

# REVIEWING THE THREE TRUMP APPOINTEES: *EX ANTE* AND *EX POST*

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## ABSTRACT

Justice Neil Gorsuch has now been on the Supreme Court for six years; Justice Brett Kavanaugh for five years; and Justice Amy Coney Barrett for three years. By virtually any measure, today's Supreme Court is the most conservative bench in modern history. But it could have been far, far worse for progressives if President Trump had actually nominated Justices in the mold of Justices Scalia, Thomas, and Alito.

This essay, written in the fall of 2023, provides a prospective and retrospective analysis of the three Trump appointees. Part 2 begins with cases on the Supreme Court's merits docket. Part 3 turns to the Supreme Court's emergency docket. Part 4 considers what could have been: denials of petitions for writs of certiorari. Part 5 will revisit the records of these three justices *ex ante* and *ex post*. Very little has surprised me about the Supreme Court over the past several years.

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## 1. INTRODUCTION

By virtually any measure, today's Supreme Court is the most conservative bench in modern history.<sup>1</sup> Replacing Justice Antonin Scalia with Justice Neil Gorsuch, rather than Merrick Garland, or someone to his left, preserved the balance of the Court. Getting Justice Anthony Kennedy to retire, and replacing him with Justice Brett Kavanaugh, in many—but not all—regards, moved the Court to the right. And replacing Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett right before the tumultuous 2020 presidential election proved to be the coup de grâce. On paper at least, there is a 6-3 conservative majority for the first time in nearly a century. But those numbers do not tell the entire story.

In June 2023, Ron DeSantis, the Governor of Florida and then-GOP presidential candidate, offered a mild criticism of President Trump's three Supreme Court nominees.<sup>2</sup> "I respect the three [Trump] appointees," DeSantis said, "but none of those three are at the same level of Justice[] Thomas and Justice Alito."<sup>3</sup> DeSantis was not wrong. Consistently, Justices Brett Kavanaugh, Amy Coney Barrett, and, to a lesser extent, Neil Gorsuch, have voted to the left of Justices Clarence Thomas and Samuel Alito.<sup>4</sup> Today,

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<sup>1</sup> This article was written in the Fall of 2023. Due to the vagaries of the publication process in a new journal, this article was not published until Spring 2025. I have not attempted to update the content of this article to reflect more recent decisions from the Court. Rather, I have addressed similar issues regarding the Trump appointees in more recent writings. See Josh Blackman, *SCOTUS DOGE: The Wall of Receipts for President Trump's Three Appointees*, VOLOKH CONSPIRACY (Mar. 12, 2025, 10:44 PM), <https://perma.cc/GWP6-HFFC>; Josh Blackman, *Trump Must Pick Judges Who Have Publicly Demonstrated Their Courage*, CIVITAS INST. (Jan. 23, 2025), <https://perma.cc/3VQK-BDRG>.

<sup>2</sup> See Hugh Hewitt, *Florida Governor Ron DeSantis on "Reconstitutionalizing the Government,"* HUGHHEWITT.COM (June 12, 2023), <https://perma.cc/45VW-R7FG>.

<sup>3</sup> *Id.*

<sup>4</sup> See generally Adam Feldman, *Was It Ever Really Roberts' Court?*, EMPIRICAL SCOTUS (May 17, 2022), <https://perma.cc/WTT4-9MVL> (discussing majority voting patterns

critics assail this Supreme Court as the most conservative bench in modern history.<sup>5</sup> True enough. But it could have been far, far worse for progressives if President Trump had actually nominated Justices in the mold of Justices Scalia, Thomas, and Alito.

Look past the string of headline-grabbing conservative victories concerning abortion, affirmative action, the religion clauses, the Second Amendment, and so on. Rather, count up the 5-4 cases on the merits docket that swing left, the rejection of applications on the emergency docket brought by conservative litigants, and the denials of certiorari petitions that could have moved the law to the right. These three-dozen cases are all progressive victories snatched from the jaws of conservative defeat.<sup>6</sup> On balance, progressives should be grateful for President Trump's not-so-conservative SCOTUS picks.

This essay, written for the inaugural volume of the Texas A&M Journal of Law & Civil Governance, provides a prospective and retrospective analysis of the three Trump appointees. This essay considers cases decided as of early December 2023.

Part 2 begins with cases on the Supreme Court's merits docket. In five cases, Justice Gorsuch voted opposite the Court's other four conservatives.<sup>7</sup> In seven other cases, Justice Kavanaugh joined Chief Justice Roberts, and the Court's three progressives to form a 5-4 majority.<sup>8</sup> And even when Justice Kavanaugh votes with the conservatives, he often writes moderating concurrences that push the jurisprudence to the mushy middle.<sup>9</sup> Between 2017 and 2023, a Trump appointee has cast the decisive fifth vote in a 5-4 case that

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of the Roberts court); *see also* Adam Feldman, *Where We Are at the End of the Supreme Court's 2022 Term*, EMPIRICAL SCOTUS (July 12, 2023), <https://perma.cc/8H8Q-58RP> (analyzing the 2022 Supreme Court term).

<sup>5</sup> E.g., Nina Totenberg, *The Supreme Court Is the Most Conservative in 90 Years*, NPR (July 5, 2022, 7:04 AM), <https://perma.cc/JHY8-3AXD>; Vincent M. Bonventre, *6 to 3: The Impact of the Supreme Court's Conservative Super-Majority*, N.Y. STATE BAR ASS'N (Oct. 31, 2023), <https://perma.cc/6MEE-3YAS>.

<sup>6</sup> See *infra* Parts 2–4.

<sup>7</sup> See *infra* Part 2.

<sup>8</sup> See *infra* Part 2.

<sup>9</sup> See *infra* note 45 and accompanying text.

swung to the left a dozen times.<sup>10</sup> To date, Justice Barrett has not cast the deciding vote in a 5-4 liberal case.

Part 3 turns to the Supreme Court's emergency docket. On the so-called "shadow" docket, five votes are needed to grant relief.<sup>11</sup> Between November 2020 and June 2023, Justices Thomas, Alito, and Gorsuch have consistently ruled together on emergency applications.<sup>12</sup> However, Justices Kavanaugh and Barrett often vote together and deny the conservatives a five-member majority on the emergency docket.<sup>13</sup> This voting pattern (likely) arose in cases affecting COVID-19 lockdown measures, vaccine mandates, affirmative action, partisan gerrymandering, the federal eviction moratorium, restrictions on social media companies, and more. Between Justice Barrett's confirmation in November 2020 and the end of the October 2022 term, I count more than a dozen cases in which she and Justice Kavanaugh could have joined Justices Thomas, Alito, and Gorsuch on the emergency docket.<sup>14</sup> But the duo chose not to. Prior to Justice Barrett's confirmation in October 2020, Justice Kavanaugh was often the odd man out on the emergency docket. I count at least five cases from *before* the presidential election that challenged COVID-related voting procedures.<sup>15</sup> In each case, Justices Thomas, Alito, and Gorsuch would have granted full relief.<sup>16</sup> Justice Kavanaugh did not.<sup>17</sup>

Part 4 considers what could have been: denials of petitions for writs of certiorari. Under the "rule of four," four votes are required to grant a case.<sup>18</sup> In recent years, there have been a string of high-profile cases where Justices Thomas, Alito, and Gorsuch dissented from the denial of certiorari. One more vote from a Trump appointee would have granted the petition. By my count, Justices Kavanaugh or Barrett could have been the fourth vote for

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<sup>10</sup> See *infra* Part 2.

<sup>11</sup> E.g., Lawrence Hurley & Andrew Chung, *U.S. Supreme Court's "Shadow Docket" Favored Religion and Trump*, REUTERS (July 28, 2021, 11:30 AM), <https://perma.cc/BC3N-2L3Y>.

<sup>12</sup> See *infra* Part 3.

<sup>13</sup> See *infra* Part 3.

<sup>14</sup> See *infra* Part 3.

<sup>15</sup> See cases cited *infra* note 74.

<sup>16</sup> See cases cited *infra* note 74.

<sup>17</sup> See cases cited *infra* note 74.

<sup>18</sup> *Supreme Court Procedures*, U.S. Cts., <https://perma.cc/X42N-5AM6>.

certiorari in five important cases, but they chose not to. These cases concerned Medicaid funding for abortion, a florist who refused to make floral arrangements for a same-sex wedding, a law that granted employee information to unions, a challenge to a two-decade-old murder conviction, and a law that required a Catholic hospital to perform a hysterectomy on a transgender patient.<sup>19</sup> In each of these cases, the Court's conservatives were willing to grant a case, but Justice Kavanaugh and/or Barrett declined.<sup>20</sup>

The three Trump appointees are simply not as conservative as they could have been. But conservatives should not be surprised by President Trump's Supreme Court picks. Their track record—both what they did and did not do—has presaged their views on the high court. Part 5 will revisit these records *ex ante* and *ex post*. Justice Gorsuch's decisions in *Bostock v. Clayton County*<sup>21</sup> and other cases affecting LGBT issues were predictable. In 2009, he joined an unpublished Ninth Circuit panel decision that ruled for a transgender plaintiff.<sup>22</sup> Second, Justice Kavanaugh has voted with Chief Justice Roberts in nearly 95% of the cases.<sup>23</sup> Here too, there should be no surprise. Look no further than his 2011 panel decision, which found that the Affordable Care Act imposed a tax rather than a penalty.<sup>24</sup> And third, the defining feature of Justice Barrett's jurisprudence so far is caution. And this hesitance was presaged by her brief stint on the circuit court and limited publication record in academia. Very little has surprised me about the Supreme Court over the past several years.

Critics of the Court should be at least somewhat grateful. Had President Trump nominated three Justices in the mold of Justices Alito and Thomas, *none* of the nearly three-dozen cases would have gone to the left, none of the moderating concurrences would have been written, and many of the emergency applications would have been granted. I'm not saying that the progressive glass is half-full—but they're lucky it's not empty. On the other hand, conservatives should be thrilled, but their cup does not exactly runneth over.

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<sup>19</sup> See *infra* Part 3.

<sup>20</sup> See *infra* Part 4.

<sup>21</sup> 140 S. Ct. 1731, 1754 (2020).

<sup>22</sup> See *infra* notes 148–159 and accompanying text.

<sup>23</sup> Jess Bravin, *John Roberts and Brett Kavanaugh Are Now the Supreme Court's Swing Votes*, WALL ST. J. (July 7, 2023, 5:30 AM), <https://perma.cc/UH6F-44D4>.

<sup>24</sup> *Seven-Sky v. Holder*, 661 F.3d 1, 47–50 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

## 2. THE MERITS DOCKET

Let's start with the Supreme Court's merits docket. Justice Gorsuch has cast the deciding vote in five 5-4 cases that swung to the ideological left. First, *Sessions v. Dimaya* held that a federal immigration law was unconstitutionally vague.<sup>25</sup> Second, *Washington Department of Licensing v. Cougar Den* exempted members of an Indian tribe from a tax on fuel importers.<sup>26</sup> In both of these two cases, Justice Kennedy voted with the Court's conservatives in dissent. The third case, *Herrera v. Wyoming*, protected the right of an Indian Tribe to hunt on "unoccupied" property.<sup>27</sup> Fourth, *United States v. Davis* held that a criminal penalty for using a firearm during a "crime of violence" was unconstitutionally vague.<sup>28</sup> The fifth case was the most significant. Justice Gorsuch wrote the majority opinion in *McGirt v. Oklahoma*, which held that large portions of Oklahoma, including the city of Tulsa, remain "Indian country."<sup>29</sup> As a result, the state of Oklahoma could not prosecute crimes committed by members of the Creek Nation.<sup>30</sup> In each of these five cases, President Trump's nominee to replace Justice Scalia voted opposite the Court's other four conservatives.

After Justice Kavanaugh replaced Justice Kennedy, it should have become harder for the Court's four progressives to cobble together a majority for 5-4 cases—in theory at least. In May 2019, Justice Kavanaugh wrote the majority opinion in *Apple v. Pepper*, joined by Justices Ginsburg, Breyer, Sotomayor, and Kagan.<sup>31</sup> The case held that iPhone owners could sue Apple for alleged antitrust violations.<sup>32</sup>

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<sup>25</sup> *Sessions v. Dimaya*, 138 S. Ct. 1204, 1215 (2018).

<sup>26</sup> *Wash. State Dep't of Licensing v. Cougar Den, Inc.*, 139 S. Ct. 1000, 1021 (2019).

<sup>27</sup> *Herrera v. Wyoming*, 139 S. Ct. 1686, 1691 (2019).

<sup>28</sup> *United States v. Davis*, 139 S. Ct. 2319, 2336 (2019).

<sup>29</sup> *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2459 (2020).

<sup>30</sup> *Id.*

<sup>31</sup> *Apple Inc. v. Pepper*, 139 S. Ct. 1514, 1518 (2019).

<sup>32</sup> *Id.* at 1520.

In September 2020, Justice Ginsburg passed away.<sup>33</sup> By the end of October, Justice Barrett was confirmed to fill the vacancy.<sup>34</sup> Now, with only three progressives on the Court (Breyer, Sotomayor, and Kagan), two conservative Justices would have to swing left to form a five-member majority. Yet, the progressives would prevail in five more 5-4 decisions. In each case, Chief Justice Roberts and Justice Kavanaugh joined the three progressives. First, *Biden v. Texas* approved the Biden administration's immigration policy.<sup>35</sup> Second, *Biden v. Missouri* held that the federal government could mandate vaccines for health care workers.<sup>36</sup> Third, *Nance v. Ward* ruled in favor of a death row inmate.<sup>37</sup> Fourth, *Torres v. Madrid* allowed a plaintiff to sue police officers who shot her.<sup>38</sup> Fifth, *Torres v. Department of Public Safety* ruled that Texas could be sued for damages.<sup>39</sup>

In June 2022, Justice Breyer retired.<sup>40</sup> He was replaced by Justice Ketanji Brown Jackson.<sup>41</sup> During the October 2022 Term, Chief Justice Roberts and Justice Kavanaugh continued to join the Court's three progressives in two prominent 5-4 cases. *Allen v. Milligan* held that Alabama violated the Voting Rights Act by not creating a second "majority-minority" district.<sup>42</sup> And *Cruz v. Arizona* permitted a prisoner to challenge his conviction in federal court.<sup>43</sup>

Finally, even when Justice Kavanaugh votes with the Court's conservatives, he still pivots left. Justice Kavanaugh wrote influential concurring

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<sup>33</sup> Jess Bravin, *Ruth Bader Ginsburg, a Pioneering Justice on Supreme Court, Dies at 87*, WALL ST. J. (Sept. 19, 2020, 1:31 PM), <https://perma.cc/89ZC-GQ4D>.

<sup>34</sup> Lindsay Wise & Jess Bravin, *Amy Coney Barrett Sworn in as Supreme Court Justice*, WALL ST. J. (Oct. 27, 2020, 8:22 AM), <https://perma.cc/U9R8-DDQ7>.

<sup>35</sup> *Biden v. Texas*, 142 S. Ct. 2528, 2548 (2022).

<sup>36</sup> *Biden v. Missouri*, 595 U.S. 87, 89 (2022).

<sup>37</sup> *Nance v. Ward*, 142 S. Ct. 2214, 2219 (2022).

<sup>38</sup> *Torres v. Madrid*, 141 S. Ct. 989, 1003 (2021).

<sup>39</sup> *Torres v. Tex. Dep't of Pub. Safety*, 597 U.S. 580, 591–92 (2022).

<sup>40</sup> Letter from Stephen Breyer, Assoc. Just., Sup. Ct. of the U.S., to Joseph Biden, President of the U.S. (June 29, 2022) (on file with the Supreme Court of the United States).

<sup>41</sup> Pamela King, *Jackson Sworn in as Breyer's Supreme Court Replacement*, GREENWIRE E&E NEWS BY POLITICO (June 16, 2020, 1:38 PM), <https://perma.cc/A268-KMBA>.

<sup>42</sup> *Allen v. Milligan*, 599 U.S. 1, 24 (2023).

<sup>43</sup> *Cruz v. Arizona*, 598 U.S. 17, 29 (2023).

opinions in the landmark abortion and Second Amendment cases.<sup>44</sup> These concurrences narrowed the majority opinion by resolving difficult questions that were not yet in front of the Court.<sup>45</sup>

Between 2017 and 2023, a Trump appointee has cast the decisive fifth vote in a 5-4 case that swung to the left a dozen times. To date, Justice Barrett has not cast the deciding vote in a 5-4 liberal case. But this tally only considers the Supreme Court's merits docket. The Supreme Court's emergency docket provides an even larger set of data points.

### 3. THE EMERGENCY DOCKET

On the Emergency Docket, also known as the “shadow” docket, five votes are needed to grant relief.<sup>46</sup> Generally, shadow docket applications for emergency relief are decided by unsigned per curiam opinions. On occasion, one or more Justices will dissent from the denial or grant of relief. Between November 2020 and June 2023, Justices Thomas, Alito, and Gorsuch have consistently ruled together on emergency applications. Had Justices Kavanaugh and Barrett joined the conservative troika in each case (3+2=5), full relief would have been granted.

In January 2021, the Harvest Rock Church and South Bay United Pentecostal Church challenged California’s restrictions on in-person gatherings and singing during worship.<sup>47</sup> The Court, by a 6-3 vote, ruled that the prohibition on indoor worship violated the Free Exercise Clause of the First Amendment.<sup>48</sup> Justices Thomas, Alito, and Gorsuch went further and declared unconstitutional the singing ban.<sup>49</sup> Justices Barrett and Kavanaugh, however, left the singing ban in place.<sup>50</sup> (This concurrence was Justice

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<sup>44</sup> N.Y. State Rifle & Pistol Ass’n v. Bruen, 597 U.S. 1, 79 (2022); Dobbs v. Jackson Women’s Health Org., 597 U.S. 215, 366 (2022).

<sup>45</sup> Paul Blumenthal, *Brett Kavanaugh Finds Himself at the Center of the Supreme Court’s Big Cases this Term*, HUFFPOST (Oct. 8, 2023, 8:00 AM), <https://perma.cc/94SJ-VJHT>.

<sup>46</sup> Hurley & Chung, *supra* note 11.

<sup>47</sup> Harvest Rock Church, Inc. v. Newsom, 141 S. Ct. 1289, 1290 (2021); S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716, 716 (2021).

<sup>48</sup> *Harvest Rock Church*, 141 S. Ct. at 1290; *S. Bay United Pentecostal Church*, 141 S. Ct. at 720.

<sup>49</sup> *S. Bay United Pentecostal Church*, 141 S. Ct. at 719.

<sup>50</sup> *Id.* at 717.

Barrett's first writing on the bench.<sup>51</sup>) This 3-2 split on the emergency docket would repeat itself again and again.

In four cases, Justices Kavanaugh and Barrett declined to cast the deciding votes that would have blocked the enforcement of vaccine mandates: *Dunn v. Austin*, *We The Patriots USA v. Hochul*, *Does 1-3 v. Mills*, and *Dr. A. v. Hochul*.<sup>52</sup> Eventually, Justices Kavanaugh and Barrett also likely declined to grant certiorari in *Dr. A v. Hochul*.<sup>53</sup> (I say *likely* here, and elsewhere, because the Justices did not expressly state their positions, but we can reasonably infer how they voted.) Justices Thomas, Alito, and Gorsuch would have heard the case.<sup>54</sup> Meanwhile, in *Austin v. U.S. Navy Seals 1-26*, Justice Kavanaugh and likely Justice Barrett allowed the Navy to deny religious exemptions for the vaccine mandate.<sup>55</sup>

This 3-2 split would fracture other cases on the emergency docket. The plaintiffs in *Coalition for TJ v. Fairfax County School Board* asked the Supreme Court to block an affirmative action policy at an elite public high school.<sup>56</sup> Justices Thomas, Alito, and Gorsuch would have granted the application.<sup>57</sup> Justices Kavanaugh and Barrett were silent.<sup>58</sup>

In *Moore v. Harper*, the republican North Carolina legislature asked the Supreme Court to block the state supreme court's finding of a partisan gerrymander.<sup>59</sup> Justices Thomas, Alito, and Gorsuch would have granted the stay.<sup>60</sup> Justice Kavanaugh and likely Justice Barrett declined to grant relief.<sup>61</sup>

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<sup>51</sup> Jonathan Adler, *Justice Barrett's First Opinion as a Justice*, VOLOKH CONSPIRACY (Feb. 6, 2021, 10:31 AM), <https://perma.cc/Z89X-E7VN>.

<sup>52</sup> *Dunn v. Austin*, 142 S. Ct. 1707 (2022); *We the Patriots USA, Inc. v. Hochul*, 142 S. Ct. 734 (2021); *Does v. Mills*, 142 S. Ct. 17 (2021) (Barrett, J., concurring); *Dr. A. v. Hochul*, 142 S. Ct. 552 (2021).

<sup>53</sup> *Dr. A. v. Hochul*, 142 S. Ct. 2569 (2022).

<sup>54</sup> *Id.*

<sup>55</sup> *Austin v. U.S. Navy Seals 1-26*, 142 S. Ct. 1301, 1302 (2022) (Kavanaugh, J., concurring).

<sup>56</sup> *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, 142 S. Ct. 2672, 2672 (2022).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Moore v. Harper (Moore I)*, 142 S. Ct. 1089, 1089 (2022).

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

(In June 2023, Justices Kavanaugh and Barrett would cast the fifth and sixth votes against the North Carolina legislature on the merits docket).<sup>62</sup>

In *Alabama Association of Realtors v. HHS*, the Court declined to block the federal eviction moratorium.<sup>63</sup> Justices Thomas, Alito, Gorsuch, and Barrett would have granted the application.<sup>64</sup> Justice Kavanaugh concurred to explain why he would leave the policy in place, at least temporarily.<sup>65</sup> (After the Biden administration called Kavanaugh's bluff, and continued the policy, the Court halted the moratorium by a 6-3 vote.)<sup>66</sup>

In *NetChoice v. Paxton*, Justices Kavanaugh and Barrett voted to block the enforcement of a Texas law that restricted social media sites.<sup>67</sup> Justices Thomas, Alito, and Gorsuch would have allowed the regulations to go into effect.<sup>68</sup> The case is now pending on the Court's docket.<sup>69</sup>

Between Justice Barrett's confirmation in November 2020 and the end of the October 2022 term, I count more than a dozen cases in which she and Justice Kavanaugh could have joined Justices Thomas, Alito, and Gorsuch on the emergency docket. But the duo chose not to. By contrast, Justices Barrett and Kavanaugh likely joined the Court's progressives in *Lombardo v. City of St. Louis*.<sup>70</sup> That unsigned opinion gave another appeal to the family of a prisoner who died in police custody.<sup>71</sup> Justices Thomas, Alito, and Gorsuch would have allowed the case to end.<sup>72</sup> Ultimately, the lower court ruled against Lombardo's family again, and the Supreme Court denied certiorari over Justices Sotomayor and Jackson's dissent.<sup>73</sup>

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<sup>62</sup> Moore v. Harper (*Moore II*), 600 U.S. 1, 1 (2023) (showing vote distribution in synopsis).

<sup>63</sup> Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs. (*Ala. Ass'n of Realtors I*), 141 S. Ct. 2320, 2320 (2021).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 2321.

<sup>66</sup> Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs. (*Ala. Ass'n of Realtors II*), 141 S. Ct. 2485, 2490 (2021).

<sup>67</sup> NetChoice, LLC v. Paxton, 142 S. Ct. 1715, 1715 (2022).

<sup>68</sup> *Id.* at 1716.

<sup>69</sup> Docket for No. 22-555, SUP. CT. U.S., <https://perma.cc/7DJU-FQ38>.

<sup>70</sup> 141 S. Ct. 2239, 2240 (2021) (per curiam).

<sup>71</sup> *Id.* at 2242.

<sup>72</sup> *Id.* at 2244.

<sup>73</sup> Lombardo v. City of St. Louis, 143 S. Ct. 2419, 2419 (2023).

Prior to Justice Barrett's confirmation in October 2020, Justice Kavanaugh was often the odd man out on the emergency docket. I count at least five cases from *before* the presidential election that challenged COVID-related voting procedures: *Berger v. North Carolina State Board of Elections*, *Wise v. Circosta*, *Moore v. Circosta*, *Andino v. Middleton*, and *Republican National Committee v. Common Cause Rhode Island*.<sup>74</sup> In each case, Justices Thomas, Alito, and Gorsuch would have granted full relief.<sup>75</sup> Justice Kavanaugh did not.<sup>76</sup>

There is one emergency docket case in which Justice Kavanaugh joined the Court's three conservatives. *Garland v. Vanderstok* presented a challenge to the "Frame or Receiver" rule.<sup>77</sup> (The press has dubbed it the "Ghost Gun" regulation.)<sup>78</sup> The district court vacated the rule, and the Fifth Circuit denied a stay.<sup>79</sup> The Solicitor General then petitioned for a stay of the lower-court ruling on the Supreme Court's emergency docket.<sup>80</sup> The Supreme Court stayed the lower court's ruling.<sup>81</sup> The vote was 5-4, with Chief Justice Roberts and Justice Barrett in the majority.<sup>82</sup> Justices Thomas, Alito, Gorsuch, and Kavanaugh noted their dissent, but they did not prepare a dissent.<sup>83</sup> Here, Justice Barrett was flanked only by the Chief Justice and the Court's progressives.<sup>84</sup> And once again, she issued a ruling adverse to that of the conservative Fifth Circuit.<sup>85</sup>

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<sup>74</sup> *Berger*, 141 S. Ct. at 658; *Wise v. Circosta*, 141 S. Ct. 658 (2020); *Moore v. Circosta*, 141 S. Ct. 46 (2020); *Andino v. Middleton*, 141 S. Ct. 9 (2020); *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206 (2020).

<sup>75</sup> See cases cited *supra* note 74.

<sup>76</sup> See cases cited *supra* note 74.

<sup>77</sup> *Docket for No. 23A82*, SUP. CT. U.S., <https://perma.cc/QR4Y-GJTF>.

<sup>78</sup> See, e.g., Nate Raymond, *US Appeals Court Calls Biden's 'Ghost Gun' Limits Unlawful*, REUTERS (Nov. 10, 2023, 2:23 AM), <https://perma.cc/5FXM-KZ84>.

<sup>79</sup> Application for Stay at 5, *Garland v. Vanderstok*, 144 S. Ct. 44 (2023) (No. 23A82).

<sup>80</sup> *Id.* at 6.

<sup>81</sup> *Vanderstok*, 144 S. Ct. at 44.

<sup>82</sup> See *id.*

<sup>83</sup> *Id.*

<sup>84</sup> See *id.*

<sup>85</sup> Josh Blackman, *Justice Barrett's Shadow Docket Policy: Do the Opposite of Whatever the Fifth Circuit Did (Updated)*, VOLOKH CONSPIRACY (Aug. 9, 2023, 12:05 AM), <https://perma.cc/H76B-ZXWU>.

#### 4. DENIALS OF CERTIORARI

On the Supreme Court, four votes are required to grant certiorari.<sup>86</sup> In rare cases, one or more Justices will dissent from the denial of certiorari. When there are three such dissents, we can reasonably infer that one more Justice was unwilling to give a “courtesy” fourth vote. Like with the emergency docket, there have been a string of high-profile cases where Justices Thomas, Alito, and Gorsuch dissented from the denial of certiorari. One more vote from a Trump appointee would have granted the petition. By my count, Justices Kavanaugh or Barrett could have been the fourth vote for certiorari in five important cases, but they chose not to. I offer another speculative example about Justice Barrett’s caution with regard to granting certiorari. The *New York Times* reported that Justice Barrett originally voted to grant certiorari in *Dobbs*.<sup>87</sup> However, as the case was relisted several times, Justice Barrett switched her vote to deny certiorari.<sup>88</sup> The *Times* said her rationale for flipping her vote is unclear.<sup>89</sup> Yet, once *Dobbs* was granted, Justice Barrett promptly joined Justice Alito’s majority opinion when granting *Roe*.<sup>90</sup>

In 2018, the Supreme Court denied appeals from Kansas and Louisiana, which excluded Planned Parenthood from receiving Medicaid funding.<sup>91</sup> Justice Kavanaugh, who could have provided the pivotal fourth vote, was silent in these cases.<sup>92</sup> *Arlene’s Flowers v. Washington* involved a florist who declined to make floral arrangements for a same-sex wedding.<sup>93</sup> After nearly seven years of litigation, the Supreme Court denied review.<sup>94</sup> Justices

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<sup>86</sup> *Supreme Court Procedures*, *supra* note 18.

<sup>87</sup> Jodi Kantor & Adam Liptak, *Behind the Scenes at the Dismantling of Roe v. Wade*, N.Y. TIMES (Dec. 15, 2023), <https://perma.cc/D2V6-ZXUH>.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> Josh Blackman, *16 Disclosures from the New York Times Leak Report About Dobbs*, VOLOKH CONSPIRACY (Dec. 15, 2023, 3:17 PM), <https://perma.cc/PX3C-V667>.

<sup>91</sup> *Anderson v. Planned Parenthood of Kan. & Mid-Mo.*, 139 S. Ct. 638, 638 (2018), *denying cert. to* 882 F.3d 1205 (10th Cir. 2018); *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408, 408 (2018), *denying cert. to* 876 F.3d 699 (5th Cir. 2017).

<sup>92</sup> See *Anderson*, 139 S. Ct. at 638; *Gee*, 139 S. Ct. at 408.

<sup>93</sup> 141 S. Ct. 2884, 2884 (2021).

<sup>94</sup> *Id.*; Josh Blackman, *After Seven Years of Litigation, Justices Kavanaugh and Barrett Let Arlene’s Flowers Wilt*, VOLOKH CONSPIRACY (July 2, 2021, 5:49 PM), <https://perma.cc/ER24-28P6>.

Thomas, Alito, and Gorsuch would have granted the petition.<sup>95</sup> Justices Kavanaugh and Barrett were silent.<sup>96</sup> *Boardman v. Inslee* involved a challenge to a Washington law that granted employee information to unions.<sup>97</sup> The Court denied review, but Justices Thomas, Alito, and Gorsuch would have granted certiorari.<sup>98</sup> Justices Kavanaugh and Barrett allowed the case to conclude.<sup>99</sup> *Shoop v. Cunningham* presented a challenge to a two-decade-old murder conviction.<sup>100</sup> Justices Thomas, Alito, and Gorsuch would have granted review and summarily reversed the lower court judgment that ruled for the prisoner.<sup>101</sup> Justices Kavanaugh and Barrett said nothing.<sup>102</sup>

In *Dignity Health v. Minton*, California law required a Catholic hospital to perform a hysterectomy on a transgender patient.<sup>103</sup> The Court denied review over the dissents of Justices Thomas, Alito, and Gorsuch.<sup>104</sup> Alas, without the votes of Justices Kavanaugh or Barrett, the Catholic hospital would be forced to perform the procedure.<sup>105</sup> In a related case, *Roman Catholic Diocese of Albany v. Emami*, New York mandated that religious employers must fund abortions through their employee health plans.<sup>106</sup> Justices Thomas, Alito, and Gorsuch would have granted certiorari immediately.<sup>107</sup> But Justices Kavanaugh and Barrett kicked the can down the road and let the New York courts consider the case in light of a recent Free Exercise Clause decision, *Fulton v. City of Philadelphia*.<sup>108</sup> The following year, the New

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<sup>95</sup> *Arlene's Flowers*, 141 S. Ct. at 2884.

<sup>96</sup> *See id.*

<sup>97</sup> *See Boardman v. Inslee*, 142 S. Ct. 387, 387 (2021), *denying cert. to* 978 F.3d 1092 (9th Cir. 2020).

<sup>98</sup> *Id.*

<sup>99</sup> *See id.*

<sup>100</sup> *See Shoop v. Cunningham*, 143 S. Ct. 37, 37 (2022).

<sup>101</sup> *Id. at 43.*

<sup>102</sup> *See id. at 37.*

<sup>103</sup> *See Dignity Health v. Minton*, 142 S. Ct. 455, 455 (2021), *denying cert. to* 252 Cal. Rptr. 3d 616 (Ct. App. 2019).

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

<sup>106</sup> *See Roman Cath. Diocese of Albany v. Vullo*, 127 N.Y.S.3d 171, 178 (App. Div. 2020), *vacated sub nom. Roman Cath. Diocese of Albany v. Emami*, 142 S. Ct. 421 (2021) (mem.), *remanded to* 168 N.Y.S.3d 598 (App. Div. 2022).

<sup>107</sup> *Emami*, 142 S. Ct. at 421.

<sup>108</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021).

York appellate division ruled that *Fulton* did not change the relevant standard, so the Diocese lost again.<sup>109</sup> And why did *Fulton* not change the relevant standard? Because in *Fulton*, Justices Barrett and Kavanaugh declined to overrule *Employment Division v. Smith*, a decision that required courts to deferentially review laws that burden religion.<sup>110</sup> Even when Justices Barrett and Kavanaugh joined a conservative majority opinion, they tempered its reach. Meanwhile, Justices Thomas, Alito, and Gorsuch would have overruled *Smith* in *Fulton*.<sup>111</sup> The relationship between *Fulton* and *Catholic Diocese of Albany* illustrates with clarity the gap between Justices Kavanaugh and Barrett on the one hand, and Justices Thomas, Alito, and Gorsuch on the other.

As of the fall of 2023, when this article was written, *Diocese of Albany* was currently before the New York Court of Appeals; briefing concluded in November 2023.<sup>112</sup> Even if New York's highest court moved promptly, a petition for a writ of certiorari may not get to the Supreme Court until late 2024; if there is a grant, a decision may not issue until 2025, or even 2026, nearly five years after the punt.<sup>113</sup>

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<sup>109</sup> *Vullo*, 168 N.Y.S.3d at 598.

<sup>110</sup> *Fulton*, 141 S. Ct. at 1882–83 (Barrett, J., concurring) (citing *Emp. Div., Dep't of Hum. Res. v. Smith*, 494 U.S. 872 (1990)).

<sup>111</sup> *Id.* at 1926 (Alito, J., concurring).

<sup>112</sup> *Vullo*, 168 N.Y.S.3d 598, *appeal docketed*, No. 2022-00089 (N.Y. Apr. 10, 2023); *Court-PASS: Search Court of Appeals Docket*, Ct. APPEALS STATE N.Y., <https://perma.cc/23YP-4EFV>.

<sup>113</sup> In May 2024, the New York Court of Appeals held that *Fulton* changed nothing. See Josh Blackman, *30 Months After Only Three Justices Would Have Granted Cert in Roman Catholic Diocese of Albany, the New York Court of Appeals Holds Fulton Changed Nothing*, VOLOKH CONSPIRACY (May 21, 2024), <https://perma.cc/L8FL-8ATV>. A cert petition was filed in September 2024. The case was distributed for conference in January 2025, but as of the date of printing, has not been resolved yet. It seems likely that there will be a dissent from the denial of certiorari. See *No. 24-319 Roman Cath. Diocese of Albany v. Harris*, SUP. CT. OF THE U.S., <https://perma.cc/59NU-BBWU>. My prediction from 2023 is looking pretty accurate.

## 5. THE THREE TRUMP APPOINTEES: BEFORE AND AFTER

In 2017, President Trump nominated Judge Neil Gorsuch to fill Justice Scalia's vacant seat.<sup>114</sup> In 2018, President Trump nominated Judge Brett Kavanaugh to replace Justice Kennedy.<sup>115</sup> And in 2020, President Trump nominated Judge Amy Coney Barrett to fill Justice Ginsburg's vacant seat.<sup>116</sup> It is easy enough to look back and evaluate whether a Justice has issued any surprising rulings. But it is also useful to look forward: based on what was known when the Justice was nominated, could the Justice's voting patterns have been predicted?

This section will revisit the records of each of the three Trump appointees *prior* to their nominations. Based on these records, we should not be particularly surprised how they have voted in certain cases. First, Justice Gorsuch's decisions in cases affecting LGBT issues were presaged by an unpublished Ninth Circuit panel decision he joined in 2009 that applied sex discrimination precedent to a transgender individual.<sup>117</sup> Second, Justice Kavanaugh's near-identical voting record with Chief Justice Roberts was presaged by his dissent in a 2011 D.C. Circuit decision in which he reasoned that the Affordable Care Act imposed a tax rather than a penalty.<sup>118</sup> And third, Justice Barrett's cautious approach was presaged by her brief career on the circuit court. Very little has surprised me about the Supreme Court over the past several years. This section will review their records *ex ante* and *ex post*.

### 5.1. Conservatives Should Not Be Surprised by Justice Gorsuch's Opinion in *Bostock*

In June 2020, many conservatives were stunned by Justice Gorsuch's majority decision in *Bostock v. Clayton County*.<sup>119</sup> He found that Title VII of the Civil Rights Act of 1964 prohibits discrimination against employees because of their sexual orientation or gender identity.<sup>120</sup> This case was 6-3, with

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<sup>114</sup> *Justices 1789 to Present*, SUP. CT. U.S., <https://perma.cc/WE9V-QF7P>.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Kastl v. Maricopa Cnty. Cnty. Coll. Dist.*, 325 F. App'x 492, 494 (9th Cir. 2009).

<sup>118</sup> *Seven-Sky v. Holder*, 661 F.3d 1, 22 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

<sup>119</sup> *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

<sup>120</sup> *Id.* at 1754.

Chief Justice John Roberts and the progressives in the majority.<sup>121</sup> Justices Thomas, Alito, and Kavanaugh dissented.<sup>122</sup> This decision came as something of a shock to the right. Indeed, Senator Josh Hawley of Missouri warned that *Bostock* may “represent[] the end of the conservative legal movement.”<sup>123</sup> (The rumors of the movement’s death were greatly exaggerated.)

*Bostock* was not a one-off for Justice Gorsuch with regard to federal protections for LGBT people. In several other lesser-profile cases, he parted company with Justices Thomas and Alito on claims affecting transgender people.

First, in *Edmo v. Corizon*, the Ninth Circuit held that denying treatment for a transgender inmate was unconstitutional.<sup>124</sup> Idaho asked the Supreme Court for an emergency stay of the lower court ruling.<sup>125</sup> Only Justices Thomas and Alito would have granted that relief.<sup>126</sup> Later, *Edmo* was provided the treatment and the case ostensibly became moot.<sup>127</sup> Justices Thomas and Alito would have vacated the lower court’s decision.<sup>128</sup> Justice Gorsuch was once again silent, letting this precedent of the Ninth Circuit stand.<sup>129</sup> (Justice Kavanaugh was confirmed one week before certiorari was denied, so he likely did not participate in that case.)<sup>130</sup>

Second, *Gloucester County School Board v. Grimm* involved a transgender student and bathrooms at a public school.<sup>131</sup> The Fourth Circuit held that both Title IX and the Equal Protection Clause of the Fourteenth Amendment prohibited denying transgender students access to the

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<sup>121</sup> *Id.* at 1736–37.

<sup>122</sup> *Id.* at 1754 (Alito, J., dissenting).

<sup>123</sup> Josh Blackman, *Senator Hawley: Bostock “Represents the End of the Conservative Legal Movement,”* VOLOKH CONSPIRACY (June 16, 2020, 5:39 PM), <https://perma.cc/AKD3-F4AY>.

<sup>124</sup> *Edmo v. Corizon, Inc. (Edmo I)*, 949 F.3d 489, 504–05 (9th Cir. 2020).

<sup>125</sup> Idaho Dep’t of Corr. v. *Edmo (Edmo II)*, 140 S. Ct. 2800, 2800 (2020).

<sup>126</sup> *Id.*

<sup>127</sup> Idaho Dep’t of Corr. v. *Edmo (Edmo III)*, 141 S. Ct. 610, 610 (2020), *denying cert. to* 935 F.3d 757 (9th Cir. 2019).

<sup>128</sup> *Id.*

<sup>129</sup> *See id.*

<sup>130</sup> Amy Howe, *Decade in Review: Justice Brett Kavanaugh’s Confirmation Hearing*, SCOTUSBLOG (Dec. 31, 2019, 9:00 AM), <https://perma.cc/P6HR-K7SQ>.

<sup>131</sup> *Grimm v. Gloucester Cnty. Sch. Bd.*, 972 F.3d 586, 593 (4th Cir. 2020).

restrooms assigned to the opposite biological sex.<sup>132</sup> By the time the cert petition reached the Supreme Court, the Biden administration had adopted the Fourth Circuit's reading of Title IX, in light of *Bostock*.<sup>133</sup> However, rather than resolving whether the Department of Education was correct, the Supreme Court simply denied certiorari.<sup>134</sup> Justices Thomas and Alito would have granted the petition.<sup>135</sup> Justice Gorsuch was silent, as were Justices Kavanaugh and Barrett, letting this precedent of the Fourth Circuit stand.<sup>136</sup>

Third, in *Kincaid v. Williams*, the Fourth Circuit held that the Americans with Disabilities Act required a prison to accommodate an inmate's gender dysphoria.<sup>137</sup> On appeal, the Supreme Court denied certiorari.<sup>138</sup> Justices Alito and Thomas would have granted the petition right away, finding there was "no good reason for delay."<sup>139</sup> Justice Gorsuch, as well as the other two Trump appointees, let the precedent of the Fourth Circuit stand.<sup>140</sup>

Fourth, *Tingley v. Ferguson* presented the question of whether a prohibition on conversion therapy violates the Free Speech and Free Exercise Clauses.<sup>141</sup> Washington law prohibits any conversations that might encourage "change [of] an individual's sexual orientation or gender identity," while allowing conversations that "support . . . identity exploration" and "do not seek to change sexual orientation or gender identity."<sup>142</sup> In December 2023, the Supreme Court denied review.<sup>143</sup> Justice Kavanaugh would have granted the petition, and Justices Thomas and Alito wrote dissents from the denial of certiorari.<sup>144</sup> Alito noted that given the circuit split, "this case easily satisfies our established criteria for granting certiorari"<sup>145</sup> But there was no fourth

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<sup>132</sup> *Id.*

<sup>133</sup> See Exec. Order No. 13,988, 86 Fed. Reg. 7023 (Jan. 20, 2021).

<sup>134</sup> *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *Williams v. Kincaid*, 45 F.4th 759, 779–80 (4th Cir. 2022).

<sup>138</sup> *Kincaid v. Williams*, 143 S. Ct. 2414, 2414 (2023).

<sup>139</sup> *Id.* at 2415.

<sup>140</sup> *Id.* at 2419.

<sup>141</sup> *Tingley v. Ferguson*, 144 S. Ct. 33, 33 (2023) (Thomas, J., dissenting).

<sup>142</sup> WASH. REV. CODE § 18.130.020(4).

<sup>143</sup> *Tingley*, 144 S. Ct. at 33; see also Josh Blackman, *Counting to Four on LGBT Without NMG*, VOLOKH CONSPIRACY (Dec. 12, 2023, 1:22 PM), <https://perma.cc/B53T-JP76>.

<sup>144</sup> *Tingley*, 144 S. Ct. at 33.

<sup>145</sup> *Id.* at 35–36 (Alito J., dissenting).

vote. Given that there were three noted votes for certiorari, we can presume one more vote would have been enough to grant the case. In most cases, where Justices Thomas and Alito complain that a case is not granted, Justice Gorsuch is right on board.<sup>146</sup> But he was silent here.<sup>147</sup>

Should *Bostock*, *Edmo*, *Grimm*, *Kincaid*, and *Tingley* have been surprises? Not really. In 2008, then-Judge Gorsuch sat by designation on the U.S. Court of Appeals for the Ninth Circuit.<sup>148</sup> He heard *Kastl v. Maricopa County Community College District* on a panel with appointees by Presidents Carter and Clinton.<sup>149</sup> The case concerned Rebecca Kastl who “presented full-time as female.”<sup>150</sup> After “complaints that a man was using the women’s restroom,” Kastl was banned “from using the women’s restroom until she could prove completion of sex reassignment surgery.”<sup>151</sup> (Here, the panel used Kastl’s preferred pronouns.) The Ninth Circuit had previously held that California law prohibited discrimination against “transgender individuals” based on the “victim’s real or perceived non-conformance to socially-constructed gender norms.”<sup>152</sup> That opinion was authored by the liberal lion of the Ninth Circuit, Judge Stephen Reinhardt.<sup>153</sup> The *Kastl* panel then extended that state law doctrine to Title VII.<sup>154</sup> Gorsuch agreed with the Carter and Clinton appointees to extend that Reinhardt precedent to Title VII.<sup>155</sup> Under Gorsuch’s view, federal law had all along barred “impermissible gender stereotypes” of a transgender individual.<sup>156</sup> One such impermissible stereotype was the notion that bathrooms can be assigned based on a person’s biological sex.<sup>157</sup> *Kastl* was an unpublished, non-precedential three-page order.<sup>158</sup> But it was cited by many district court opinions, as well as a case from

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<sup>146</sup> Adam Feldman, *Empirical SCOTUS: How Gorsuch’s First Year Compares*, SCOTUSBLOG (Apr. 11, 2018, 12:00 PM), <https://perma.cc/Y8JT-JGJ8>.

<sup>147</sup> See *Tingley*, 144 S. Ct. at 33.

<sup>148</sup> *Kastl v. Maricopa Cnty. Cmty. Coll. Dist*, 325 F. App’x 492, 492 n.\* (9th Cir. 2009).

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 493 n.1.

<sup>151</sup> *Id.* at 493.

<sup>152</sup> *Id.* (citing *Schwenk v. Hartford*, 204 F.3d 1187, 1201–02 (9th Cir. 2000)).

<sup>153</sup> *Schwenk*, 204 F.3d at 1191.

<sup>154</sup> *Kastl*, 325 F. App’x at 493.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> *Id.* at 493–94.

<sup>158</sup> *Id.* at 492.

the Eleventh Circuit.<sup>159</sup> Here Judge Gorsuch decided an important question of federal law in a drive-by fashion.

Throughout his entire career, Justice Gorsuch has read the protections of federal and state law broadly—including the Equal Protection Clause, Title VII, Title IX, and the ADA—to broadly protect LGBT rights.<sup>160</sup> *Bostock*, *Edmo*, *Grimm*, *Kincaid*, and *Tingley* should not have been a surprise for anyone who read *Kastl*. And those who were responsible for nominating Gorsuch were no doubt aware of *Kastl* and recommended him nonetheless.

## 5.2. Conservatives Should Not Be Surprised by Justice Kavanaugh's Voting Pattern with Chief Justice Roberts

For a generation, legal conservatives chanted, “No more Souters.”<sup>161</sup> This mantra arose in the wake of the nomination of Justice David Souter, who turned out to be a consistent liberal vote.<sup>162</sup> After *NFIB v. Sebelius*, the Obamacare case, conservatives adopted a new mantra: “No more Robertses.”<sup>163</sup> Never again would conservatives select a Justice who would rewrite a law in the name of judicial restraint.<sup>164</sup> Yet, to replace Justice Kennedy, President Trump managed to select a Justice who has voted with Chief Justice Roberts nearly 95% of the time!<sup>165</sup> “Roberts and Kavanaugh are cut from the same cloth. And Kavanaugh consistently votes with Roberts, and

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<sup>159</sup> See, e.g., *Chavez v. Credit Nation Auto Sales*, 49 F. Supp. 3d 1163, 1190–91 (N.D. Ga. 2014); *Evancho v. Pine–Richland Sch. Dist.*, 237 F. Supp. 3d 267, 296 (W.D. Pa. 2017); *Glenn v. Brumby*, 663 F.3d 1312, 1317 (11th Cir. 2011).

<sup>160</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731, 1743 (2020); *Edmo III*, 141 S. Ct. 610, 610 (2020); *Gloucester Cnty. Sch. Bd. v. Grimm*, 141 S. Ct. 2878, 2878 (2021); *Tingley v. Ferguson*, 144 S. Ct. 33, 33 (2023); *Kincaid v. Williams*, 143 S. Ct. 2414, 2414 (2023).

<sup>161</sup> Molly Runkle, *Judge William Pryor—A Southern Conservative Who Speaks His Mind*, SCOTUSBLOG (Jan. 30, 2017, 6:06 PM), <https://perma.cc/87QP-UB7Z>.

<sup>162</sup> See, e.g., *id.*; Randy E. Barnett & Josh Blackman, *The Next Justices: Filling Supreme Court Vacancies: A Guide for GOP Candidates on How to Fill Court Vacancies*, WEEKLY STANDARD, Sept. 14, 2015, at 22, <https://perma.cc/5FXF-HQKL>.

<sup>163</sup> Kelly Riddell, *No More Robertses, Souters or Kennedys on Supreme Court, Conservative Group Pleads*, WASH. TIMES (Sept. 14, 2015), <https://perma.cc/D8B8-MM2U>.

<sup>164</sup> See JOSH BLACKMAN, *UNPRECEDENTED: THE CONSTITUTIONAL CHALLENGE TO OBAMACARE* 271–72 (2013).

<sup>165</sup> Bravin, *supra* note 23.

the Court’s three progressives, to form a majority.”<sup>166</sup> But this voting pattern should not come as a surprise. Like with Justice Gorsuch, Judge Kavanaugh’s jurisprudence under pressure was on full display.

Flashback to 2011, as the constitutional challenges to the Affordable Care Act were trickling up to the Supreme Court. One of the cases, *Seven-Sky v. Holder*, landed before Judge Kavanaugh on the D.C. Circuit Court of Appeals.<sup>167</sup> The other two judges on the panel (Silberman and Edwards) upheld the ACA’s individual mandate.<sup>168</sup> This provision, the panel found, could require people to purchase health insurance based on Congress’s power to regulate interstate commerce.<sup>169</sup> However, Judge Kavanaugh took a very different path based on Congress’s taxing power.<sup>170</sup> The analysis here is very complex. Indeed, I devoted an entire chapter of my 2013 book on the Obamacare litigation to Kavanaugh’s approach.<sup>171</sup>

To over-simplify things, there are four things to know about Kavanaugh’s opinion. First, Kavanaugh found that the court lacked jurisdiction because the “tax” that enforced the ACA would not be collected until 2014.<sup>172</sup> Critical to that jurisdictional analysis, however, was a finding that the Affordable Care Act in fact imposed a tax, rather than a penalty.<sup>173</sup> Kavanaugh repeatedly referred to a “tax penalty.”<sup>174</sup> Having found that the court lacked jurisdiction, Judge Kavanaugh should have simply ended his opinion. But he didn’t. He never does. He always keeps writing.<sup>175</sup>

Second, Kavanaugh made a comment in dicta about how the ACA could be put on a surer footing. Specifically, Congress could make “just a minor tweak” to the law, and “eliminate the legal mandate language.”<sup>176</sup>

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<sup>166</sup> Josh Blackman, *Conservatives Should Not Be Surprised by Justice Kavanaugh’s Voting Pattern with Chief Justice Roberts*, VOLOKH CONSPIRACY (July 19, 2023, 9:00 AM), <https://perma.cc/9W3L-QK47>.

<sup>167</sup> *Seven-Sky v. Holder*, 661 F.3d 1, 1 (D.C. Cir. 2011).

<sup>168</sup> *Id.* at 4–5.

<sup>169</sup> *Id.* at 19.

<sup>170</sup> *Id.* at 21 (Kavanaugh, J., dissenting).

<sup>171</sup> BLACKMAN, *supra* note 164, at 150–58.

<sup>172</sup> *Seven-Sky*, 661 F.3d at 22 (Kavanaugh, J., dissenting).

<sup>173</sup> *Id.* at 23.

<sup>174</sup> See generally *id.*

<sup>175</sup> Josh Blackman, *The Kavanaugh Concurrence Is the New Kennedy Concurrence*, VOLOKH CONSPIRACY (June 28, 2022, 1:04 PM), <https://perma.cc/QP66-NNZZ>.

<sup>176</sup> *Seven-Sky*, 661 F.3d at 48 (Kavanaugh, J., dissenting).

Rather than penalizing people who failed to comply with the individual mandate, people without insurance could simply pay a tax to the IRS.<sup>177</sup> The law would shift from a mandate enforced by a penalty to a choice that resulted in a tax.<sup>178</sup> This change would not be merely one of semantics. This alternative law would be grounded in Congress's broad taxing power and would avoid the thorny question of whether the federal government could require people to engage in a commercial transaction.

Third, the federal government expressly invoked Judge Kavanaugh's opinion before the Supreme Court. The Solicitor General argued that no "minor tweak" was needed because the ACA was "materially indistinguishable from Judge Kavanaugh's proposed revision."<sup>179</sup> The argument tracked many of Kavanaugh's observations about how the ACA operates.<sup>180</sup> In the reply brief, the Solicitor General then built on Judge Kavanaugh's observation, and wrote the Court should not construe the ACA to "create[] an independent legal obligation."<sup>181</sup> Rather, the government contended, the ACA as drafted gave people a choice: purchase insurance or don't purchase insurance. And if they chose the latter option, they would have to pay a tax.<sup>182</sup>

Fourth, Judge Kavanaugh's decisions planted the seeds for Chief Justice Roberts's saving construction. Shortly after the case was argued, Harvard Law School Professor Laurence Tribe observed that it was "considerably more plausible to see the law being upheld under the taxing power, as Judge Kavanaugh suggested it would be [as] if the law were interpreted this way."<sup>183</sup> Tribe was right. To save the law, Roberts read the Affordable Care Act in the same fashion as Kavanaugh's *tweaked* version.<sup>184</sup> Under the so-called "saving construction," the law did not actually impose a mandate to purchase insurance, but instead merely taxed the uninsured.<sup>185</sup>

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<sup>177</sup> *Id.* at 49.

<sup>178</sup> *See id.*

<sup>179</sup> Brief for Petitioners (Minimum Coverage Provision) at 60, *Dep't of Health & Hum. Servs. v. Florida*, 567 U.S. 519 (2012) (No. 11-398).

<sup>180</sup> *See id.*

<sup>181</sup> Reply Brief for Petitioners (Minimum Coverage Provision) at 22, *Dep't of Health & Hum. Servs.*, 567 U.S. 519 (No. 11-398).

<sup>182</sup> *See id.*

<sup>183</sup> Blackman, *supra* note 166.

<sup>184</sup> *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 574–75 (2012).

<sup>185</sup> *See id.*

For my book, I interviewed a senior DOJ official who relayed that “Judge Kavanaugh’s opinion convinced the Solicitor General’s office that the ‘tax argument might be a more conservative and judicially restrained basis to act to uphold as a tax.’”<sup>186</sup> DOJ credited Judge Kavanaugh with the ‘assist’ for the argument that would save Obamacare.<sup>187</sup>

Judge Kavanaugh’s opinion in *Seven-Sky* was like a carbon copy of his nascent Supreme Court jurisprudence. First, his lodestar is avoiding controversy, especially in polarized cases. During oral argument, Kavanaugh analogized the Obamacare litigation to the New Deal clash between the Supreme Court and President Roosevelt. He asked, “[W]hy should a court get in the middle of that and risk being another 1935 situation?”<sup>188</sup> Now, Justice Kavanaugh’s consistent voting pattern with the Chief Justice reflects a similar mode of avoiding controversy. Public perception pervades all aspects of his judging. Indeed, in his remarks to the Eighth Circuit judicial conference, Kavanaugh cited his decisions in *Allen v. Milligan*<sup>189</sup> and *Moore v. Harper*<sup>190</sup> as evidence that the Court is not “partisan.”<sup>191</sup> In both cases, Kavanaugh voted with the Court’s progressive wing.<sup>192</sup> To paraphrase Chief Justice Roberts, the Court as an “institution” functions better when there are fewer 5-4 right-left cases. And that is apparently how Kavanaugh defines the Court’s legitimacy.

Second, Kavanaugh can never fully remove himself from the political process. He consistently offers compromises as a way to signal moderation. In *Seven-Sky*, he felt compelled to offer Congress advice on how to modify a statute, even after finding that the court lacked jurisdiction.<sup>193</sup> But why? His

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<sup>186</sup> Blackman, *supra* note 166.

<sup>187</sup> *Id.*

<sup>188</sup> Transcript of Oral Argument at 20–21, *Seven Sky v. Holder*, 661 F.3d 1 (D.C. Cir. 2011) (No. 11-5047).

<sup>189</sup> *Allen v. Milligan*, 143 S. Ct. 1487, 1517 (2023) (Kavanaugh, J., concurring) (agreeing that Alabama’s redistricting plan violated § 2 of the Voting Rights Act).

<sup>190</sup> *Moore II*, 600 U.S. 1, 38–40 (2023) (Kavanaugh, J., concurring) (finding that state laws governing federal elections are subject to state court review, but a state court’s interpretation of state law in cases regarding the elections clause will be subject to federal review).

<sup>191</sup> Josh Gerstein, *Kavanaugh: No Warring Camps at Supreme Court*, POLITICO (July 13, 2023, 3:49 PM), <https://perma.cc/C99B-AJ6S>.

<sup>192</sup> See *Allen*, 143 S. Ct. at 1487; *Moore II*, 600 U.S. at 6.

<sup>193</sup> *Seven Sky v. Holder*, 661 F.3d 1, 46–49 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

efforts to reach out to resolve issues that are not properly before the Court are flatly inconsistent with any professed fidelity to judicial restraint. Yet, to this day, Justice Kavanaugh routinely writes concurrences that purport to settle issues that are not properly before the Court, especially in high-profile cases involving abortion and guns.<sup>194</sup>

Third, Kavanaugh employed Roberts-esque dexterity to avoid difficult legal questions. After Justice Kennedy announced his retirement, SCOTUSblog observed that Kavanaugh in *Seven-Sky* was “willing to look for artful ways to avoid deciding questions he does not want to decide.”<sup>195</sup> Artful? More like inventive. None of the parties raised the specific taxing power argument he relied on.<sup>196</sup> Indeed, during oral argument in *Seven-Sky*, Judge Edwards asked Beth Brinkmann, who headed DOJ Civil Appellate, whether she had read the obscure provision of the tax code that Judge Kavanaugh cited.<sup>197</sup> Kavanaugh had thought up the convoluted argument based on the tax code all by himself—an argument that allowed him to duck the most consequential constitutional question in a generation. SCOTUSblog concluded that Kavanaugh “recognized that the litigation over the ACA was politically fraught for both the judiciary as a whole and for individual judges who might have aspirations to higher courts, and so he decided to find a way out.”<sup>198</sup> Kavanaugh surely knew that his future Supreme Court nomination could hinge largely on that decision, and like Chief Justice Roberts, Kavanaugh found a way to avoid striking down the statute.<sup>199</sup> Indeed, Kavanaugh apparently had such aspirations for some time. I wrote the chapters of my book<sup>200</sup> with some precision in order to provide a complete record, should Kavanaugh ever be nominated to the Supreme Court. And so it came to be.

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<sup>194</sup> Josh Blackman, *The Kavanaugh Concurrences in Bruen and Dobbs*, VOLOKH CONSPIRACY (June 28, 2022, 2:34 PM), <https://perma.cc/K6CC-8GMR>.

<sup>195</sup> Tejinder Singh, *Kavanaugh on the Affordable Care Act: Seven-Sky v. Holder*, SCOTUSBLOG (July 19, 2018, 3:53 PM), <https://perma.cc/TS4Z-TEY6>.

<sup>196</sup> Josh Blackman, “*Unprecedented*” on Judge Kavanaugh’s Obamacare Decision in *Seven-Sky v. Holder*, JOSHBLACKMAN.COM (July 3, 2018), <https://perma.cc/BGJ4-B3HS>.

<sup>197</sup> Transcript of Oral Argument at 91, *Seven-Sky*, 661 F.3d 1 (No. 11-5047).

<sup>198</sup> Singh, *supra* note 195.

<sup>199</sup> *Id.*

<sup>200</sup> BLACKMAN, *supra* note 164.

Justice Kavanaugh is performing just as Judge Kavanaugh's record would have predicted. His record was in plain sight for all to see. Senator Mitch McConnell, the Republican leader, observed, "Those who have paid attention to his earlier career are familiar with [Kavanaugh's] restrained, case-by-case jurisprudence."<sup>201</sup> (Kavanaugh was not McConnell's preferred pick after Justice Kennedy announced his retirement.<sup>202</sup>) Indeed, at least with regard to Obamacare, Judge Kavanaugh was to the left of his former boss, Justice Anthony Kennedy.<sup>203</sup> The Court's longtime swing vote would have invalidated the *entire* Affordable Care Act.<sup>204</sup>

Those who were responsible for selecting Justice Kavanaugh were no doubt aware of *Seven-Sky* but recommended him nonetheless. But we have at least some evidence that Kavanaugh initially met some resistance. In May 2016, then-candidate Donald Trump released a list of eleven possible candidates to fill the seat caused by Justice Antonin Scalia's passing.<sup>205</sup> Indeed, two names were glaringly absent from that initial list: Judges Brett Kavanaugh of the D.C. Circuit Court of Appeals and Judge Neil Gorsuch of the Tenth Circuit Court of Appeals.<sup>206</sup> Both were well-known appointees of President George W. Bush. I can only conclude that Kavanaugh's omission was deliberate—perhaps due to *Seven-Sky v. Holder*. I alluded to—and praised—this omission in *National Review*.<sup>207</sup> By contrast, the *Wall Street Journal*

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<sup>201</sup> Mitch McConnell, *Mitch McConnell: Neither Party Can Count on the Supreme Court to Be Its Ally*, WASH. POST (July 10, 2023, 2:59 PM), <https://perma.cc/R6BD-WU9F>.

<sup>202</sup> Maggie Haberman & Jonathan Martin, *McConnell Tries to Nudge Trump Toward Two Supreme Court Options*, N.Y. TIMES (July 7, 2018), <https://perma.cc/NGY6-84YD> ("Mr. McConnell was originally hopeful that Mr. Trump would select Amul Thapar, a federal appeals court judge who was previously on the bench in Kentucky, but has concluded that the president is unlikely to name him.").

<sup>203</sup> Ilya Shapiro, *Don't Worry (Too Much) About Kavanaugh Changing the Supreme Court*, CATO INST. (July 17, 2018), <https://perma.cc/2YAF-NXGU>.

<sup>204</sup> Brett Norman, *Tone of Dissent Shows Law Could Have Been Wiped Out*, POLITICO (June 28, 2012, 2:02 PM), <https://perma.cc/LX9T-MPEW>.

<sup>205</sup> Nick Gass, *Trump Unveils 11 Potential Supreme Court Nominees*, POLITICO (May 18, 2016, 5:03 PM), <https://perma.cc/K2KR-C69X>.

<sup>206</sup> *Id.*

<sup>207</sup> Josh Blackman, *Cautiously Optimistic About Trump's SCOTUS Shortlist*, NAT'L REV. (May 19, 2016, 8:00 AM), <https://perma.cc/2ZPQ-HEWG> ("Third, for the first time in a generation, not a single judge from the D.C. Circuit Court of Appeals—often called

Editorial Board wrote that Trump should add Kavanaugh to the list, who “could replace some of the conservative intellectual heft that the Court has lost in Justice Scalia.”<sup>208</sup> The *Journal* did not mention Gorsuch.<sup>209</sup>

In September 2016, Trump would release the second iteration of the list, now with twenty-one names.<sup>210</sup> This time, Gorsuch made the cut.<sup>211</sup> But Kavanaugh was still missing.<sup>212</sup> Again, I can only conclude this omission was deliberate. In November 2016, after the election, the *Wall Street Journal* editorialized once again that Kavanaugh should be added to the list.<sup>213</sup> In January 2017, shortly after the inauguration, President Trump nominated Gorsuch to fill the Scalia vacancy.<sup>214</sup> Ultimately, no one on the initial list would be nominated to the Supreme Court.

Ten months later, in November 2017, President Trump released the third iteration of his list, which ballooned to twenty-five names.<sup>215</sup> Two conspicuous names made the cut. At long last, Judge Kavanaugh was

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the second-highest court in the land—made the Supreme Court shortlist. This is a positive development. The judges on Trump’s list are less likely to view the great expanses of the United States beyond the Hudson River in the same way as that famous New Yorker cover. They are also less likely to be susceptible to the so-called Greenhouse Effect, the ‘judicial drift’ caused by Beltway Fever. These justices will have the strongest immunity to the D.C. cocktail-hour scene, which tries to nudge judicial conservatives to the left.”).

<sup>208</sup> *Donald Trump’s Day in Court*, WALL ST. J. (May 19, 2016, 7:31 PM), <https://perma.cc/FWP9-YCBC>.

<sup>209</sup> *Id.*

<sup>210</sup> Nina Totenberg, *Donald Trump Unveils New, More Diverse Supreme Court Short List*, NPR (Sept. 23, 2016, 3:22 PM), <https://perma.cc/HK9C-B8GK>.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Trump’s Supreme Court Priority*, WALL ST. J. (Nov. 20, 2016, 5:50 PM), <https://perma.cc/CM4R-ZDKJ> (“Mr. Trump released a list of 21 potential nominees during the campaign (we’d add appellate judges Jeff Sutton and Brett Kavanaugh to the list), and the White House ought to have them vetted and ready to take off like planes at O’Hare.”).

<sup>214</sup> Amy Howe, *Trump Nominates Gorsuch to fill Scalia Vacancy*, SCOTUSBLOG (Jan. 31, 2017, 9:15 AM), <https://perma.cc/H56A-2ZZD>.

<sup>215</sup> *President Donald J. Trump’s Supreme Court List*, TRUMP WHITE HOUSE ARCHIVES, (Nov. 17, 2017) <https://perma.cc/UEN9-LL2B>; Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 17, 2017, 4:48 PM), <https://perma.cc/FHC3-6CSL>.

included.<sup>216</sup> I don't think Kavanaugh had done anything over the prior year to warrant his inclusion. Rather, whatever resistance there was to Kavanaugh on prior lists was overcome. Most likely, his name was added to grease the skids for Justice Kennedy's retirement. The *New York Times* hinted at this overture in February 2017, shortly after Gorsuch's nomination.<sup>217</sup> At the time, I thought Kavanaugh was at last added so he could be nominated to the Court. And so he was. When liberals came out in full force to oppose Kavanaugh's confirmation, I chuckled. The worst thing that could have happened to the left would have been for Kavanaugh to have withdrawn. Just about anyone else on the Trump list would have been to Kavanaugh's right but without the baggage. Nevertheless, he persisted.

I am not alone in concluding that Kavanaugh's performance was entirely predictable. Lisa Blatt is a leading Supreme Court advocate. She has argued more cases before the high court than any other woman.<sup>218</sup> In 2018, she drew widespread criticism for supporting, and not withdrawing her support for, Justice Kavanaugh's nomination.<sup>219</sup> Blatt, a "liberal feminist," later explained that Kavanaugh was "the best choice . . . in these circumstances" with a Republican president and Republican Senate.<sup>220</sup> In 2023, Blatt looked back, and said that Kavanaugh's "first five years are exactly what I thought they would be."<sup>221</sup> Blatt explained that she was disappointed with Kavanaugh's vote in *Dobbs*, but said his overall record "shows he's a mainstream conservative who is acutely aware of the practical consequences of the

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<sup>216</sup> Nolan D. McCaskill, *Trump Releases Updated Short List of Potential Supreme Court Nominees*, POLITICO (Nov. 17, 2017, 7:37 PM), <https://perma.cc/S4R2-JUHC>.

<sup>217</sup> Adam Liptak, *How Trump Chose His Supreme Court Nominee*, N.Y. TIMES (Feb. 6, 2017), <https://perma.cc/6NZC-TNZS> ("Mr. Trump's team is already looking down the road, weighing the choices should Justice Anthony M. Kennedy decide to step down. Judge Kethledge would be a leading candidate, an official said, and so would Judge Brett M. Kavanaugh of the Federal Appeals Court in Washington. Both judges, like Judge Gorsuch, once served as law clerks to Justice Kennedy.").

<sup>218</sup> Mark Sherman & Jessica Gresko, *Supreme Court Notebook: Gender Gap Persists at Arguments*, ASSOCIATED PRESS (Apr. 27, 2023, 3:44 PM), <https://perma.cc/VY43-9UNY>.

<sup>219</sup> ALM MEDIA, *Daily Dicta: Why Supreme Court Star Lisa Blatt Left Arnold & Porter for Williams & Connolly*, YAHOO! FIN. (Jan. 28, 2019), <https://perma.cc/4E5K-A4LH>.

<sup>220</sup> David G. Savage, *An Unexpected Check on Supreme Court's Sharp Move Right: Justice Kavanaugh*, L.A. TIMES (Oct. 2, 2023, 4:00 AM), <https://perma.cc/P3JM-FVHQ>.

<sup>221</sup> *Id.*

court's decisions."<sup>222</sup> Blatt added, "I think this is Justice Kavanaugh's court, meaning his vote will continue to have a decisive effect in the court's most important cases."<sup>223</sup> Blatt predicted that Kavanaugh "will be the conservative version of Justice Breyer, if he is not already. Very well-liked by all his colleagues and trying to find middle ground."<sup>224</sup>

President Trump added another name to the November 2017 list: Amy Coney Barrett, whom the Senate confirmed to the Seventh Circuit Court of Appeals only seventeen days earlier.<sup>225</sup> We will turn to Justice Barrett now.

### 5.3. Conservatives Should Not Be Surprised by Justice Barrett's Cautious Approach

When President Trump added Justices Gorsuch and Kavanaugh to the Supreme Court shortlist, their judicial records were on full display. Justice Barrett was just the opposite. She had zero judicial record when President Trump added her to the third iteration of his Supreme Court list.<sup>226</sup> None at all. Indeed, the Senate confirmed Barrett to the Seventh Circuit only seventeen days before President Trump released the list!<sup>227</sup> Moreover, when President Trump nominated Judge Barrett to the Supreme Court, she had only a handful of high-profile cases.<sup>228</sup> Her submissions to the Senate Judiciary Committee in 2017 and 2020 reveal her paper-thin record.<sup>229</sup> Barrett lacked many of the indicia used to select other members on the list.

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<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

<sup>224</sup> *Id.*

<sup>225</sup> *President Donald J. Trump's Supreme Court List*, *supra* note 215; *Barrett, Amy Coney*, FED. JUD. CTR., <https://perma.cc/QBU7-G348>.

<sup>226</sup> *President Donald J. Trump's Supreme Court List*, *supra* note 215.

<sup>227</sup> *Id.*; *Barrett, Amy Coney*, *supra* note 225.

<sup>228</sup> See, e.g., *Kanter v. Barr*, 919 F.3d 437, 451–69 (7th Cir. 2019) (Barrett, J., dissenting); *Cook County v. Wolf*, 962 F.3d 208, 234–54 (7th Cir. 2020) (Barrett, J., dissenting); *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 656 (7th Cir. 2018).

<sup>229</sup> See STAFF OF S. COMM. ON THE JUDICIARY, 115TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES (Amy Coney Barrett 2017), <https://perma.cc/QCA9-4EHJ>; STAFF OF S. COMM. ON THE JUDICIARY, 115TH CONG., QUESTIONS FOR THE RECORD 1–6 (Amy Coney Barrett 2017), <https://perma.cc/44LT-YQ4H>; STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., QUESTIONNAIRE FOR NOMINEE TO THE SUPREME COURT (Amy Coney Barrett

It is often said that the Federalist Society selected President Trump's nominees.<sup>230</sup> If that were the case, it could have started with someone who was actually a longstanding member of the organization. But Barrett was not a member of the Federalist Society while in law school, while clerking, or when she entered the academy.<sup>231</sup> Even while living in the District of Columbia, she never attended the Federalist Society's National Lawyers Convention—a pilgrimage for conservative lawyers.<sup>232</sup> She was a member in 2005 and 2006, then let her membership lapse for nearly a decade.<sup>233</sup>

In 2017, Barrett was asked why she left the Society in 2006.<sup>234</sup> She replied, "I do not recall why I left the Federalist Society in 2006."<sup>235</sup> The dues for faculty are only \$25 per year.<sup>236</sup> She must have not found the organization useful—at least at that point in her career. By contrast, she held positions of leadership in the American Association of Law Schools (AALS).<sup>237</sup> Every year, the Federalist Society hosts a faculty conference at the same time as the AALS convention, usually in the same hotel or a hotel across the street. She never spoke at any of the Federalist Society faculty conferences.<sup>238</sup> And I do not recall ever seeing Barrett at any of those meetings.

Barrett rejoined the Federalist Society towards the end of the Obama administration in 2014.<sup>239</sup> That year, she had her first speaking engagement

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2020) [hereinafter BARRETT SUPREME COURT QUESTIONNAIRE], <https://perma.cc/J42U-X6SS>; STAFF OF S. COMM. ON THE JUDICIARY, 117TH CONG., NOMINATION OF AMY CONEY BARRETT TO THE U.S. SUPREME COURT: QUESTIONS FOR THE RECORD 1–184 (2020) [hereinafter BARRETT SUPREME COURT QUESTIONS FOR RECORD], <https://perma.cc/U3VU-BZ5G>.

<sup>230</sup> Lydia Wheeler, *Meet the Powerful Group Behind Trump's Judicial Nominations*, THE HILL (Nov. 16, 2017), <https://perma.cc/4D8V-Q4B3>.

<sup>231</sup> BARRETT SUPREME COURT QUESTIONNAIRE, *supra* note 229.

<sup>232</sup> STAFF OF S. COMM. ON THE JUDICIARY, 115TH CONG., WRITTEN QUESTIONS FOR AMY CONEY BARRETT, JOAN LARSEN, AND ERIC DREIBAND 1–6 (2017), <https://perma.cc/TR7W-RU6D>.

<sup>233</sup> BARRETT SUPREME COURT QUESTIONNAIRE, *supra* note 229.

<sup>234</sup> BARRETT SUPREME COURT QUESTIONS FOR RECORD, *supra* note 229, at 16.

<sup>235</sup> *Id.*

<sup>236</sup> *Membership*, FEDERALIST SOC'Y, <https://perma.cc/G9WE-F8CG>.

<sup>237</sup> BARRETT SUPREME COURT QUESTIONNAIRE, *supra* note 229, at 5.

<sup>238</sup> See *id.* at 19–27.

<sup>239</sup> *Id.* at 5.

at a Federalist Society event.<sup>240</sup> However, after Justice Scalia's passing in February 2016, the former Scalia clerk became a fixture of the Federalist Society speaking circuit, with four talks in the span of a year.<sup>241</sup> That rate would accelerate after Barrett was confirmed to the Seventh Circuit in October 2017.<sup>242</sup> I do not recall ever seeing Barrett at any Federalist Society event before 2017. And as best as I can remember, I met her for the first time in August 2017 at a law professor conference in Florida. She warmly said hello to me, but I was embarrassed that I didn't know who she was; it took me a few moments to recall that she was the professor from Notre Dame who had been nominated to the Seventh Circuit. That was *all* I knew about her.

Prior to her confirmation to the Seventh Circuit, Barrett served as a law professor for about fifteen years.<sup>243</sup> She taught constitutional law, civil procedure, federal courts, and other public law topics.<sup>244</sup> During that time, she authored eleven law review articles, a few book chapters, several blog posts on PrawfsBlawg, and zero books.<sup>245</sup> These articles focused on statutory interpretation, federal court jurisdiction, and stare decisis.<sup>246</sup>

To put Barrett's productivity in perspective, a group of professors measures the scholarly impact of law school faculties.<sup>247</sup> And within each

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<sup>240</sup> *Past Events*, FEDERALIST SOC'Y, <https://perma.cc/M6UV-UC5A> (click "speaker" and filter by "Amy Barrett"); *see also* BARRETT SUPREME COURT QUESTIONNAIRE, *supra* note 229, at 5.

<sup>241</sup> BARRETT SUPREME COURT QUESTIONNAIRE, *supra* note 229, at 20–21.

<sup>242</sup> *See id.* at 17–19.

<sup>243</sup> *Id.* at 2.

<sup>244</sup> *Id.* at 61–62.

<sup>245</sup> *Id.* at 9–10.

<sup>246</sup> *See id.*

<sup>247</sup> Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties: Extending the Leiter Rankings to the Top 70* (Sept. 30, 2010) [hereinafter Sisk 2010], <https://dx.doi.org/10.2139/ssrn.1674764> (on file with the Social Science Research Network); Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties in 2012: Applying Leiter Scores to Rank the Top Third*, 9 U. ST. THOMAS L.J. 838 (2012) [hereinafter Sisk 2012]; Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties in 2015: Updating the Leiter Score Ranking for the Top Third*, 12 U. ST. THOMAS L.J. 100 (2015) [hereinafter Sisk 2015]; Gregory C. Sisk et al., *Scholarly Impact of Law School Faculties in 2018: Updating the Leiter Score Ranking for the Top Third*, 12 U. ST. THOMAS L.J. 95 (2018) [hereinafter Sisk 2018].

faculty, the professors list the top ten most-cited authors.<sup>248</sup> Professor Barrett did not make the top ten of her own faculty in 2010, 2012, 2015, or 2018.<sup>249</sup> I'll offer another point of comparison. Stephanos Bibas, a Trump nominee to the Third Circuit Court of Appeals, also served as a law professor between 2001 and 2017.<sup>250</sup> He had also clerked on the Supreme Court.<sup>251</sup> During Bibas's academic tenure, he published two books and more than fifty law review articles in roughly the same period of time.<sup>252</sup> Bibas was also a member of the Federalist Society since he was in law school.<sup>253</sup>

There is one strong conservative marker on her resume, but it warrants an asterisk. Over the course of five summers, then-Professor Barrett lectured at the Blackstone conference, which is organized by the Alliance Defending Freedom (ADF).<sup>254</sup> This gathering brings together hundreds of conservative law students who aspire to work in the field of religious liberty.<sup>255</sup> (I have lectured at Blackstone several times.) Why the asterisk? During her confirmation hearing in 2017, Barrett testified that she "actually wasn't aware" that ADF had run the Blackstone program "until [she] received the honorarium and saw the A.D.F. on the check, or maybe when [she] saw an e-mail and saw the signature line."<sup>256</sup> Barrett added, "I don't know what all of A.D.F.'s policy positions are. And it has never been my practice to investigate all of the policy positions of a group that invites me to speak."<sup>257</sup> Blackstone and ADF are well-known entities in the conservative legal

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<sup>248</sup> Sisk 2010, *supra* note 247, at 4–11; Sisk 2012, *supra* note 247, at 854–58; Sisk 2015, *supra* note 247, at 120–26; Sisk 2018, *supra* note 247, at 116–29.

<sup>249</sup> Sisk 2010, *supra* note 247, at 8; Sisk 2012, *supra* note 247, at 856; Sisk 2015, *supra* note 247, at 122; Sisk 2018, *supra* note 247, at 121.

<sup>250</sup> STAFF OF S. COMM. ON THE JUDICIARY, 115TH CONG., QUESTIONNAIRE FOR JUDICIAL NOMINEES 2 (Stephanos Bibas 2017), <https://perma.cc/P3WU-AZSB> [hereinafter Bibas Questionnaire].

<sup>251</sup> *Id.* at 2.

<sup>252</sup> *Id.* at 10.

<sup>253</sup> See *id.* 8.

<sup>254</sup> David D. Kirkpatrick, *The Next Targets for the Group that Overturned Roe*, NEW YORKER (Oct. 2, 2023), <https://perma.cc/N34H-N294>.

<sup>255</sup> *Blackstone Legal Fellowship*, ALL. DEFENDING FREEDOM, <https://perma.cc/7CGT-KUDJ>.

<sup>256</sup> *Senate Judiciary Hearing on the Nominations of Barrett, Larsen, Dreband, Campbell, and Parker*, 115th Cong. (2017) (statement of Amy Coney Barrett, L. Professor, Notre Dame).

<sup>257</sup> *Id.*

movement. I struggle to understand how Barrett, who taught at the leading religiously affiliated law school in America, was unaware of Blackstone's connection to ADF. But maybe I shouldn't be surprised.

Barrett had very little public advocacy.<sup>258</sup> She authored or joined zero amicus briefs while a professor. She did not write any op-eds. In her fifteen years on the faculty, she listed only thirteen newspaper, radio, or television interviews.<sup>259</sup> Again, for a point of comparison, Professor Bibas had more than thirteen pages of media hits.<sup>260</sup> The closest Barrett came to taking a position on a controversial matter of public concern was a 2006 petition, which stated, "It's time to put an end to the barbaric legacy of *Roe v. Wade*."<sup>261</sup> But Barrett would later tell Senators that her position was moral, and not legal.<sup>262</sup> Barrett said she signed the petition while leaving church.<sup>263</sup> There was a "table set up for people on their way out of Mass to sign a statement . . . validating their commitment to the position of the Catholic Church on life issues."<sup>264</sup> Barrett's jurisprudential slate was not blank, but it was pretty clean. And with that background, Justice Barrett never had to face public ridicule until her confirmation hearing.

In 2023, Justice Barrett observed "that justices and all judges are public figures and public criticism kind of comes with the job."<sup>265</sup> She added, "I've been at it for a couple of years now, and I've acquired a thick skin."<sup>266</sup> Barrett concluded, "I think that's what public figures have to do and that's what all judges have to do."<sup>267</sup> It is good that Justice Barrett is now

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<sup>258</sup> Josh Blackman, *OK, Justice Barrett, I "Read the Opinion"* in Netchoice LLC v. Paxton, VOLOKH CONSPIRACY (June 1, 2022, 12:11 AM), <https://perma.cc/KEE8-L9KJ>.

<sup>259</sup> Amy Coney Barrett, NOTRE DAME, <https://perma.cc/2TF5-QMCK>.

<sup>260</sup> Bibas Questionnaire, *supra* note 250, at 40–54.

<sup>261</sup> Kate Smith, *Four Things We've Learned About How Amy Coney Barrett Might View Abortion Cases*, CBS NEWS (Oct. 16, 2020, 5:36 PM), <https://perma.cc/5P4F-UKRU>.

<sup>262</sup> *Confirmation Hearing on the Nomination of Hon. Amy Coney Barrett to Be an Associate Justice of the Supreme Court of the United States*, 116th Cong. 173 (2020) (statement of Hon. Amy Coney Barrett).

<sup>263</sup> *Id.* at 103.

<sup>264</sup> *Id.* at 173.

<sup>265</sup> Ariane de Vogue, *Justice Amy Coney Barrett: 'I've Acquired a Thick Skin'*, CNN POL. (Aug. 29, 2023, 7:25 AM), <https://perma.cc/8GNA-T74U>.

<sup>266</sup> *Id.*

<sup>267</sup> *Id.*

developing a thick skin. But Presidents should select judges who have already demonstrated their thick skin by walking across hot coals.

By all accounts, Barrett was a devoted and beloved law professor. Her students and colleagues adore her. And in my brief interactions with Barrett, I can see why. But her public-facing record was quite unrevealing. The cleanest distillation of her judicial philosophy came in her not-entirely-positive review of Professor Randy Barnett's book, *Our Republican Constitution*.<sup>268</sup> Reading between the lines, Barrett seemed to favor judicial restraint as a jurisprudence.<sup>269</sup> Why, then, was she added to the Supreme Court shortlist with virtually none of the indicia of the other candidates?

In 2020, when Barrett was nominated to the Supreme Court, she had participated in roughly 620 cases over the span of three years.<sup>270</sup> A few of those cases were high profile. In *Kanter v. Barr*, Judge Barrett wrote a dissent, finding that non-violent felons could not permanently be deprived of their Second Amendment rights.<sup>271</sup> In *Cook County v. Wolf*, Barrett wrote another dissent that would have upheld the Trump administration's "public charge" rule for immigrants who accept public assistance.<sup>272</sup> And in *Grussgott v. Milwaukee Jewish Day School*, Barrett wrote a majority opinion finding that the ministerial exception barred a Hebrew teacher from suing her religious school.<sup>273</sup>

But one case Barrett did not list was *St. Joan Antida High School Inc. v. Milwaukee Public School District*.<sup>274</sup> In this case, a Catholic high school contended that the government's busing policy treated religious schools unequally.<sup>275</sup> Judge Barrett joined the majority opinion, which found that the government may have had a "rational basis" to impose additional

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<sup>268</sup> Amy C. Barrett, *Countering the Majoritarian Difficulty*, 32 CONST. COMMENT. 61 (2017) (reviewing RANDY BARNETT, *OUR REPUBLICAN CONSTITUTION* (2016)).

<sup>269</sup> *Id.*

<sup>270</sup> VALERIE C. BRANNON ET AL., CONG. RSCH. SERV., R46562, JUDGE AMY CONEY BARRETT: HER JURISPRUDENCE AND POTENTIAL IMPACT ON THE SUPREME COURT 52 (2020), <https://perma.cc/NVS4-C8WC>.

<sup>271</sup> *Kanter v. Barr*, 919 F.3d 437, 451 (7th Cir. 2019) (Barrett, J., dissenting).

<sup>272</sup> *Cook County v. Wolf*, 962 F.3d 208, 234 (7th Cir. 2020) (Barrett, J., dissenting).

<sup>273</sup> *Grussgott v. Milwaukee Jewish Day Sch., Inc.*, 882 F.3d 655, 662 (7th Cir. 2018).

<sup>274</sup> 919 F.3d 1003 (7th Cir. 2019).

<sup>275</sup> *Id.* at 1006.

requirements on the Catholic school.<sup>276</sup> The panel did not rule outright for the District.<sup>277</sup> Rather, the court remanded the case to the lower court to determine more facts.<sup>278</sup> Judge Diane Sykes, who was on the original Trump shortlist, dissented.<sup>279</sup> She wrote that “this discriminatory treatment cannot be justified,” even on the current record.<sup>280</sup>

Barrett’s vote in *St. Joan* presaged her position in two pandemic-era cases involving the Harvest Rock Church<sup>281</sup> and South Bay United Pentecostal Church.<sup>282</sup> At the time, California prohibited singing in houses of worship.<sup>283</sup> Justices Thomas, Alito, and Gorsuch concluded that the record favored a ruling for the churches.<sup>284</sup> But Justice Barrett, as well as Justice Kavanaugh, suggested that the singing ban may be unconstitutional, but on the limited record, she would not enjoin the policy.<sup>285</sup> Like in *St. Joan*, Justice Barrett favored hesitancy in the face of alleged religious discrimination. She followed a similar hesitant approach in *Fulton*.<sup>286</sup> What Professor Will Baude describes as “look before you leap”<sup>287</sup> is Barrett’s consistent level of caution—a caution that Justices Thomas and Alito lack. Progressives should be grateful that President Trump picked Barrett, and not someone else on the short list who would have voted closer to Thomas and Alito.

I’ll admit there is something unsettling about Justice Barrett’s glide path to the Supreme Court. She was added to the shortlist before she had taken any action as a judge. Indeed, she was added with a public record that said virtually nothing about her judicial philosophy. Once she was added to the list, Barrett was on something of a permanent audition. Every opinion

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<sup>276</sup> *Id.* at 1014.

<sup>277</sup> *Id.* at 1016.

<sup>278</sup> *Id.* at 1016.

<sup>279</sup> *Id.* (Sykes, J., dissenting).

<sup>280</sup> *Id.* at 1023.

<sup>281</sup> *Harvest Rock Church, Inc. v. Newsom*, 141 S. Ct. 1289, 1289–90 (2021).

<sup>282</sup> *S. Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716, 717 (2021).

<sup>283</sup> *Harvest Rock Church*, 141 S. Ct. at 1289; *S. Bay United Pentecostal Church*, 141 S. Ct. at 716.

<sup>284</sup> *Harvest Rock Church*, 141 S. Ct. at 1289; *S. Bay United Pentecostal Church*, 141 S. Ct. at 716.

<sup>285</sup> *S. Bay United Pentecostal Church*, 141 S. Ct. at 717.

<sup>286</sup> *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021) (Barrett, J., concurring).

<sup>287</sup> Will Baude, *The “Look Before You Leap” Principle*, VOLOKH CONSPIRACY (June 29, 2023, 6:11 PM), <https://perma.cc/4Q2Z-Q7PJ>.

she wrote, or did not write, would be parsed as a SCOTUS short-lister. Every speech she gave to the Federalist Society was like a dress rehearsal for her confirmation hearing. Judge Kavanaugh had to walk this tightrope for the better part of a decade in cases like *Seven-Sky*. In my view, the best measure of a potential judge's philosophy *must* predate the moment he or she becomes an aspiring judge. For Barrett, the time to measure her mettle would have been during her time as a tenured law professor, when she had full autonomy to speak and write on matters of public concern. But she didn't. Ultimately, during Barrett's two-decade career between clerking and the judiciary, she did little to articulate what her judicial philosophy would be.

Perhaps Judge Barrett's limited academic and judicial record convinced the decisionmakers in the Trump White House that Barrett's judicial philosophy was akin to that of Justices Thomas and Alito. Maybe they disregarded *St. Joan*. But Barrett's cautious performance on the bench so far should not be surprising.

## 6. CONCLUSION

No Supreme Court pick is perfect. Indeed, I am not even sure that any two people could agree on a single set of criteria to judge a Justice. I use the crude proxy of measuring the Trump appointees against Justices Thomas and Alito, the standard bearers of the conservative legal movement. Justice Gorsuch votes most consistently with Justices Thomas and Alito but is absent on many emergency docket cases that touch on LGBT rights, consistent with his long-ago vote in *Kastl*.<sup>288</sup> Justice Kavanaugh has proven himself by word and deed to be a disciple of the Gospel of John—Roberts that is. This viewpoint was on display in *Seven-Sky v. Holder*,<sup>289</sup> but he was selected nonetheless. After chanting “No more Robertses,” we got another Roberts. Still, perhaps placing Kavanaugh in contention was essential to nudge Justice Kennedy to retire. But there were other Kennedy clerks that could have sufficed. And others would have faced a far less contentious confirmation hearing. Finally, Justice Barrett had something of a blank slate and could only have been added to the short list based on personal opinions of her. *Trust us, she's solid*, the conversations likely went. In hindsight, her voting record has been better

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<sup>288</sup> See *supra* Section 5.1.

<sup>289</sup> See *supra* Section 5.2.

than that of Justice Kavanaugh, but her cautious streak has kept her distant from Justices Thomas and Alito in high-profile cases. To use baseball analogies, the conservative legal movement could have scored three home runs. However, we didn't even score a run. Justice Gorsuch was a standing double—a solid hit that probably could have been extended to a triple. Justice Kavanaugh was a sacrifice bunt—he advanced the movement, but still scored an out. Justice Barrett was a walk—she never swung but still made it to first.

Why were these three judges picked at these points in time over other nominees? I doubt there is actually any single rationale. Even if I interviewed every person involved in the process—at the White House, in DOJ, and in outside groups—there would not be a coherent explanation. Many people were involved in the process over the course of many years, each with different motivations and perspectives. To be sure, all nominees have various strengths and weaknesses. But when Judges Gorsuch, Kavanaugh, and Barrett were nominated, their records—or lack thereof—were known to all. Those who supported these judges were aware of potential red flags. And they were selected anyway. Going forward, conservatives should be more public about the red flags of potential nominees.

I understand the temptation for conservatives to keep their powder dry. Friendly fire is never pleasant, and it gives the left fodder when conservatives publicly bicker. A unified front is always preferred. Moreover, advocates who are wedded to their preferred candidate will zealously advocate for them. After all, people who are associated with a Supreme Court justice have many benefits to reap. But the flip side is those who advocated for a particular justice will be unlikely to admit their support was wrong—no matter what the Justice does. Finally, would-be critics of nominees may fear the consequences of public opposition—social ostracization, denial of opportunities, and even reprisals. All politics is personal. I get it. But the Supreme Court is too important for conservatives to stay quiet. In hindsight, I should have been more vocal about the Supreme Court nominees during the Trump years. I don't know if my words would have made a difference, but I regret not speaking out more forcefully.

It is easy enough for conservatives to claim victory and say *good enough!* Though I am quite grateful for this new era of originalist jurisprudence, we should never rest on our laurels. Indeed, the failure to identify past errors in the selection process will guarantee that they recur. We should

reorient future selections. Any future short list produced by a Republican candidate for President should start from scratch. We doubt any conservatives would hold Justices Gorsuch, Kavanaugh, or Barrett up as the model—they will still cite Justices Thomas and Alito, the septuagenarian standard-bearers. Rather, the inquiry should focus on the actions taken *before* the candidate became an aspiring judge, and those actions should be consistent with the decisions they rendered while on the bench—both positive and negative. It is not sufficient to study a small sample size while the jurist was auditioning for higher office. Rather, a person’s experience across his or her entire career must be the complete metric. The era of *trust us* and *she’s solid* must come to an end.