COVID-19 and the Constitution
Justice Barrett and the Supreme Court

AJA
November 18, 2020

Erwin Chemerinsky
Dean and Jesse H. Choper Distinguished Professor of Law
University of California, Berkeley School of Law

I. General principles -- Broad government power to stop the spread of communicable disease

Jacobson v. Massachusetts, 197 U.S. 11 (1905)
"Upon the principle of self-defense, of paramount necessity, a community has the right to protect itself against an epidemic of disease which threatens the safety of its members."

"But the liberty secured by the Constitution of the United States to every person within its jurisdiction does not import an absolute right in each person to be, at all times and in all circumstances, wholly freed from restraint. There are manifold restraints to which every person is necessarily subject for the common good. On any other basis organized society could not exist with safety to its members. . . . This court has more than once recognized it as a fundamental principle that 'persons and property are subjected to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the state; of the perfect right of the legislature to do which no question ever was, or upon acknowledged general principles ever can be, made, so far as natural persons are concerned."

"it might be that an acknowledged power of a local community to protect itself against an epidemic threatening the safety of all might be exercised in particular circumstances and in reference to particular persons in such an arbitrary, unreasonable manner, or might go so far beyond what was reasonably required for the safety of the public, as to authorize or compel the courts to interfere for the protection of such persons."

"if a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

In re Abbott, 954 F.3d. 772 (5th Cir. 2020)
"[U]nder the pressure of great dangers, constitutional rights may be reasonably restricted "as the safety of the general public may demand. That settled rule allows the state to restrict, for example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home. The right to abortion is no exception."

"The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some

'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"

"The first *Jacobson* inquiry asks whether GA-09 lacks a 'real or substantial relation' to the crisis Texas faces. . . . The second *Jacobson* inquiry asks whether GA-09 is '*beyond question*, in palpable conflict with the Constitution.'"

II. Issues

A. The constitutionality of quarantine and shelter in place

1. General power of the government

Oregon-Washington R. & Nav. Co. v. Washington, 270 U.S. 87 (1926)
"In the absence of any action taken by Congress on the subject-matter, it is well settled that a state, in the exercise of its police power, may establish quarantines against human beings, or animals, or plants, the coming in of which may expose the inhabitants, or the stock, or the trees, plants, or growing crops, to disease, injury, or destruction thereby, and this in spite of the fact that such quarantines necessarily affect interstate commerce."

Hickox v. Christie, 205 F.Supp.3d 579 (D.N.J. 2016)
"I sympathize with Hickox's plight, but I cannot find that her isolation violated any clearly established constitutional principle embodied in quarantine case law. Of course, even as to a dread disease, it is possible to overreact; as it was with cholera and yellow fever, so it is with Ebola today. A restriction can be so arbitrary or overbroad as to be impermissible. The parties cite no case striking down a quarantine order, however, that is even close to Hickox's factual scenario, or that would have clearly indicated to any of these defendants that their actions violated established law."

"Since as long ago as 1799, however, federal legislation has mandated federal noninterference and cooperation with the states' execution of their quarantine laws."

B. First Amendment rights

1. Free exercise of religion

Prince v. Massachusetts, 321 U.S. 158, 166–67 (1944)
"[t]he right to practice religion freely does not include liberty to expose the community ... to communicable disease"

South Bay United Pentacostal Church v. Newsom, 140 S.Ct. ___ (May 29, 2020). Declining injunctive relief following a district court decision, affirmed by the Ninth Circuit, in challenge by religious entities to limits on the size of public gatherings.

Chief Justice Roberts, concurring: "Although California's guidelines place restrictions on places of worship, those restrictions appear consistent with the Free Exercise Clause of the First

Amendment. Similar or more severe restrictions apply to comparable secular gatherings, including lectures, concerts, movie showings, spectator sports, and theatrical performances, where large groups of people gather in close proximity for extended periods of time. And the Order exempts or treats more leniently only dissimilar activities, such as operating grocery stores, banks, and laundromats, in which people neither congregate in large groups nor remain in close proximity for extended periods.

Our Constitution principally entrusts '[t]he safety and the health of the people' to the politically accountable officials of the States 'to guard and protect.' When those officials 'undertake[ ] to act in areas fraught with medical and scientific uncertainties,' their latitude 'must be especially broad.' Where those broad limits are not exceeded, they should not be subject to second-guessing by an 'unelected federal judiciary,' which lacks the background, competence, and expertise to assess public health and is not accountable to the people."

Justice Kavanaugh, dissenting: "I would grant the Church's requested temporary injunction because California's latest safety guidelines discriminate against places of worship and in favor of comparable secular businesses. Such discrimination violates the First Amendment.
The Church and its congregants simply want to be treated equally to comparable secular businesses. California already trusts its residents and any number of businesses to adhere to proper social distancing and hygiene practices. The State cannot 'assume the worst when people go to worship but assume the best when people go to work or go about the rest of their daily lives in permitted social settings.'"

Calvary Chapel Dayton Valley v. Sisolak, --- S.Ct. --- (July 24, 2020). Rejecting Free Exercise claim of church.

Justice Alito, dissenting: "The Constitution guarantees the free exercise of religion. It says nothing about the freedom to play craps or blackjack, to feed tokens into a slot machine, or to engage in any other game of chance. But the Governor of Nevada apparently has different priorities. Claiming virtually unbounded power to restrict constitutional rights during the COVID–19 pandemic, he has issued a directive that severely limits attendance at religious services. A church, synagogue, or mosque, regardless of its size, may not admit more than 50 persons, but casinos and certain other favored facilities may admit 50% of their maximum occupancy—and in the case of gigantic Las Vegas casinos, this means that thousands of patrons are allowed.

That Nevada would discriminate in favor of the powerful gaming industry and its employees may not come as a surprise, but this Court's willingness to allow such discrimination is disappointing. We have a duty to defend the Constitution, and even a public health emergency does not absolve us of that responsibility."

2. Speech and assembly

Givens v. Newsom, No. 2:20-cv-00852-JAM-CKD, 2020 U.S. Dist. LEXIS 81760, at *27 (E.D. Cal. May 8, 2020).

Plaintiffs request a temporary restraining order on California stay at home orders so that they may hold political demonstrations, rallies, protests, and religious services in compliance with social distancing guidelines. They allege First Amendment and California Constitution due process and liberty violations. Plaintiffs' request was denied.

Best Supplement Guide, LLC v. Newsom, No. 2:20-cv-00965-JAM-CKD, 2020 U.S. Dist. LEXIS 90608, at *3 (E.D. Cal. May 22, 2020)
Plaintiff operates membership-based gyms which have been closed due to California State and County Stay at Home Orders. The Court denied Plaintiffs' request for a temporary restraining order enjoining the Orders and for an order to show cause. There is no First Amendment violation because gym closures only restrict non-expressive conduct: operating gyms. The court cannot find a violation of the right to interstate travel, which does not (yet) exist. The Orders meet rational basis review for due process and equal protection, and they are not so substantial as to violate the right to liberty.

Murphy v. Lamont, 2020 WL 4435167, (D.Conn. August 3, 2020). Restrictions on speech are constitutional, using the *Jacobson* test.

C. Voting and elections

Republican National Committee v. Democratic National Committee (S.Ct. April 6, 2020)
"[F]ive days before the scheduled election, the District Court unilaterally ordered that absentee ballots mailed and postmarked after election day, April 7, still be counted so long as they are received by April 13. Extending the date by which ballots may be cast by voters—not just received by the municipal clerks but cast by voters—for an additional six days after the scheduled election day fundamentally alters the nature of the election."

"This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election."

"Therefore, subject to any further alterations that the State may make to state law, in order to be counted in this election a voter's absentee ballot must be either (i) postmarked by election day, April 7, 2020, and received by April 13, 2020, at 4:00 p.m., or (ii) hand-delivered as provided under state law by April 7, 2020, at 8:00 p.m."

Justice Ginsburg dissenting: "Because gathering at the polling place now poses dire health risks, an unprecedented number of Wisconsin voters—at the encouragement of public officials—have turned to voting absentee. About one million more voters have requested absentee ballots in this election than in 2016. Accommodating the surge of absentee ballot requests has heavily burdened election officials, resulting in a severe backlog of ballots requested but not promptly mailed to voters."

"While I do not doubt the good faith of my colleagues, the Court's order, I fear, will result in massive disenfranchisement. A voter cannot deliver for postmarking a ballot she has not received. Yet tens of thousands of voters who timely requested ballots are unlikely to receive them by April 7, the Court's postmark deadline. Rising concern about the COVID–19 pandemic

has caused a late surge in absentee-ballot requests The Court's suggestion that the current situation is not "substantially different" from "an ordinary election" boggles the mind. Some 150,000 requests for absentee ballots have been processed since Thursday, state records indicate. The surge in absentee-ballot requests has overwhelmed election officials, who face a huge backlog in sending ballots."

"The majority of this Court declares that this case presents a 'narrow, technical question.' That is wrong. The question here is whether tens of thousands of Wisconsin citizens can vote safely in the midst of a pandemic. Under the District Court's order, they would be able to do so. Even if they receive their absentee ballot in the days immediately following election day, they could return it. With the majority's stay in place, that will not be possible. Either they will have to brave the polls, endangering their own and others' safety. Or they will lose their right to vote, through no fault of their own. That is a matter of utmost importance—to the constitutional rights of Wisconsin's citizens, the integrity of the State's election process, and in this most extraordinary time, the health of the Nation."

Clarno v. People Not Politicians Oregon, --- S.Ct. --- (August 11, 2020). Court stayed district court order modifying signatures requires for an initiative to qualify for the ballot.

Little v. Reclaim Idaho, 2020 WL 4360897 (July 30, 2020). Staying district court order relaxing signature requirement for initiatives to qualify for the ballot.

Merrill v. People First of Alabama, --- S.Ct. --- (July 2, 2020). Court stays district court order enjoining Alabama from requiring that absentee ballots be notarized and be accompanied by photo identification.

Texas Democratic Party v. Abbott, --- S.Ct. --- (June 26, 2020). Court stays district court order enjoining Texas law restricting who can cast absentee ballot.

Republican National Committee v. Common Cause, --- S.Ct. --- (August 13, 2020). Decision of state officials to modify absentee ballot requirements would not be stayed by Court.

D. Abortion

Adams & Boyle, P.C. v. Slatery, 956 F.3d 913 (6th Cir. 2020).
On April 8, Tennessee placed a general ban on surgical and invasive procedures that are elective and non-urgent (among other things, a three-week criminal prohibition on procedural abortion) until at least April 30. Plaintiffs sought a temporary restraining order and/or preliminary injunction barring the State from enforcing the ban as applied to procedural abortions. The District Court granted the injunction, and the Court of Appeals upheld it, but limited the injunction to apply only to the three classes of patients most affected by the ban.

In re Abbott, 954 F.3d 772 (5th Cir. 2020).
"[U]nder the pressure of great dangers, constitutional rights may be reasonably restricted "as the safety of the general public may demand. That settled rule allows the state to restrict, for

example, one's right to peaceably assemble, to publicly worship, to travel, and even to leave one's home. The right to abortion is no exception."

"The bottom line is this: when faced with a society-threatening epidemic, a state may implement emergency measures that curtail constitutional rights so long as the measures have at least some 'real or substantial relation' to the public health crisis and are not 'beyond all question, a plain, palpable invasion of rights secured by the fundamental law.'"

"In sum, based on this record we conclude that GA-09—an emergency measure that postpones certain non-essential abortions during an epidemic—does not "beyond question" violate the constitutional right to abortion."

In re Abbott, 956 F.3d 656 (5th Cir. 2020). The [district] court again 'fail[ed] to apply ... the framework governing emergency exercises of state authority during a public health crisis, established over 100 years ago in Moreover, the court again second-guessed the basic mitigation strategy underlying GA-09 (that is, the concept of "flattening the curve"), and also acted without knowing critical facts such as whether, during this pandemic, abortion providers do (or should) wear masks or other protective equipment when meeting with patients. Those errors led the district court to enter an overbroad TRO that exceeds its jurisdiction, reaches patently erroneous results, and usurps the state's authority to craft emergency public health measures 'during the escalating COVID-19 pandemic.'"
"Once again, the dissenting opinion accuses the majority of treating abortion differently and once again it is wrong. At issue is whether abortion can be treated the same as other procedures under GA-09. It is the district court that treated abortion differently, issuing back-to-back TROs that did not follow the law.
We therefore grant the writ in part and direct the district court to vacate these parts of the April 9 TRO:
• That part restraining enforcement of GA-09 as a "categorical ban on all abortions provided by Plaintiffs."
• That part restraining the Governor of Texas and the Attorney General.
• That part restraining enforcement of GA-09 as to medication abortions.
• That part restraining enforcement of GA-09 as to patients who would reach 18 weeks LMP on the expiration date of GA-09 and who would be "unlikely" to be able to obtain abortion services in Texas.
• That part restraining enforcement of GA-09 after 11:59 p.m. on April 21, 2020.
We do not grant the writ, and therefore do not order vacatur, of that part of the TRO restraining GA-09 as to patients "who, based on the treating physician's medical judgment, would be past the legal limit for an abortion in Texas—22 weeks LMP—on April 22, 2020."

Federal District Court invalidations: *South Wind Medical Center LLC v. Stitt* (W.D. Okla. April 6, 2020); *Robinson v. Marshall* (M.D. Ala. April 3, 2020).

E. Release from custody

1. Prisoners

Valentine v. Collier, 141 S.Ct. ___ (Nov. 16, 2020). Denying release from custody request from Texas prisoners.

Barnes v. Ahlman, 2020 WL 4499350 (Mem) (August 3, 2020). Staying federal district court order concerning steps to be taken with regard to the Orange County, California jail.

Wilson v. Williams, No. 20-3447, 2020 U.S. App. LEXIS 14291 (6th Cir. May 4, 2020). Release order stayed by Justice Sotomayor, June 4, 2020. (IT IS ORDERED that the District Court's April 22 and May 19 orders are hereby stayed pending disposition of the Government's appeal in the United States Court of Appeals for the Sixth Circuit and further order of the undersigned or of the Court.)

Petitioners, four inmates housed in the Elkton Federal Correctional Institution, filed a petition to limit their exposure to the COVID-19 virus on behalf of all current and future inmates, including a subclass of those particularly vulnerable to COVID-19. The District Court entered a preliminary injunction requiring certain steps be taken to protect the subclass. The Court of Appeals struck down Petitioners' motion to strike Respondents' motion to stay, finding that Respondents were right to simultaneously seek relief from the District Court and Court of Appeals "given the short time frame in which they sought relief." The Court of Appeals also struck down Respondents' motion to stay. Taking a deferential standard of review on motions to stay, the court noted: "COVID-19 infections are rampant among inmates and staff, and numerous inmates have passed away... Elkton has higher occurrences of infection than most other federal prisons." This was not a question of habeas relief because Petitioners, in claiming that no set of conditions would be constitutionally sufficient, challenge the fact of confinement rather than its condition.

Cameron v. Bouchard, No. 20-1469, 2020 U.S. App. LEXIS 16741 (6th Cir. May 26, 2020). Plaintiffs are pretrial detainees or convicted prisoners filing on behalf of themselves and others housed or to be housed in Oakland County Jail. Plaintiffs requested a preliminary injunction for basic safeguards to limit exposure and transmission of COVID-19 and to improve treatment, and for release of a subclass of medically-vulnerable inmates to home confinement. The court (2:1) found that the preliminary injunction was properly imposed because, despite the fact that the Jail had already implemented some of the requested safeguards, "Oakland's efforts in mitigating transmission are not evenly or consistently applied." The court denied the motion to stay, and granted the motion to expedite. A strong dissent criticized the District Court opinion for assuming "the role of super-warden" (citing to *Swain v. Junior*, 958 F.3d 1081 (11th Cir. 2020)) because, in spite of the fact that the prison was taking actions to remedy the situation, the District Court "hamstrings [those] officials with years of experience running correctional facilities, and the elected officials they report to, from acting with dispatch to respond to this unprecedented pandemic." (citing to Swain v. Junior, 958 F.3d 1081 (11th Cir. 2020).) *Id.* at *9.

Swain v. Junior, 958 F.3d 1081 (11th Cir. 2020).
A class action was filed by inmates held at the Metro West Detention Center to challenge the conditions of their confinement, seeking release through habeas relief for the named plaintiffs and "medically vulnerable" inmates. The District Court granted in part Plaintiffs' emergency Motion for Temporary Restraining Order, requiring a list of detainees who were especially vulnerable to COVID-19 and compliance with a number of healthy and safety precautions for the general prison population. The Court of Appeals stayed the injunction pending appeal and expedited the appeal because it found errors of law in the District Court opinion. First, the lower court incorrectly collapsed the subjective and objective components of the cruel and unusual punishment test by treating the resultant harm (infected inmates and Metro West's inability to "achieve meaningful social distancing") as if it established a liable state of mind. In addition, "[a]bsent a stay, the defendants will lose the discretion vested in them under state law to allocate scarce resources among different county operations necessary to fight the pandemic," which would be an irreparable injury. Next, "where the government is the party opposing the preliminary injunction, its interest and harm merge with the public interest." In addition, the Court of Appeals found that the District Court likely erred in holding that the plaintiffs were not required to establish municipal liability under *Monell* and declining to address PLRA exhaustion at the preliminary injunction stage.

United States v. Dade, No. 19-35172, 2020 U.S. App. LEXIS 16401 (9th Cir. May 22, 2020).
Appellant Dade moves for release on bail pending his appeal of the District Court's denial of his motion to vacate his sentence. The Court of Appeals denied this motion for release. The court found that "it cannot be the case that a prisoner whose detention would be required under that Act pending direct appeal can obtain release pending appeal on collateral review." Dade's motion does not show "by clear and convincing evidence that the person is not likely to flee or pose a danger to the safety of any other person or the community if released." In addition, the Government stated that it will recharge and retry Dade if he prevails on this appeal. The special circumstances of COVID-19 might warrant a change in the conditions of his confinement if those risks are not being adequately addressed, but they are not sufficient to warrant release.

2. Immigration

Hope v. Warden York Cty. Prison, 956 F.3d 156 (3d Cir. 2020).
Petitioners are individuals who are being held in civil detention by ICE and face an imminent risk of death or serious injury if exposed to COVID-19. The District Court granted Petitioners' Motion for Temporary Restraining Order and ordered their immediate release before the Government responded. In an interlocutory appeal, the Court of Appeals found that the relief granted by the District Court was more consistent with a preliminary injunction than a TRO because it was of indefinite duration and was the ultimate relief sought by Petitioners. The Court of Appeals therefore has appellate jurisdiction over the release.

Thakker v. Doll, No. 1:20-cv-480, 2020 U.S. Dist. LEXIS 75362 (M.D. Pa. Apr. 27, 2020).
Petitioners, ten ICE detainees at various facilities who have particular vulnerabilities to COVID-19, had previously been granted a TRO which permitted their immediate release and then was extended. Petitioners' motion for a preliminary injunction continuing this release was granted in part for three of the detainees, but denied for the remaining seven. The court found Petitioners'

risk of absconding was low because of COVID-19-related travel restrictions. The court found actual or imminent harm to the Petitioners for whom the injunction was granted because the facility where they were being held already had 40 confirmed cases of the virus and had to house multiple inmates in each cell. In addition, two of those released were being held for nonviolent misdemeanors, one committed over a decade ago, and the other was only held because he was unable to pay his bail. Release was denied to those who had committed violent offenses or were being held in facilities without any known cases of COVID-19, or facilities with enhanced prevention measures.

Castillo v. Barr, No. CV 20-00605 TJH (AFMx), 2020 U.S. Dist. LEXIS 54425 (C.D. Cal. Mar. 27, 2020).
Petitioners are detainees at the Adelanto Detention Center because of immigration issues, and they are particularly at risk for COVID-19. Petitioners filed a habeas petition, claiming several violations of the Fifth Amendment including state-created danger and punitive detention, emphasizing the fact that they were civil detainees. The court granted Petitioners' motion for a TRO, requiring that they be released from custody. The court notes that the center poses "significant and various health and safety risks," and that "the Government cannot put a civil detainee into a dangerous situation, especially where that dangerous situation was created by the Government." In addition, Petitioners are unlikely to flee "given the current global pandemic."

Basank v. Decker, 2020 U.S. Dist. LEXIS 53191 (S.D.N.Y. Mar. 26, 2020).
Petitioners are ICE detainees who are particularly vulnerable to COVID-19 and being held in county jails with cases of the virus. The court granted Petitioners' habeas petition and request for a TRO seeking release because of the public health crisis and for Respondents to be restrained "from arresting Petitioners for civil immigration detention purposes during the pendency of their immigration proceedings." "The risk that Petitioners will face a severe, and quite possibly fatal, infection if they remain in immigration detention constitutes irreparable harm warranting a TRO." There is a due process violation because "Respondents have exhibited, and continue to exhibit, deliberate indifference to Petitioners' medical needs" as the measures they were taking were insufficient (eg. No social distancing).

Bent v. Barr, No. 19-cv-06123-DMR, 2020 U.S. Dist. LEXIS 62792, at *7 (N.D. Cal. Apr. 9, 2020).
Petitioner, a foreign national with a particularly vulnerability to COVID-19 who was detained in an ICE Processing Facility, challenged his continued detention during the pandemic as a violation of his substantive due process rights. Bent's motion for a temporary restraining order seeking immediate release from detention was granted. Plaintiff's behavior over the past 14 years showed him to be a non-threat to the community.

F. Right to travel

Page v. Cuomo, 2020 WL 4589329, (N.D.N.Y. August 11, 2020). Right to travel is a fundamental right. Restrictions on travel imposed by a quarantine after returning to the state are constitutional under the *Jacobson* test.

G. Criminal law

1. Confrontation

Coy v. Iowa, 487 U.S. 1012 (1988)
“the Confrontation Clause guarantees the defendant a face-to-face meeting with witnesses appearing before the trier of fact.”

Maryland v. Craig, 497 U.S. 836 (1990)
“We have never held, however, that the Confrontation Clause guarantees criminal defendants the *absolute* right to a face-to-face meeting with witnesses against them at trial.”
“In sum, our precedents establish that “the Confrontation Clause reflects a *preference* for face-to-face confrontation at trial,” a preference that “must occasionally give way to considerations of public policy and the necessities of the case.”

2. Speedy trial

Barker v. Wingo, 407 U.S. 514 (1972)
“Finally, and perhaps most importantly, the right to speedy trial is a more vague concept than other procedural rights. It is, for example, impossible to determine with precision when the right has been denied. We cannot definitely say how long is too long in a system where justice is supposed to be swift but deliberate. As a consequence, there is no fixed point in the criminal process when the State can put the defendant to the choice of either exercising or waiving the right to a speedy trial.”

“The approach we accept is a balancing test, in which the conduct of both the prosecution and the defendant are weighed. A balancing test necessarily compels courts to approach speedy trial cases on an ad hoc basis. We can do little more than identify some of the factors which courts should assess in determining whether a particular defendant has been deprived of his right. Though some might express them in different ways, we identify four such factors: Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant.”

3. Public trial

Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)
“a trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present, and where their presence historically has been thought to enhance the integrity and quality of what takes place.”

“We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and “of the press could be eviscerated.””

The New Supreme Court

Erwin Chemerinsky*

In March 2014, I wrote an oped in the Los Angeles Times encouraging Justice Ruth Bader Ginsburg to retire at the end of that term of the Supreme Court.[1] I explained that it appeared likely that the Republicans would take the Senate in the November 2014 elections and it was uncertain what would happen in the presidential election in 2016. I said that if Justice Ginsburg wanted someone with her values and views to take her place, she should step down and let President Barack Obama pick her successor when there was a Senate with a majority of Democrats.

I received intense criticism for suggesting this, especially from those with whom I usually agree. Justice Ginsburg made clear that she had no intention of retiring.

It was a gamble that she would remain on the Court until there was a Democratic President to replace her. The country lost that gamble when she died on September 18, 2020. Eight days later, President Donald Trump nominated Seventh Circuit Judge Amy Coney Barrett to replace Justice Ginsburg. The Senate Judiciary Committee held hearings the week of October 12 and on October 26, the Senate voted to confirm Barrett by a vote, by a vote of 52-48. Every Democratic Senator voted against; every Republican Senator except Senator Susan Collins voted to confirm.

Barrett had an extensive "paper trail" as a law professor, based on the articles she wrote and the speeches she delivered. She also had spent two years as a federal court of appeals judge and her opinions and votes also provide an indication of her views. Simply put, Barrett was as

---

*Dean and Jesse H. Choper Distinguished Professor of Law, University of California, Berkeley School of Law.

[1] Erwin Chemerinsky, "Much Depends on Ginsburg," Los Angeles Times, March 15, 2014

conservative as any federal judge in the country. In 2018, when Justice Anthony Kennedy retired, conservatives pushed for her, not Brett Kavanaugh, to be nominated.[2] No one disputes that President Trump selected Barrett because of her very conservative views. Republican Missouri Senator Josh Hawley said of her, "For the first time in decades, religious conservatives had a strong voice in the process. And the result was the most openly pro-life, pro-faith nominee of my lifetime."[3]

In this essay, I discuss the likely effects of replacing Justice Ginsburg with Justice Barrett. Initially, I focus on areas where this shift is not likely to change the outcome of the decisions, but will make the vote margin 6-3 rather than 5-4. After all, in so many crucial areas, Justice Ginsburg had been in dissent. I then look at the implications in areas where Justice Ginsburg was in the majority and more generally, the difficulty for the liberals in attracting two votes in any ideologically defined areas of law. Finally, I discuss the long-term implications of this shift on the Court.

I. Changing the Vote Count, But Not the Result

A very liberal justice, Ginsburg, has been replaced by a very conservative justice, Barrett. What is it likely to mean for the Court? I neither want to overstate nor underestimate its importance. Last term, October Term 2019, there were 14 5-4 decisions out of 53 cases with signed opinions. In 10 of the 14, the majority was Chief Justice Roberts and Justices Thomas, Alito, Gorsuch, and Kavanaugh. In these 10 cases, the result likely would have been 6-3 rather than 5-4 with Barrett rather than Ginsburg.

[2] *See* Ruth Marcus, Supreme Ambition: Brett Kavanaugh and the Conservative Takeover (2019) (describing the conservative push for Barrett over Kavanaugh).
[3] www.foxnews.com/opinion/amy-coney-barrett-josh-hawley

In many important areas, there already were five votes for a significant conservative shift in the law and Barrett just provides a sixth. For example, it seems highly likely that there already was a majority before Barrett's confirmation to dramatically change the law with regard to affirmative action and to interpret the equal protection clause to require that the government be color-blind. In its last decision on affirmative action, *Fisher v. University of Texas*, in 2016, the Court, 4-3, upheld the University of Texas's affirmative action program and reaffirmed that colleges and universities may use race as one factor in admissions decisions.[4] Justice Kennedy wrote for the Court and his opinion was joined by Justices Ginsburg, Breyer, and Sotomayor. Justice Kagan was recused, likely because of her involvement with the litigation as Solicitor General of the United States. Justice Alito wrote a dissent, joined by Chief Justice Roberts and Justice Thomas. It was the year that Justice Scalia died and there were only eight justices.

But the three Trump appointees, Justices Gorsuch, Kavanaugh, and Barrett, together with the three dissenters from *Fisher*, create a clear majority to eliminate affirmative action. Chief Justice Roberts has been explicit in expressing this objective.[5] Over a decade ago, he declared that "[t]he way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[6] Replacing Justice Ginsburg with Justice Barrett is not likely to change the outcome, just the vote count, when affirmative action comes back before the Supreme Court.

Another area like this concerns the Constitution and religion. Before Barrett joined the Court, there already were five justices who rejected the idea of a wall separating church and state and who believe that the government violates the Establishment Clause only if it coerces

[4] 136 S.Ct. 2198 (2016).
[5] Parents Involved in Community Schools v. Seattle School Dist. No. 1, 551 U.S. 701 (2007).
[6] Id. at 748. *See* Joan Biskupic, The Chief: The Life and Turbulent Times of John Roberts 185-192 (2019).

religious participation.[7] In the last several years, there were Supreme Court decisions allowing overtly Christian prayers before town board meetings over a long period of time,[8] and permitting a 45 foot cross on public property at a busy intersection.[9] Justice Ginsburg dissented in these cases.

At the same time, even with Justice Ginsburg on the Court there also were five votes to provide much greater protection for free exercise of religion. Last term of the Court demonstrates this. *Espinoza v. Montana Department of Revenue* involved a Montana law that allowed parents sending their children to private school to receive a $150 tax credit.[10] In Montana, almost all of the private schools are religious. The Montana Supreme Court invalidated the tax credit law as violating the Montana state constitution which forbids direct or indirect government aid to religion.

But the Supreme Court, 5-4, concluded that the Montana Supreme Court violated free exercise of religion in invalidating the Montana program. Chief Justice John Roberts wrote the opinion for the Court and said that the Montana constitution prevented parents from receiving aid if they sent their children to religious as opposed to secular private schools. This, the Court concluded, violated free exercise of religion. The Court said that the government must have a compelling reason and no other alternative any time it denies benefits to religious institutions that it allows to secular ones.

The practical effect of this decision, which follows from the Court's ruling in *Trinity Lutheran of Columbia, Missouri v. Comer* in 2017, is that whenever the government gives

---

[7] *See* Howard Gillman and Erwin Chemerinsky, The Religion Clauses: The Case for Separating Church and State (2020) (describing and critiquing the shift in the Court's religion clause jurisprudence).
[8] Town of Greece v. Galloway, 572 U.S. 565 (2014).
[9] American Legion v. American Humanist Association, 139 S.Ct. 2067 (2019).
[10] 140 S.Ct. 2246 (2020).

benefits to secular private schools it must provide them to religious schools unless it can be shown that doing so would violate the Establishment Clause of the First Amendment.[11] Justice Ginsburg dissented in both of these cases.

In *Our Lady of Guadalupe School v. Morrissey Beru*, the Court held that a religious school cannot be held liable under employment discrimination laws for the choices it makes as to its teachers.[12] In *Hosanna-Tabor Lutheran Evangelical School v. EEOC* (2012), the Court concluded that a fifth-grade teacher who had been ordained as a minister in the faith could not sue a religious school for employment discrimination. [13]

In *Our Lady of Guadalupe School*, the Court in a 7-2 decision, with Justice Alito writing the majority, held that religious schools are exempt from employment discrimination laws for the choices they make as to their teachers. This means that religious schools are free to discriminate on the basis of race, sex, religion, sexual orientation, age, and disability in hiring and firing teachers. Again, Justice Ginsburg was in dissent. Replacing her with Justice Barrett would have changed the vote count, but not the outcome.

II. Making It Much Harder to Get to Five

Of the 14 5-4 decisions in October Term 2019, there were two where the majority was Roberts, Ginsburg, Breyer, Sotomayor, and Kagan. These likely would have come out differently if Barrett rather than Ginsburg were on the Court when they were decided.

The DACA (Deferred Action for Childhood Arrival) program created by President Barack Obama program applies to individuals who were brought to the United States before age

[11] 137 S.Ct. 2012 (2017).
[12] 140 S.Ct. 2049 (2020).
[13] 565 U.S. 171 (2012).

16 and who were under the age of 31. The person must be in school or have graduated high school, or be in the military or have been honorably discharged from it. The individual must not have a conviction for a felony or a serious misdemeanor. Pursuant to federal immigration law, these individuals are given deferred deportation status for a period of two years, which can be renewed. This means that they do not need to fear being deported during this time and are eligible for work permits. There are many Dreamers in my law school and on my campus.

President Trump repealed this program as part of his strong anti-immigrant policies. In *Department of Homeland Security v. University of California*, the Supreme Court found, 5-4, that President Trump's rescission of DACA violated the Administrative Procedures Act.[14] In an opinion by Chief Justice Roberts and joined by the liberal justices, the Court held that there was not an articulated, legitimate justification that considered alternatives when DACA was rescinded and put over 700,000 individuals in danger of deportation. If the case were decided this term with Barrett on the bench, it likely would have been 5-4 in favor of President Trump.

The other case where Roberts joined with the four liberal justices powerfully shows an area where replacing Justice Ginsburg is likely to make a huge difference: abortion rights. In *June Medical Services LLC v. Russo*, the Court declared unconstitutional a Louisiana law that required a doctor to have admitting privileges at a hospital within 30 miles in order to perform an abortion.[15] In one sense, this was not remarkable because just four years earlier in *Whole Women's Health v. Hellerstedt* (2016), the Court struck down an identical Texas law. Justice Breyer wrote for the plurality in *June Medical Services* and said that the Louisiana law, like the Texas one, would do little to protect women's health, but would significantly decrease access to abortion in that state.

---

[14] 140 S.Ct. 2091 (2020).
[15] 140 S.Ct. 2103 (2020).

In *Whole Women's Health*, Justice Kennedy was the fifth vote in the majority joining justices Breyer, Ginsburg, Sotomayor, and Kagan.[16] What is most notable about *June Medical Services* is that Chief Justice Roberts was the fifth vote to invalidate the Louisiana law. Roberts concurred in the judgment and said that although he dissented and disagreed with the decision in *Whole Women's Health*, he felt bound to follow precedent. This is the first time since coming on the Court in 2005 that Roberts has voted to strike down an abortion restriction.

But with Barrett and not Ginsburg, this would almost surely have come out 5-4 the other way to uphold the Louisiana law. Indeed, I predict that there are now five votes to overrule *Roe v. Wade* and constitutional protection for abortion.[17] Before Justice Ginsburg died, I would have said that I thought that there were four votes to overrule *Roe*: Justices Thomas, Alito, Gorsuch, and Kavanaugh. I thought Roberts likely would have voted to uphold most restrictions on abortion, but I was uncertain that he would be a fifth vote to overrule *Roe*, especially given his recent emphasis on *stare decisis* in *June Medical Services.* Now, though, I have little doubt that such a majority exists.

More generally, replacing Ginsburg with Barrett makes the chance of liberal victories far less likely on the Supreme Court. With four liberal justices, they needed to attract only one conservative justice. Occasionally, as in the two cases last term, they could attract Chief Justice Roberts as a fifth vote. There were other notable instances of this in prior years, such as in the Court's decisions upholding the Affordable Care Act,[18] and in preventing President Trump from adding a question about citizenship to the 2020 census.[19] And there have been occasional instances where another justice joined the liberals to create 5-4 majorities, such as Justice

[16] 136 S.Ct. 2292 (2016).
[17] 410 U.S. 113 (1973).
[18] National Federation of Independent Business v. Sebelius, 567 U.S. 519 (2012).
[19] Department of Commerce v. New York, 139 S.Ct. 1543 (2019).

Gorsuch being the fifth vote in *McGirt v. Oklahoma*, holding that members of the Creek Nation in Oklahoma could not be tried in state court.[20]

Without Justice Ginsburg, it will be much more difficult for Justices Breyer, Sotomayor, and Kagan to be in the majority. It is not simply the challenge of getting two rather than one vote. It is that there are five staunch conservatives and one moderate conservative; getting two votes from this group for a liberal result will be daunting and, I fear, rare.

III. The Long-Term

The ideological composition of the current Court is the crowning achievement of a conservative political movement that began with Richard Nixon's campaign against the Warren Court in 1969. By the early 1980s, and the Reagan presidency, conservatives openly articulated the goal of gaining control of the Supreme Court and the federal judiciary. Republican Presidents became ever more careful to select justices with proven conservative ideologies and to pick individuals young enough to likely be on the Court for decades.

The composition of the current Court is a product of the historical accidents as to when vacancies have occurred and also deliberate manipulation of the confirmation process by Senate Republicans in blocking the confirmation of Chief Judge Merrick Garland and rushing through the confirmation of Justice Amy Coney Barrett. Since 1960, there have been twenty-eight years with a Democratic President and thirty-two years with a Republican President. During this time, Democrats have appointed eight justices to the Court and Republicans have appointed fifteen. Since 1988 – and I pick that year because no current justice was appointed earlier than the George H. W. Bush presidency – there have been sixteen years of Democratic Presidents (Clinton and Obama) and sixteen years of Republican Presidents (Bush, Bush, and Trump.) But

[20] 140 S.Ct. 2452 (2020).

the Republican Presidents have nominated seven justices, while the Democratic Presidents have selected only four of the justices. Put another way, although Democrats have won the popular vote in seven of the last eight presidential elections, during this time, Republican Presidents have selected five Supreme Court justices and Democratic Presidents only two.

Amy Coney Barrett was 48 years old when she was confirmed. If she remains on the Court until she is 87, the age at which Justice Ginsburg died, she will be a justice until the year 2059. At the time Barrett was confirmed, Chief Justice Roberts was 65 years old, while Justice Thomas was 72, Justice Alito 70, Justice Gorsuch 53, and Justice Kavanaugh 55. It is easy to imagine at least five of these justices being on the Court for another decade or two. In other words, the effect of confirming Justice Barrett is that this seat on the Supreme Court will be held by a very conservative justice for a very long time to come and she is likely to be part of a conservative majority at least for a substantial part of those years.

Conclusion

For conservatives, what I have described is an occasion for great celebration. They have succeeded in their goal of a very conservative Court. For liberals, like me, the challenge is enormous. No longer can we imagine the Court as a possibility for progressive change. We must look to state courts and the political process for that, while fearing how the Court will strike down progressive federal, state, and local laws. We also must consider reforms of the Supreme Court – such as increasing its size – if we want an alternative to a far-right Supreme Court for a long time to come.