917 F.3d 532 (7th Cir. 2018); *Price v. City of Chicago* (upholding a buffer zone around an abortion clinic protecting patients from anti-abortion protestors but making clear that she would overrule precedent and strike down such a law as a Supreme Court justice).
- 14 Meredith McGraw & Nancy Cook, *Trump walks abortion tightrope on SCOTUS pick*, POLITICO (Sept. 25, 2020), <https://www.politico.com/news/2020/09/25/trump-supreme-court-abortion-421443>.
- 15 *Id.*
- 16 See Jesse J. Holland, *Dems aggressively question Alito’s “inconsistencies”*, SEATTLE TIMES (Jan. 11, 2006), <https://www.seattletimes.com/nation-world/dems-aggressively-question-alitos-inconsistencies/>.
- 17 See, e.g., Gwyneth K. Shaw, *Roberts: Roe ‘settled as precedent’*, BALTIMORE SUN (Sept. 14, 2005), <https://www.baltimoresun.com/news/bal-te-roberts14sep14-story.html>; *COURT IN TRANSITION: ‘I Believe That No One Is Above the Law Under Our System’*, N.Y. TIMES (Sept. 14, 2005), <https://www.nytimes.com/2005/09/14/us/court-in-transition-i-believe-that-no-one-is-above-the-law-under-our.html>.
- 18 *Gonzales v. Carhart*, 550 U.S. 124, 159 (2007).
- 19 *Stenberg v. Carhart*, 530 U.S. 914, 920 (2000).
- 20 *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as revised (June 27, 2016).
- 21 *Whole Woman’s Health v. Lahey*, 46 F. Supp. 3d 673, 681 (W.D. Tex. 2014), *aff’d in part, vacated in part, rev’d in part sub nom. Whole Woman’s Health v. Cole*, 790 F.3d 563 (5th Cir. 2015), *modified*, 790 F.3d 598 (5th Cir. 2015), *rev’d and remanded sub nom. Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as revised (June 27, 2016), *and rev’d and remanded sub nom. Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016), as revised (June 27, 2016), *and vacated and remanded sub nom. Whole Woman’s Health v. Hellerstedt*, 833 F.3d 565 (5th Cir. 2016).
- 22 *June Med. Servs. L. L. C. v. Russo*, 140 S. Ct. 2103, 2153–71 (2020) (Alito, J., dissenting); *id.* at 2171–82 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).
- 23 *Id.* at 2116.
- 24 *Id.* at 2133 (Roberts, C.J., concurring in the judgment); see also Gretchen Borchelt, *Symposium: June Medical Services v. Russo: When a “win” is not a win*, SCOTUSBLOG.COM (June 30, 2020 12:31 PM), <https://www.scotusblog.com/2020/06/symposium-june-medical-services-v-russo-when-a-win-is-not-a-win/>.
- 25 *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 876 (1992).
- 26 *Id.* at 877.
- 27 See, e.g., *Hopkins v. Jegley*, 968 F.3d 912, 916 (8th Cir. 2020) (“Chief Justice Roberts . . . emphasized the ‘wide discretion’ that courts must afford to legislatures in areas of medical uncertainty. As a result, we vacate the district court’s preliminary injunction and remand for reconsideration in light of Chief Justice Roberts’s separate opinion in *June Medical*, which is controlling[.]”).
- 28 See SUPREME COURT VACANCY: WHAT’S AT STAKE FOR ABORTION, NATIONAL WOMEN’S LAW CENTER (Oct. 2020), <https://nwlrc.org/wp-content/uploads/2020/09/Whats-At-Stake-for-Abortion-v7.pdf>.
- 29 See *June Med. Servs.*, 140 S. Ct. at 2142–49 (Thomas, J., dissenting); *id.* at 2153–54 (Alito, J., dissenting); *id.* at 2173–75 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).
- 30 See K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access Is Out of Reach*, N.Y. TIMES (May 31, 2019), <https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html>.
- 31 See Lysandra Campbell, *The Hidden Link Between Domestic Violence and Abortion*, REWIRE NEWS GROUP (Oct. 24, 2019), <https://rewirenewsgroup.com/article/2019/10/24/the-hidden-link-between-domestic-violence-and-abortion/>.
- 32 See Jamila Taylor, *Women of Color Will Lose the Most if Roe v. Wade is Overturned*, CENTER FOR AMERICAN PROGRESS (Aug. 23, 2018), <https://www.americanprogress.org/issues/women/news/2018/08/23/455025/women-color-will-lose-roe-v-wade-overturned/>.