

BY AMBERLY PAGE

On September 5, 2019, Dean D. Gordon Smith welcomed guests to the annual BYU Law Founders Day dinner, which he described as a “signature event for our community,” celebrating “the vision and courage and faith of those who founded the BYU Law School.”

After Dean Smith’s remarks, Tommy Christensen, ’82, president of the BYU Law Alumni Association, presented BYU professor of law Aaron Nielson with the 2019 Alumni Professor of the Year award. Joshua Prince, ’18, spoke of Professor Nielson’s willingness to help students inside and outside of the classroom. Prince said, “I never felt like I was a burden, and I never felt like I was taking time away from things he would rather be doing. That is something that makes Professor Nielson particularly special.” Nielson has continued to support and mentor Prince after graduation. Prince said, “Multiple times over the last several years, I’ve received emails from him, asking how I’m doing, asking how my career is going, and asking

about steps that I’m going to be taking in the future.”

In accepting the award, Professor Nielson shared the story of his clerkship interview with Justice Samuel A. Alito Jr. He said, “I got one legal question, which I got wrong. . . . The entire interview was Justice Alito telling me stories about how important Rex Lee had been to him and how all of the BYU people he had met through Rex Lee over the years had influenced his life. . . . I want to make sure that that legacy continues forward for our students.”

The featured speaker for the event was Judge Amy Coney Barrett, who sits on the United States Court of Appeals for the Seventh Circuit. Judge Barrett earned her JD, summa cum laude, from Notre Dame, where she was a Kiley Fellow and earned the Hoynes Prize, which is Notre Dame Law School’s highest honor. Judge Barrett



also served as executive editor of the *Notre Dame Law Review*. Following graduation she clerked for Judge Laurence H. Silberman of the United States Court of Appeals for the DC Circuit and for Associate Justice Antonin Scalia of the United States Supreme Court. Judge Barrett also worked in private practice

as an associate at Miller, Cassidy, Larroca & Lewin in Washington, DC, and was a professor of law at Notre Dame Law School, where she continues to teach.

Lisa Grow Sun, BYU professor of law, clerked for Associate Justice Anthony M. Kennedy of the United States Supreme Court at the same time that Judge Barrett clerked for Justice Scalia. She introduced Judge Barrett at the event and described her as brilliant, intellectually modest, principled, and kind. Sun went on to say, “She has been a great example to me . . . as a consummate legal scholar, a consummate teacher, and an amazing person of faith.” Professor Sun noted that when Judge Barrett was nominated to the Seventh Circuit Court of Appeals, “every clerk who was in the building the same year” signed a letter in support of Judge Barrett’s confirmation, citing her intellectual rigor,



The Constitution Is Our Story

The BYU Law Founders Day Celebration



fairness, and open-mindedness. Professor Sun considered that unanimous show of support from individuals with varying political views and affiliations as powerful testimony of Judge Barrett's legal acumen, brilliance, and character.

Judge Barrett's address, entitled "The Constitution Is Our Story," focused on the role of the Constitution in the nation's history, identity, and story. Judge Barrett said that the histories of the United States and the Constitution are necessarily intertwined. Big events, such as the Revolutionary War and the founding of the United States, the Louisiana Purchase, the Civil War, and the civil rights movement, are not just "bold-faced heading[s] in our history textbooks; [they are] also black letter section[s] in our constitutional law casebooks."

Judge Barrett identified several constitutional lessons to be

learned from the events leading up to, during, and after the Civil War, including the successful ratification of the Thirteenth, Fourteenth, and Fifteenth Amendments. She went on to note that we can learn lessons from constitutional "failures" as well. She specifically mentioned the ratification and repeal of the Eighteenth Amendment, regarding prohibition. The story of the Eighteenth Amendment, she said, highlights the tension in constitutional law between national and local rules. "Some things must be utterly non-negotiable as a constitutional matter. Slavery and segregation are obvious candidates. But that's not true of every issue, and the trick in our constitution-building over the last two-plus centuries has been to figure out which issues should have a uniform, national rule and which should be left to local disagreement." With

the issue of prohibition, Judge Barrett said there were too many differences, and the country was not willing to have it "hard-wired in as part of our fundamental, national commitments."

Judge Barrett acknowledged that the central place the Constitution is given in our national story and identity makes disagreement—even intense disagreement—likely, and "when we have such strongly held views on both sides of an issue, it can be tempting to try to resolve every question by using the Constitution." However, Judge Barrett cautioned, "we might not want a national rule for every issue. . . . Federalism . . . permits us to strike a balance between when we have national, nonnegotiable rules and when we can let differences flourish. It promotes experimentation and development."

Judge Barrett encouraged a thoughtful approach to policy questions and more careful consideration of whether a policy rule should be constitutional and, therefore, nonnegotiable or whether it's something that can be left to local determination and disagreement. She concluded by saying: "Our constitutional experiment is still a work in progress, . . . and because it is a work in progress, there will be strong disagreement about what the next chapter should look like. We shouldn't fear that disagreement. It is a feature, not a bug, of our system. And if we understand the ways . . . that differentiate our system from others and how in this large and diverse nation we can all continue to live under one roof, so to speak, we can appreciate how these distinctions inform not only our law but also our politics and our society."