Judge Amy Coney Barrett – Chevron & Administrative Deference

David McIntosh, President

Club for Growth

Executive Summary

- If Judge Amy Coney Barrett were seated on the Supreme Court, her judicial philosophy would have a positive impact on limiting agency overregulation.
- Current jurisprudence requires that when a judge and an agency butt heads on how to interpret the law, the tie goes to the agency.
- Free rein of administrative deference has led to a dramatic expansion of regulatory authority to the detriment of economic liberty and property rights.
- Recent decisions and the current composition of the Supreme Court hints that administrative deference may soon face substantive limitations.
- Judge Barrett follows a judicial philosophy called "pragmatic originalism" that gives respect to prior precedent to avoid excessive disruption, but which is still willing to overrule erroneous precedent.
- Judge Amy Coney Barrett's jurisprudence signals that she would work to rein-in agency overreach to the benefit of economic growth and individual rights.

Judicial Review and Agency Power

If confirmed to the Supreme Court, Judge Barrett's judicial philosophy is poised to impact judicial review of agency action. Current jurisprudence requires courts to examine agency action and defer to agencies' "reasonable" interpretation of ambiguous statutes. Many object to this standard because judges, as experts in the law, are supposed to be the final arbiters of legal interpretation. Giving agencies extra deference undermines the separation of powers.[1] The power of the executive to implement laws, the legislature to make laws, and the judicial branch to interpret laws shifts completely to unelected bureaucrats when they create, execute, and interpret their own regulations. This concentration of power is dangerous when agencies make expansive politically motivated regulations that strangle economic growth, infringe on private property, and bully individual rights.

Current Justices on the Supreme Court have criticized the legal regime reducing judicial review of agency action and criticize taking the interpretive power away from the courts and giving it to unelected bureaucrats. Chief Justice John Roberts wrote, "[t]he Framers could hardly have envisioned today's 'vast and varied federal bureaucracy' and the authority administrative agencies now hold over our economic, social, and political activities . . . . the danger posed by the growing power of the administrative state cannot be dismissed."[2] In an important 2015 case, *King v. Burwell*, Chief Justice Roberts led the majority on the Court to carve out an exception to administrative deference by refusing to defer to IRS interpretation of the Affordable Care Act.[3] In another 2015 case called *Michigan v. EPA*, the Supreme Court did not defer to the EPA after

[1] Cass R. Sunstein, *Chevron as Law*, 107 Geo. L.J. 1613, 1664 (2019).
[2] *City of Arlington v. FCC*, 569 U.S. 290, 313 (2013) (Roberts, C.J., dissenting).
[3] *King v. Burwell*, 576 U.S. 473, 486 (2015).

finding that the EPA unreasonably deemed cost irrelevant in regulating power plants.[4] Concurring in *Michigan v. EPA*, Justice Thomas argued that the current state of the law, "wrests from Courts the ultimate interpretive authority to 'say what the law is,' . . . and hands it over to the [e]xecutive [agencies]."[5]

Donald Trump's most recent nominees to the Supreme Court also question administrative deference. Justice Neil Gorsuch shares an almost identical view with Justice Thomas, objecting that current jurisprudence transfers the job of "saying what the law is from the judiciary to the executive [agencies]."[6] Likewise, Justice Kavanaugh criticizes administrative deference as "an atextual invention by courts . . . [and] nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch [agencies]."[7] Doubts in the wisdom of this approach to agency power signals that the Supreme Court may shift away from giving executive agencies so much deference.[8]

Judge Barrett's mentor, Justice Antonin Scalia argued that limiting judicial review over agencies was to some degree a necessary evil because it gave Congress clear expectations that agencies would have some interpretative authority to fill in grey areas as they administered the law.[9] However, he also argued, "[i]t is not immediately apparent why a court should ever accept the judgment of an executive agency on a question of law. Indeed . . . '[i]t is emphatically the province and duty of the judicial department to say what the law is.'"[10] He also complained that this authority could not be found in a textualist interpretation of the fundamental statute (the Administrative Procedure Act) that originally granted agencies ever-widening authority.[11] Judge Barrett's record on the 7th Circuit shows that she respects court precedent while also demonstrating a willingness to limit the overly-broad powers of agencies in the arena of regulation.

Judge Barrett & Application of Erroneous Precedent

Judge Barrett demonstrates a strong connection with her mentor Justice Antonin Scalia in her judicial philosophy best described as "pragmatic" originalism. She acknowledges that the Framers of the Constitution likely conceived that those in charge of interpreting and enforcing the Constitution would make errors, and that some of these errors would become deeply entrenched in American judicial precedent.[12] Despite that entrenchment, she writes that "[t]he unbroken practice in the United States is to treat interpretations of the Constitution, in contrast to the Constitution itself, as provisional and subject to change."[13]

Judge Barrett acknowledges that a pragmatic originalist interpretation of the Constitution does not mean an originalist must reject all precedent that conflicts with the original meaning of the

---

[4] *Michigan v. EPA*, 576 U.S. 743, 750-51 (2015).
[5] *Id.* at 762 (Thomas, J., concurring).
[6] *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016).
[7] Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)).
[8] Michal Kagan, *Loud & Soft Anti-Chevron Decisions*, 53 Wake Forest L. Rev. 37, 45 (2018).
[9] *Id.* at 1660.
[10] Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 Duke L.J. 511, 521 (1989).
[11] *Id.* at 1660-61.
[12] *Congressional Originalism*, 19 U. Penn. J. of Const. L. 1, 42 (2017) (with John Copeland Nagle).
[13] *Id.*

Constitution.[14] Rather, pragmatic originalism allows a judge to allow precedent to stand that if struck down would be "extraordinarily disruptive."[15] In sum, Judge Barrett is likely to follow the lead of her mentor Justice Scalia. Her judicial philosophy recognizes that errors of interpretation do happen, while also acknowledging that not all errors should be completely overruled for practical reasons. Consequently, Judge Barrett allows the law and Constitution to lead her decisions, rather than her own policy preferences. Even so, Judge Barrett believes it is the Supreme Court's obligation to strike down laws that conflict with the Constitution.[16]

Judge Barrett and Agency Action

Orchard Hill Building Co. v. United States Army Corps of Engineers, decided with Judge Barrett in the majority on the 7th Circuit Court of Appeals, is particularly interesting with regard to agency action.[17] In *Orchard Hill*, the Army Corps of Engineers declared that a parcel of land owned by a real estate developer had become a wetland and constituted "waters of the United States."[18] The Clean Water Act does not define "waters of the United States," instead leaving that determination to the Army Corps of Engineers and the Environmental Protection Agency (EPA). This delegation essentially allows the Army Corps of Engineers and the EPA to expand their own regulatory jurisdiction by defining "waters of the United States" and then so classifying private property whenever they see fit. The Army Corps of Engineers argued that the real estate developer's property was "wetland[] adjacent to" a navigable river of the United States.[19] In fact, the area in question was eleven miles away from any navigable river.[20] The real estate developer challenged this designation, and the case ended up before Judge Barrett as she sat on the 7th Circuit.

The 7th Circuit majority relied on Supreme Court precedent called *Rapanos v. United States*, which established that the legal standard for when adjacent wetlands constitute waters of the United States. *Rapanos* requires a "significant nexus between the wetlands in question and navigable waters in the traditional sense."[21] Additionally, an internal Army Corps of Engineers guidance further interpreted the *Rapanos* case and set a standard by which the agency was to determine if the wetlands in question had a significant nexus to a navigable water.[22] The Army Corps argued that the court was required to pay deference to this agency guidance.[23] The 7th Circuit agreed that the Army Corps of Engineers' interpretation was due deference by the court.[24] However, the court held that the Army Corps of Engineers determination under its guidance was only due deference if it was based on "reasonable grounds."[25] In this case, the

---

[14] *Originalism and Stare Decisis*, 92 Notre Dame L. Rev. 1921, 1921 (2017).
[15] *Id*.
[16] *Countering the Majoritarian Difficulty*, 31 Const. Comm. 61, 61 (2017).
[17] *Orchard Hill Building Co. v. United States Army Corps of Engineers,* 893 F.3d 1017 (7th Cir. 2018).
[18] *Id.* at 1020.
[19] *Id.* at 1019.
[20] *Id.* at 1021.
[21] *Id.* at 1021 (internal citations omitted).
[22] *Id.* at 1022.
[23] *Id.*
[24] *Id.* at 1026.
[25] *Id.* at 1027.

court concluded that the Army Corps of Engineers had failed to provide "sufficient evidence" that the wetlands in question had a significant nexus with a navigable river.[26]

In *Orchard Hill*, Judge Barrett's pragmatic originalism is on display. Judge Barrett joined an opinion that relied upon Supreme Court precedent. The opinion also respected deference to an agency's interpretation of its own regulations. However, this opinion also suggests that Judge Barrett may be willing to limit precedent that has gone too far. In the *Orchard Hill* case, Judge Barrett hints that judicial review of agency action does not have to operate like a rubber stamp. In cases where the law or Constitution allows for certain agency action, she will defer to the agency while ensuring that the agency action is reasonable on factual or evidentiary grounds. Effectively, the *Orchard Hill* approach affords deference to agencies in their interpretation of law while making it more difficult for agencies to apply their interpretation unless backed up by strong evidence. A Justice Barrett may erode or overrule prior decisions that led to expansive powers of regulatory agencies—steps that would be a boon for economic liberty and property rights.

Conclusion

Judge Amy Coney Barrett's nomination to the U.S. Supreme Court bodes well for economic liberty and property rights. Judge Barrett's pragmatic originalist approach, modeled on the approach of Justice Antonin Scalia, will be positive for economic growth, particularly in the realm of agency action in regulation. Judge Barrett sees the value of precedent but also is willing to revisit cases that are inconsistent with the Constitution. She may be willing to overrule prior erroneous precedent on excessive regulation, and at the very least is poised to limit agency overreach.

[26] *Id.*