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# An Expert Explains: What is at stake in the US presidential election on November 3?

Just over three weeks from today, the United States will vote in one of the most consequential and bitterly contested presidential elections in its recent history. What is at stake for Americans as they choose between giving Donald Trump four more years in the White House and replacing him with the Democratic candidate Joe Biden? This is Part 1 of a three-part weekly series explaining the US Presidential Election, 2020, and why it matters to India.

Written by Amitabh Mattoo |

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President Donald Trump and Democratic presidential candidate former Vice President Joe Biden exchange points during their first presidential debate Tuesday, Sept. 29, 2020, at Case Western University and Cleveland Clinic, in Cleveland, Ohio. (AP Photo/Morry Gash, Pool)

**Given the manner in which President Donald Trump and former Vice President Joe Biden have carried out the campaign, including their sparring during the recent televised debate, is this the most divisive election in current history of the United States?**

In terms of public and even academic memory, this election is as divisive and significant as the 1968 Presidential Election. The 1968 election destroyed the “New Deal” coalition, which had enabled the Democrats to become the natural party of power. The 1968 election was thus a turning point, which made the Republicans the new natural party of power until the early 1990s (with the exception of Jimmy Carter’s one-term Presidency). The 2020 elections may now confirm the domination of the Republican Party, with a Trump re-election; or generate a New Deal 2.0 through the “rainbow” that the Democrats have coalesced. In many ways, this election is a battle for both America’s body and soul.

The similarities between 1968 and 2020 do not end there. America was faced with choices as stark in 1968 as it is faced with today. Not surprisingly, the 1968 presidential election was probably the most bitter in public memory until the present one. It decisively broke the consensus around the series of welfare state measures that were put in place after the Great Depression in the 1930s; but it was made also with as much turbulence as we are facing today.

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Consider the following: in 1968, a sitting President, Lyndon B Johnson, pulled out of the nomination after narrowly winning New Hampshire (facing a serious challenge from Eugene McCarthy), an early barometer of the national mood; a charismatic Democratic hopeful, Senator Robert Kennedy, was assassinated; the greatest

American civil rights leader, Martin Luther King Jr, was killed in his hotel balcony in Memphis, Tennessee.

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Source: Survey of US adults conducted July 27 – August 2, 2020

It was in 1968 that America “lost” the Vietnam War at home. The Americans were able to militarily prevail over the Tet Offensive, but the government lost domestic public support (with the growing number of casualties within the US armed forces), as opposition to the war and to compulsory conscription (“the draft”) reached new heights. Anti-war student protests and acts of violence were witnessed on campuses both on the East and West Coast. One of the centres of the protests was Berkeley, where [Kamala Harris](#)’s mother, Shyamala Gopalan, became active in the resistance.

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Today too, the electorate is deeply divided, along partisan and racial lines, as the US is faced with severe economic disparity between the rich and the poor. On almost every issue that matters, there is a Manichean divide; between Trump supporters and the rainbow coalition that stands by Biden. There is no military war comparable to Vietnam, but the United States is fighting the Covid **pandemic** (with over 200,000 lives lost already, compared to just about 50,000 in Vietnam), deep economic precarity, unprecedented levels of racial tension, fundamental differences over health care, concerns over packing the courts (including the Supreme Court) and violence on the streets of many cities including Minneapolis (where George Floyd died, and whose “killing” inspired the Black Lives Matter movement), Atlanta, Dallas, Minneapolis, Cleveland, Raleigh, Los Angeles and New York.



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### Why is there such a great divide between the Republicans and the Democrats, and why has the Republican Party taken an apparent turn towards the extreme right?

The root of the problem lies in the inability of right wing mainstream parties, like the Republican Party, to appeal to sections outside the elite on their agenda of economic conservatism. In order to become electable, they have to widen their constituency by adding a “toxic” emotional content to their political ideology.

As Franklin Foer wrote in The New York Times, in his review of Jacob S. Hacker and Paul Pierson’s brilliant book *Let them eat Tweets: How the Right Rules in an Age of Extreme Inequality*: “From their 19th-century inception, political parties of the right have faced an electoral disadvantage since, for the most part, they emerged as vessels for the wealthy, a definitionally small coterie. Their growth seemed further constrained by the fact that they could never match their opponents’ enticing promises of government largesse because their wealthy backers steadfastly refused to pay higher taxes...”

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President Donald Trump and former Vice President Joe Biden during the first presidential debate at Case Western University and Cleveland Clinic, in Cleveland, Ohio. (Photo: AP)

Hacker and Pierson believe that there has been a two-way shift in the Republican Party. On the one hand “is the rise of the plutocracy — a government of, by, and for the rich... increasingly divisive, distant from the centre, and disdainful of democracy”. And on the other is dangerous populism. “From the White House on down, the Republicans now make extreme appeals once associated only with fringe right-wing parties in other rich nations, stoking the fires of white identity and working class outrage.”

Not surprisingly, Trump refuses to denounce white supremacy or condemn xenophobia; these may be part of his individual idiosyncrasies, but capsule into a wider political strategy. The choice before the electorate is for a vision of America for the 21st century, and the contrasts couldn't be clearer.

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## Why has the Trump nomination of Amy Coney Barrett to the Supreme Court become such a major issue in the election?

Other than the ethics of trying to appoint, literally weeks before the election, a judge for life to the highest court of the land—when the Senate Republican majority had blocked confirmation hearings for Judge Merrick Garland, nominated by President Obama as early as in March of 2016 — and allegations of a retaliatory “packing of the court” by a possible Democratic majority in Congress, there are a number of critical cases which may be heard by the Supreme Court in the next few months, including possible cases involving the Presidential election itself. But two cases need to be flagged and fleshed out: Obamacare, and Roe versus Wade.

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FILE – In this Sept. 29, 2020, file photo President Donald Trump, left, and Democratic presidential candidate former Vice President Joe Biden, right, participate in the first presidential debate with moderator Chris Wallace of Fox News, center, Case Western University and Cleveland Clinic, in Cleveland, Ohio (AP Photo/Patrick Semansky, File)

## Obamacare

In 2012, the US Supreme Court decision established the constitutionality of the Patient Protection and Affordable Care Act 2010 (“the Act”, popularly referred to as “Obamacare”). The Act established an “individual mandate” for Americans to maintain “minimum essential” health insurance coverage.

Under the Act, those individuals who did not comply with the mandate from 2014 onwards, would be required to make a “[s]hared responsibility payment” to the Federal Government, which was referred to as a “penalty”. In the 2012 decision of the Supreme Court, the majority held that the penalty was justified on the basis of Congress’ power to “lay and collect taxes”. The majority’s reasoning was that the described “penalty” imposed in the individual mandate, in fact resembled a tax.

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With the election of Trump in 2016, the individual mandate was amended so that the payment of the penalty was no longer required and could not be enforced. This has undermined the validity of the individual mandate, the constitutionality of which had been upheld on the basis of the tax it was found to impose. This has also raised doubts about the constitutionality of the Act as a whole, with the Supreme Court expected to hear oral arguments on the matter on November 10, 2020, shortly after the Presidential elections. If Judge Barrett is confirmed to the Supreme Court before that date, it may mean that the Act is held to be unconstitutional by the majority.

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FILE – In this June 20, 2020, file photo a supporter waves a flag prior to a campaign rally for President Trump at the BOK Center in Tulsa, Okla. (AP Photo/Charlie Riedel, File)

**Roe v. Wade**

The 1973 landmark Supreme Court decision in Roe v. Wade is rooted deep in the American psyche. The case concerned the constitutionality of a Texas statute, which made it a crime to obtain an abortion, except where abortion was necessary to save the mother's life, but is embedded into larger issues related to choices and women's rights. The Court, by a 7:2 majority, held that the constitutional "right of personal liberty" includes the mother's right to take a decision about abortion.

The right was not absolute, and was to be balanced against the interests of states in regulation. The Court held with respect to the Texas statute, which criminalised all abortions (other than those required to save the mother's life), without taking account the stage of pregnancy or any interests, that it violated the Due Process Clause of the Fourteenth Amendment of the US Constitution. This decision thus established constitutional protection for women's right to take decisions for their own health, and paved the way for greater political, social and economic involvement of women in public life.

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As highlighted by Professor Erwin Chemerinsky of Berkeley Law School (in a recent UC Berkeley lecture, 'Berkeley Conversations: Justice Ruth Bader Ginsburg, her legacy, and what may follow'), if Judge Barrett were confirmed to the Supreme Court, this would mean the Court would likely be run by Conservatives for years to come. Until the death of Justice Ginsburg, there were four liberal justices and four conservative justices on the Supreme Court in recent years, with Chief Justice John Roberts as a moderately conservative justice who agreed with the liberal bloc of justices in certain decisions.

As Chemerinsky emphasised, if Judge Barrett is confirmed, Chief Justice Roberts is likely to express agreement with the conservative bloc, and the Court may be willing to overrule *Roe v. Wade*. There have been several hints of Barrett's openness to overrule Roe, including her 2013 article for Texas Law Review, where she observed that certain "super precedents" could not be overruled; *Roe v. Wade* was notably absent from her list of such landmark cases ("Precedent and Jurisprudential Disagreement", Amy Coney Barrett, 91 TXLR 1711, Texas Law Review).

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### **The Expert**

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*Justice Amy Coney Barrett, Donald Trump's nominee to be a justice of the US Supreme Court, was a Professor of Law at Notre Dame; and one of the early and leading contenders for the Democratic nomination, Pete Buttigieg, was Mayor of South Bend.*

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**(Research Assistance: Pooja Arora & Ishita Mattoo)**

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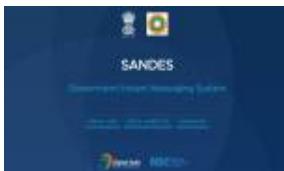
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