

Questions for the Record for Professor Amy Coney Barrett
Submitted by Senator Richard Blumenthal
September 13, 2017

1. In a speech you delivered at Notre Dame in 2013 entitled “*Roe* at 40: The Supreme Court, Abortion, and the Culture Wars that Followed,” you suggested that overturning *Roe v. Wade* would have little impact on Americans: “The day after *Roe* fell, of course, abortion would be neither legal nor illegal throughout the United States. Instead, the states and Congress would be free to ban, protect, or regulate abortion as they saw fit.”

During the hearing, I asked you whether you believed that overturning *Roe* would have a massive disruptive and harmful effect on Americans, but I did not receive a clear answer.

- **Do you agree that overturning *Roe* would have a massive disruptive and harmful effect on Americans?**

The statement that you quote did not aim to describe the impact that overturning *Roe* would have on Americans. It was designed to explain to a primarily undergraduate audience what the legal landscape would look like if *Roe* were overruled. Many non-lawyers assume that overturning *Roe* would settle the question of abortion’s legality, and my statement sought to correct that misimpression. Never having studied the existing protections for abortion outside of the Supreme Court precedents, I am not equipped to offer an opinion on the practical effects of overturning *Roe*, beyond recognizing the reliance interests identified by the Supreme Court in *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992).

- **Do the reliance interests flowing from *Roe* weigh decisively in favor of upholding *Roe*?**

In *Planned Parenthood v. Casey*, the plurality opinion declined to overrule *Roe* because, among other things, “people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail.” 505 U.S. 833, 856 (1992). That decision, like all Supreme Court precedents, would be binding upon me as a Circuit Judge if I am confirmed.

2. In a 2013 *Texas Law Review* article entitled “Precedent and Jurisprudential Disagreement,” you wrote that it is “more legitimate for [a justice] to enforce her best understanding of the Constitution rather than a precedent she thinks clearly in conflict with it.”

- **Under what circumstances would you decide to defer to your “best understanding” of the Constitution rather than to precedent?**

If I am confirmed, there are no circumstances under which I would defer to my best understanding of the Constitution rather than to Supreme Court precedent. As for potential conflicts between my best understanding of the Constitution and Seventh Circuit precedent, I

would apply the law of stare decisis. For an explanation of the language you quote in context, please see my Answer to Question 1e from Senator Whitehouse.

- **Under what circumstances would you find it appropriate for a judge to decline to follow Supreme Court precedent?**

None. A lower court's obligation to follow Supreme Court precedent is absolute. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989).

3. The Seventh Circuit recently held, en banc, in *Hively v. Ivy Tech Community College*, that discrimination on the basis of sexual orientation was actionable under Title VII of the Civil Rights Act. The EEOC under President Obama determined that workplace discrimination based on sexual orientation was covered by Title VII. However, the Department of Justice under Attorney General Sessions recently filed an *amicus* brief before the Second Circuit in *Zarda v. Altitude Express* stating that sexual orientation is not covered by Title VII.

- **Does Title VII's prohibition against sex discrimination encompass discrimination based on sexual orientation?**

Hively v. Ivy Tech Community College is a precedent that I will follow if I am confirmed, consistent with the Seventh Circuit's doctrine of stare decisis.

- **If you are confirmed to the Seventh Circuit, would you be bound by the Court's recent decision on this issue?**

See above.