Neomi Rao

President Trump nominated Neomi Rao to serve on the U.S. Court of Appeals for the District of Columbia Circuit on November 14, 2018. Rao is anti-choice.

Career[1]

- Bachelor of Arts, Yale University, 1995
- Reporter, The Weekly Standard, 1995-1996
- Juris Doctorate, University of Chicago Law School, 1999
- Clerk, Hon. J. Harvie Wilkinson, III, Fourth Circuit Court of Appeals, 1999-2000
- Counsel, United States Senate Committee on the Judiciary, 2000-2001
- Clerk, Associate Justice Clarence Thomas, U.S. Supreme Court, 2001-2002
- Associate, Clifford Chance LLP, 2002-2005
- Associate Counsel and Special Assistant to the President, The White House, 2005-2006
- Visiting Professor, University of Minnesota Law School, 2012
- Assistant Professor, George Mason University Antonin Scalia Law School, 2006-2012
- Associate Professor, George Mason University Antonin Scalia Law School, 2012-present (on leave)
- Director and Founder, Center for the Study of the Administrative State, 2015-2017
- Administrator, Office of Management and Budget, Office of Information and Regulatory Affairs, 2017-present

Record on Choice-Related Issues

Notable Information

- While serving as the Administrator of the Office Information and Regulatory Affairs, Rao has overseen the development and publication of the following anti-choice regulations:
    - The final rules related to the women's preventative-services benefit under the Affordable Care Act (ACA) vastly expand the categories of employers that are allowed to deny their employees the ACA's contraceptive coverage benefit, which guarantees more than 62 million women access to birth control without a copay. Under the new rules, employers can refuse to cover birth control for nearly any reason just by claiming an objection to contraception.[2]

- The proposed Title X domestic gag rule would fundamentally reshape the Title X program and make it impossible for many current providers to continue to participate.[3] Title X is the nation's only program solely dedicated to family planning, and it serves over four million people annually. The rule in its current form would prohibit Title X providers from referring or supporting abortion and require physical and financial separation of Title X and abortion services. Women who lose their contraceptive coverage because their employer has a religious or moral objection to providing such coverage would be eligible for Title X services, even if they don't otherwise qualify. Finally, the proposed rule indicates a shift away from the full range of clinically supported contraceptive services and opens the door for ideologically based programs, such as those who offer only very limited family planning services (to include natural family planning under the rule) or support abstinence-only education.

- The proposed rule interfering with insurance coverage of abortion would impose unnecessary and burdensome restrictions on insurers and consumers with the goal of eliminating abortion coverage in the state health insurance exchanges. The proposed rule would place burdens on insurers in exchanges created under the ACA by requiring separate invoicing and payments for abortion services.[4]

- The proposed rule that created the "Conscience and Religious Freedom Division" within the Office of Civil Rights at HHS, which is led by anti-choice advocate Roger Severino.[5] The entire focus of the new division is to "protect" healthcare workers who want to discriminate against patients seeking certain health services, like reproductive care or care for LGBTQ people. With this action, the Trump administration sent a clear signal that it is acceptable to discriminate in the name of religion.

- The pending proposed rule rolling back Section 1557 of the ACA, which, according to HHS' fall regulatory agenda, is slated to be released imminently. Section 1557 is the healthcare non-discrimination provision of the ACA, which prohibits discrimination in health coverage and care on the basis of race, color, national origin, sex, age or disability. The current rule states sex discrimination covers gender identity and all forms of reproductive care — including birth control and abortion.[6] The pending Trump administration rule is expected to reverse the current guidelines.[7]

- Rao wrote a law review article in which she argued that the Supreme Court uses references to philosophy as "a backdoor means to bring a controversial decision within the respectable mainstream--masking the contentious policy choice being made."[8] She wrote the article mainly in reference to right-to-die cases, but also noted

her belief that philosophy was being used to justify controversial opinions in reproductive rights and other "sexual ethics" cases.[9]

- In the article, Rao alluded to a disdain for the right to privacy, writing: "As American society becomes more heterogeneous, the Court faces more controversial and political issues, such as sexual ethics, sexual equality, social class, and religion. Instead of deciding these cases in a way that would leave controversial decisions to the states and the political process, the Court has often developed fundamental rights and given an expansive reading of the Due Process Clause of the Fourteenth Amendment. To avoid criticisms of judicial activism, the Supreme Court, both in majority and dissenting opinions, may rely on philosophers."[10]

- Of abortion rights, Rao wrote: "In perhaps the most disputed decision in recent history, the Court in its majority opinion in *Roe v Wade* discussed the approval of abortion by some ancient Greeks. Although the Hippocratic Oath, still sworn by doctors today, provides that a doctor 'will not give to a woman an abortive remedy,' the Court argued that the Oath was not widely accepted in Greek society and that both Plato and Aristotle supported abortion, at least prior to viability. The Court never explains why Plato and Aristotle should be considered authority for such a controversial moral and political issue, or how the support of philosophers provides a persuasive legal or institutional argument for the Court's expansion of privacy rights. Rather, the Court uses esteemed philosophers to legitimize a controversial perspective. By contrast, there were many persuasive legal arguments against recognizing a constitutional right to abortion. For instance, substantive due process arguably has no textual support in the Fourteenth Amendment Due Process Clause, and was at any rate severely discredited after the Lochner era. Furthermore, most states have historically prohibited abortion. The Texas statute struck down in *Roe* was enacted in 1857, and had remained virtually unchanged until the Court's decision in *Roe*."[11]

- Rao attempted to undermine a brief submitted by prominent philosophers in the *Glucksberg* right-to-die case by criticizing their reliance on *Planned Parenthood v. Casey* precedent: "In contrast to the Court in *Glucksberg*, the Philosophers' Brief asserts that individuals have a protected liberty interest to make certain decisions for themselves. For this weighty proposition the philosophers begin with dicta from the highly controversial decision in *Planned Parenthood v Casey*: '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.'"[12]

- Rao criticized Justice Ginsburg's landmark opinion in the *Virginia Military Institute* case, which struck down a longstanding policy of male-only admission at the school, allowing women to attend for the first time in its history: "In a challenge to the Virginia Military Institute's ('VMI') single-sex model of education, Justice Ginsburg, writing for the Court, defended the right of women to be admitted to that prestigious institution. Justice Ginsburg cited a contemporary scholar for the proposition that even in Plato's society, 'women's native ability to serve as guardians was not seriously questioned.' Justice Ginsburg further elaborated that the only real question about women serving as military defenders in the Greek army concerned physical training, which customarily occurred in the nude. There are a number of aspects in which the Court's reliance on Plato is suspect. First, one could challenge the historical accuracy of Justice Ginsburg's claims. Perhaps Plato never questioned a woman's ability to serve as a guardian because in the male-dominated Greek society, in which women played no political or social role outside of the home, the idea of a woman serving in such a highly visible and prestigious position was unimaginable. Second, the Court does not use Plato's philosophical ideas, but only his views of gender relations as interpreted by a modern scholar. This once-removed interpretation is less persuasive than a direct reading of Plato, because the scholar lacks the intellectual authority possessed by a philosopher of Plato's stature. Even if the historical characterization is accurate, Plato's ideas have more relevance to the social and political climate of ancient Athens than to modern American judicial decision making. Finally, the Court does not explain how Plato's views on single-sex military education are germane to the integration of VMI, nor how the guardians of Athens are analagous [sic] to the officers being trained at VMI. These examples illustrate the increasing tendency of the Court to use philosophers to support contested political positions."[13]

- Rao has written extensively about the concept of dignity. Within these articles, Rao has commented on the courts' use of dignity in abortion cases:

    - "The plurality opinion in *Planned Parenthood v. Casey* explicitly connected dignity, autonomy, and choice as 'central to the liberty protected by the Fourteenth Amendment.' The plurality highlighted the inherent dignity of a woman's freedom to choose an abortion, but it minimized the competing inherent dignity of the fetus to life. In several abortion decisions, the German Federal Constitutional Court has focused on the inherent dignity of the life of the fetus and held that dignity attaches to each human being before and after birth. Weighing these dignities has proved difficult for courts, which have often avoided the conflict by emphasizing the centrality of one of these dignities at the expense of the other."[14]

- "Conflicting dignities can be found across a number of other areas of constitutional law, including free speech and privacy. Varying cultural conceptions of human dignity have led to significantly different outcomes in cases touching on controversial social policies. For example, concepts of dignity are frequently invoked with regard to abortion. In the United States, *Roe v. Wade* gave women a right to terminate pregnancy, a choice that was later explained in *Planned Parenthood of Southeastern Pennsylvania v. Casey* to be central to the dignity and autonomy protected by the Fourteenth Amendment. By contrast, in Germany, the GFCC held in 1975 that the Basic Law demanded respect and protection for the human dignity of the fetus and concluded that abortion must be criminalized."[15]

- "The right to sexual privacy is another area in which autonomy to make choices about one's sexual life and reproduction is often defended in terms of dignity. For example, the plurality opinion in *Planned Parenthood of Southeastern Pennsylvania v. Casey* explicitly connected dignity, autonomy, and choice: 'These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment.' The *Casey* plurality treated a woman's right to choose an abortion as part of her constitutionally protected liberty, because her choice implicated both dignity and autonomy. The plurality linked reproductive choices with the essential nature of the individual and emphasized the importance of the freedom to make such choices without compulsion from the state. Justice Stevens's separate opinion similarly emphasized: 'The authority to make such traumatic and yet empowering decisions is an element of basic human dignity . . . . [A] woman's decision to terminate her pregnancy is nothing less than a matter of conscience.' In *Casey*, the plurality focused on the inherent dignity of a woman's freedom to choose an abortion, but minimized the competing inherent dignity of the fetus to life. Weighing these dignities has proved difficult for courts, which have often avoided the conflict by emphasizing the centrality of one of these dignities at the expense of the other. The Supreme Court has advanced themes of personal dignity and autonomy into the area of other sexual freedoms. For example, in *Lawrence v. Texas* the Court invalidated Texas' criminal sodomy law. While the Court in *Lawrence* focused on a number of concepts of dignity, it explained that one important aspect of respecting individual dignity required allowing individuals the right to make choices about their sexuality without intervention by the government. As the Court explained, '[A]dults may choose to enter upon this [homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.' According to the Court, part of the liberty protected by the Fourteenth Amendment includes the ability to make choices about sexual conduct. Protecting this liberty to choose serves the individual's dignity. The

Court declined to pass judgment on the dignity of particular sexual practices and furthermore prohibited the community from expressing such disapproval through legislation. In this view, dignity stems from a significant degree of sexual freedom, not by following some particular conception of dignified sexual behavior. This dignity reflects an intrinsic quality of human beings as capable of formulating their own ends and therefore requiring a space of freedom for self-definition."[16]

- "Reva Siegel has argued that a paternalistic conception of dignity underscores *Gonzales v. Carhart*, in which the U.S. Supreme Court recognized that the ban on partial-birth abortion 'expresses respect for the dignity of human life.' The Court considered Congress' finding that '[i]mplicitly approving such a brutal and inhumane procedure by choosing not to prohibit it will further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life.' Siegel classifies the reasoning of the *Carhart* majority as providing 'gender-paternalist justification[s] for abortion restrictions.' She contrasts this to the decisional autonomy reasoning found in *Planned Parenthood v. Casey*. Siegel considers this to be a conflict between paternalistic dignity and autonomy dignity. Similarly, she argues that the anti-abortion movement, for example in South Dakota, has claimed that 'banning abortions will protect women's health and freedom of choice.' Siegel explains that such reasoning takes a particular view of harm to women, i.e., abortion harms women who are, by nature, mothers. 'Women who seek abortions must have been confused, misled, or coerced into the decision to abort a pregnancy. . . . Using law to restrict abortion protects women from such pressures and confusions--and frees women to be true women.' She argues that this is a paternalistic move, based on stereotypes that 'violate[ ] forms of dignity and decisional autonomy guaranteed to women.' The rationale of protecting women from misinformed and ultimately bad choices contains a substantive judgment about what the dignity of womanhood requires. On Siegel's implicit view that in the abortion context the pregnant woman is the only actor with dignity, restrictions justified to 'protect' women from an abortion are paternalistic."[17]

- Rao has been active in the conservative, anti-choice Federalist Society.[18] Rao has worked on multiple working groups and projects within the Federalist Society since serving as the President of the University of Chicago Law School Chapter from 1998 to 1999.[19] The Federalist Society is led by Leonard Leo, the anti-choice activist who is heavily involved in selecting Trump's Supreme Court and lower court nominees. Leo has been outspoken in his anti-choice views, calling abortion "an act of force" and "a threat to human life,"[20] and serves as co-chairman of Students for Life,[21] a group whose mission is to "abolish abortion."[22]

- Rao has close ties to the conservative, anti-choice Heritage Foundation. She was a Lawrence Wade journalism fellow at the Heritage Foundation during college, and later spoke at several Heritage-sponsored events.[23] In 2018, Rao was even given the Heritage Foundation Distinguished Alumni Award.[24]

- Rao has donated thousands of dollars to anti-choice politicians, including Jeb Bush, Mitt Romney, and Ted Cruz.[25]

Record on Other Key Issues

- Rao wrote an op-ed in opposition to Barack Obama's candidacy for president, namely because he "placed empathy at the center of his judicial philosophy" when choosing federal judges.[26] She highlighted the importance of federal judicial appointments, both to the Supreme Court and the lower courts, and talked about the "controversial issues" the court gets to decide, including "abortion, the death penalty, affirmative action, school choice, [and] the right to bear arms." Particularly concerning to Rao was a speech Obama gave in which he stated, "We need somebody who's got the heart, the empathy, to recognize what it's like to be a young teenage mom. The empathy to understand what it's like to be poor, or African American, or gay, or disabled, or old. And that's the criteria by which I'm going to be selecting my judges."[27]

    - In a separate comment to the New York Times, Rao said, "That comment [about empathetic judges] was pretty remarkable to a lot of us. When I hear about a judge who rules on the basis of empathy, I think about an activist judge."[28]

- Rao rolled back an important initiative put in place by the Obama administration to combat the gender pay gap.[29] The policy simply, "required employers to collect data on how much they pay their workers, broken down by gender, race and ethnicity."[30] Rao told the Guardian, "We don't believe it would actually help us gather information about wage and employment discrimination."[31]

- Rao served as a Republican witness at Supreme Court Justice Sonia Sotomayor's confirmation hearing, testifying alongside other Republican witnesses like Charmaine Yoest of the anti-abortion group Americans United for Life.[32] While Rao took "no position on the ultimate question of the confirmation of Judge Sotomayor," she did criticize Sotomayor for supposedly "explicitly reject[ing] the idea that there can be an objective stance in judging."[33]

- Rao criticized the Supreme Court's reasoning in *King v. Burwell* which held the Affordable Care Act's tax credits are also available when insurance is purchased

through federally-established exchanges.[34] Chief Justice Roberts stated, "A fair reading of legislation demands a fair understanding of the legislative plan. Congress passed the Affordable Care Act to improve health insurance markets, not to destroy them."[35] Rao criticized the holding, which protected access to healthcare for women nationwide, stating that Roberts relied on "talking points" instead of the actual law.[36]

- Rao founded George Mason University's so-called Center for the Study of the Administrative State, which opposes federal regulations.[37] The Center received support from the Koch brothers.[38]

- Rao served as a Humane Studies Fellow with the Institute for Humane Studies in 1997 and 1998. Today the Institute has close ties to the Koch brothers.[39]

- Rao received the "Empowered Woman of the Year" award[40] from the Network of Enlightened Women, a group that aims to "educat[e] and train[] the next generation of conservative women leaders."[41]

- Rao wrote multiple sexist, racist, homophobic, and anti-environment op-eds in college:

    - Rao questioned victims' responsibility in sexual assault cases on college campuses.[42] She wrote, "A man who rapes a drunk girl should be prosecuted. At the same time, a good way to avoid a potential date rape is to stay reasonably sober." Rao went on to state, "Unless someone made her drinks undetectably strong or forced them down her throat, a woman, like a man, decides when and how much to drink. And if she drinks to the point where she can no longer choose, well, getting to that point was part of her choice." In another op-ed Rao wrote, "Just as women want to control their education and then choose their career, similarly, they must learn to understand and accept responsibility for their sexuality. The terminology of 'date rape' removes the burden of sexual ambiguity from the woman's shoulders. The controversy has been painted in terms of 'yes' and 'no', reducing sex to something merely consensual."[43]

    - Rao questioned the feminist movement.[44] "No one can have it all. The feminist paradigm has ignored theoretical choices women have to make, and thus forces them into an unhappy compromise. When things go wrong, it is only too easy for the feminists to blame society and demand sexual justice."

    - Rao wrote about the "multicultural nightmare" she perceived on campus.[45] "The multiculturalists are not simply after political reform," she wrote. "Underneath their touchy-feely talk of tolerance, they seek to undermine

American culture. They argue that culture, society, and politics have been defined and presumably defiled by white, male heterosexuals hostile to their way of life. Homosexuals want to redefine marriage and parenthood; feminists in women's studies programs want to replace so-called male rationality with more sensitive responses common to womyn [sic]. It may be kinder and gentler, but can you build a bridge with it?" Rao also complained that, "Every year during BGLAD week (that's Bisexual, Gay, and Lesbian Awareness Days, for the uninitiated) a publication called My Tongue appears, filled with pornographic pictures of homosexual couplings." She closed the article, writing, "Instead of marching to 'take back the night,' reading My Tongue or fasting in a cage for Haitians, those truly concerned with tolerance should be fighting for individuals who want to escape the multicultural nightmare."[46]

- In a different article Rao wrote, "Equality in the classroom is pretty much de rigueur, according to women majoring in everything from physics to English. But this should come as no surprise. Over the past decades, Yale has dedicated itself to a relatively firm meritocracy, which drops its standards only for a few minorities, some legacies and a football player here or there."[47]

- Rao criticized the "modern homosexual movement".[48] She wrote, "Trendy political movements have only recently added sexuality to the standard checklist of traits requiring tolerance." Rao goes on to write, "People tend to view race and gender as an accident of birth, one which should not confer special status, simply because it is given and unchangeable. But often these same people who tolerate women in the workplace and blacks and Hispanics as neighbors view homosexuality as a behavior – and behaviors, unlike gender and race, are subject to change. When homosexuality is viewed as a correctable behavior, it can be judged as being immoral, unnatural, and contrary to religious doctrine. Yet no one knows whether sexuality is a biological phenomenon or social construct. The truth may lie somewhere in the middle. Because homosexuality, unlike gender and race, concerns a socially unacceptable *activity*, many gays have responded to the demands of normalcy in radical ways. They want not only equal rights, but they struggle more fundamentally to alter culture and society."

- Rao was critical of President Clinton's health care reform efforts in the 1990s.[49] She wrote, "Problems of health care in this country are largely the cause of third-party interference with the market mechanism – interference which leads to higher costs and limited provision of care. Government regulations combined with rising malpractice awards have placed a tremendous burden on both hospitals and doctors."

- Rao railed against campus environmentalists.[50] She wrote, "Funny as they may be, environmental hysteria in the university has dangerous implications for the real world. After leaving college many student activists – eco-warriers among them – immediately gravitate to Washington, where they can pursue their ideas for forcing Americans to live up to their standards of environmental purity. The scary part is that, despite their college educations, they seem perfectly comfortable discarding scientific evidence and common sense in their crusade to 'save' the Earth."

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[3] Compliance With Statutory Program Integrity Requirements, 83 Fed. Reg. 25502 (proposed June 1, 2018) (to be codified at 42 C.F.R. pt. 59)
[4] Patient Protection and Affordable Care Act; Exchange Program Integrity, 83 Fed. Reg. 56015 (proposed Nov. 9, 2018) (to be codified at 45 C.F.R. pt. 155, 45 C.F.R. pt. 156)
[5] Protecting Statutory Conscience Rights in Health Care; Delegations of Authority, 83 Fed. Reg. 3880 (proposed Jan. 26, 2018) (to be codified at 45 C.F.R. pt. 88)
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[10] Ibid.
[11] Ibid.
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[16] Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, NOTRE DAME LAW REVIEW, 86 Notre Dame L. Rev. 183 (Feb. 2011)
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[18] *Hon. Neomi Rao,* THE FEDERALIST SOCIETY, https://fedsoc.org/contributors/neomi-rao (last visited January 10, 2019)
[19] *Questionnaire for Judicial Nominees: Neomi Jehangir Rao*, UNITED STATES COMMITTEE ON THE JUDICIARY
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