MARCH 28 2016 2:31 PM

Brazil Is Confiscating Abo Way to Women Who Fear Zika

By Nora Caplan-Bricker

A supporter of legalizing abortion poses during a march for women's rights on International Women's Day on March 8 in Rio de Janeiro.

Mario Tama/Getty Images

Pregnant women in Brazil who fear they've contracted Zika, the virus that is believed to cause the severe birth defect microcephaly, are going to great lengths to access abortion drugs. But their safest and most reliable options are frequently

blocked by the government; **according to the *Los Angeles Times***, Brazilian officials have been confiscating the drugs that an international women's advocacy group has been sending to Brazilian women in the mail.

Women in Brazil are caught in an impossible situation: The Zika epidemic is severe enough that a senior member of the country's health ministry advised women in high-risk areas late last year, "**Don't get pregnant at the moment**." But, as Christina Cauterucci **has written at *Slate***, unplanned pregnancy is a reality, and, given that Brazil is a country where abortion is strictly illegal, many woman are finding themselves in trouble. Brazil only makes abortion exceptions in cases of rape, to save the life of the woman, or if the fetus has a fatal birth defect called anencephaly. As the *L.A. Times* reports, "relatively safe clandestine abortions are available in Brazil to those able to pay around $800 or more, almost four times the monthly minimum wage"—but that leaves poor women vulnerable to Zika's possible impacts on pregnancy.

Many of these women turned to the international advocacy group **Women on Web**, an online collective that mails misoprostol and mifepristone—the **World Health Organization-approved regimen** for inducing abortion—to women in countries where abortion is banned.

Women on Web spokeswoman Leticia Zenevich told the *L.A. Times* that her organization "received 9,500 emails last year from women largely in Brazil inquiring about abortion medication, and an additional 10,400 emails from women in the Spanish-speaking Americas." Since February 1, the group has been providing drugs free of charge to women in Zika-affected countries and has sent "dozens of packages" to Brazil. But Women on Web says that 95 percent of the drugs it sent to Brazilian women were seized by the government. As a result, the group is temporarily suspending its operations in the country. "It's not fair to tell women they are going to get a package, and it will not arrive to them," Zenevich told the *L.A. Times*.

BRAZIL IS BLOCKING WOMEN CONCERNED ABOUT ZIKA FROM GETTING ABORTION DRUGS

The Zika outbreak has prompted a fresh wave of activism around access to abortion in Latin America. The Brazilian women's rights group Anis is **putting together a petition** asking the country's Supreme Court to allow abortion specifically for women who have contracted Zika. The United Nations' Office of the

High Commissioner for Human Rights **has also said** that "laws and policies that restrict access to sexual and reproductive health services ... must be repealed and concrete steps must be taken so that women have the information, support and services they require to exercise their rights to determine whether and when they become pregnant." But **the Brazilian Conference of Catholic Bishops has made it clear** that it opposes any softening of the country's anti-abortion law. Pope Francis, lthough he has called contraceptive usage a "lesser evil" in the face of Zika, has continued to refer to abortion as "**a crime, an absolute evil**."

There's still much that we don't know about Zika: Scientists are scrambling to confirm that it does in fact cause birth defects, and, to figure out how, and **at what rate**. As of early March, however, Brazil's health ministry had confirmed the existence of 641 microcephaly cases that it considers to be associated with Zika—and had compiled accounts of **over 4,800 cases** with suspected links to the virus. Microcephaly, which causes babies to be born with abnormally small skulls and incomplete brain development, **generally causes lifelong problems**.

With Women on Web unable to continue operating in Brazil, women who fear Zika have fewer options than ever. The *L.A. Times* reports that some resort to doing business with traffickers, buying drugs that may be fake, or even dangerous. Others emailed Women on Web, expressing utter hopelessness, after their medication failed to arrive. In one message that Zenevich shared with reporters, a woman wrote, "I'm thinking of doing the worst ... I really need help. I can no longer eat, and I cry all the time." Another woman summed up the reality before her when her pills were confiscated for the second time: "Here in my town there's nothing else to do, it's either your service or nothing."

COVER STORY READ THIS FIRST.

MARCH 27 2016 8:02 PM

Roe v. Wade Was Lost in 1992

How "undue burden"—a concept nurtured by anti-abortion groups and championed by the first woman on the Supreme Court—has eroded the right to choose.

By Meaghan Winter

Newly appointed Justice Sandra Day O'Connor stands in front of the Supreme Court on Sept. 25, 1981, in Washington.

David Hume Kennerly/Getty Images

On June 29, 1992, as Justice Sandra Day O'Connor began reading the decision for *Planned Parenthood v. Casey*, 25-year old Andrea Miller sat in the audience stunned. She'd braced herself for the likelihood that the Supreme Court might overturn *Roe v. Wade*. Court watchers had speculated that O'Connor would cast the decisive vote to uphold the statutory provisions regulating abortion as laid out in the Pennsylvania Abortion Control Act, which included parental consent for minors, spousal consent for married women, and 24-hour waiting periods.

Miller had started as an assistant at the American Civil Liberties Union in New York City; she had requested to work under Kathryn Kolbert, co-counsel for the Reproductive Freedom Project from the Philadelphia office. Born to a college-aged mother six years before *Roe*, Miller says she grew up keenly aware of her mother's financial hardships and thwarted dreams. In the fall of 1991, Miller helped the attorneys as they wrote Planned Parenthood of Southeastern Pennsylvania's brief in *Casey*, which boiled down to one simple question: Is *Roe v. Wade* still the law of the land?

"We conclude that the central holding of *Roe* should be reaffirmed," O'Connor read that June morning in 1992. Miller, by then the head of communications for the newly formed Center for Reproductive Law and Policy, was awed. Here was the first woman ever to sit on the Supreme Court asserting women's right to abortion. "Oh my God, did we just win?" Miller remembers thinking. "How it that possible?"

But O'Connor kept reading. In "reaffirming" *Roe*, the court had also mostly upheld four of the five restrictions put in place by the Abortion Control Act, only invalidating the spousal notification law. Abortion remained legal, but the judges introduced two caveats. One was that the states had a compelling interest in protecting unborn life from the "outset of pregnancy"—a stark departure from *Roe*, which held that states had no such interest until after the first trimester. The other was that states would be able regulate abortion unless their laws "unduly burden" a woman's right to choose abortion.

Miller, who is now the president of the National Institute for Reproductive Health, remembers her mind spinning. What was an "undue burden"? How could the Pennsylvania restrictions stand if *Roe* stood too? In the Supreme Court's crowded vestibule, Miller huddled with other advocates from pro-choice organizations,

scrambling to understand: *Should the decision be framed as a win or a loss?* Guards waved them toward the exits. Outside, reporters filled the stone steps, awaiting a reaction. For months the clinics' attorneys had been insistent that the American public needed to understand exactly what was at stake. It was an election year; they wanted to rouse the mainstream pro-choice public out of complacency. In their courtroom arguments, they'd aimed simple language at the media and voters: Keep *Roe* on the books. But now they had a murky legal decision that upheld *Roe* in name but not in content.

The assembled advocates came to a consensus: "The justices have blown a hole in *Roe* big enough to drive a Mack truck through," as Kolbert later put it. Minutes later, Kolbert stood surrounded by reporters by the Supreme Court steps and spoke into a bouquet of microphones. "Let me be clear about what the court has done," she said. "The right to choose abortion is no longer a fundamental constitutional right. ... We are at a point where states have been permitted to place roadblocks in the path of women, some roadblocks which in fact mean that low-income women, poor women, rural women are unable to get to the clinic door."

The current eight-member incarnation of the Supreme Court will soon hand down a decision in *Whole Woman's Health v. Hellerstedt*. The case challenges the Texas law, HB2, that among other things requires abortion providers to have admitting privileges at hospitals within 30 miles and to perform abortions in clinics that meet all the building requirements of ambulatory surgical centers. The American College of Obstetricians and Gynecologists and the American Medical Association, among other medical groups, **filed an amicus brief** calling HB2's restrictions "devoid of any medical or scientific purpose" and "unnecessary" because most abortions are simple enough to be done in a doctor's office; a medication abortion, for example, is as simple as taking two pills. Nonetheless, HB2's requirements have effectively shuttered more than half of Texas' remaining abortion clinics: According to the Center for Reproductive Rights, in 2011, Texas had 40 abortion clinics, but after HB2, there are 19. (If, in the wake of Justice Antonin Scalia's death, the Supreme Court splits 4–4 on *Whole Woman's Health*, the decision will uphold the Texas law without establishing precedent on its constitutionality.) During oral arguments on March 2, conservative Justice Samuel Alito—who had ruled on *Planned Parenthood v. Casey* as a 3rd U.S. Circuit Court of Appeals judge back in 1991—suggested that there wasn't any evidence that HB2 itself was responsible for closing Texas' clinics, with liberal

Justice Elena Kagan in sharp disagreement. “It’s almost like the perfect controlled experiment as to the effect of the law, isn’t it? It’s like you put the law into effect, 12 clinics closed,” Kagan remarked. “You take the law out of effect, they reopen.”

Many headlines have declared that if the court upholds Texas’ restrictions in *Whole Woman’s Health*, it will presage the end of *Roe*. But the question of whether *Roe* will be overturned hasn’t been the salient one for 24 years—not since *Casey* threw out *Roe*’s clear-cut trimester framework and adopted the cloudy and subjective concept of “undue burden.”

* * *

Kathryn Kolbert, co-counsel for the Reproductive Freedom Project

Robin Marchant/Getty Images

At first, both anti-abortion and pro-choice camps lambasted the *Casey* decision. In her initial statement to reporters, Kolbert said that it was the first time in her life that she agreed with Chief Justice William Rehnquist, who had opposed *Roe* and who joined Scalia’s *Casey* dissent, which stated that the undue burden standard was “inherently manipulable.” *Casey* gave abortion rights advocates the burden of proving that newly introduced abortion restrictions created a “substantial obstacle” for women seeking abortions. In the decades since the *Casey* decision, much of the media coverage of abortion rights in America has either skimmed over the undue burden standard or described it as a moderate compromise that O’Connor brokered with the other justices for feminist purposes. In the best-seller ***The Nine: Inside the Secret World of the Supreme Court***, Jeffrey Toobin writes that the undue burden standard is O’Connor’s “triumph,” because she “had invented that test and

over time persuaded a majority of her colleagues to agree with her. She single-handedly remade the law in the most controversial area of Supreme Court jurisprudence. … No other woman in United States history, and very few men, made such an enormous impact on their country."

That reading obscures the impact of dozens of anti-abortion attorneys—senators, governors, judges, legislators, lawyers for the Department of Justice and the Catholic Church, most of them conservative men—who patiently, over decades, readied the court to permit obstacles between women and abortion. There was nothing "single-handed" about the *Casey* decision. In fact, O'Connor originally advocated for an early iteration of the "undue burden" standard after President Ronald Reagan's anti-abortion Solicitor General Rex Lee proposed the idea, during what his assistant called "the first frontal assault on *Roe* ever launched by the federal government."

The consequences of *Casey* have been dire for many women seeking abortions. According to data from the Centers for Disease Control and Prevention, 9 out of 10 abortions are performed in the first trimester; *Casey* gave the states a compelling interest in all of them, and in doing so, gave anti-abortion campaigns unprecedented momentum. Just since 2010, nearly 300 state restrictions have passed nationwide, and since 2011, 162 clinics have closed. State legislatures across the country have adopted TRAP laws (the acronym stands for "targeted regulation of abortion providers") that mandate abortion clinics follow rules well outside medical guidelines. According to the Guttmacher Institute, five states require clinics to provide medically inaccurate information about a purported link between breast cancer and abortion. Ten states mandate the width of clinic corridors. Texas is one of 22 states that require physicians to perform abortions in facilities comparable to ambulatory surgical centers that cost roughly $1 million to build.

It is now not uncommon for American women seeking abortion to have to travel across state lines, and reproductive rights advocates say low-income women shoulder the greatest burdens. A **study** published this month in *American Journal of Public Health* looked at the implications of HB2 for women in Texas whose nearest clinic closed after the law took effect. Researchers found that before HB2 became law, on average, those women lived 17 miles from a clinic; after HB2, that average became 70 miles. One-quarter of those women now live at least 139 miles from

their nearest clinic. Because of added travel and waits, roughly a third of women surveyed said they paid at least $100 in extra costs—covering gas or child care or lodging—and 36 percent said obtaining their abortion was difficult.

U.S. Route 180 near Abilene, Texas*

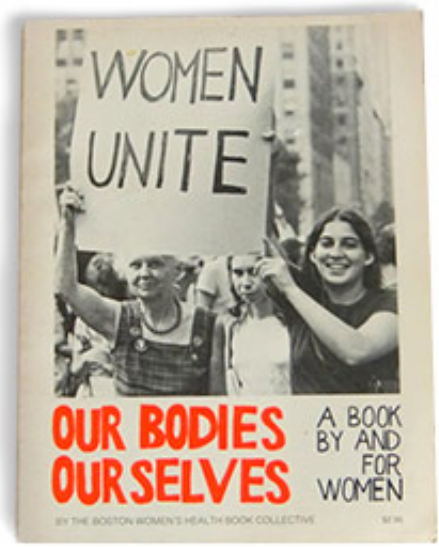
Photo illustration by Natalie Matthews-Ramo. Photo by Greg Westfall/Flickr.

Yet it's no wonder the public doesn't fully grasp *Casey*'s influence, despite the problems the decision has helped create for women seeking access to reproductive health care. Lower courts have interpreted the decision in myriad and sometimes conflicting ways. Because of the subjectivity of what counts as a "substantial obstacle," lower court judges have used *Casey* to justify differing opinions about waiting periods, admitting privileges, and more. *Whole Woman's Health* marks the first time the court has had to grapple with *Casey*, and how the justices define "undue burden" will have a ripple effect on abortion access for years to come. But the challenge before them—to determine just how many obstacles Texas women can face before their burdens are undue—is the result of anti-abortion advocates' work within the government, patiently, over decades, to dismantle *Roe v. Wade*.

* * *

The card that would give the anti-abortion movement its winning hand in *Casey* was tucked into a sleeve many years before. The story begins in earnest in Akron, Ohio, in the late 1970s, with a local entrepreneur, Ed George, owner of a steakhouse-cum–wedding hall where a before-she-was-famous Tina Turner once performed. One day, George called up his city councilman, Ray Kapper, to complain that the abortion clinic across the street was bad for his business.

“Ray, you’ve got to do something, pass something to close that place down. It’s terrible to see those girls going in and out every day,” Kapper recalls George saying.



Following *Roe*, patients traveled to the clinic from across Ohio and neighboring states. Another clinic not far from downtown, Akron Center for Reproductive Health, shared an office building with a real estate agency. Public school teachers invited the center’s staffers into classrooms to show high school students flip charts of anatomy and explain the basics of ovulation, menstruation, and pregnancy; they also spoke at church groups. The Boston Women’s Health Book Collective had just published ***Our Bodies, Ourselves***. Women were entering the workforce in unprecedented numbers. “It was really a time of dynamic change,” says Bonnie Bolitho, who was then the clinic’s co-director. Often, Bolitho says, a mother accompanying her daughter would say that she was glad her daughter wasn’t forced into a “back alley” abortion as she had been. Bolitho told women and girls, “You don’t have to have an unplanned pregnancy. You don’t have to get married at 17 and have children early in life. … You can exercise control over your reproductive health.”

Meanwhile, anti-abortion advocates were drafting models of the laws that the court is considering now, some 40 years later. In 1977, Akron's chapter of National Right to Life, an anti-abortion organization, asked the City Council to consider abortion regulations they'd co-written with Alan Segedy, a lawyer for the group, and attorneys from Americans United for Life, an anti-abortion legal organization based in Chicago. (Ann Marie Segedy, Alan Segedy's wife, co-led Greater Akron Right to Life.) Kapper, a Catholic Democrat who was ambivalent about abortion, remembered George's consternation about the abortion clinic across the street. Kapper wanted to be mayor. In October 1977, he agreed to sponsor the regulations, thinking he'd curry favor with voters.

Kapper says now that he didn't appreciate the significance of his mayoral campaign strategy—how novel and precedent-setting it might be for a local government to create obstacles for a woman seeking a first-trimester abortion in the post-*Roe* world. One attorney described the multipart ordinance as "a Christmas tree," with everything possible hanging off it: a parental consent rule, a mandatory waiting period, and "informed consent" counseling. The attorneys designed it to be a national model. After Kapper proposed the law, experts from cities all over the U.S descended on Akron for four public hearings held over several weeks. Tracy Thomas, associate dean at University of Akron School of Law, later recounted how hundreds of divided locals watched John Willke of National Right to Life, a hero of the anti-abortion movement, present a slideshow of fetal life. (It's hard to imagine now, but disturbing audiences with images of fetuses was then a cutting-edge tactic.) Gynecologists slated to appear at the hearings were so angered by the anti-abortion advocacy that they walked out without testifying. Shouting erupted in the hallway outside the hearing room.

Viewers watching an anti-abortion representative from Akron on the *Today* show might have been impressed with what seemed to be the anti-abortion movement's grassroots organizing skills. But its advocacy wasn't as homegrown as it appeared. In 1966, the Catholic Church had formed a political arm, the National Conference of Catholic Bishops, that deployed lobbyists in state houses. The bishops founded National Right to Life in order to deflect the idea that Catholic leadership alone was driving its anti-abortion stance. "The idea was to create the appearance of

widespread Catholic grassroots opposition to abortion reform so that it didn't look like Catholic opposition was a top-down effort," Patricia Miller writes in her book ***Good Catholics***.

As an extension of the church, Miller explains, National Right to Life immediately had what fledgling, grassroots organizations don't: a deep reserve of cash and a built-in audience of millions. Bishops hired political consultants who had helped Reagan become governor of California. Their representatives flew around the country testifying against bills relegalizing abortion and teaching volunteers how to speak to legislators. (Meanwhile, according to Miller, Catholics for a Free Choice, a burgeoning pro-choice organization, couldn't afford to make long-distance phone calls.) By the late '70s, National Right to Life had some 11 million members and roughly 3,000 local chapters.

Reeves, Texas

Photo illustration by Natalie Matthews-Ramo. Photo by Nicolas Henderson/Flickr.

At the same time in Chicago, a handful of attorneys founded the Americans United for Life Legal Defense Fund, which they conceived of as an ACLU of the anti-abortion movement. The organization's long-term influence on national abortion policy cannot be overstated. Co-founder John Gorby says the group based its arguments on the Bill of Rights, not religious teaching, and that each of his

colleagues agreed that a fertilized egg should be considered as a "constitutional person"; he tells me that he believes women decide to terminate their pregnancies "just like a slave owner would have control over his slaves." Women who have abortions, Gorby says, are "probably motivated more by self-interest" than "a greater good"; he is dismayed that women have "that kind of power and control over other people." In 1980, attorneys from Americans United for Life helped successfully defend the Hyde Amendment, which bars Medicaid funding for most abortions, before the Supreme Court. "A woman's freedom of choice," the court decided, did not include "a constitutional entitlement to the financial resources to avail herself of the full range of protected choices." ("A right without access is no right at all," said Massachusetts Sen. Edward Brooke, a Republican who opposed the Hyde Amendment.)

Anti-abortion strategists of the time focused on laws that involved parents and husbands, Gorby explains, because "you can simply say that throughout the common law, fathers and spouses have had a role in these decisions, and it's unimaginable that the scope of *Roe v. Wade* would reverse those traditional common law rights that existed in time immemorial." Gorby says that AUL wanted judges to contend with tricky questions. If a 15-year-old is pregnant, can she have an abortion without her parents' permission? Do parents' rights concerning their minor child become irrelevant if the child is pregnant? Does a man have fewer rights over the fate of the unborn than his pregnant wife?

In these cases, Gorby contends, a judge evaluating a spousal or parental notification law who doesn't want to limit parental rights must limit the right to an abortion. Anti-abortion lawyers designed laws that would force judges to wrestle with these questions and gambled that judges would decide to limit abortion rights. The long-term plan: to poke so many holes in *Roe* that abortion rights would eventually deflate.

"You can't turn around and say, 'Judge, all we want to do is stop abortions.' He's going to strike down that statute," Gorby says. "But you can argue that these are very reasonable regulations in the name of maternal health, to protect women and so forth, and that is the purpose of it. ... We were willing to make those arguments."

AUL and its allies predicted that most Americans would see the abortion regulations as discrete, common-sense provisions. Kapper says he saw them in that light too; he admits that he never considered the slippery slope of legal precedent. He recalls being taken aback when feminists from around the country began calling him at home to say, "You're telling me what I should do with my body!" He told them he believed in abortion rights for adult women. The ordinance he sponsored was eventually adopted by 20 states.

Local clinics and the ACLU sued the city of Akron, arguing that *Roe* did not allow local governments to put obstacles in the path of women seeking first-trimester abortions. A district court judge threw out most of the ordinance but upheld its requirements for a 24-hour waiting period, for doctors to explain risks of abortion, and for second-trimester abortions to be performed in hospitals. Kapper told a reporter he wanted the city to accept the decision, saying the controversy "became an emotional thing I would not like to see again."

The city chose to appeal. The 6th U.S. Circuit Court of Appeals threw out everything but the parental consent rule and the requirement that second-trimester abortions needed to be performed in hospitals. Then the city appealed to the Supreme Court —and that caught the attention of attorneys working for the Reagan administration.

By the early 1980s, Republicans had only recently seized on anti-abortion positions to mobilize voters. In 1967, as governor, Reagan had signed California's law to relegalize abortion; in 1969, Nixon initiated the expansion of funds for federal family planning counseling. But during his 1972 re-election campaign, Nixon began using Catholic bishops' "sanctity of human life" rhetoric to secure Catholic voters, as historian Daniel Williams, author of ***Defenders of the Unborn***, explains. During Reagan's 1980 presidential bid, conservative strategist Paul Weyrich brilliantly reframed anti-abortion sentiments and policies as "pro-family," sealing Reagan's campaign victory by consolidating anti-abortion voting blocs, enamoring evangelicals as well as Catholics.

Rex Lee, solicitor general under Reagan

Department of Justice

Reagan needed to appease the religious leaders who'd helped elect him, so opposing abortion became a prerequisite of any Reagan appointee. Rex Lee, his solicitor general, was a Mormon from a Utah political dynasty and a former dean of Brigham Young University's law school; he had also written a whole book against the Equal Rights Amendment. When Lee heard about the Akron case, he made a then-unorthodox request: He wanted to argue for the Akron restrictions on behalf of the federal government. Prior to Reagan, the federal government didn't often choose sides in divisive Supreme Court cases, but the administration gave Lee the green light.

After the Supreme Court agreed to hear the case, AUL's Gorby traveled from Illinois to Akron to advise the city's lawyers. He urged them to resist fantasies of heroically overturning *Roe* and instead argue that Roe allowed for *some* obstacles—an approach that would advance the long-term anti-abortion strategy. Gorby didn't have to worry: The Department of Justice also summoned the Akron lawyers to Washington to suggest the same strategy.

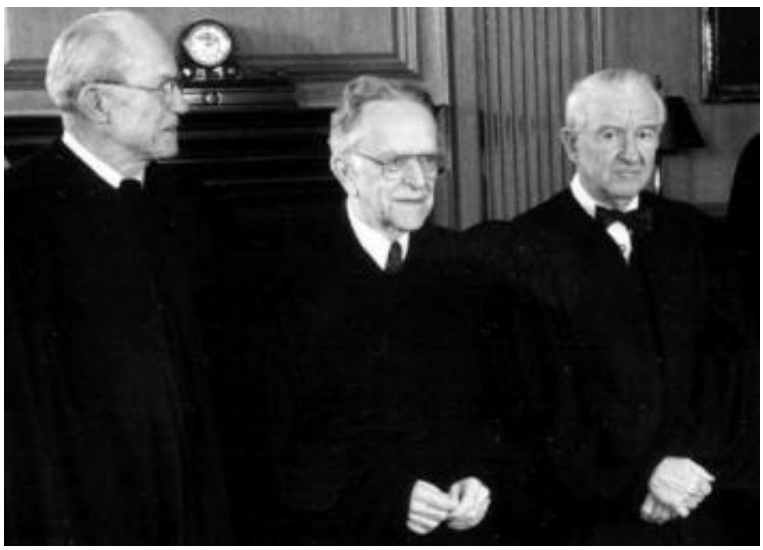
Meanwhile, a new and huge question loomed for both camps preparing to argue before the Supreme Court. In 1981, Reagan had appointed Sandra Day O'Connor, the first female justice. At O'Connor's confirmation hearings, anti-abortion groups testified against her. Asked pointed questions about her stance, O'Connor said she felt "an abhorrence of abortion" but that she wouldn't directly comment on questions that could come before the court. A former Arizona state senator, O'Connor had served on a superior court for four years and on the Arizona Supreme Court of Appeals for just two before being promoted to the Supreme

Court. She had virtually no experience with constitutional law, and no one knew how she'd vote. *Akron v. Akron Center for Reproductive Health* was her first abortion case.

On the morning of Nov. 30, 1982, the Supreme Court heard oral arguments in *Akron*. First to speak was the city of Akron's lawyer, Alan Segedy, who argued, "The city of Akron submits that the major thrust of this legislation is not burdensome on the choice of the pregnant woman, but is rather choice-enhancing." Segedy made arguments similar to those made today by proponents of abortion restrictions: that informed consent procedures and other requirements help women reflect better on their decisions. Next up was Rex Lee, who told the court that local legislatures such as the Akron City Council were better equipped than courts to handle politically sensitive issues such as abortion.

This was one of the Reagan administration's key ideas. It was also likely to appeal to O'Connor, who had signaled as a legislator and judge that she believed in putting fraught decisions in the hands of the states. But Lee's suggestion was nervy; it undermined the justices' authority.

"Some [states] will adopt laws diametrically opposed to others," Lee said, with clairvoyance few in the audience could have understood.



Justices Byron White, Harry Blackmun, and John Paul Stevens, 1991.

AFP/Getty Images

Justice Harry Blackmun, who authored *Roe*, interrupted him. "Mr. Solicitor General, are you asking that *Roe v. Wade* be overruled?" Blackmun asked.

“I am not, Mr. Justice Blackmun,” Lee said.

“Why not?” Blackmun asked.

“That is not one of the issues presented in this case,” Lee replied.

Blackmun said it seemed like Lee was asking the court to overturn *Roe*. The audience gave out a collective gasp. The *New York Times* reported that Blackmun glared at Lee.

Under Lee’s plan, local governments could do anything short of making abortion totally illegal. (His definition of undue burden was more extreme than the court would adopt in *Casey*.) Lee was proposing something radical. The crowd understood what was happening because Blackmun’s response made it obvious.

Across the room, Stephan Landsman, the clinic’s lawyer, knew he could relax. Rehnquist and Justice Byron White had dissented in *Roe*—it was assumed they’d vote against the clinics. It seemed unlikely, though, that the other justices would go for Lee’s proposal.

A couple of months later, on Jan. 22, the 10th anniversary of *Roe*, and with the *Akron* decision still not handed down, a busload of National Organization for Women protesters from New Jersey arrived outside Lee’s house. Lee recounted in the *American Bar Association Journal*: “They marched around for a while chanting, ‘Keep your laws off our bodies!’ My son went outside and yelled back, ‘Keep your bodies off our lawn!’ Anyway, I’ve arrived. I’ve been picketed at my home.” Lee said that as solicitor general he could only occasionally advocate for a pointedly political position. He’d chosen to spend some of his ideological capital on *Akron.*

In June, the court struck down Akron’s ordinance by a 6–3 vote. O’Connor, however, delivered a dissent no one quite anticipated. O’Connor borrowed Lee’s thesis, writing that courts should evaluate local abortion laws by asking whether they create an “undue burden” for women seeking abortions. She defined an undue burden as “absolute obstacles or severe limitations.” She wrote, “In my view, this ‘unduly burdensome’ standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular ‘stage’ of pregnancy involved.” That meant O’Connor was willing to allow states to place a

wide range of obstacles between women and first-trimester abortions—and effectively nullify *Roe*'s ruling that women had a constitutional right to abortion before viability.

Saragosa, Texas

Photo illustration by Natalie Matthews-Ramo. Photo by Charles Henry/Flickr.

Abortion foes didn't have the majority precedent they wanted, but they had a dissent from a supposed moderate and the first woman on the Supreme Court. "In a sense [Lee] gave O'Connor the tools that enabled her to write her dissent, which had a huge impact," says Clarke Forsythe, current senior legal counsel at AUL. "It was earth-shattering at the time."

* * *

Akron galvanized the anti-abortion movement. During the mid-1980s, AUL mapped out a long-term legal strategy that hinged on passing laws that would place seemingly surmountable obstacles in the path of women seeking abortions. Pennsylvania and Missouri led the anti-abortion charge during this period, aided by the Catholic Church's firm grip on local politics in those states. In 1986, in *Thornburgh v. American College of Obstetricians and Gynecologists*, the Supreme Court struck down Pennsylvania abortion restrictions that required informed consent, the

dissemination of printed materials, and extra provisions requiring a second physician to assist with abortions after viability. Once again, O'Connor dissented, arguing that the laws were constitutional and that they didn't "unduly burden" women.

Meanwhile, in Missouri, anti-abortion activist Samuel Lee (no relation to Rex) pored over O'Connor's *Akron* dissent before helping to write a law that restricted public facilities from providing abortions and required physicians to test fetuses for viability at an earlier stage than *Roe*, as Cynthia Gorney describes in her book ***Articles of Faith***. By the time the court heard arguments over Missouri's laws in 1989, in *Webster v. Reproductive Health Services*, Reagan had appointed the conservative Scalia and Justice Anthony Kennedy, tilting the court in favor of restricting abortion. In *Webster*, the court allowed Missouri to create obstacles for both abortion providers and women by requiring physicians to test fetal viability at 20 weeks and restricting public funds for public facilities or employees that performed or counseled for abortion. It marked the first time that Rehnquist, who opposed *Roe*, would write the majority opinion in an abortion case. O'Connor didn't need to write a dissent.

Webster was a watershed moment. *Casey* would be bigger. The long-term anti-abortion strategy was working. In his first dissent in an abortion case since *Roe*, Blackmun acknowledged what was happening: "The signs are evident and very ominous, and a chill wind blows," he wrote.

That same year, AUL began flying state legislators to Chicago, putting them up in a Sofitel for an all-expenses-paid annual conference. The National Right to Life Committee held a conference and drafted eight sample pieces of legislation. In 1990, AUL spent $100,000 on travel and accommodation for 125 legislators representing 42 states, including Pennsylvania, who learned to "sell" anti-abortion ideas. Legislators were taught to call fetuses "the unborn." Clinics would be called "abortion mills."

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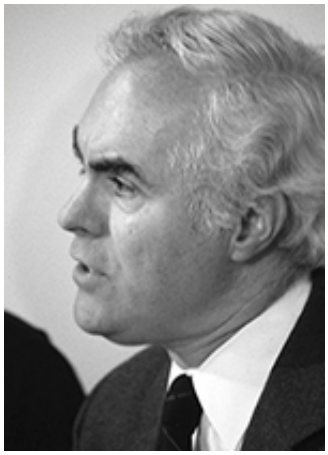

Pennsylvania Gov. Bob Casey in 1986

Michael Casey

A couple of years before the Supreme Court handed down the decision that bears his name, Pennsylvania Gov. Bob Casey met with one of his staffers and his wife, who'd had an abortion. Morgan Plant, a Planned Parenthood lobbyist, spent considerable effort arranging the meeting. Casey was a Catholic Democrat who believed, as he later wrote, that "abortion is the ultimate violence." This encounter was meant to help him see why a woman might feel that having an abortion was the best choice for her and her family. In Casey's office, Plant recalls, the couple described how their first child had spina bifida, a birth defect that can cause paralysis and seizures. During the woman's second pregnancy, they'd received a Down syndrome diagnosis. As she told the governor how painful it had been for them to decide that they wouldn't be able to care adequately for two disabled children, she began to cry, but "Casey was stone-faced and unresponsive," Plant recalls. Leaving his office, Plant remembers thinking, "No matter what we'd done, we would not be able to reach him."

Casey, the son of a coal miner–turned-lawyer, had a strong base among Democrats with conservative social values living in Rust Belt towns not unlike Akron. (Casey's adviser James Carville is often quoted as saying that Pennsylvania is essentially Philadelphia and Pittsburgh with Alabama in between.) The Catholic Church wielded enormous political power in Pennsylvania. At St. Patrick's Cathedral, a block from the state Capitol, legislators, judges, and sometimes Casey himself streamed into the so-called Red Mass, a service held especially for government officials. Like its national office, the Pennsylvania Catholic Conference encouraged priests to sermonize against lawmakers who didn't toe the anti-contraception and anti-abortion line. The bishops' lawyers also helped draft anti-abortion legislation. In closed-door sessions sometimes held in the church's offices, legislators met with

lawyers from Ball & Murren, the Pennsylvania Catholic Conference's law firm. (Later, attorneys from the same firm would provide the conference legal advice on its "secret archive" of documents that incriminated clergy in sexually abusing children.) AUL and National Right to Life provided advice on the abortion bills as well.

In 1989, emboldened by the *Webster* decision, the Pennsylvania legislature passed—and Casey signed—a bill with provisions very similar to those the court had struck down in previous years. The new law included a 24-hour waiting period, dissemination of materials on fetal development, state-designated counseling, permission from a parent for a minor, and notification of a husband for a married woman. The ACLU and Women's Law Project challenged the law on behalf of local clinics.

At least on paper, *Roe* was still the law of the land. The onus was therefore on the government to show that its laws regulating first-trimester abortions advanced the state's interest in maternal health. When preparing for trial, the legal team was able to build the strongest case against the requirement that a married woman needed to notify her husband before having an abortion; new research had demonstrated that domestic violence often begins or worsens when a woman is pregnant. They spent less time on other requirements such as the mandatory waiting period. Linda Wharton, formerly of the Women's Law Project and co-lead counsel with Kolbert in *Casey*, says it can be difficult to show privileged judges how seemingly minor obstacles can become insurmountable for poor, disenfranchised women who can't necessarily pay for extra drives or child care, or take more time off work.***** "They're affluent, they're white, they really can't get out of that brain-set," Wharton says.

Nonetheless, the district court sided with the clinics and threw out the restrictions. The state appealed—and that was where Alito, then a 3rd Circuit judge, and his colleagues came in. Reagan had made it a priority to appoint anti-abortion judges; meanwhile, anti-abortion attorneys had been helping draft legislation those judges would permit. Those two wings of the same strategy finally coalesced when the 3rd Circuit panel handed the anti-abortion movement a remarkable decision. In weighing whether to allow Pennsylvania's laws, the 3rd Circuit judges didn't base their decision primarily on *Roe*—instead, they looked to *Webster*. After all, in *Webster* the court had sanctioned obstacles that *Roe* wouldn't have allowed; in their view, *Roe* wasn't really the prevailing law anymore. "In sum, Justice O'Connor's undue

burden standard is the law of the land, and we will apply that standard to all provisions of the Pennsylvania Act at issue in this appeal," they concluded. (Alito also wrote that he considered spousal notification requirements constitutional because women with abusive husbands could get a waiver and because the evidence presented didn't indicate to him that such requirements create more abuse.)

In less than 10 years, the bedrock of abortion law had been altered. The 3rd Circuit decision exemplified the savvy, patience, and influence of anti-abortion attorneys and their allies in the church and government. The judges' use of the undue burden standard not only vindicated AUL's long-term strategy; it completed its first stage. Judges were justifying obstacles to abortion by pointing to other obstacles.

With that backdrop, the clinics' advocates braced for the Supreme Court to overturn *Roe*. The 3rd Circuit used the definition from O'Connor's *Akron* dissent and said only "absolute obstacles or severe limitations" were undue burdens, which would have allowed states to make abortion all but illegal. *Casey* stopped short of that standard, which allowed the pro-choice camp its sigh of relief. That relief redoubled years later, when Linda Greenhouse and Reva Siegel unearthed Rehnquist's opinion overturning *Roe*—nixed at the last minute when Kennedy changed his mind.

But that *Casey* could be spun as even a partial pro-choice win demonstrates just how badly things were going for the movement to preserve abortion rights. Consider how much had changed: Back in 1982, Blackmun was astonished when government lawyers defended Akron's abortion regulations. A decade later, the Supreme Court decision upholding similar laws was touted as a feminist victory.

Whole Woman's Health v. Hellerstedt's outcome depends on two main questions: first, whether the justices agree with Texas that its laws protect women's health; and second, how burdensome the justices consider the obstacles that HB2 creates for Texan women seeking abortions. During oral arguments, Texas Solicitor General Scott Keller pointed to a clinic in New Mexico as evidence that Texans near the state line could find access to abortion even if HB2 closes clinics in their home state. Justice Ruth Bader Ginsburg noted that New Mexico does not require the very provisions Texas argues are necessary to protect women's health.

“So if your argument is right,” Ginsburg said, “then New Mexico is not an available way out for Texas, because Texas says: ‘To protect our women, we need these things.’ But send them off to New Mexico … and that’s perfectly all right.”

Ginsburg’s comments brought into the open what anti-abortion advocates freely admit everywhere but in the courtroom: that a primary purpose of their laws is to restrict women’s access to abortion, not to protect their health. That moment also gestured at an argument that abortion-rights advocates stress again and again: that financial and logistical obstacles to abortion disproportionately affect poor and working women. Wharton says that the judges tasked with evaluating abortion restrictions are by definition removed from the reality of those women’s lives. Because the undue burden standard is so subjective, she says, its fair application relies on judges being able to put themselves in the shoes of those women for whom 100 miles, a tank of gas, lodging in a distant or out-of-state town, extra child care, and missed hours at work add up to a “substantial obstacle.”

The justices may decide that these obstacles are a woman’s problem to overcome, not a problem of the law. After all, in 1980 the Supreme Court decided that poverty, not the Hyde Amendment, was what prevents poor woman from obtaining an abortion. It was John Gorby who had helped come up with that line of reasoning, which AUL used to clinch the government’s case. During one of my conversations with Gorby, I cited a Center for Reproductive Rights report about women on Medicaid who continued unwanted pregnancies because they couldn’t afford to obtain abortions. “It seems to me,” he replied, “that if she wanted it badly enough, that probably there’s some way she could have gotten the funding to do it. Don’t you think so?”

*This article was reported in partnership with **the Investigative Fund** at **the Nation Institute**.*

Correction, March 28, 2016: *Due to a production error, a photo caption originally misspelled Abilene, Texas. (**Return**.)*

Update, March 28, 2016: *This article has been updated to include that Linda Wharton was co-lead counsel in* Planned Parenthood v. Casey. *(**Return**.)*

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