

A transcription of the relevant comments from the conversation between Justice Barrett and Bishop Barron¹ (in italics):

“BISHOP BARRON: It’s a very interesting thing, again, the parallels with biblical interpretation because there’s a kind of living hermeneutics when it comes to the Bible. But then the trouble is, then the Bible can mean anything you want it to mean. It’s like we’ve lost an anchor in anything like authorial intention or how it was understood at the time. ‘Oh no, I think the Letter to the Romans means something completely crazy.’ And so I think we’ve recognized that as a danger in Biblical reading. So it seems like you’re recognizing that in [that] living constitutionalism can be so open-ended.

JUSTICE BARRETT: [...] Well, sure, it can be so open-ended that it can mean anything. And I think on the one hand it could lead to the kind of problem that you're talking about where people can't agree on what it means because everyone has their own idea. But again when you come back to the constitution as law, and I guess this would apply more when you're thinking about like the magisterium or you're thinking about the teaching of the church, there has to be something definitive. And if it's not rooted in any kind of guide and you just have these words that are infinitely malleable you can't make those choices.

BISHOP BARRON: Right. Before I get to the to the right-wing critique of originalism, that issue of amending the constitution I find fascinating. Wasn't it who Scalia argued we should maybe make that process a bit easier, that the bar is so high to amend the constitution and we should lower that bar a bit?

JUSTICE BARRETT: [...] He did say that and I think there's really something to it. Think about it, the time the constitution was ratified, we were talking about 13 states. Um, and I think the process of achieving agreement, you know, Article 5 sets a pretty high bar and receiving that kind of supermajority agreement is a lot harder when you're talking about 50 states than when you're talking about 13. And I think the Constitution is pretty hard to amend and that puts a lot of pressure on the courts to do the updating.

BISHOP BARRON: Yeah. On that, on a recent plane trip I watched um Spielberg's Lincoln again which is [...] all about the amending [of] the constitution and the difficulty involved and the opportunities [...] But I was intrigued by Scalia's observation. The right-wing critique of originalism, call it common good constitutionalism right? That would say something like look you're in this high position of great influence. We should seek the common moral good as much as we can and so to kind of to go behind, well, ‘that's just what the law says’. I mean, why not do whatever you can to promote a more moral vision of society? What's wrong with that approach to it?

JUSTICE BARRETT: You know, it's actually interesting, a lot, in the academy, of the proponents of this theory happen to be Catholic. Let's see. I believe in natural law and I certainly believe in the common good. I think this goes back to the who decides question. You know, I think legislators have, you know, the duty to pursue the common good. I mean, within the confines of the constitution and respect for religious freedom, et cetera. But the idea that the court is well suited or that any court in the country is well suited to that task is a different thing entirely. I mean, the constitution distributes authority in a particular way.

The authority that I have is circumscribed. And you know, it's one thing to say if you like the composition of the current court, ‘I really want to trust them to make decisions to pursue the common good.’ But back to that, if

¹ <<https://www.wofdigital.org/bishop-barron-presents/videos/bishop-barron-presents-justice-amy-coney-barrett>>

Also at <https://www.youtube.com/watch?v=Ehl_akpW7BE>

you cut down all the laws ... [A reference to the famous quote attributed to Sir Thomas More in Robert Bolt's 'A Man for All Seasons'] You know, you have to imagine, 'what if I didn't like the composition of the court I was in front of, the court that was making these decisions and they view the common good quite differently than I do.' That's the reason why we have a document like the Constitution because it's a point of consensus and common ground.

And if we start veering away from that and reading into it our own individual ideas of the common good, it's going to go nowhere good fast.

BISHOP BARRON: But as you say, and I think that's an important point again, do it but through the legislature.

JUSTICE BARRETT: Yes.

BISHOP BARRON: It's just a matter of you're trying to keep the thing clear and properly distinguished, right?

JUSTICE BARRETT: Mhm.

Sure, pursue the common good, pursue your sense of the natural law, but do it through the legislative process. Vote for people who agree with you –

JUSTICE BARRETT: Yeah.

BISHOP BARRON: – and get them to change the law or amend the Constitution –

JUSTICE BARRETT: Yeah.

BISHOP BARRON: – but using the judicial branch for that purpose is contraindicated –

JUSTICE BARRETT: Yes.

BISHOP BARRON: – That's what I picked up, you know, rather consistently from your book.

[The conversation then turns to the Dobbs (2022) decision and how Justice Barrett did not decide based on her own views of morality or religion but because of her understanding of the Constitution and stare decisis – the whole exchange is not transcribed here]

JUSTICE BARRETT: [...] But the best defense of Roe – um – the commonly fought defense of Roe was that it was grounded in the word 'liberty' and the Due Process Clause, you know, that we protect life, liberty and property – it can't be taken away without due process of law. Well, that word 'liberty' can't be an open vessel, an empty vessel in which judges can just read into it whatever rights they want because otherwise we lose the democracy in our democratic society. And so the problem, to my mind, with Roe, is that it was a free-floating, free-wheeling decision that read into the Constitution ... the Constitution, um, the reason why it's difficult to amend is that it reflects a supermajority consensus -

BISHOP BARRON: Mhm.

JUSTICE BARRETT: - and the rights that are protected in the Constitution as well as the structural guarantees that are made in that Constitution are not of my making. You know, they are ones that Americans have agreed to, and Roe told Americans what they should agree to rather than what they already agreed to in the Constitution.

BISHOP BARRON: Yeah. Maybe you can't say this, but I'll say it: Casey v. Planned Parenthood in 1992, I've been saying for years is one of the dumbest things that was ever said by the U.S. Supreme Court and the one that I always cite is this famous line, "At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." That's the most extravagantly stupid definition of

liberty that I've ever seen. Um ... for that reason I'm glad it was overturned, you know. What's ... I'll tell you, philosophically what's the matter with that statement. I mean, it's an incoherent statement and it's based upon a complete misunderstanding of what real liberty means. What's wrong with it legally? Like, how would you say, there's the trouble with Casey v. Planned Parenthood?

JUSTICE BARRETT: I've heard you criticize this statement maybe a year or two ago -

BISHOP BARRON: Yeah.

JUSTICE BARRETT: - on the podcast. Um I would say, that from a legal point of view, it gets to the same point that I was just making about what liberty is.

BISHOP BARRON: Yeah. Yeah.

JUSTICE BARRETT: Liberty, and the Dobbs opinion makes this point, liberty might mean a lot of different things to a lot of different people and if you define it up to a very high level of generality like that, well then what rights could I not take outside the legislative process? Because it's important for people to understand and for non-lawyers to understand, the effect of a decision, like for example Roe and Casey, is to say that people cannot, in the democratic process, in state legislatures or the federal legislature, that people can't make decisions for themselves ... um ... through the democratic process about abortion. So, Dobbs itself involved a restriction ... um ... limiting abortion after a particular point in time -

BISHOP BARRON: Yeah.

JUSTICE BARRETT: Right, you couldn't draw the line at 21 weeks or that sort of thing. Judges were deciding how far along it should go. And that's what's wrong legally with that line because it just pulls everything to such a high level of generality, it gives all of the authority to the judges.

BISHOP BARRON: Yeah. And that's the point Cardinal George of Chicago, of happy memory, was a great mentor to me. He was like Scalia in my life. And he used to complain about judges having too much authority in our society and judges deciding these high moral matters. I remember he used to say, when the Obergerfell thing was under consideration, he said, 'I'm not so much for or against it. The Court should not be deliberating on that matter. The nature of marriage is not a matter for a court to decide. It's a matter of the natural law'. So, generally he thought judges had too much authority to determine moral matters in our country.

JUSTICE BARRETT: Well, I think, let's see, if it's a free-floating thing ... So, I do have to be careful not to express views and Dobbs did not touch Obergerfell. But I think what Cardinal George was reacting to is what we've been talking about, the distinction between the approach to the Constitution that Dobbs took versus the approach that Roe took, which is putting decisions about what liberties are protected in the hands of judges rather than the democratic process.

BISHOP BARRON: I think that's right and that's what was bothering him about it. Hey, let's go into sort of my area of interest, which is philosophy of law.

I remember years ago just up the street here at Catholic University when I was 20 years old and I'm studying Aristotle's Politics for the first time and of course Aristotle has this very high view of politics. It's a moral enterprise. It's the way the polis kind of achieves great moral stature. And I remember this all being laid out and 20 years old from Chicago and I said yeah but who picks up the garbage? You know when I think of politics I thought of you know how do you manage [that]? And the answer came back [was], 'well no that's a matter of

the household, for the ancients that would be a matter of the private realm, you know'. So it speaks to the nature of law. I mean, what is law and what's the purpose of law if you were to state that philosophically?

JUSTICE BARRETT: So because my engagement with the law does fall on the more practical side I don't know that my answers will be satisfying because I don't engage as deeply with the philosophy of law as you do. But I would say that, in our society, I mean certainly, law is designed to help move society towards the common good.

And I think Aristotle's ideas are what we all wish politics might be and law might be. I'm not sure, you know, the Supreme Court is right across the street from Congress. Query whether that's what people would feel like observing what we do. But law serves both a coordinating function and I actually do think about the who picks up the trash. How do you know which side of the street to drive on? Um ... how do you know how laws are made, where authority is placed? It serves a coordinating function that enables all the trains to keep running. Um ... our jurisdiction, you know, the limits of our authority, that's defined by the Constitution. Everything we've been talking about and who decides, that's law's coordinating function. But behind that decision about who gets what authority lies a judgment about where decisions are best made in the democratic process or by neutral judges who have life tenure who can do the hard things or make decisions without fear of not being able to support their families because they lose their job. But hopefully the way that process works is it does move us all to a place where the health and safety of the American people are protected and we're moving towards the common good.

BISHOP BARRON: That's a good way to segue too because some people express the classical versus modern view as: in classical philosophy law's purpose is really directive. It's directing us toward the good. Like, for Aristotle he wants us to be happy. That's what he's interested in happiness. How do you become happy? He says well you need virtue to be happy. How do you get virtue? You need habit to get virtue. How do you get habit? The law. The law comes in to habituate you to act in a certain way which leads to virtue which leads to happiness. So it's directive right where for most of modern philosophy it seems to me law is more protective. So I have these basic rights and they're threatened in different ways and the law should exist to protect me from those threats. Help me with that and your view, the directive purpose of a law. Is the law there to make us good?

JUSTICE BARRETT [quite firmly]: I do not think that the civil law is there to make us good. I do think of it as more protective. I would say, you know, the moral law or the law of the Church might serve that directive function and hopefully does serve that directive. I would not I would not understand the civil law that way.

BISHOP BARRON: How about, so Aquinas [...], well he'll adapt Aristotle, that the positive law, so even things like you know drive 55 miles an hour, how a particular positive law is grounded in the natural law which in turn is grounded in the eternal law of God and so even something as simple as that, it's a restriction on how fast you can drive your car. ultimately has a moral purpose – [...] it's grounded in the natural law to protect life and so on and then you think of Martin Luther King, right, who explicitly references that in the letter from the Birmingham City Jail where he says, what makes a law unjust is it's not grounded in the natural law and therefore it's repugnant to God. I've always found that fascinating how King, [a] deeply American figure obviously, speaking on the steps of the Lincoln Memorial and invoking our great, you know, civil tradition, but yet has that very moral vision of the law that is explicitly coming out of Aquinas. Just curious how you see some of that fitting together.

JUSTICE BARRETT: Let's see. I do think that. I see that as a different thing than whether the law inculcates virtue or whether it's directive just because, you know, the driving 55 miles an hour, I can see that as a way to

instantiate the natural law. But by the same token, I'm not sure that it necessarily cultivates virtue in that same way. Or certainly even Aquinas would say, there's much that's not covered by the positive law. you know, I teach my kids not to gossip or not to talk back, but they're not violating any laws. There's no law against that. No, it is interesting that King said that and, you know, I think Lincoln would have agreed with that. I think there are distinct questions about how people in different roles respond to laws that are unjust or not."