March for Life

January witnessed two large marches in the District of Columbia. One was the Women's March on Washington on January 21. Although it was supposed to be an inclusive event for all women, pro-life women were barred from involvement.

The second march came a few days later, on January 27. It was the annual March for Life, protesting the Supreme Court's creation in 1973 of an unrestricted right to abortion in *Roe v. Wade* and *Doe v. Bolton*.

This year's March for Life differed from others in a major respect. For the first time ever, the vice president of the United States addressed the marchers. Introducing him, his wife, Karen, reminded the crowd that "this is not our [family's] first March!" The vice president's speech reflected his long-time pro-life commitment: "Life is winning in America. … I have long believed that a society can be judged by how we care for our most vulnerable—the aged, the infirm, the disabled, and the unborn. … I urge you to press on. … We will not rest until we restore a culture of life for ourselves and our posterity."[1]

Vice President Pence was preceded at the podium by presidential advisor Kellyanne Conway. She asked the crowd what it means to be pro-life: "It means to stand up, stand tall, and stand together on behalf of babies in the womb. It is no coincidence that the first right cited in the Declaration of Independence is the right to life. … It is God-given. … So, to the March for Life 2017, allow me to make it very clear: We [the Trump administration] hear you. We see you. We respect you."[2]

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1. Mike Pence, "Remarks at the March for Life," January 27, 2017, Federal News Service transcript, C-SPAN, https://www.c-span.org/.

2. Kellyanne Conway, "Address at the Annual U.S. March for Life Rally," transcript from audio, American Rhetoric, http://www.americanrhetoric.com/.

Pence and Conway were speakers at the program preceding the March. Another memorable speaker was Mia Love, the first black female Republican elected to Congress and the child of Haitian immigrants. After the talks—wildly cheered and appreciated by the large crowd—the March itself commenced, finishing at the steps of the Supreme Court.

President Trump tweeted, "The March for Life is so important. To all of you marching—you have my full support!"

The 2016 Elections

The elections in the fall of 2016 were of immense importance to the pro-life cause. First, at least nominally pro-life (Republican) majorities were elected in both houses of Congress. Second, Pence's and Conway's boss, Donald Trump, who ran at least in part as a pro-life candidate, was elected President. That means that pro-life laws can be passed in Congress and signed into force and effect by the President.

We shall see what legislative pro-life initiatives eventually become law, but priorities announced by congressional leaders include defunding Planned Parenthood and enacting the Pain-Capable Unborn Child Protection Act (H.R. 36), which bans abortion after twenty weeks (with a few exceptions).

Regarding Planned Parenthood, Congress and the President acted together to revoke a regulation put in place by President Obama in the last few days of his presidency. Obama's rule prohibited a state from redirecting federal Title X family-planning funds away from abortion providers to other providers, something many states wanted to do. Under the Congressional Review Act, Congress, by a simple majority in each house, may revoke a regulation imposed during the last six months of the previous administration. Although it took a tie-breaking vote by Pence in the Senate, Congress voted to revoke Obama's rule, and Trump signed the new legislation in mid-April, meaning states may now redirect family-planning funds away from abortion providers such as Planned Parenthood.[3]

Regulations not subject to the Congressional Review Act can be changed under the Administrative Procedures Act, but such changes require a fairly lengthy "notice-and-comment" rule-making process and thus are more difficult and require more time. This is apparently the case with the HHS contraception mandate, which was adopted by Health and Human Services in 2012 pursuant to notice-and-comment rule-making and which threatens the very existence of Catholic and other organizations that refuse to provide insurance coverage for contraceptives and abortifacients.

On the other hand, anti-life executive orders can be reversed by the President acting alone. Trump did so within days of his inauguration. On January 23, he reinstated the Mexico City Policy, which bars federal funds from going to organizations

3. Colin Dwyer, "Trump Signs Law Giving States Option to Deny Funding for Planned Parenthood," *NPR*, April 13, 2017, http://www.npr.org/.

that promote or provide abortions overseas.[4] (The policy, which was first instituted by President Ronald Reagan, had been rescinded in 2009 by President Barack Obama.)

Another significant consequence of the elections is that many executive posts will be filled by the President, some requiring Senate approval. Although a significant number of important posts remain unfilled, noted pro-life figures are in place. For instance, former congressman Dr. Tom Price now heads HHS,[5] and former senator Jeff Sessions is now attorney general and leads the Justice Department. Price will oversee the overhaul of Obamacare and, inter alia, the elimination of its anti-life aspects. Sessions is a strong opponent of legalized abortion: "I firmly believe *Roe v. Wade* and its descendants represent one of the worst, colossally erroneous Supreme Court decisions of all time."[6] Appointees like Price and Sessions will play a major role in shaping how the Trump administration both removes anti-life measures and takes positive steps to build a culture of life.

Confirmation of Neal Gorsuch

Probably the most important pro-life appointment so far is that of Neal Gorsuch to the US Supreme Court.

Gorsuch was nominated a few days after the March for Life to replace Justice Antonin Scalia, who died in February 2016. Gorsuch was confirmed on April 7 on a vote of 54 to 45, in which three Democrats joined the Republican majority.[7] He was sworn into office in a private ceremony at the Supreme Court by Chief Justice John Roberts on April 10, and in a public ceremony later that day at the White House by Justice Anthony Kennedy. In 1993, Gorsuch had served as a judicial clerk for Justice Kennedy following the retirement of Justice Byron White, for whom Gorsuch also clerked at the time. (Both White and Gorsuch are Colorado natives.) After the swearing-in, Gorsuch immediately "assumed his seat," and on April 17 began hearing oral arguments in pending cases. One of the cases to be argued that week was *Trinity Lutheran Church v. Comer*, a case involving religious liberty under the Constitution. (The state of Missouri claims it may deny all state funds going to any "church-related" entity, including funds for resurfacing playgrounds at preschools pursuant to a state constitutional provision.)

Few, if any, nominees have ever had a more impressive resume than does Gorsuch. After receiving his undergraduate degree from Columbia University,

4. John McCormack, "Trump Reverses Unpopular Obama Executive Action on Abortion by Reinstating Mexico City Policy," *Weekly Standard*, January 23, 2017, http://www.weeklystandard.com/.

5. Steven Ertelt, "Senate Confirms Pro-Life Rep. Tom Price as HHS Secretary despite Planned Parenthood's Objections," LifeNews.com, February 10, 2017, http://www.lifenews.com/.

6. Steven Ertelt, "Attorney General Nominee Jeff Sessions: *Roe v. Wade* 'One of the Worst Supreme Court Decisions' Ever," LifeNews.com, January 10, 2017, http://www.lifenews.com/.

7. Ariane de Vogue and Dan Berman, "Neil Gorsuch Confirmed to the Supreme Court," CNN, April 7, 2017, http://www.cnn.com/.

where he was inducted into the Phi Beta Kappa honor society, he attended Harvard Law School, graduating with honors. Subsequently, he received a doctorate from Oxford University under the direction of one of the world's leading jurisprudential scholars, John Finnis. Later, after President George W. Bush nominated him, he was unanimously confirmed by the Senate to serve as a judge for the Tenth Circuit Court of Appeals. He served there for over ten years before being nominated by President Trump to the Supreme Court. The American Bar Association gave him its highest rating of "well qualified."

And yet his nomination was subject to the first partisan filibuster in history. What are the reasons for that? What do they tell us about the potential significance of the Gorsuch confirmation?

First, of course, Gorsuch replaced Scalia. While Scalia was well known to be a pro-life Justice, it would be more accurate to say that his judicial philosophy made it clear to him that there was no right to abortion in the Constitution. Remember, the reason there is a right to abortion in America is because the Supreme Court said the Constitution provided for it. The Constitution itself, however, does not contain the word "abortion." Nonetheless, the Court said the "due process clause" provides for such a right.[8] The due process clause is a portion of the Fourteenth Amendment. The relevant language of section 1 of the amendment says, "Nor shall any state deprive any person of life, liberty or property without due process of law." In *Roe* and *Doe* and in a subsequent case, *Planned Parenthood v. Casey*, which upheld *Roe*, the Supreme Court said that the word "liberty" includes an essentially unlimited right to terminate a pregnancy.[9] In *Casey*, the Court defined "liberty" thus: "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." Scalia famously derided this as the "sweet mystery of life" passage. Scalia was an originalist, who did not believe judges were free to expound on a word like "liberty"; rather, the meaning of the word is limited to that provided by the original text, the actual language and structure of the text. Since the text is silent on abortion, Scalia would not find such a right. Those who disagree with Scalia, such as Justice Kennedy, believe justices should interpret words such as "liberty" as they think best for society. This philosophy is called by its admirers "living constitution" and by its detractors "judicial activism." Scalia was an originalist, and Gorsuch is rightly put in the originalist camp. As he said during his hearing before the Senate Judiciary Committee, the starting point is the "plain text … read as a reasonable citizen would." Thus, Gorsuch was opposed chiefly because of his judicial philosophy.

8. The Supreme Court provided an alternative source, the Ninth Amendment: "The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people." However, this has not been developed in subsequent cases, which uniformly rely on the Fourteenth Amendment.

9. *Doe*, which said abortion could be chosen for any reason, made that choice subject only to the assent of the abortion provider, who obviously has a financial interest in seeing that an abortion takes place.

There are a few things to note about this argument over judicial philosophy. Originalism insists that rights must be enumerated in or clearly implied by the text of the Constitution. If they are not, any recognition of such putative rights is left to the states. If rights are to exist as national rights, they must be added by the people to the text of the Constitution through the amendment process. (This is the way the Constitution itself provides for it to be changed.) The Constitution does not give the power to the Supreme Court to add new rights. All the Constitution says about the Supreme Court is that it is one of three co-equal branches of government with the power of review. The Constitution does not say that the Court is to resolve all controversies. It does not say that the Court should interpret words as the Court thinks is best. It does not make the Court the policy-making branch of government. The Constitution separates national power into three co-equal branches. The policy-making power is reserved to the Congress, who, with its resources and large staffs, is better able to determine facts, and is better able to resolve conflicts among the competing preferences of different groups through the familiar horse trading of legislative politics. If courts take this role, they usurp the legislative role and effectively deprive the citizens of the right to rule themselves through the representatives they elect (and can "un-elect").[10] This is why judicial activism is also sometimes called judicial policy making—referring, that is, to judges making policy without the Constitutional right to do so.

One can understand the dispute over the Fourteenth Amendment's meaning in this light. Is a Court supposed to apply a procedural rule? (That is, was the process by which the state acted in accordance with appropriate norms, such as that legislation be "prospective" and "of general applicability," meaning that it does not target a particular person for harsh treatment?) Or should the Court *develop* the meaning of the substantive provisions as it thinks best? If so, that is "substantive due process."

This issue was central to the hearings before the Senate Judiciary Committee during the Gorsuch nomination. Time and again, Gorsuch was asked if certain unenumerated rights, like abortion, were protected by the Constitution. Gorsuch took a limited view of the judicial role—a judge should decide only the case before him, and since the way an issue is framed depends on the factual context of the particular dispute, as well as how the arguments were presented by each side of the dispute, it is not appropriate for a nominee to say how we would decide a future case.[11] Frustrated senators asked him if precedent, that is, the holding in one or more prior cases, gave a right to abortion. Gorsuch, of course, conceded that is true (that

10. As Gorsuch said during the hearing, "Notice [of what the law is] is the key to the rule of law." Citizens should not be held accountable to rules of which they could not reasonably be aware. He also noted that "if judges were secret legislators … the very idea of government by the people would be at risk."

11. Gorsuch was following the so-called Ginsburg standard, under which a nominee does not speculate about future cases. As current Justice Ruth Bader Ginsburg said during her confirmation hearings in 1993, "A judge sworn to decide impartially can offer no forecasts, no hints, for that would show not only disregard for the specifics of the particular case; it would display disdain for the entire judicial process."

is, decisions such as *Roe* do exist). Gorsuch admitted the Court had had numerous opportunities to overturn those decisions but had not done so. However, he would not go so far as to say he would not vote to do so, as these senators wanted him to do. Indeed, he noted that precedent is not always entitled to deference; it depends, in part, on whether the prior case was *rightly* decided, that is, whether it was based in the Constitutional text.[12]

The viewer of those televised hearings before the Judiciary Committee can be forgiven if he sensed a kind of dance going on. For the viewer would be correct—there was, indeed, a story behind the story, so to speak. It is a story with a long history, and it concerns particularly one substantive issue: abortion.

As noted, the "right" to abortion was really created by the Court from vague guarantees of liberty in the Constitution. Since the Court is poorly placed to decide disputed matters of public policy, its abortion decisions have spawned an unending public protest (such as the March for Life). Though the Court demanded that those protests cease in its 1992 decision in *Casey*, they did not: this year was, for instance, the forty-fifth *consecutive* March for Life.

Since most Americans did not support, and never have, the unlimited abortion rights created by the Court in *Roe* and *Doe* and sustained by *Casey*, supporters of abortion rights turned to the Court to protect them. The idea was that what elections would not produce (a pro-abortion majority of Congress) could be achieved by carefully controlling the make-up of the nine judges on the Court. Thus, abortion supporters sought to ensure that the Court contained pro-abortion judges, and abortion opponents pledged to choose judges who would overturn *Roe*.

This first became evident in 1987, with the nomination of Robert Bork to the Supreme Court by Ronald Reagan. Bork was a formidable intellectual, whom everyone expected to have a significant effect on future Supreme Court decisions. Within minutes, Senator Edward Kennedy went onto the Senate floor to claim that the confirmation of Bork would force women to have back-alley abortions. Kennedy was determined to ensure a pro-abortion majority on the Court.

This began the battle over the Court, and it has continued for thirty years. During this time, Democrats blocked many nominees of Republican presidents, even those to the lower or inferior courts just below the Supreme Court, the courts of appeal. How did they do this? After all, the President nominates and the Senate confirms. So one might think that if the President is pro-life and the Senate is likewise, a nominee of such a President would be confirmed. But things were not so simple. The minority had a right, under Senate rules, to "extend debate," that is, to keep talking for as long as it wished; another term for this is "filibuster." A majority facing a filibuster can end debate, but only if it can muster sixty votes; otherwise, the filibuster continues, preventing a vote on the underlying nomination.

12. Gorsuch coauthored a book with twelve other judges on the proper use of precedent, *Law of Judicial Precedent*. He frequently remarked that he would act in accordance with the analysis in that book, whose coauthors include liberals and conservatives.

When Democrats' blocking of nominees through actual or threatened filibusters became acute during the presidency of George W. Bush, Republicans threatened to change the Senate rules to eliminate the filibuster (meaning a simple majority vote would end debate, and a second majority vote would confirm a nominee). The press referred to this as the "nuclear option," suggesting that it was a drastic last step. However, moderate Democrats and Republicans struck a deal to allow some nominees to be confirmed, and the Republicans never proceeded to eliminate the filibuster.

Subsequently, in 2013, when Republicans were blocking some of Obama's nominees, Senate Majority Leader Harry Reid employed the nuclear option. Extending the metaphor, Reid's act might be called a "tactical nuclear strike," for it did not completely eliminate the filibuster but left it intact for Supreme Court nominations while eliminating it for lower court and administrative branch appointments.

Thus we come to the Gorsuch nomination. President Trump ran squarely on the issue of Supreme Court appointments. He pledged to nominate someone from one of two lists he received from conservative legal and policy groups. Gorsuch was on that list.

Democrats are, of course, in the minority in the Senate. But they have more than forty votes, and could, thus, successfully employ a filibuster in normal circumstances. However, the Republicans, learning from the thirty years' war over judicial nominations in which they were constantly outmaneuvered by the Democrats, stated they would employ the nuclear option themselves, eliminating the Supreme Court filibuster this time. Democrats, who support abortion rights and want to protect them, faced a dilemma: employ the filibuster against Gorsuch or save it for the next nominee? From a certain perspective, the Gorsuch nomination was unimportant, for he was only replacing one of four conservatives on a Court that also contains four liberals and the essential "swing" vote, Justice Kennedy. A fifth conservative will be needed to establish a majority. The next nomination, when it comes, is likely to be for one of the liberals or for Kennedy and will thus be for "control" of the Court.

The Democrats chose to filibuster Gorsuch. This was a poor choice from some perspectives, since it meant the Republicans would eliminate the filibuster and it would not be around when needed to stop control of the Court passing to the conservatives with a future nomination. However, the raw political fact is that the Democrats could not prevent the final elimination of the filibuster. Under the procedural maneuver Democrats employed under Harry Reid, mentioned above, Republicans could change the Senate rules simply because they were in the majority, and Republicans had said they would do so. So if the Democrats held off on the filibuster until the next vacancy, the Republicans would simply change the rules then. Still, an argument could be made that the Democrats should have held off, because later, when control of the Court was at stake, there would be a better chance of provoking a widespread popular political backlash that would cause the Republicans to refrain from eliminating the filibuster.

In the event, Democrats filibustered Gorsuch, one of the most qualified nominees in history, a man who is hardly an ideologue but who is surely an originalist.

There was a good deal of talk by the Democrats about needing to level the field after the way Republicans treated the nomination of Merrick Garland following

Scalia's death. The narrative was that Republicans had shamefully treated Garland by refusing to consider his nomination, either through a committee vote or a vote by the entire Senate. However, while this has a certain surface plausibility, the Democrats themselves, during the presidency of George W. Bush, had stated that, should a seat become vacant on the Court before the upcoming presidential election, Bush should not nominate anyone, allowing the election to decide the President who would fill the seat. The Republicans simply followed that advice after the death of Scalia, and the issue of Supreme Court nominations was an important part of the 2016 presidential campaign, as noted above. (The Senate majority leader Mitch McConnell stated before the election that he would hold hearings on any Supreme Court nomination from Hillary Clinton if she were elected.)

While the elimination of the Supreme Court filibuster can be lamented, it was inevitable. Democrats themselves—including their nominee for vice president, Tim Kaine—had pledged to abolish it once they regained control of the Senate. The reason, again, is abortion. To protect it, Democrats decided to make sure the Court was composed of judicial activists who would continue to find abortion a matter of substantive due process under the liberty guarantee of the Fourteenth Amendment. In any case, the fact is that the Constitution is silent about the filibuster. The filibuster was created under Senate rules as a product of a traditional sort of civility that once prevailed in the Senate but has evaporated in the battle over abortion. Since elimination of the filibuster is consonant with the Constitution, it may more properly be called the constitutional option rather than the nuclear option.

Assisted Suicide

Gorsuch's doctoral dissertation concerned assisted suicide. It was subsequently published as *The Future of Assisted Suicide and Euthanasia*. Written when Oregon was the only state to have legalized assisted suicide, it is a very thorough review of the law and an in-depth consideration of the arguments in favor and opposed. In a scholarly way, Gorsuch puts forward for consideration the chief argument against legalizing assisted suicide—the principle that the intentional killing of an innocent human being is always wrong.[13]

Sadly, many states and localities have proceeded to legalize assisted suicide since publication of the book, including, recently, the District of Columbia and Colorado.

The reason these jurisdictions could even consider the question whether to legalize assisted suicide is because the Supreme Court in 1997, in the twin decisions in *Washington v. Glucksberg* and *Vacco v. Quill*, refused to recognize, as a matter of substantive due process, a federal constitutional right to assisted suicide under the liberty interest of the Fourteenth Amendment, thereby leaving the issue to the states to decide.

13. This statement, on its face, appears to implicate abortion as well as assisted suicide, a fact not lost upon Senate Democrats. For instance, Sen. Diane Feinstein raised it in her first round of questions. However, Gorsuch refused to speculate on how he would decide the abortion issue if it came before the Court again.

However, the Court in *Obergefell v. Hodges* appeared to call into question the continuing validity of those decisions. Indeed, if the living constitution philosophy reigns on the Court, it is difficult to see how the liberty interest under the Fourteenth Amendment would fail to provide a right to end one's life. The nomination and confirmation of Gorsuch ensures that when that issue arises in the future, as it will, Justice Gorsuch will bring his scholarship and his judicial philosophy of originalism to bear on its resolution.

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