

2-8-2017

Abortion Rights: “ash heap of history” or Surviving the Smoke?

Alicyn B. Whitley

Golden Gate University School of Law

Follow this and additional works at: http://digitalcommons.law.ggu.edu/ggu_law_review_blog



Part of the [Constitutional Law Commons](#)

Recommended Citation

Whitley, Alicyn B., "Abortion Rights: “ash heap of history” or Surviving the Smoke?" (2017). *GGU Law Review Blog*. 48.
http://digitalcommons.law.ggu.edu/ggu_law_review_blog/48

This Blog Post is brought to you for free and open access by the Student Scholarship at GGU Law Digital Commons. It has been accepted for inclusion in GGU Law Review Blog by an authorized administrator of GGU Law Digital Commons. For more information, please contact jfischer@ggu.edu.



Abortion Rights: “ash heap of history” or Surviving the Smoke?

PUBLISHED ON *February 8, 2017* by *Alicyn B. Whitley*

One day after Donald Trump officially became the 45th President of the United States, millions of people across the world marched in solidarity (<http://heavy.com/news/2017/01/how-many-attended-the-womens-march-on-washington-number-people-in-dc-crowd-size/%20>) with the 500,000 who protested (<https://www.nytimes.com/interactive/2017/01/22/us/politics/womens-march-trump-crowd-estimates.html>) in the nation’s capital. The Women’s March on Washington (<https://www.womensmarch.com/>), brought those of different genders, ethnicities, religions, and circumstance to send, what Planned Parenthood Federation of America President, Cecile Richards (<https://www.theguardian.com/us-news/2016/dec/27/womens-march-on-washington-dc-guide>), called “a strong message to the incoming administration that millions of people across this country are prepared to fight attacks on reproductive healthcare.”

“the ash heap of history.”

While the Inauguration has had the effect of stoking the fire for a resistance, one of Donald Trump's first acts as President was aimed at crippling the very right the Women's March on Washington aimed to protect. In an Executive Order (<http://www.huffingtonpost.com/entry/donald-trump-abortion-men-us-5886369be4b0e3a7356a7910>), the 45th President moved to revive a federal ban (<http://www.nbcnews.com/us-news/trump-reinstates-reagan-era-anti-abortion-policy-n710081%20>) eliminating U.S. funding for international health



organizations who counsel women on reproductive health, including abortion. With Republicans now controlling the Executive and Legislative Branches of the United States Government, access to legal abortion faces the threat of being placed on, according to Vice President Mike Pence (<http://www.reuters.com/video/2016/07/28/pence-prayer-and-a-pledge-to-end-roe-v-w?videoId=369417543>), "the ash heap of history."

On January 31, 2017, President Trump announced 10th Circuit Court of Appeals Judge, Neil Gorsuch (<http://www.npr.org/2017/02/05/513532446/heres-what-we-know-about-neil-gorsuch>), as his Supreme Court nominee. Following the death of Supreme Court Justice, Antonin Scalia (<https://www.supremecourt.gov/about/biographyScalia.aspx>), on February 13, 2016, the highest court has not been complete. Senate Republicans have since refused to hold a hearing for President Obama's nominee. This nominee appointment gave Trump an enormous role in shaping the composition of the Supreme Court. Judge Gorsuch was a traditional pick many Republicans support, however, the main question is whether Gorsuch's stance on reproductive health care will bring a negative spark, marking the promised destruction of modern day abortion rights.

The Appointments Clause of Article II (<https://www.law.cornell.edu/constitution/articleii>) vests the power to appoint Supreme Court Justices in the Executive Branch and the President. Article II also subjects the President's nominee to a confirmation by the United States Senate. Following the Senate's refusal to hold a hearing for President Obama's nominee, House Speaker, Paul Ryan, (<http://thehill.com/blogs/blog-briefing-room/news/273230-mcconnell-no-hearing-for-garland%20>) said, "Under our Constitution, the president has every right to make this nomination, and the Senate has every right not to confirm a nominee."

The Supreme Court Justices act as legal protectors of the United States Constitution. In the landmark 1803 case of Marbury v. Madison (<https://supreme.justia.com/cases/federal/us/5/137/case.html>), the Court declared it "emphatically the province and duty of the judicial department to say what the law is." The Constitution (<http://judiciallearningcenter.org/article-3-and-the-courts/>) allows justices to "hold their Offices during good Behaviour..." which is interpreted (<http://judiciallearningcenter.org/article-3->

and-the-courts/%20) to mean until death, retirement or impeachment for bad “Behaviour.” Although the two other branches of government limit the power of the Supreme Court, a potentially unlimited term gives a Justice power in shaping the laws and future of America.

One social issue the Supreme Court has protected is a woman’s right to a legal abortion. In 1973, the Court expressly declared, in *Roe v. Wade* (<https://www.law.cornell.edu/supremecourt/text/410/113%20>), access to legal abortion is safeguarded through the due process clause of the Fourteenth Amendment (<https://www.law.cornell.edu/constitution/amendmentxiv>), giving emphasis to the concept of “substantive due process.” (https://nationalparalegal.edu/conLawCrimProc_Public/DueProcess/SubstantiveFundamentalRights.asp) Both the Fifth (<https://www.law.cornell.edu/wex/fifth>) and Fourteenth Amendments to the Constitution of the United States emphasize no person shall be deprived of “life, liberty, and property, without due process of law.” This concept, analyzed in *Roe*, examines the question of whether the government’s deprivation of a woman’s “liberty” was justified by a necessary purpose. In a 7-2 decision, the Court found a woman’s right to choose was shielded as a fundamental right under the Fourteenth Amendment through this idea of “liberty.” This gave women autonomy over the pregnancy during the first trimester, preventing any state interference (<https://prochoice.org/education-and-advocacy/about-abortion/history-of-abortion/>) until the second and third trimesters.

The Court’s standard to defend a woman’s right to an abortion, has been further restricted in recent years. *Planned Parenthood v. Casey* (<https://supreme.justia.com/cases/federal/us/505/833/case.html>), in 1992, established a State’s ability to make laws restricting pre-viability abortions. The new test allowed restrictions to be placed on first trimester abortions, as long as the restrictions do not place an “undue burden” (<http://www.newyorker.com/news/news-desk/the-supreme-courts-just-application-of-the-undue-burden-standard-for-abortion>) on women seeking the abortion. The Court’s “undue burden test” generated doubt on whether a woman’s right to an abortion was a fundamental right, which should be held to the highest level of scrutiny (<http://www.scotusblog.com/2016/01/symposium-abortion-is-still-a-fundamental-right/>). These questions were answered on June 27, 2016 with the Supreme Court’s opinion in *Whole Woman’s Health v. Hellerstedt* (<https://www.law.cornell.edu/supremecourt/text/15-274>). The 5-3 majority opinion upheld the “undue burden” standard and affirmed abortion is a fundamental right.

The possibility of further restrictions of abortion rights smolder on the horizon, but currently remain at bay. After *Whole Woman’s Health*, a Trump appointed nominee will likely swing the Court toward a 5-4 majority in favor of upholding current abortion law. Justices Breyer, Kennedy, Ginsburg, Sotomayor, and Kagan voted to reaffirm *Casey’s* “undue burden” standard safeguarding a woman’s fundamental right to an abortion. Thomas, Alito, and Roberts were the three Justices to dissent to the opinion. If all the current justices were to remain on the bench until after the next president is elected, the potential threat to abortion rights should remain dormant even if Justice Gorsuch were to side with the dissent.

Specifically, the confirmation of Trump’s nominee creates a right leaning court (<http://www.nytimes.com/2016/11/10/us/politics/trump-supreme-court.html>) with moderate conservative Justice, Anthony Kennedy, remaining the swing vote on the issue of abortion. While Kennedy indicated an intention to protect the “undue burden test” by siding with the majority in *Whole Woman’s Health*, Kennedy’s opinion in a 2007 abortion case suggests personal conflict on the issue. In *Gonzales v. Carhart* (<https://www.law.cornell.edu/supct/html/05-380.ZS.html>), the Court upheld a congressional ban on “partial-birth abortion.” Kennedy’s opinion suggests he was bothered by the lack of dignity in this procedure. In upholding the ban, *Carhart* affirmed States have some responsibility toward unborn children and in these rare instances the rights of the unborn overshadow the life of the mother. Kennedy also referenced his belief women may regret their choice

<http://time.com/4243675/heres-what-justice-kennedy-thinks-about-abortion/>) stating, “[w]hile we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained.”



“Trump could establish a relatively young 7-2 conservative court.”

Justice Gorsuch is the first Trump nominee appointed, but with three of the Court’s senior members continuing to age, there remains uncertainty whether he will be his last. If Justice Ginsburg (83), Justice Breyer (78), and Justice Kennedy (80) decide to step down or their health were to fail, Trump could establish a relatively young 7-2 conservative court (http://www.nytimes.com/2016/11/10/us/politics/trump-supreme-court.html?_r=1%20). In this scenario, the safety net protecting abortion rights is likely to become engulfed in flames. Especially after Trump publicly pledged (<http://www.cnbc.com/2016/10/19/trump-ill-appoint-supreme-court-justices-to-overturn-roe-v-wade-abortion-case.html>) to appoint justices who would overturn *Roe v. Wade* and stated “some form of punishment” (<http://www.msnbc.com/kate-snow/watch/trump-some-form-of-punishment-for-abortion-655208515561>) is necessary for women who have an abortion.

Donald Trump’s appointment of Justice Gorsuch, could also mean a shift in majority regarding reproductive rights. Justice Gorsuch has an impressive legal resume (<http://www.npr.org/2017/02/05/513532446/heres-what-we-know-about-neil-gorsuch>), clerking for two Supreme Court justices, White and Kennedy. A self-described Originalist, Gorsuch is known in the legal profession for his textual analysis in his opinions. Gorsuch told law students at Case Western Reserve University School of Law (<http://www.cnn.com/2017/01/25/politics/neil-gorsuch-supreme-court/>), judges should “apply the law as it is, focusing backward, not forward, and looking to text, structure, and

history to decide what a reasonable reader at the time of the events in question would have understood the law to be — not to decide cases based on their own moral convictions or the policy consequences they believe might serve society best.” In the controversial *Burwell v. Hobby Lobby* case in 2013, Gorsuch penned a concurring opinion (<https://www.ca10.uscourts.gov/opinions/12/12-6294.pdf>) stating a mandate for employers (<http://abcnews.go.com/Politics/judge-neil-gorsuch-sctus-nominee/story?id=45008516>) to provide contraception coverage under the Affordable Care Act was a violation of the rights to religious freedom of Christian employers and religious organizations. Gorsuch has not been required to give an opinion on *Roe v. Wade*, therefore his stance on abortion is largely unknown.

“Our constitution does not begin with ‘I, the President.’ It begins with, ‘We, the People.’”

Feminist leader, Gloria Steinem, pointed out, (<https://www.instagram.com/p/BOh4FNBDwpB/>) “Our constitution does not begin with ‘I, the President.’ It begins with, ‘We, the People.’” Year after year, it seems that “we, the people” favor a growing trend toward “pro-choice” abortion rights. For example, in a 2016 Pew Research Center (<http://www.pewforum.org/2016/04/08/public-opinion-on-abortion-2/>) poll, 56% of people stated abortion should be legal in all or most cases, while only 41% said it should be illegal. This majority increased from a 2015 Gallup poll (<http://www.gallup.com/poll/183434/americans-choose-pro-choice-first-time-seven-years.aspx>) with only 50% identifying as “pro-choice” and 44% identifying as “pro-life.” As our country moves forward with a new conservative President and Legislature, the issue to keep an eye on is the threat to a woman’s fundamental right to choose. Only time will tell how imminent this threat really is.



Image by: Lorie Shaull

CATEGORIES GGU LAW REVIEW • TAGS ABORTION, ABORTIONRIGHTS, CONSTITUTION, CONSTITUTIONAL LAW, DONALD TRUMP, GORSUCH, INAUGURATION, JUDICIAL, MIKEPENCE, PLANNEDPARENTHOOD, PROCHOICE, PROLIFE, ROE V. WADE, SUPREME COURT, UNITEDSTATES, WOMENSMARCH

