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BACK TO THE FUTURE OF REGULATING ABORTION IN THE FIRST TERM

Tracy A. Thomas*

On the fortieth anniversary of *Roe v. Wade*, abortion and women's reproductive rights remained front-page news. In the preceding two years, states had accelerated anti-abortion legislation and created new ways to restrict and discourage women's exercise of their constitutional right.¹ The scope and extent of this legislation was unprecedented. In 2012, "19 states enacted 43 measures to limit abortion access. This was in addition to the 92 abortion restrictions enacted in 24 states in 2011."² As the director of the American Civil Liberties Union's Reproductive Freedom Project stated: "We've seen versions of this—the sort of chipping away at *Roe*—for many years. But this year, instead of using a chisel, they're using a jackhammer."³

This abortion activism was part of a larger attack on women's reproductive health, dubbed the "war on women."⁴ As one commentator noted, "[s]tate by state, legislatures are creating new obstacles to abortions and are treating women in ways that are patronizing and humiliating."⁵ Abortion rights advocates assumed that *Roe* had conclusively resolved the question of the legality of abortion, protecting women's right to privacy and choice in the first trimester of pregnancy.⁶ While technically, the core protections of privacy guaranteed by *Roe* remain intact,⁷ feminists believe "those protections are eroding because of the constant onslaught by conservatives bent on undermining the rights of women."⁷ "Relentless lawsuits, . . . even the patently baseless ones, make constitutionally protected abortion rights appear as though they are up for discussion."⁸

The deluge of new anti-abortion laws reaches far into the first trimester of pregnancy and into *Roe*'s presumption of validity. "It's as though legislatures all across the country are saying, 'We don't really care. We're just going to do it anyway in the face of the Constitution.'"⁹ States have designed a wide variety of laws to erode this presumption. A few states now require longer waiting periods of 72 hours between the clinic consult and

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¹ WHO DECIDES? THE STATUS OF WOMEN'S REPRODUCTIVE RIGHTS IN THE U.S., NARAL PRO-CHOICE AMERICA, ANNUAL REPORT (Jan. 2012).

² Kate Michelman & Carol Tracy, "*Roe v. Wade*" About Much More than Abortion, USA TODAY, Jan. 22, 2013; see also Julie Rovner, *New Restrictions on Abortion Almost Tied Record Last Year* (Jan. 19, 2012), NPR HEALTH BLOG; Rachel Benson Gold & Elizabeth Nash, *Troubling Trend: More States Hostile to Abortion Rights as Middle Ground Shrinks*, 15 GUTTMACHER POL'Y REV. 14,16 (2012).

³ L.J. Jackson, *Friendlier State Legislatures Lead to a Rise in Anti-Abortion Legislation*, A.B.A. J. 20 (Aug. 2011).

⁴ Tracy A. Thomas, *Foreword*, WOMEN AND THE LAW (Tracy A. Thomas, ed. West 2012).

⁵ Nicholas D. Kristof, *When States Abuse Women*, N.Y. TIMES, Mar. 4, 2012, at SR11.

⁶ *Roe v. Wade*, 410 U.S. 113 (1973).

⁷ Michelman, *supra* note 2.

⁸ Molly Redden, *Fetal Heartbeat Abortion Laws are Dangerous Even if Judges Reject Them*, NEW REP., Mar. 28, 2013.

⁹ Rebecca Boone, *Idaho First State to Have Fetal Pain Law Rejected*, AP, Mar. 7, 2013.

the procedure.¹⁰ Mandatory disclosure laws, like that in South Dakota, require that woman be told that “the abortion will terminate the life of a whole, separate, unique, living human being,” that she “has an existing relationship with that unborn human being,” and that there are increased risks of depression and suicide.¹¹ Mandatory ultrasound laws require women to view an image of the fetus.¹² Hospital requirements for abortion providers and procedures effectively shut down clinic access.¹³ Other states banned abortions outright at twenty weeks.¹⁴ Fetal pain laws prohibit abortion around eighteen or twenty weeks on the non-scientific basis that the fetus can feel pain.¹⁵ Heartbeat bills ban abortion after the first heartbeat can be detected, which can occur as early as six weeks into the pregnancy.¹⁶ States ban abortions by prescription, either by prohibiting the use of RU40, the abortion pill, or by circumscribing the ability of the physician to prescribe the medicine by telephone.¹⁷ Funding for abortion has been slashed by defunding Planned Parenthood and restricting coverage under federal healthcare reform of the Affordable Care Act.¹⁸

¹⁰ E.g., S.D. CODIFIED LAWS 34-23A-56 (enacted 2011); UTAH CODE ANN. § 76-7-305(2) (eff. May 8, 2012); NEB. REV. STAT. §§28–327 (West 2011).

¹¹ S.D. CODIFIED LAWS § 34–23A–10.1(1)(b), (c) &(e)(i) & (ii).

¹² See Guttmacher Institute, *State Policies in Brief: Requirements for Ultrasound* (Dec. 1, 2012) (collecting state laws); Heartbeat Informed Consent Act, H.R. 3130, 112th Cong. (2011); *Nova Health Systems v. Pruitt*, No. 110813, Okla. S.Ct. (Dec. 4, 2012) (striking down mandatory ultrasound law as inconsistent with federal constitutional law); see also Carol Sanger, *Seeing and Believing: Mandatory Ultrasound and the Path to a Protected Choice*, 56 UCLA L. REV. 351 (2008).

¹³ E.g., N.D. STAT. § 14-.02.1-04 (Mar. 2013); see Erik Eckholm, *North Dakota’s Sole Abortion Clinic Sues to Block New Law*, N.Y. TIMES, May 15, 2013 (discussing laws requiring doctors to have local hospital admitting privileges in North Dakota and Mississippi); Gary Robertson, *Virginia Becomes Latest State to Tighten Abortion Rules*, www.reuters.com, Apr. 12, 2013 (noting hospital-style standards passed in Virginia, Indiana, New Jersey, and Texas).

¹⁴ E.g., ARK. CODE ANN. § 20-16-1305 (eff. Feb. 26, 2013); OH. REV. CODE § 2919.18(B) (2011) (prohibiting if physician determines fetus is viable); 2010 NEB. LAWS 1103 (2010). But see *Isacson v. Horne*, 2013 WL 2160171 (9th Cir. May 21, 2013) (striking down Arizona twenty-week ban as unconstitutional); *McCormack v. Hiedeman*, 900 F.Supp.2d 1128 (D. Idaho 2013) (invalidating twenty-week ban). The Judiciary Subcommittee on the Constitution and Civil Justice proposed a federal twenty-week ban on abortion. Dorothy J. Samuels, *War on Women Continues*, Editor’s Blog, N.Y. Times (June 10, 2013).

¹⁵ “Ten states have enacted fetal pain laws since 2010. . . . Nebraska was first, followed over the next few years by Alabama, Arkansas, Arizona, Georgia, Idaho, Indiana, Kansas, Louisiana, and Oklahoma.” Boone, *supra* note 9. See generally I. Glenn Cohen & Sadath Sayeed, *Fetal Pain, Abortion, Viability, and the Constitution*, 39 J. L. MED. & ETHICS 235 (2001) (tracing development of fetal pain laws and questioning their constitutionality).

¹⁶ North Dakota (March 15, 2013) (six-week ban); Arkansas Human Heartbeat Protection Act, Act 301, 89th Cong., 20-16-1304 (Mar. 5 & 6, 2013) (banning abortion at twelve weeks if heartbeat detected in abdominal ultrasound). See N.D. Governor Signs Nation’s Strictest Abortion Laws, USA TODAY, Mar. 29, 2013. A federal district court preliminarily enjoined the Arkansas heartbeat law finding it “impermissibly burdened a woman’s Fourteenth Amendment right to choose to terminate a pregnancy before viability.” *Edwards v. Beck*, ___ F.Supp.2d ___, 2013 WL 2302323 *5 (E.D. Ark. May 23, 2013). Ohio’s Heartbeat Bill passed the state House, but was not pursued in the Senate. See Ohio H.B. 125, 129th Sess. (2011–2012); Julie Carr Smyth, *Ohio Abortion Ban Would Use Heartbeat as Trigger*, AKRON BEACON J. (Feb. 7, 2011); Jo Ingels, *Ohio House Approves Abortion Ban*, REUTERS (June 28, 2011); Ann Sanner, *Ohio Senate Puts End to “Heartbeat” Abortion Bill*, www.salon.com, Nov. 27, 2012. See also Jessica L. Knopp, *The Unconstitutionality of Ohio House Bill 124: The Heartbeat Bill*, 46 AKRON L.REV. 253 (2013).

¹⁷ E.g., OHIO REV. CODE ANN. § 2929.123 (eff. Sept. 2004); see Gold & Nash, *supra* note 2, at 16 (listing Arizona, Kansas, Nebraska, North Dakota, Oklahoma, South Dakota, and Tennessee); But see Okla.

Courts have been conflicted over the legitimacy of these news laws. Initially, many courts struck down the laws, recognizing them as blatant attempts to deny women their constitutional rights of privacy and choice.¹⁹ As an unanimous United States Court of Appeals for the Ninth Circuit stated in striking down a ban on abortion at twenty weeks, because the early-term law “deprives the women to whom it applies of the ultimate decision to terminate their pregnancies prior to fetal viability, it is unconstitutional under a long line of invariant Supreme Court precedents.”²⁰ The initial judicial determination, however, was reversed in many cases upon further review by appellate courts that upheld the new restrictions on abortion.²¹ Yet, even after reversal, one federal district court continued on remand to assert that there was “little doubt” that the mandatory sonogram law was an invalid “attempt by the Texas Legislature to discourage women from exercising their constitutional rights by making it more difficult for caring and competent physicians to perform abortions.”²² Despite four decades of constitutional law, courts seem resistant to women’s constitutional rights and their moral authority in early-term abortions.

This article contextualizes the recent aggressive anti-abortion legislation by examining the backstory and historical context of two early U.S. Supreme Court cases challenging abortion regulation in the first term: *City of Akron v. Akron Center for*

Coalition for Reprod. Justice v. Cline, No.110765, Okla. S. Ct. (Dec. 4, 2012) (invalidating law that restricted use of abortion medicine).

¹⁸ Gold & Nash, *supra* note 2, at 16 (Kansas, Nebraska, Oklahoma and Utah); Michelman, *supra* note 2; Jackson, *supra* note 3, at 20; *see* Planned Parenthood Ass’n of Hidalgo Cty. Tex., Inc. v. Suehs, 692 F.3d 343 (5th Cir. 2012) (upholding law defunding women’s health organization against First Amendment challenge); *but see* Planned Parenthood of Central N.C. v. Cansler, 877 F.Supp.2d 310 (M.D.N.C. 2012) (denial of state or federal funds to organization was violation of First Amendment, Equal Protection, bill of attainder, and preempted by federal law). *See also* Reproductive Parity Act, Wash. H.B. 1044 (passed April 2013) (requiring all health insurers to cover elective abortions).

¹⁹ *See* Edwards, 2013 WL 2302323 *5 (enjoining Arkansas heartbeat bill); McCormack, 900 F.Supp.2d at 1148 (striking down hospital requirement for second trimester abortions and twenty-week ban); Planned Parenthood of Minn. v. Daugaard, 799 F.Supp.2d 1048, 1064-66 (D.S.D. 2011) (enjoining preliminarily South Dakota 72-hour waiting period); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp.2d 942 (W.D. Tex. 2011) (declaring mandatory ultrasound law unconstitutional), *overruled*, 667 F.3d 570 (5th Cir. 2012); Nova Health Systems, No. 110813 (striking down mandatory ultrasound law); Okla. Coalition for Reprod. Justice, No.110765 (invalidating prescription ban).

²⁰ Isaccson v. Horne, 2013 WL 2160171 (9th Cir. May 21, 2013).

²¹ *See* Planned Parenthood Minn., N.D., S.D. v. Rounds, 650 F. Supp. 2d 972 (D.S.D. 2009) (striking down relationship and suicide disclosures as unconstitutional, but upholding biological disclosures of fetus as a living human being), *rev’d in part*, 653 F.3d 662 (8th Cir. 2011) (upholding required counseling disclosures of biology, medical risks, and parent/child relationship), *partial hearing en banc*, 686 F.3d 889 (8th Cir. 2012) (upholding suicide disclosure); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570 (5th Cir. 2012) (upholding Texas mandatory ultrasound law); Planned Parenthood Ass’n of Hidalgo, Cty. Tex., Inc. v. Suehs, 828 F. Supp. 2d 872 (W.D. Tex. 2012) (granting preliminary injunction enjoining Texas administrative rule that prohibited funding for organizations that provided abortion or any preventive health and family planning services); 692 F.3d 343 (5th Cir. 2012) (upholding law defunding women’s health organization against First Amendment challenge).

²² Tex. Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp.2d 942 (W.D. Tex. 2011) (finding that mandatory ultrasound and display law violates free speech rights of doctors and patients); Tex. Med. Providers Performing Abortion Servs. v. Lakey, 2012 WL 373132, *5 (W.D. Tex. Feb. 6, 2012) (reluctantly enforcing law); *see also* Jim Vertuno, *Federal Judge Rejects Major Parts of New Texas Law on Sonograms and Abortions*, AP, Aug. 30, 2011.

Reproductive Health (Akron),²³ and *Ohio v. Akron Center for Reproductive Health (Akron II)*.²⁴ Little has been written about these foundational cases. Yet at the time of the first *Akron* case, the Supreme Court's decision was "celebrated as the most far-reaching victory on reproductive rights since *Roe v. Wade*."²⁵ Now the arguments, strategies, and motivations of the *Akron* cases have renewed relevance, as first-term regulations are fast tracked through the judicial system and placed at the center of the ongoing debate over abortion.

In *Akron*, the Court struck down invasive regulations it found were mere attempts to discourage women from exercising their constitutional rights.²⁶ The Akron ordinance imposed seventeen different requirements including counseling, religious disclosures, waiting periods, parental consent, and hospital requirements for abortion.²⁷ The comprehensive law was one of the first attempts to enact so-called informed consent laws. These laws borrowed from the tort concept of informed consent requiring physicians to inform patients of the medical risks of procedures.²⁸ Anti-abortion groups endorsed these laws "under the theory that a woman who was truly informed would choose not to terminate a pregnancy."²⁹ Critics, however, argue that these abortion laws are perversions of the tort law designed to protect a patient's autonomy by interfering with that self-determination because of women's assumed mental instability.³⁰ The abortion informed consent laws create a gendered exception to the usual rules of informed consent based upon stereotypes of women, bias against abortion, and unsupported medical advice.³¹ Initially, the Court agreed with this, and accordingly struck down the transparent attempts to discourage abortion in the Akron ordinance.³²

The Court's reaffirmation of *Roe*, however, was short-lived. Seven years later, in *Akron II*, the Court changed the direction of its abortion jurisprudence, and upheld parental notification and consent laws demonstrating a new tolerance for state regulation of abortion in the first trimester.³³ Despite the stewardship of the trial judge, Ann Aldrich, the

²³ 462 U.S. 416 (1983).

²⁴ 497 U.S. 502 (1990).

²⁵ LEIGH ANN WHEELER, *HOW SEX BECAME A CIVIL LIBERTY* 148 (2013).

²⁶ *Akron*, 462 U.S. at 444.

²⁷ *Id.* at 422; *see also* *Akron Ctr. for Reproductive Health v. City of Akron*, 479 F. Supp. 1172, App. 1208–13 (N.D. Ohio 1979) (reprinting ordinance in entirety).

²⁸ *See* Nadia N. Sawicki, *The Abortion Informed Consent Debate: More Light, Less Heat*, 21 CORNELL J.L. & PUB. POL'Y 1, 3 (2011). *See* Maya Manian, *Perverting Informed Consent, The South Dakota Court Decision* (Aug. 1, 2012), <http://www.rhrealitycheck.org/article/2012/08/01/perverting-informed-consent-south-dakota> (arguing that South Dakota is not the only state which misuses traditional principles of informed consent to regulate abortion with laws that "are rife with mis-information and shaming rituals masquerading as protections of a 'woman's right to know.'"); Sawicki, *supra*, at 1, 19; Evelyn Atkinson, Comment, *Abnormal Persons or Embedded Individuals?: Tracing the Development of Informed Consent Regulations for Abortion*, 34 HARV. J.L. & GENDER 617, 655 (2011).

²⁹ Reginald Stuart, *Akron Divided by Heated Abortion Debate*, N.Y. TIMES, Feb. 1, 1978.

³⁰ Atkinson, *supra* note 27, at 618; Sawicki, *supra* note 27, at 3; Maya Manian, *The Irrational Woman: Informed Consent and Abortion Decision-Making*, 16 DUKE J. GENDER L. & POL'Y 223 (2009).

³¹ Pamela Laufer-Ukeles, *Reproductive Choices and Informed Consent: Fetal Interests, Women's Identity and Relational Autonomy*, 37 AM. J.L. & MED. 567, 568 (2011).

³² *Akron*, 462 U.S. at 444.

³³ *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 519–20 (1990).

first woman appointed to the federal district court in Ohio, the implications of this law for women was lost. The Court justified the restrictions as necessary to protect young women from their inability to appreciate the “complex philosophical and psychological dimensions” of abortion.³⁴ This woman-protective rationale evolved into a primary judicial justification for restricting abortion for *all* women, as the Court found that women generally failed to understand the potential psychological and moral consequences of their decision.³⁵ The informed consent laws proved to be an effective way for pro-life groups incrementally to whittle away at the right to abortion by creating obstacles and state discouragement to a woman’s choice.³⁶

This Article provides the backstory of the political and legal case in *Akron*, capturing the public dispute over abortion that seized the locality and the attention of the national media. Part I follows the case through its rocky path in the Akron City Council, including the protests, demonstrations, and outrage that drove the legislation. Part II traces the case through the trial court as the American Civil Liberties Union (ACLU) litigated the case as a medical issue of scientific expertise and physician decision-making, rather than one of women’s privacy. Part III then discusses the Supreme Court’s rejection of informed consent laws and its reaffirmation of the core privacy right of *Roe*. The Article then discusses the follow-on case of *Akron II*, when the state of Ohio again passes legislation on parental consent and notification. Part IV explores the difference Judge Ann Aldrich, the first female judge in the Northern District of Ohio, made to the consideration of abortion laws, and the Supreme Court’s rejection of her analysis and its new tolerance for restrictions of abortion in the first term.

This legal history offers insights and analyses gleaned from a review of the historical record found in archives and long-forgotten files in dusty basements.³⁷ It relies on interviews with key players in the cases to fill in the story between the black and white lines of judicial opinions.³⁸ Revisiting the legal and factual details of the foundational cases of first-term abortion regulation offers a more nuanced understanding of the opposition to abortion and the unsatisfactory nature of the judicial compromises. For only one thing is clear—that “the decision in *Roe v. Wade* neither started nor ended the debate over abortion.”³⁹

³⁴ See *id.* at 519.

³⁵ *Gonzales v. Carhart*, 550 U.S. 124, 159, 172 (2007).

³⁶ Caitlin E. Borgmann, *Roe v. Wade’s 40th Anniversary: A Moment of Truth for the Anti-Abortion-Rights Movement*, 24 STANFORD LAW & POL’Y REV. 245(2013).

³⁷ See, e.g., Abortion, File of John Frank (on file with author); Archival Search File, Akron Beacon Journal (on file with author).

³⁸ Telephone Interview with Bonnie Bolitho, Director of Development, Planned Parenthood (June 29, 2010); Interview with John Frank, former Akron City Councilman, in Akron, Ohio (June 21, 2010); Interview with Stephen Funk, former law clerk to Judge Aldrich, in Cleveland, Ohio (Feb. 12, 2010); Telephone Interview with Stephan Landsman, Professor of Law, DePaul University (June 8, 2010); Interview with Lana Moresky, former president, National Organization of Women, in Cleveland, Ohio (Feb. 12, 2010); Interview with Robert Pritt, Attorney, Roetzel & Andress, in Akron, Ohio (June 18, 2010).

³⁹ Linda Greenhouse & Reva Siegel, *Reaction*, in *BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING* 81 (Linda Greenhouse & Reva Siegel eds., 2010).

I. THE PERSISTENCE OF STRONGLY HELD BELIEFS

While many thought that *Roe* had resolved the legal question of abortion regulation, the case instead became a trigger point for challenges to the compromise respecting women's rights. Resistance to the ruling became stronger as the practice of abortion emerged from underground and was now publicly visible. The city of Akron, Ohio, with a population at the time of 237,000, became one of the early battlegrounds over challenges to *Roe* and its endorsement of abortion in the first term.⁴⁰ The unlikely venue was the Akron City Council. The locality was drawn into the national constitutional debate because of the heightened awareness of abortion in the city due to the operation of four abortion clinics.⁴¹ Women came to Akron from all parts of Ohio and neighboring states for legal and affordable abortions.⁴² The public visibility of abortion in the city triggered a reaction from the City Council, which was known for "reacting to social phenomena" and threats to the social order, like video games, headshops, and rock concert crowds.⁴³

The abortion regulation was instigated by leaders of the Greater Akron Right to Life organization, Jane Hubbard, and Ann Marie Segedy.⁴⁴ The National Right to Life movement had grown beyond its original sponsorship by the Catholic Church in 1967 into a formidable national movement incorporated as a political committee in 1973.⁴⁵ In August 1976, the local Akron group petitioned the council to regulate abortion.⁴⁶ Initially, the Akron City Council rejected the proposed ordinance on the advice of the city law department, which concluded the law was unconstitutional.⁴⁷ The council did, however, pass one change, a law requiring that abortions after the first three months of pregnancy be performed in hospitals.⁴⁸

A year later, the Akron Right to Life group proposed another, more expansive abortion regulation.⁴⁹ The group hoped to "persuade the Roman Catholic-dominated City Council to consider adopting an abortion restriction that . . . would be the toughest in the

⁴⁰ Stuart, *supra* note 28, at A10.

⁴¹ *Id.*; Bolitho Interview *supra* note 36.

⁴² Bolitho Interview, *supra* note 36; Iver Peterson, *Akron's 1978 Rules Were Enjoined Almost at Start*, N.Y. TIMES, Dec. 1, 1982, at B4 (stating that according to the Akron City Health Department, in 1981 there were a total of 7,685 abortions performed in Akron, 1,843 for Akron women and the rest were for women from outside the city).

⁴³ Peterson, *supra* note 40 (quoting the Deputy Mayor David Pagnard: "The fact is, it's a part-time City Council and they don't have very much to do." "They spend a lot of time reacting to social phenomena. It's something you get in small cities, and Akron is just big enough to have abortion clinics but small enough to have this mentality.").

⁴⁴ Letter to the Editor, Ann Marie Segedy, *Don't Blame National Right to Life*, AKRON BEACON J., June 1983.

⁴⁵ See generally NATIONAL RIGHT TO LIFE, <http://www.nrlc.org/abortion/facts/abortiontimeline.html> (last visited Oct. 2, 2012).

⁴⁶ *Akron Council to Get "Tough" Abortion Plan*, AKRON BEACON J., Oct. 17, 1977, at B1 [hereinafter *Akron Council to Get "Tough"*].

⁴⁷ William Hershey, *Legal Flaws Seen in Abortion Bill*, AKRON BEACON J., Feb. 11, 1978, at A3 [hereinafter *Hershey, Legal Flaws*].

⁴⁸ *Id.*

⁴⁹ *Akron Council to Get "Tough," supra* note 43.

nation.”⁵⁰ The lawyer for the group, Alan Segedy, husband of the woman who had initiated the demand for local regulation of abortion, drafted a proposed ordinance with Marvin Weinberger, the chairman of Akron Right to Life, in consultation with national anti-abortion legal experts.⁵¹ The Akron ordinance was intended as a model for national restrictions on abortion and eventually was copied in twenty other states.⁵²

As an “informed consent” law, the ordinance was designed to counter the assumed “feminist rhetoric” and financial profit motives of the abortion clinics and convince women not to have abortions.⁵³ As Hubbard, the 29-year-old president of the Akron Right to Life group described, “[t]he legislation’s main thrust is to ensure that a woman who decides to abort her child will have when she decides scientifically and medically accurate information: that the child she will abort is alive and growing, and that the procedure may cause her physical or psychological harm.”⁵⁴ She continued: “When someone realizes that they are taking the life of a baby then they will realize that there are alternatives.”⁵⁵

The Akron regulation had sixteen provisions designed to “protect a woman’s health” during abortion.⁵⁶ Its controversial provisions included parental consent for minors under fifteen, parental notification for minors between fifteen and eighteen,⁵⁷ informed consent for all women, a twenty-four-hour waiting period, and counseling with highly-detailed medical disclosures about the procedure and biological disclosures about the “unborn child.”⁵⁸ Similar to sonogram bills of today, the mandated physician disclosures of

⁵⁰ Stuart, *supra* note 28.

⁵¹ William Hershey, *More Hearings Planned on Abortion*, AKRON BEACON J., Dec. 21, 1977, at C4 (noting that local ordinance drafted in consultation with law professors Charles Rice of the University of Notre Dame Law School and Joseph Witherspoon of the University of Texas).

⁵² See, e.g., *Louisiana’s Stringent New Abortion Law Termed “Standard Bearer,”* N.Y. TIMES, Aug. 1, 1978, at B6 (noting that the new legislation had passed almost unanimously and that the drafter of the legislation had followed the Akron ordinance “right down the line.”)

⁵³ Jane Hubbard, Letter to the Editor, *Should City Monitor Abortion?*, AKRON BEACON J., Nov. 21, 1977, at A6.

⁵⁴ *Id.*; see also Marvin I. Weinberger & Alan G. Segedy, Op-Ed., *For Ordinance: ‘Would Protect Both Mother and Child,’* AKRON BEACON J., Dec. 18, 1977 (quoting drafters of law that “[t]o insure truly informed consent, the mother must be informed of the biological facts . . . the alternatives to abortion . . . [and] the potentially grave physical and psychological complications”).

⁵⁵ Hubbard, *supra* note 50.

⁵⁶ Akron Ord. No. 160–1978, Chp. 1870, *reprinted in* Akron Ctr. for Reproductive Health v. City of Akron, 479 F. Supp. 1172, App. 1208–13 (N.D. Ohio 1979).

⁵⁷ *Id.* at 1185–86. The ordinance provided an exception to the parental consent if the minor first obtained an order “from a court having jurisdiction over her that the abortion be performed or induced.” *Id.* at 1201 (quoting Akron Ord. No. 160-1978 § 1870.05(B)(2) (1975)). However, because the municipality had no authority to dictate the jurisdiction of the state courts, the trial court held that this provision was void. *Id.* at 1207–08.

⁵⁸ *Id.* at 1186. The Akron ordinance also required abortions to be performed by a licensed physician; prohibited abortions after 24 weeks unless necessary for the life or health of the woman, and in such case required the attendance of a second physician dedicated to providing “immediate medical care for a child born as a result of the abortion”; required maintenance of records of abortion and individual, detailed abortion reports by the physician for each procedure; mandated open access for inspection by the Department of Public Health at any time; prohibited abortions in municipal hospitals; included a freedom of conscience exception allowing any hospital or employee to refuse to perform abortions; prohibited experimentation or selling of a live or unborn child; and required post-abortion medical instructions. See *id.* at 1184–87 (citing

the Akron law required a statement that “the unborn child is a human life from the moment of conception” and “a detailed description of the anatomical and physiological characteristics of the particular unborn child” at that point of development including “appearance, mobility, tactile sensitivity including pain, perception or response, brain and heart function, the presence of internal organs and the presence of external members.”⁵⁹ Like counseling laws enacted in 2011, the Akron ordinance provided that “in order to insure that the consent for the abortion is truly informed,” the physician must inform the woman that the “unborn child might be viable and capable of surviving outside the woman if more than 22 weeks,” that abortion is a major surgical procedure that can result in serious complications, including “hemorrhage, perforated uterus, infection, menstrual disturbances, sterility and miscarriage in subsequent pregnancies,” and that abortion “may worsen existing psychological problems and result in severe emotional disturbances.”⁶⁰

The city’s chief trial attorney, Willard F. Spicer, advised the council that the ordinance was unconstitutional, stating “[t]here’s no question in my mind if the ordinance was passed it would be knocked out (by a judge) very quickly.”⁶¹ Similar municipal regulations were passed prior to the Akron law in Chicago and St. Louis, but had been struck down as unconstitutional.⁶² And the parental consent provisions seemed directly contrary to the U.S. Supreme Court’s decision in *Planned Parenthood of Central Missouri v. Danforth*, which had struck down a similar statute just two years before.⁶³ In light of these recent precedents, Spicer advised the council against regulation and identified its exposure to significant attorney fees and damages if it lost the case.⁶⁴ Despite this legal advice, the council proceeded with the proposed legislation.⁶⁵

The proposed Akron abortion law triggered a series of heated, public meetings before the City Council Health and Social Service Committee. The meetings attracted several hundred people, despite the blizzard conditions in February 1978, when Akron was

Akron Ord. § 1870.01–1870.18). Violation of the ordinance was either a first or third degree misdemeanor, depending upon the specific provision violated. *Id.* at 1187. An earlier version of the ordinance prohibited abortions after twenty-two weeks, required the pregnant woman to be shown pictures of an unborn child, and required notification of the father of the unborn child. William Hershey, *Akron Council Gets Milder Abortion Bill*, AKRON BEACON J., Jan. 10, 1978, at A1; Charles Buffum, *Abortion Bill Nearing Vote*, AKRON BEACON J., Feb. 23, 1978, at B1.

⁵⁹ *Akron*, 479 F. Supp. at 1202–03 (quoting Akron Ord. § 1870.06(B)); Charles Buffum, *Abortion: Thorny Issue*, AKRON BEACON J., Dec. 18, 1977, at G1 (stating that “unborn child” provision “would seem to outlaw ‘morning after’ birth control pills, IUD and some oral contraceptive practices which prevent development after conception”).

⁶⁰ *Akron Ctr.*, 479 F. Supp. at 1202–04 (citing Akron Ord. § 1870.06(B)(5), Informed Consent.)

⁶¹ Memorandum from W.F. Spicer, Chief Trial Counsel, Akron Department of Law, to John V. Frank, 8th Ward Councilman, Akron, Ohio (Feb. 27, 1978) (copy on file with author); Hershey, *Legal Flaws*, *supra* note 44, at A3; *see also* William Hershey, *Goehler Wants Abortion Vote this Month*, AKRON BEACON J., Feb. 17, 1978, at B1.

⁶² *See* *Friendship Med. Ctr., Ltd. v. Chi. Bd. of Health*, 505 F.2d 1141, 1154 (7th Cir. 1974); *Word v. Poelker*, 495 F.2d 1349, 1352 (8th Cir. 1974).

⁶³ *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52 (1976) (concluding that the State does not have the constitutional authority to give a third party an absolute and possibly arbitrary veto over the decision of the physician and his patient).

⁶⁴ Spicer Memorandum, *supra* note 58.

⁶⁵ Hershey, *Legal Flaws*, *supra* note 44.

covered by the “storm of the century.”⁶⁶ At the hearings on the abortion law, local representatives from the National Organization of Women (NOW) and the specially created Akron Pro-Choice Coalition led the organized opposition.⁶⁷ Local and national members of Right to Life groups led the organized support for the law.⁶⁸ The committee permitted the public to speak only at the first hearing.⁶⁹ At the second hearing, the committee heard from legal experts from Washington, D.C., Indiana, and Georgia, who disagreed on the legality and constitutionality of the bill, and its informed consent provisions.⁷⁰ The third and fourth hearings considered testimony from medical and psychological experts.⁷¹ One particularly controversial speaker was a national Right to Life leader from Cincinnati, Dr. John C. Willke, who self-published the *Handbook of Abortion*, considered the bible of the Right to Life movement.⁷² Willke presented provocative slides of fetal life at the hearing, triggering shouting matches in the hall and a walkout led by gynecologists scheduled to speak.⁷³ The county health director, Dr. C. William Keck, testified against the bill.⁷⁴ He argued that no further regulation was needed to insure quality health care for women, as professional medical ethics and existing public health regulation were more than sufficient.⁷⁵

At the end of the day, the standing-room-only crowds seemed evenly divided on the issue of abortion.⁷⁶ But the contentious debate “served to divide further a community already at odds over school desegregation and plagued by a declining job base as the tire industry” withdrew from the city.⁷⁷ Religious leaders stirred up their constituents, the Catholic bishop actively lobbied his parish, and a Catholic principal and nun lobbied the parents at her school.⁷⁸ A minor fire was at the Akron Women’s Clinic nine days after a fire at a Cleveland abortion facility put the clinic out of business, mimicking other fires

⁶⁶ Jean Peters, *Policing of Abortion Clinics Debated*, AKRON BEACON J., Feb. 5, 1978, at A1; William Hershey, *Abortion Debate Centers on Consent Provisions*, AKRON BEACON J., Jan. 26, 1978, at A1; William Hershey, *More Hearings Planned on Abortion*, AKRON BEACON J., Dec. 21, 1977, at C4.

⁶⁷ Peters, *supra* note 63.

⁶⁸ *Id.*

⁶⁹ Peggy Rader, *Lawyers Differ on Abortion Proposal Legality*, AKRON BEACON J., Jan. 15, 1978, at C1.

⁷⁰ *Id.*

⁷¹ William Hershey, *Abortion Debate Centers on Consent Provisions*, AKRON BEACON J., Jan. 26, 1978, at A1; *Last Session on Abortion is Saturday*, AKRON BEACON J., Feb. 3, 1978, at B1.

⁷² Richard McBane, *Fetus Survival is Described in Testimony*, AKRON BEACON J., Sept. 16, 1978, at A10. Dr. Willke also testified in the subsequent trial. *Id.* See J.C. WILLKE & BARBARA WILLKE, HANDBOOK ON ABORTION (1st ed. 1971), as reprinted in BEFORE ROE V. WADE, *supra* note 37, at 99–112.

⁷³ See Peters, *supra* note 63.

⁷⁴ Statement by C. William Keck, M.D., M.P.H., to Akron City Council Health & Social Service Committee, Feb. 4, 1978, in Joint Appendix at 304a-309a, *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983) [hereinafter Keck Statement]; see Peters, *supra* note 63.

⁷⁵ Keck Statement, *supra* note 72; Peters, *supra* note 63, at A6.

⁷⁶ William Hershey, *Akron Abortion Proposal Sparks Heated Exchange*, AKRON BEACON J., Jan. 11, 1978, at A1.

⁷⁷ Stuart, *supra* note 28.

⁷⁸ William Hershey, *Bishop Urges Council to OK Abortion Bill*, AKRON BEACON J., Jan. 8, 1978, at A1.

and vandalism against clinics nationwide.⁷⁹ Community groups on both sides of the issue marched and demonstrated at city hall and elsewhere in town.⁸⁰

Marvin Weinberger, an orthodox Jew and twenty-three-year-old law student, was chairman of the Akron group Citizens for Informed Consent (CIC), and orchestrated the local demonstrations and public relations efforts of the anti-abortion group. The press described Weinberger as an “overzealous” and “aggressive man,”⁸¹ who used “little stunts” to manipulate the media and attract publicity.⁸² He appeared on national television, on NBC’s *Today Show*, debating Akron obstetrician, Dr. Linda Parenti.⁸³ Locally, he orchestrated an all-night prayer vigil in frigid weather on the eve of the council vote. Six hundred anti-abortion protestors attended the vigil at the Lutheran church across the street from council chambers.⁸⁴ On the day of the vote, 150 people overflowed council chambers and hallway to hear the final forty-five-minute debate.⁸⁵ Approximately thirty protestors paraded outside of chambers, wrapped in blankets against the cold.⁸⁶ The national nightly news on all three television channels then in existence featured these protests, making Akron the center of the national debate over abortion.⁸⁷

The Akron city council passed the abortion resolution by a vote of seven to six.⁸⁸ The lone Republican on the council, John Frank, voted against the regulation.⁸⁹ Frank later said he voted the way he did because of his own personal experience.⁹⁰ Years before the vote, his girlfriend had an unplanned pregnancy, and he believed the decision to continue the pregnancy was hers alone.⁹¹ He supported her unilateral decision, even though he had

⁷⁹ *Abortion Clinic Fire Blamed on Arsonist*, AKRON BEACON J., Mar. 3, 1978, at A1; *see also Arsonists, Vandals Stalk Abortion Clinics*, AKRON BEACON J., Mar. 2, 1978, at A1.

⁸⁰ *See, e.g.,* William Canterbury, *Mayor Meets with Bill’s Opponents*, AKRON BEACON J., Feb. 12, 1978, at B1 (describing demonstration of three hundred people led by Maryann Baker, president of the Ohio chapter of the National Organization of Women (NOW)).

⁸¹ Stuart, *supra* note 28; Abe Zaidan & William Hershey, *Weinberger Stunt ‘Appalls’ Kapper*, AKRON BEACON J., Mar. 7, 1978, at B1.

⁸² Abe Zaidan, *Press “Manipulator” Weinberger Backs Off*, AKRON BEACON J., Mar. 6, 1978, at A1; David B. Cooper, Op-Ed., *Manipulating the Press?: ‘Little Stunts’ for Big Issues*, AKRON BEACON J., Mar. 9, 1978, at A6.

⁸³ William Hershey, *Abortion Focus to Remain on Akron*, AKRON BEACON J., Mar. 1, 1978, at A1; *Marvin Weinberger and Linda Parenti Debate Akron Abortion Issue*, NBC News, Clev., Ohio, Mar. 1, 1978.

⁸⁴ William Canterbury, *600 Abortion Foes Shun the Cold During Night-long Candle Rally*, AKRON BEACON J., Feb. 28, 1978, at A1.

⁸⁵ William Hershey, *Council Passes Abortion Control Bill; Opponents Vow Challenge in Court*, AKRON BEACON J., Feb. 28, 1978, at A1 [Hershey, *Council Passes*].

⁸⁶ *News with David Brinkley* (NBC television broadcast Feb. 28, 1978); *see* Peters, *supra* note 63 (noting that the Akron abortion debate had been spotlighted in the *New York Times*, NBC’s *Today Show*, and CBS’s network evening news).

⁸⁷ *News with Barbara Walters* (ABC television broadcast Feb. 28, 1978); *News with Walter Kronkite* (CBS television broadcast Feb. 28, 1978); *News with David Brinkley*, *supra* note 85.

⁸⁸ Hershey, *Council Passes*, *supra* note 84.

⁸⁹ *Id.*; Letter from Dr. Linda A. Parenti, MD (Akron OB/GYN) to John Frank, Mar. 2, 1978 (“You are in a lonely place, Mr. Frank, and I do not envy you—but I respect you far more than those people of my political party and my ‘faith’ who have disregarded the law and the greatest law, the Golden Rule, in imposing their morals on everybody else.”).

⁹⁰ Frank Interview, *supra* note 36.

⁹¹ *Id.*

not wanted a child, and was obligated to pay child support for the child she chose to have.⁹² Frank believed that abortion was simply none of council's business, and that it was a woman's decision whether or not to have a baby—period.⁹³

Councilman Ray Kapper led the charge for passage of the law because he was concerned the abortion clinics were preying on young girls, and that a lot of people weren't aware of "what kind of money those rip-off artists were making off teen-agers."⁹⁴ Kathleen Greissing, a nurse and one of two women on the council, voted for the ordinance as an assurance of "good quality healthcare" for women.⁹⁵ The other councilwoman, Elsie Reaven, voted against the law, and expressed her outrage that the "dominant male faction in council had the arrogance to persist against all reason in burdening and possibly encumbering women."⁹⁶ Mayor John Ballard refused to either endorse the bill with his signature or register his opposition through veto, and the bill became law.⁹⁷ City attorney, Willard Spicer, predicted, "the ordinance just doesn't stand a chance."⁹⁸

II. MEDICINE AND MORALITY IN THE COURT

Three abortion clinics immediately challenged the Akron ordinance, represented by attorneys from the Ohio chapter of ACLU.⁹⁹ Clinic directors were concerned that the ordinance's provisions intimidated and harassed women, increased costs of the procedure, and resulted in a loss of privacy for the patients.¹⁰⁰ The president of the national Planned Parenthood organization, Faye Wattleton, called the law "a savage threat to the emotional and physical well-being of women who seek abortions."¹⁰¹ The ACLU was "dismayed that the advocates of compulsory continued pregnancy managed to persuade the Akron city council to enact such a flagrantly unconstitutional and obnoxious ordinance."¹⁰²

The ACLU had become the "preeminent litigator on abortion rights" by the time of the Akron challenge.¹⁰³ In 1967, the National ACLU organization first adopted a policy

⁹² *Id.*

⁹³ *Id.*

⁹⁴ Rick Reiff, *No Apology for 1978 Actions, Kapper Says*, AKRON BEACON J., June 16, 1983, at A15.

⁹⁵ *News with David Brinkley*, *supra* note 85.

⁹⁶ Hershey, *Council Passes*, *supra* note 84; *News with David Brinkley*, *supra* note 85; *see generally News with Walter Kronkite*, *supra* note 86.

⁹⁷ *Abortion a 'Private Matter' Ballard Says*, AKRON BEACON J., Dec. 28, 1977, at B1 (quoting the mayor as saying his own personal view is that abortion is a private matter, but could be "a legitimate legislative area [for] setting standards"); *Mayor's Decision Lauded, Criticized*, AKRON BEACON J., Mar. 8, 1978, at A11 (quoting City Council President Ray Kapper as saying this was "typical John Ballard posture, trying to be all things to all people" and taking "the easy way out"); Editorial, *Fast Ruling on Ordinance Would Serve Community*, AKRON BEACON J., Mar. 9, 1978, at A6; Editorial, *The Abortion Issue . . . in Akron*, WASH. POST, Sept. 11, 1982, at A22.

⁹⁸ Spicer Memorandum, *supra* note 58.

⁹⁹ *Groups Pledge to Fight Akron's Abortion Law*, TOLEDO BLADE, Mar. 1, 1978, at 1; William Hershey, *Suit Challenges City Abortion Law*, AKRON BEACON J., Apr. 20, 1978, at A1.

¹⁰⁰ *Id.*; *see also* Gail Sweeney, Op-Ed., *Against Ordinance: 'An Infringement of Rights, Privacy,'* AKRON BEACON J., Dec. 18, 1977, at G1.

¹⁰¹ *See Groups Pledge*, *supra* note 97.

¹⁰² *Id.*

¹⁰³ *Id.* at 139.

endorsing the unrestricted right of a woman to choose an abortion before viability.¹⁰⁴ Instigated by lawyer and board member Dorothy Kenyon, the ACLU National Board joined the chorus of other groups that had begun to question the illegality of abortion in the early 1960s.¹⁰⁵ “The ACLU’s policy aligned it closely with the emerging women’s rights movement, but attorneys who worked on ACLU abortion cases were not necessarily governed by feminist instincts.”¹⁰⁶ Board members, including the few women, did not identify as feminists (meaning man-hating), but instead were motivated by broader concerns of privacy.¹⁰⁷ In 1972, the board voted to make the women’s rights agenda a national priority, establishing Ruth Bader Ginsburg’s Women’s Rights Project, funded with seed money from the Ford Foundation and Playboy.¹⁰⁸

Abortion had not always been illegal. At common law, abortion was permissible until the time of quickening late in the fourth month.¹⁰⁹ States first criminalized it in the mid-nineteenth century, concerned about the increase in abortions, injury to women from surgical malpractice, lobbying by the medical profession, and anti-feminist beliefs against women’s autonomy as child-bearers and midwives.¹¹⁰ In the 1960s, doctors and public health officials became troubled by the tragic injuries and deaths of women from illegal, back-alley abortions.¹¹¹ As a result, in 1962, the American Law Institute proposed therapeutic abortion laws that permitted doctors to perform abortions they believed were justified for a woman’s physical or mental health.¹¹² The growing feminist movement adopted abortion as a centerpiece of its wider agenda for women’s rights.¹¹³ Feminists connected their demand for women’s full economic and public participation with the ability of women to remove the burdens of childbearing by controlling their reproductive lives.¹¹⁴ By 1970, four states had legalized abortion, and courts in seven other states struck

¹⁰⁴ WHEELER, *supra* note 25, at 128.

¹⁰⁵ *Id.* at 126-28.

¹⁰⁶ *Id.* at 131.

¹⁰⁷ *Id.* The ACLU wrote a brief in *United States v. Vuitch*, 402 U.S. 62 (1971), the first abortion case considered by the Supreme Court, arguing that the right of privacy associated with intimate relations and procreative choice in contraception established in the landmark case *Griswold v. Connecticut*, 381 U.S. 479 (1965), should extend to abortion. WHEELER, *supra* note 25, at 134. Only Justice Douglas was persuaded, and the Court affirmed the constitutionality of the criminal laws against abortion. 402 U.S. 62. However, the day after the *Vuitch* decision was announced, the Court voted to hear *Roe v. Wade*. LINDA GREENHOUSE, *BECOMING JUSTICE BLACKMUN* 78 (2005).

¹⁰⁸ WHEELER, *supra* note 25, at 134.

¹⁰⁹ *Roe v. Wade*, 410 U.S. 113, 132-38 (1973); JAMES C. MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 3 (1978).

¹¹⁰ MOHR, *supra* note 107; Reva B. Siegel, *Reasoning From the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STANFORD L. REV.* 261 (1992).

¹¹¹ *BEFORE ROE V. WADE*, *supra* note 37, at xii.

¹¹² American Law Institute Abortion Policy (1962), *reprinted in* *BEFORE ROE V. WADE*, *supra* note 37, at 25 (justifying abortion if the doctor believes there is a risk to physical or mental health of the mother, if the child would be born with grave physical or mental defect, or if the pregnancy resulted from rape, incest, or other felonious intercourse). Twelve states adopted part of the ALI’s recommendation. *Id.*

¹¹³ *BEFORE ROE V. WADE*, *supra* note 37, at xii, 35.

¹¹⁴ *Id.* at 35. In 1969, feminist leader Betty Friedan gave an influential speech declaring that abortion was the right of women to control their own bodies, their own lives, and their own place in society. Betty Friedan, *Abortion: A Woman’s Civil Right* (Feb. 1969), *in* *BEFORE ROE V. WADE*, *supra* note 37, at 38-40.

down their criminal statutes.¹¹⁵ In 1972, the American Bar Association (ABA) approved a Uniform Abortion Act that would have placed no limitations on abortion during the first twenty weeks of pregnancy, similar to the policy of the ACLU.¹¹⁶

In 1973, *Roe v. Wade* recognized a woman's fundamental privacy right to choose an abortion.¹¹⁷ The Supreme Court held that privacy rights inherent in the Constitution protect a woman's right to choose abortion as advised by her doctor.¹¹⁸ The Court rejected the therapeutic approach in a companion case,¹¹⁹ but still viewed the abortion issue through a medical lens. The majority opinion written by Justice Blackmun, a former counsel to the Mayo Clinic, drew on medical science to accommodate both the woman's privacy rights and the state's interest in protecting the fetus as it developed. The Court crafted a trimester approach that divided pregnancy into three terms.¹²⁰ The *Roe* Court held that no governmental restrictions were permissible during the first term when the woman's fundamental right to choose an abortion was paramount.¹²¹ Thus much like the original common law, *Roe* created a framework that permitted abortions until approximately the time of quickening, but regulated abortions during the later terms of pregnancy.¹²² Despite *Roe*'s attempt at reconciling competing constitutional interests, state legislatures immediately began to test the limits of the permissibility of abortion in the first trimester.¹²³

Building on this precedent, the ACLU litigated the *Akron* case as a question of medical science and the rights of physicians. However, it did not follow its own national policy of supporting abortion based on women's autonomy, and the medical approach instead had the effect of rendering women invisible.¹²⁴ "Casting abortion as a medical decision shifts the focus away from women . . . [P]rotecting physicians' rights provided little or no foundation for according women rights. Indeed, it undermined women and their rights by denying them the respect necessary to support their right of choice."¹²⁵ As Bonnie Bolitho, counselor at one of the abortion clinics and a witness in the case later said, "It was pretty clear to me that the vast majority of men involved in this were not interested in the

¹¹⁵ Nancy Ford, *The Evolution of a Constitutional Right to an Abortion: Fashioned in the 1970s and Secured in the 1980s*, 4 J. LEGAL MED. 271, 273 n.9 (1983) (noting that Alaska, Hawaii, New York, and Washington legalized abortion).

¹¹⁶ *Roe v. Wade*, 410 U.S. 113, 146–47 nn.40 & 41 (1973) (citing 58 A.B.A. J. 380 (1972)). In 1973, a post-*Roe* ABA revision of the Uniform Abortion Act would have permitted abortion during the first thirteen weeks of pregnancy by the woman herself, with the advice of a physician, contemplating the advent of the morning-after-pill even though such a drug was not yet available. See ABA Committee Proceedings, Revised Uniform Abortion Act, Aug. 7, 1973, at 4, available at <http://heinonline.org>. The revision would also have allowed unrestricted abortion from thirteen weeks to the time of viability by a physician in a medical facility. *Id.*

¹¹⁷ *Roe*, 410 U.S. at 153–54.

¹¹⁸ *Id.* at 153.

¹¹⁹ *Doe v. Bolton*, 410 U.S. 179 (1973).

¹²⁰ *Roe*, 410 U.S. at 164–66.

¹²¹ *Id.* at 164.

¹²² *Id.* at 164–66.

¹²³ See generally Ford, *supra* note 113.

¹²⁴ See Elizabeth Reilly, *The "Jurisprudence Of Doubt": How the Premises of the Supreme Court's Abortion Jurisprudence Undermine Procreative Liberty*, 14 J.L. & POL. 757, 779 (1998).

¹²⁵ *Id.*

lives of individual women.”¹²⁶ The *Akron* trial was litigated by male lawyers, pursued by a male plaintiff physician, grounded in the expert evidence of male physicians, lobbied in the press by male leaders of the ACLU and Citizens for Informed Consent, reported by male journalists, legislated by male council members, and decided by a male judge.¹²⁷ Women were relegated to the sidelines, even though the core issue in the case was their fundamental right to self-autonomy.

The *Akron* case began quietly. “Although passage of the ordinance . . . resulted in demonstrations on both sides of the issue, the opening day of testimony brought only a handful of spectators to the federal building in Akron.”¹²⁸ The federal district court granted the plaintiffs’ temporary restraining order staying enforcement of the law.¹²⁹ Trial was delayed several months at the city’s request.¹³⁰

The first litigation hurdle was finding a proper plaintiff. Pregnant women were reluctant, and even afraid, to become plaintiffs in the case.¹³¹ One putative plaintiff, “Linda Loe,” filed a motion detailing her fear from the publicity surrounding the case, and the potential embarrassment and harassment because of the “personal nature” of the proceedings.¹³² The trial judge refused to allow any pregnant woman or physician to proceed anonymously under pseudonyms, as was commonly done in abortion cases.¹³³

By then, anti-abortion fervor was strong in the community, as the brief in support of the motion to proceed with pseudonyms explained, “[M]any citizens of Akron, Ohio, have had a strong emotional reaction to the debate over the propriety of abortion.”¹³⁴ The brief detailed the “[m]anifestations of strife” that occurred, including regular public demonstrations, threatening and harassing telephone calls and letters, and one act of arson.¹³⁵ Even plaintiffs’ lead counsel, Stephan Landsman, a professor at Cleveland-Marshall College of Law, initially turned down the case because he did not want abortion

¹²⁶ Bolitho Interview, *supra* note 36.

¹²⁷ For example, a lead story in the *Akron Beacon Journal* reporting the trial court’s decision in the case featured the photographs of five leading men in the case, but no women. Dennis McEanene, *Who Won? . . . Both Sides Claim Victory After Contie Decision*, AKRON BEACON J., Aug. 22, 1979, at A8 (including Marvin Weinberger, Chairman of the local anti-abortion Citizens for Informed Consent committee, ACLU Ohio Executive Director Benson Wolman, Councilman Ray Kapper, Councilman Reggie Brooks, and former Assistant City Law Director James Bickett).

¹²⁸ Richard McBane, *Many Not Informed, Says Abortion Witness*, AKRON BEACON J., Sept. 6, 1978.

¹²⁹ *Akron*, 479 F. Supp. at 1181. The defendants then consented to a preliminary injunction. *Id.*; *Abortion Control Law is Postponed in Akron*, N.Y. TIMES, April 27, 1978, at A16.

¹³⁰ William Hershey, *Abortion Trial Delayed Until this Fall*, AKRON BEACON J., May 24, 1978, at D1.

¹³¹ See Motion of the Plaintiff to Present an Affidavit of Plaintiff Loe in a Sealed Envelope, in Joint App. at 42a, *supra* note 71; Affidavit of Linda Loe, May 3, 1978, in Joint App. at 51a, *supra* note 71.

¹³² *Id.*

¹³³ *Akron Ctr. for Reproductive Health v. City of Akron*, Order Denying Motion, in Joint App. at 57a, *supra* note 71; *ACLU Will Refile: Judge Rejects Suit’s Plaintiff*, AKRON BEACON J., May 4, 1978, at B1; *Attorneys Seek to Keep Pair in Abortion Lawsuit*, AKRON BEACON J., May 15, 1978, at A9; *Contie Blocks Abortion Appeal*, AKRON BEACON J., May 16, 1978, at C6 (refusing plaintiffs’ motion to appeal denial of motion to proceed anonymously).

¹³⁴ Brief in Support of Motion to Reconsider, in Joint App. 61a, *supra* note 71.

¹³⁵ *Id.*

demonstrations in front of his house.¹³⁶ His wife, however, said “are you kidding me?,” and convinced him to take the case.¹³⁷ The case proceeded with the clinics and one named physician as plaintiffs.¹³⁸

The plaintiffs initially honed in on the religious motivations for the law.¹³⁹ They attempted to frame the case as a foundational question of whether local legislatures were permitted to legislate on the basis of religion.¹⁴⁰ They argued the true motivation for the passage of the ordinance was religious, and therefore in violation of the First Amendment’s establishment of religion clause.¹⁴¹ The primary evidence of an impermissible religious motive was the preamble to the ordinance. WHEREAS, it is the finding of Council that there is no point in time between the union of sperm and egg, or at least the blastocyst stage and the birth of the infant at which point we can say the unborn child is not a human life, and that the changes occurring between implantation, a six-weeks embryo, a six-month fetus, and a one-week-old child, or a mature adult are merely stages of development and maturation.¹⁴²

The district court rejected the assumption that this clause was “clearly and singularly a ‘religious belief.’”¹⁴³ Judge Leroy Contie stated that an “individual’s belief of when life begins can be based upon scientific or philosophical belief rather than religious.”¹⁴⁴ The judge refused to inquire into the actual motives of the legislators.¹⁴⁵ He acknowledged that

plaintiffs’ position may be that in the minds of the seven members of Akron City Council who voted in favor of [the] Ordinance . . . the belief that human life exists . . . is clearly and singularly a religious belief. If this is plaintiffs’ position, they certainly failed to prove their case in this regard.¹⁴⁶

¹³⁶ Landsman Interview, *supra* note 36; Virginia Wiegand, *Two Dedicated Lawyers Take Fight to High Court*, AKRON BEACON J., Nov. 28, 1982, at A4 (profiling lawyers Alan Segedy and Stephan Landsman).

¹³⁷ Landsman Interview, *supra* note 36.

¹³⁸ The plaintiffs were the Akron Center for Reproductive Health, Womenscare, Inc., Akron Women’s Clinic, and Dr. Robert Bliss of Cincinnati. William Hershey, *Abortion Clinics Must Provide Data*, July 13, 1978; Richard McBane, *Foes of Abortion Law Score Breakthrough*, AKRON BEACON J., July 29, 1978, at A9. The defendants tried to make a point of this lack of a real party in interest later in the Supreme Court, arguing that there was no real patient challenging the statute. The minor point had no effect, because *Roe v. Wade* and subsequent abortion cases had clearly granted physicians standing to sue, as one of the Justices reminded defense counsel at oral argument. See Transcript of Oral Argument at *3–*4, *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983) (No. 81–746), 1982 U.S. Trans. LEXIS 51.

¹³⁹ *Acron Ctr. for Reprod. Health v. City of Akron*, 479 F. Supp. 1172, 1189 (N.D. Ohio 1979).

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.* at 1189 (quoting Akron Ordinance No. 160-1978, ch. 1870).

¹⁴³ *Id.* at 1189.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 1189 n.8.

He also held that it would be improper to inquire into the actual “in fact” motives of the legislators under existing law.¹⁴⁷ Judge Contie found that there were numerous possible secular purposes to the law, including “the state’s valid interests in maternal health and the potentiality of human life” and thus did not present an Establishment Clause problem.¹⁴⁸ The fact that the purpose coincided with a religious purpose was irrelevant.¹⁴⁹

Judge Contie also expressly distanced himself and the opinion from the national political controversy over abortion:

Analytically, however, this case is no different than the numerous others that come before the Court. It is the duty of this Court to determine the controversy before it based upon the requirements of the Constitution as expounded by the Supreme Court and the Court of Appeals for the Sixth Circuit. In considering the present case, this Court has attempted to do just that, nothing more and nothing less.¹⁵⁰

He added a footnote, quoting Justice Felix Frankfurter on the role of personal opinion in judicial decision-making:

As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard. . . . It can never be emphasized too much that one’s own opinion about the wisdom or evil of a law should be excluded altogether when one is doing one’s duty on the bench.¹⁵¹

People assumed that Judge Contie personally opposed abortion because he was Catholic.¹⁵² A Nixon appointee, the conservative, Italian-American Contie was the first Northern District judge to sit in Akron beginning in 1971, and was appointed in 1982 by President Ronald Reagan to the United States Court of Appeals for the Sixth Circuit where he would serve for thirty years.¹⁵³ Contie was respected for his hard work, and generally considered

¹⁴⁷ *Id.*

¹⁴⁸ *Akron*, 479 F. Supp. at 1194.

¹⁴⁹ *Id.* at 1189–90, *aff’d* 651 F.2d 1198, 1201 (6th Cir. 1981) (finding “[t]he district court gave full and thoughtful consideration to claims of the plaintiffs that the ordinance violates the First Amendment requirement of separation of church and state and . . . rejected these claims.”).

¹⁵⁰ *Id.* at 1180–81 (internal citations omitted).

¹⁵¹ *Id.* at 1180–81 n.2 (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 647 (1943) and Frankfurter’s dissent from opinion invalidating state requirement that students salute the American flag).

¹⁵² See Sheldon Goldman, *The Politics of Appointing Catholics to the Federal Courts*, 4 U. ST. THOMAS L.J. 193, 212 (2006) (noting that memorandum to President Reagan nominating Contie emphasized that “‘Judge Contie was enthusiastically endorsed by many Italian organizations and is a member of the Sons of Italy.’”) (citations omitted)).

¹⁵³ Proceedings, Presentation of Portrait of The Honorable Leroy J. Contie, Jr., 856 F.2d XCIII, XCVII (1988); Editorial, *Leroy J. Contie, Jr. A Legal Career Defined by Intelligence and Service*, AKRON BEACON J., May 15, 2001, at A8; Carl Chancellor, *Leroy Contie, Jr., Former Appellate Judge, Dies at 81*; Stark

by attorneys to be a “great judge.”¹⁵⁴ “[H]e established a reputation as an industrious, conscientious, and thoroughly professional judge.”¹⁵⁵ Contie was also known as a “pretty tough character.”¹⁵⁶ He had served as law director for the City of Canton and was well-known for his aggressive attack on local mafia crime and police corruption, which led to the bombing of his home.¹⁵⁷ Judge Contie “ruled in cases of great importance to the community, from the desegregation lawsuit involving the Akron Public Schools to a sex discrimination case against the former Akron National Bank.”¹⁵⁸

With Contie eliminating the First Amendment claim, the case proceeded as one about physicians and medical expertise. Justice Blackmun’s opinion in *Roe*, based on his experience as general counsel for the Mayo Clinic, seemed to call for this type of healthcare approach, as it conceptualized abortion as an issue of doctors’ care of their female patients.¹⁵⁹ The plaintiffs in *Akron Center for Reproductive Health, Inc. v. City of Akron* focused on the restrictions on the doctor’s medical decision-making.¹⁶⁰ The defendant city responded with medical appeals, arguing that concerns over maternal health necessitated regulation.¹⁶¹ The case became a battle of the male experts.¹⁶² The plaintiffs, supported by the national ACLU, presented top prestigious medical experts; indeed, one

Resident Served 30 Years at Federal Post Before Retiring Last Year, AKRON BEACON J., May 14, 2001, at D7.

¹⁵⁴ Contie Proceedings, *supra* note 151, at XCVIII (“[H]e blended large measures of hard work and common sense with his exceptional legal ability”); Chancellor, *supra* note 151; Landsman Interview, *supra* note 36.

¹⁵⁵ Contie Proceedings, *supra* note 151, at XCIII (“To say that he is conscientious misses the mark or is inadequate; for there never has been a harder working judge”);

¹⁵⁶ Landsman Interview, *supra* note 36.

¹⁵⁷ Contie Proceedings, *supra* note 151, at XCVII (describing how “one evening as he was sitting in his living room, dynamite was placed near the outside wall of his home where he was sitting. His wife, Janice, was injured in the explosion and she sustained a miscarriage. Even though extensive damage was done to the house and to the neighbor’s residence, fortunately, Judge Contie was not injured.”).

¹⁵⁸ Editorial, *supra* note 151; *see, e.g., School Closing Upset, but Akron is Cleared on Most Bias Charges*, N.Y. TIMES, April 7, 1980, at A12 (noting compromise decision in which Judge Contie cleared city of charges of racial bias but found school-closing plans discriminatory).

¹⁵⁹ *See Roe v. Wade*, 410 U.S. 113, 165 (1973) (“The decision vindicates the right of the physician to administer medical treatment according to his professional judgment.”); Linda Greenhouse, *The Evolution of a Justice*, N.Y. TIMES MAGAZINE, Apr. 10, 2005 (“For Blackmun, who had spent nine years as general counsel to the Mayo Clinic and who held the medical profession in high regard, state laws that criminalized abortion were indeed troublesome -- not, particularly, because they interfered with the rights of women but because they put doctors at risk for using their best judgment in treating their pregnant patients.”).

¹⁶⁰ Plaintiffs made an equal protection claim that the law unconstitutionally singled out abortion and did not similarly regulate other comparable medical procedures. *Akron Ctr. for Reprod. Health v. City of Akron*, 479 F. Supp. 1172, 1195 (N.D. Ohio 1979). They made several due process claims based on the right of the physician to practice medicine according to his or her best judgment, the right of the physician to give medical treatment and advice following accepted medical standards, and the rights of the clinics to provide counseling, education and services relevant to the abortion decision. *See Akron*, 479 F. Supp. at 1198. The district court rejected all of these and based its decision on the alternative claim of the right of the patients of physicians and clinics “to make and effectuate the decision to terminate their pregnancy.” *Id.* at 1198.

¹⁶¹ *Id.* at 1205, 1207.

¹⁶² Richard McBane, *Doctors Give Their Views on Abortion*, AKRON BEACON J., Sept. 14, 1978, at D1; Richard McBane, *Psychiatrist Supports Abortion Provisions*, AKRON BEACON J., Sept. 15, 1978, at B1; Richard McBane, *Doctors and ACLU Disagree*, AKRON BEACON J., Sept. 19, 1978, at B1.

had received a Nobel Prize in the Physiology of Medicine.¹⁶³ The defense experts, proffered by the Right-to-Life intervenors who effectively led the defense case, proffered less impressive witnesses who were more easily discredited on cross-examination.¹⁶⁴

One year later, Judge Contie issued a compromise decision in the Akron abortion case; both sides claimed victory.¹⁶⁵ The local newspaper noted that “[b]y striking down some sections and upholding others, he appears to have accomplished the impossible: convinced both sides in the suit that they had won.”¹⁶⁶ Anti-abortion leaders called the ruling “terrific” and “a major victory for pro-life people.”¹⁶⁷ Benson Wolman, executive director of the Ohio ACLU retorted, “[a]nother such victory and they (the anti-abortionists) will be permanently undone.”¹⁶⁸ The decision invalidated parental consent, parental notification, detailed informed consent, disposal requirements, and clinic inspection.¹⁶⁹ On the other hand, it upheld the 24-hour waiting period, the doctor’s explanation of risks and procedures, the hospital requirement for second trimester abortions, and reporting requirements.¹⁷⁰ Contie’s approach was careful and measured. The court seemed to be searching for a practical way to split the proverbial baby, constrained to follow the commands of *Roe*, but resistant to the evolving concepts of feminist equality.¹⁷¹ An editorial in the local paper thought “Judge Contie’s ruling should put an end to the bitterness that has enveloped this controversy, and should, once more, demonstrate the importance of the individual in determining a right that is so personal and private.”¹⁷²

Early reactions to the decision by the City suggested that it would not appeal.¹⁷³ “City Council President Ray Kapper (D-at large), a prime mover behind the legislation said, ‘I don’t expect an appeal by the city. It’s over. We lost, we lost.’”¹⁷⁴ He added, “[m]y intent was to regulate clinics and it became an emotional thing which I would not like to

¹⁶³ Transcript Excerpt of Trial Testimony of Dr. Frederick Robbins, Dean of Case Western Reserve School of Medicine and recipient of 1954 Nobel Prize, in Joint Appendix at 207a, *City of Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983).

¹⁶⁴ Landsman Interview, *supra* note 36. The judge allowed an Akron pediatrician, Francois Seguin and a mother of a 13-year-old girl, Patricia Black, to intervene to protect the rights of unborn children and the parents of teenage daughters. *Akron*, 479 F. Supp. at 1181. They were represented by Alan Segedy, author of the Akron ordinance. William Hershey, *Court Order Delays Akron Abortion Law*, AKRON BEACON J., Apr. 28, 1978, at A1.

¹⁶⁵ Editorial, *Ruling on Abortion Law Seems Logical and Wise*, AKRON BEACON J., Aug. 23, 1979, at A6 [hereinafter *Logical and Wise*].

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*; McEaney, *supra* note 125.

¹⁶⁹ *Akron Ctr. for Reprod. Health v. City of Akron*, 479 F. Supp. 1172, 1201–07, 1215 (N.D. Ohio 1979).

¹⁷⁰ *Id.* The court refused to consider a challenge to the entirety of the law, and denied plaintiffs standing to challenge the constitutionality of the ordinance’s requirements that abortions be provided by licensed physicians, in licensed hospitals or facilities, banned in municipal hospitals, have an emergency exception, be banned after twenty-four weeks presumptive viability, require the Akron Department of Health to report and collect information, provide a hospital and provider exemption for those who refuse to perform abortions, and bans on the experimentation or sale of the unborn or live child. *Id.* at 1182–88, 1215.

¹⁷¹ *See id.* at 1215.

¹⁷² *Logical and Wise*, *supra* note 162.

¹⁷³ *Id.*

¹⁷⁴ William Hershey, *Parts of Akron Abortion Law Struck Down*, AKRON BEACON J., Aug. 22, 1979, at A1.

see again.”¹⁷⁵ “The court has spoken and I’ll abide by what the court has said.”¹⁷⁶ Kapper was defeated in the subsequent mayoral campaign and the new Mayor Roy Ray decided to appeal the decision.¹⁷⁷ Councilwoman Elsie Reaven was not surprised, as she had thought Council would appeal the decision.¹⁷⁸ “They don’t care how it tears up the community or how much it costs. They are very narrowly single-minded.”¹⁷⁹

On appeal, the United States Court of Appeals for the Sixth Circuit overruled Contie’s compromise.¹⁸⁰ In a split decision, the appellate court invalidated most of the Akron provisions, upholding only the parental notification and hospital requirements.¹⁸¹ The majority opinion criticized Contie for employing a less demanding judicial review than that required by *Roe* for first trimester restrictions.¹⁸² Contie had failed to analyze whether there were compelling interests for first-term regulations as required by the Supreme Court in *Roe*, and instead analyzed the law under a less exacting test of whether the regulations were unduly burdensome or rationally related to a legitimate government purpose.¹⁸³

The dissenting judge, Cornelia Kennedy, appreciated that the majority’s opinion seemed to conform to *Roe*, but queried whether that opinion was still the controlling law.¹⁸⁴ She stated that “[l]anguage from the earliest abortion decisions supports the majority’s conclusion that only a compelling state interest will justify significant first trimester abortion regulation.”¹⁸⁵ But she noted that “there appears to have been some shift on the issue in the Supreme Court’s decisions”¹⁸⁶ Indeed, this shift in the abortion jurisprudence would become apparent when the Supreme Court granted certiorari in the *Akron* case.

III. AN ISSUE OF SUPREME IMPORTANCE

Akron remained in the national spotlight as the case proceeded to the United States Supreme Court.¹⁸⁷ But the tenor of the case was different at this level of the litigation. As

¹⁷⁵ *Id.*

¹⁷⁶ McEanney, *supra* note 125.

¹⁷⁷ Peterson, *supra* note 40.

¹⁷⁸ McEanney, *supra* note 125.

¹⁷⁹ *Id.*

¹⁸⁰ Jim Carney, *U.S. Appeals Court Voids Part of Akron Abortion Law*, AKRON BEACON J., June 13, 1981, at A1.

¹⁸¹ Akron Ctr. for Reproductive Health v. Akron, 651 F.2d 1198, 1206, 1208, 1210 (6th Cir. 1981). The appellate court applied Supreme Court precedent decided after the trial court’s decision in *Akron* to uphold these two provisions. See Gary-Northwest Ind. Women’s Servs., Inc. v. Orr, 101 S. Ct. 2012 (1981) (upholding second trimester hospital requirement); H. L. v. Matheson, 450 U.S. 398 (1981) (upholding parental notification requirement).

¹⁸² *Akron*, 651 F.2d at 1203–04.

¹⁸³ *Id.*; see also *id.* at 1215 (Kennedy, J., dissenting).

¹⁸⁴ *Id.* at 1212–14 (Kennedy, J., dissenting).

¹⁸⁵ *Id.* at 1212.

¹⁸⁶ *Id.*

¹⁸⁷ Virginia Wiegand, *Abortion Puts Akron in Spotlight*, AKRON BEACON J., Nov. 28, 1982, at A1 (“Akron is in the national news again, but over an issue its residents (and politicians) probably wish would go away.”).

Akron law director Robert Pritt noted, “[i]t’s a different world down here.”¹⁸⁸ He explained, “[o]nce you get away from the local political scene, you can concentrate on just the issues, just the law.”¹⁸⁹

Plaintiffs maintained their strategic focus on the legal rights of the physicians, characterizing the Akron abortion ordinance as a “straightjacket on the physician.”¹⁹⁰ Amicus briefs filed by the American Medical Association and other professional medical associations bolstered this argument.¹⁹¹ Dr. James Breen, the president of the American College of Obstetricians and Gynecologists, stated his concern that, if not overturned, the law might serve to “[dictate] to the nation’s physicians how they are to carry out the individual practice of medicine.”¹⁹² The plaintiffs supplemented their challenge with arguments about the rights of women.¹⁹³ They argued that the requirements of the Akron law “rob[] the woman of independence in the abortion decision-making process” and “treat women as irrational decision-makers who must be forced to reconsider their choice of an abortion.”¹⁹⁴

The Supreme Court definitively struck down the Akron ordinance, reaffirming its abortion rights jurisprudence ten years after *Roe v. Wade*.¹⁹⁵ “[T]he Court reached beyond the Akron case, using the decision as a vehicle to make a very deliberate, very forceful point.”¹⁹⁶ Justice Lewis Powell, writing for the majority in a six to three decision, adhered to *stare decisis* and followed both the spirit and rule of *Roe*.¹⁹⁷ “[T]he Court repeatedly and consistently has accepted and applied the basic principle that a woman has a fundamental right to make the highly personal choice whether or not to terminate her pregnancy.”¹⁹⁸

¹⁸⁸ Virginia Wiegand, *Akron Abortion Issue Now Up to Justices*, AKRON BEACON J., Dec. 1, 1982, at E1.

¹⁸⁹ *Id.*

¹⁹⁰ Transcript of Oral Argument, *supra* note 136, at 31.

¹⁹¹ See Rick Reiff, *Four Medical Groups File Briefs Against Akron’s Abortion Law*, AKRON BEACON J., Aug. 28, 1982, at A1 (reporting that professional medical associations filed amicus briefs opposing the ordinance regulating abortions because “provisions in the ordinance would interfere with a woman’s right to seek and obtain medical care and present obstacles to sound medical practice”).

¹⁹² *Id.*

¹⁹³ See Brief of Committee on Abortion Rights and Assistance for Sterilization Abuse et al., as Amici Curiae in *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1982), 1982 U.S. S. Ct. Briefs LEXIS 1557 (arguing that law was unconstitutional on equal protection grounds because it perpetuated sex-based stereotypes).

¹⁹⁴ Transcript of Oral Argument, *supra* note 136, at 27; Virginia Wiegand, *ACLU, City Argue in High Court*, AKRON BEACON J., Nov. 30, 1982, at A1.

¹⁹⁵ *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 420 (1983); see also Linda Greenhouse, *Court Reaffirms Right to Abortion and Bars Variety of Local Curbs*, N.Y. TIMES, June 16, 1983, at A1.

¹⁹⁶ Linda Greenhouse, *High Court Clears Up Any Doubts on Abortion*, N.Y. TIMES, June 19, 1983, at E7 [hereinafter Greenhouse, *High Court*].

¹⁹⁷ *Akron II*, 462 U.S. at 419–20.

¹⁹⁸ *Id.* at 420 n.1; see generally Peter Prieto, *City of Akron v. Akron Center for Reprod. Health, Inc.: Stare Decisis Prevails, but for How Long?*, 38 U. MIAMI L. REV. 921 (1984). When the conservative Justice Powell was later asked why he supported abortion, he answered based on personal experience rather than constitutional theory. Linda Greenhouse, *Lewis Powell, Crucial Centrist Justice, Dies at 90*, N.Y. TIMES, Aug. 26, 1998, at A1; David Westin, *Eulogy: Lewis Powell*, TIME, Sept. 7, 1998. He told the story of a young, black messenger at his old law firm in Richmond, Virginia who was terrified that he would be arrested for the death of his girlfriend, for whom he had helped get an illegal abortion from a “back-alley butcher.” Greenhouse, *supra*. Powell helped negotiate with the city prosecutor and no charges were ever

The Court applied heightened scrutiny to invalidate all of the ordinance requirements that were appealed: hospitalization, parental consent, informed consent, disclosures, the 24-hour-waiting period, and the disposal process.¹⁹⁹ The majority found that these regulations placed significant obstacles in the pregnant woman's path and that the legislative motivations went "beyond permissible limits."²⁰⁰ The Court understood the impact of the Akron law, stating: "[I]t is fair to say that much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."²⁰¹

Sandra Day O'Connor, the Court's newest justice, dissented.²⁰² She questioned the premise of the Court's abortion jurisprudence built on three distinct trimesters.²⁰³ In a now-famous quote, she wrote, "[t]he *Roe* framework . . . is clearly on a collision course with itself."²⁰⁴ O'Connor argued for abandonment of the three-stage approach of *Roe* in which regulations in the first trimester were evaluated under strict scrutiny and those for later trimesters were evaluated under a rational basis standard.²⁰⁵ She found that the *Akron* case illustrated why "the trimester approach is a completely unworkable method of accommodating the conflicting personal rights and compelling state interests that are involved in the abortion context."²⁰⁶ Instead, she would have applied an "unduly burdensome" standard throughout pregnancy that would ask whether the "regulation rationally relates to a legitimate state purpose."²⁰⁷

The majority expressly rejected the undue burdensome standard as meaningless, finding that it "would uphold virtually any abortion regulation under a rational-basis test," and indeed, O'Connor would have upheld all of the Akron regulations.²⁰⁸ Nevertheless, she found the undue burden standard to be the appropriate test because the recognized fundamental right of abortion was limited, and not absolute.²⁰⁹ She preferred resolving the complex and extremely sensitive issue of abortion through the legislative process, but

brought. *Id.* Powell gained an appreciation for the practical implications of the legal issue of abortion and its impact of people of different races and economic class. *Id.*

¹⁹⁹ *Akron II*, 462 U.S. at 452. The Court did not consider the constitutionality of the parental notification provision because it was not challenged by the plaintiffs on appeal. *Id.* at 439 n.29. The Sixth Circuit had upheld the parental notification requirement in light of the intervening Supreme Court precedent. See *H. L. v. Matheson*, 450 U.S. 398 (1981) (upholding parental notification statute for immature, dependent minors).

²⁰⁰ *Akron*, 462 U.S. at 444.

²⁰¹ *Id.*

²⁰² *Id.* at 452 (O'Connor, J., dissenting).

²⁰³ *Id.* (O'Connor, J., dissenting).

²⁰⁴ *Id.* at 458 (O'Connor, J., dissenting).

²⁰⁵ *Id.* at 453–54 (O'Connor, J., dissenting).

²⁰⁶ *Akron*, 462 U.S. at 454 (O'Connor, J., dissenting).

²⁰⁷ *Id.* at 453 (O'Connor, J., dissenting). "Viewed two decades later, Justice O'Connor's dissent in *City of Akron* appeared to be an example of *reculer pour mieux sauter*—a seeming retreat that firmed up a right under strong attack." John A. Robertson, *Introductory Essay, Decision Rules and Abortion Rights: Justice O'Connor, Trimesters, and City of Akron*, in *A DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: CITY OF AKRON V. AKRON CENTER FOR REPRODUCTIVE HEALTH*, v.I, at xiv (Roy M. Mersky & Kumar Percy Jayasuriya, eds. 2007).

²⁰⁸ *Akron*, 462 U.S. at 421 n.1 & 466–74 (O'Connor, J., dissenting). She suggested that precedent demonstrated an undue burden sufficient to show the unconstitutionality of an abortion regulation where regulations involved absolute obstacles or severe limitations on the abortion decision. *Id.* at 464.

²⁰⁹ *Id.* (O'Connor, J., dissenting).

explained that deference to the legislature was not the reason for her articulation of an alternative standard.²¹⁰

However, the government lawyers defending the abortion regulations had focused on legislative deference in arguing for a more lenient constitutional standard of oversight for abortion regulations. The Solicitor General for the Reagan Administration, Rex Lee, suggested a more lenient “undue burden” standard.²¹¹ When Justice Blackmun, author of the *Roe* opinion, called him out, asking, “Mr. Solicitor General, are you asking that *Roe v. Wade* be overruled?,” Lee quickly backtracked, saying that “was an issue for another day,” and that he was instead asking for deference to the legislature as the policymaking body.²¹² The lead attorney for the City of Akron, Robert Pritt, also defended the case on the basis of legislative power, as embodied in the notion of local home rule.²¹³ By the end of the long case, however, he became concerned about the law on moral grounds and the “tremendous amount of money” allegedly being made by the clinics, though many years later he reflected on the fact that “maybe as a male I don’t get it and just can’t get it.”²¹⁴

The Supreme Court’s decision in *Akron* was an enormous victory for women’s rights, even as it was a “legal embarrassment for the Reagan Administration.”²¹⁵ Linda Greenhouse of the *New York Times* described how “the decision changed the framework of the abortion debate.”²¹⁶

It subtly shifted the burden of battle. Until last week, the burden was on pro-choice advocates who were fighting to preserve the status quo. There was always the argument that the Supreme Court in 1973 had not fully understood the implications of what it was doing, that *Roe v. Wade* would wash away like a sand castle under the relentless waves of hostile opinion.

Last week, when six men, whose average age is 73 and who have a decade of reflection behind them, reaffirmed their initial stand, the constitutional right to abortion became the status quo as it had not been before. . . . With the decision, the right to abortion—exercised last year by

²¹⁰ *Id.* at 465 (O’Connor, J., dissenting).

²¹¹ Transcript of Oral Argument, *supra* note 136, at 14.. Justice Samuel Alito, then a Justice Department lawyer working for the Reagan Administration, wrote a memorandum to the Solicitor General suggesting a strategy in the *Akron* case that would help overturn abortion rights. *Preface*, in DOCUMENTARY HISTORY, *supra* note 205, at x. See *Justice Department Joins Akron Abortion Plea*, AKRON BEACON J., July 29, 1982 (“[T]he filing of the brief marks the first time the Justice Department has acted in an abortion case in which the federal government is not a party and no federal law is involved.”).

²¹² Transcript of Oral Argument, *supra* note 136, at 24:04, available at http://www.oyez.org/cases/1980-1989/1982/1982_81_746; see LINCOLN CAPLAN, THE TENTH JUSTICE: THE SOLICITOR GENERAL AND THE RULE OF LAW 105–06 (1987).

²¹³ Pritt Interview, *supra* note 36; Rick Reiff, *Abortion Law Appeal is Sought*, AKRON BEACON J., Oct. 20, 1981, at C1.

²¹⁴ Pritt Interview, *supra* note 36.

²¹⁵ Greenhouse, *High Court*, *supra* note 194; Don Bandy et al., *Action Called a ‘Victory for Women,’* AKRON BEACON J., June 15, 1983, at A1.

²¹⁶ Greenhouse, *High Court*, *supra* note 194.

1.2 million American women—entered the mainstream, and the burden shifted to the other side to show why it should not remain there.²¹⁷

On remand in the *Akron* case, Judge David Dowd, Contie’s successor on the bench, awarded the plaintiffs attorney’s fees of \$368,710.²¹⁸ Councilman John Frank demanded that Dr. Willke and the National Right to Life pay the city’s expenses; they refused, politely thanking the city for its valiant anti-abortion efforts.²¹⁹ The share of fees paid to attorney Landsman at the Cleveland-Marshall College of Law was used for the Harry Blackmun scholarship fund, named for the author of the *Roe* decision.²²⁰ Justice Blackmun himself attended the dedication, lured to Cleveland by the promise of a much-beloved baseball game with Cleveland Indians Hall of Fame pitcher, Bob Feller.²²¹

IV. CHANGING COURSE

The invalidation of governmental restrictions on access to abortion in the first term, however, remained good law for only a short time.²²² Just three years after the Supreme Court’s decision in *Akron*, the Northern District of Ohio was again presented with the issue of the constitutionality of an abortion law restricting access to minors.²²³ A 1985 state law required a physician to notify one parent of a minor seeking an abortion.²²⁴ This time, the case of a first-term abortion restriction took a different turn on its way through the Ohio

²¹⁷ *Id.*

²¹⁸ *Akron Ctr. for Reproductive Health v. Akron*, 604 F. Supp. 1275, 1295 (N.D. Ohio 1985); Virginia Wiegand, *ACLU Awarded \$368,710 in Fees for Abortion Battle*, AKRON BEACON J., Feb. 7, 1985; Virginia Wiegand, *Abortion Fight Will Cost Akron, 2 Taxpayers*, AKRON BEACON J., July 7, 1984.

²¹⁹ Rick Reiff, *Life Group Asked to Pay ACLU*, AKRON BEACON J., June 18, 1983; David B. Cooper, *Who’ll Pay for Abortion Appeal?*; *Councilman Frank Has Unusual Idea*, AKRON BEACON J., June 23, 1983; Letter from John V. Frank, 8th Ward Councilman, Akron, Ohio, to Dr. Jack Wilke (sic), President, National Right to Life Committee (June, 20, 1983) (copy on file with author); Letter from John C. Willke, President, National Right to Life Committee to John V. Frank, City Council, Akron, Ohio (June 27, 1983) (copy on file with author).

²²⁰ Landsman Interview, *supra* note 36.

²²¹ *Id.* For details of the legendary career of “Rapid Robert” Feller, the winningest pitcher in Indians history, and his off-field outspokenness, see Marla Ridenour, *Feller Dies, Legend Lives*, AKRON BEACON J., Dec. 16, 2010, at A1; Sheldon Ocker, *Lasting Impression: Bob Feller: 1918-2010*, AKRON BEACON J., Dec. 17, 2010, at C1; Editorial, *Bob Feller; Remember His Curve Ball and His Keen Sense of Place*, AKRON BEACON J., Dec. 17, 2010, at A8.

²²² See *Thornburgh v. Am. Coll. of Obstetricians and Gynecologists*, 476 U.S. 747, 760–63 (1986) (following precedent of *Akron*); *but see* *Planned Parenthood Assoc. of Kansas City v. Ashcroft*, 462 U.S. 476, 480–81 (1983) (upholding parental consent statute with adequate bypass procedure in split decision); *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) (upholding abortion regulations requiring informed consent, twenty-four-hour waiting periods, and parental consent).

²²³ *Akron Ctr. for Reprod. Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986) (“*Akron II*”).

²²⁴ OHIO REV. CODE § 2919.12 (eff. 1985). It became law without the governor’s signature. See *Akron II*, 633 F. Supp. at 1126.

courts to the Supreme Court. After an initial invalidation of the law by the lower courts, the highest court upheld it and began to shift the applicable constitutional standards.²²⁵

A. Procedural Defects and Predictable Effects

In *Akron Center for Reproductive Health v. Rosen*, the district court considered another attempt at restricting access to first-term abortions.²²⁶ The state law made it a crime for a physician, or other person, to perform an abortion for a minor woman under eighteen years of age without parental notice or consent.²²⁷ It included a process for waiver of notification if the minor convinced a juvenile court that she was mature enough to make the abortion decision without her parents, that one of her parents had engaged in physical, sexual, or emotional abuse against her, or that notification was otherwise not in her best interests.²²⁸ The Akron Center for Reproductive Health, one of the parties from the first *Akron* case, challenged the state abortion law by seeking to enjoin local prosecutors from enforcing the law.²²⁹

Judge Ann Aldrich was assigned the case. Aldrich, relatively new to the bench, granted the preliminary injunction, and later a permanent injunction, preventing enforcement of the law.²³⁰ In reaching her decision, she first recognized that the Supreme Court had held that requiring parental notification for immature, dependent minors seeking abortions did not violate the Constitution.²³¹ However, Aldrich concluded that the precedent constitutionally mandated a valid judicial bypass procedure for parental notification laws.²³² Aldrich found numerous defects with the Ohio bypass provision including its constructive authorization, physician requirement clear and convincing

²²⁵ *Akron Ctr. for Reprod. Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986), *aff'd*, *Akron Ctr. for Reprod. Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *rev'd sub nom.*, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

²²⁶ *Akron II*, 633 F. Supp. 1123.

²²⁷ OHIO REV. CODE § 2919.12(B)(1)(a) If a minor woman feared abuse from her parents, notification can be given to another relative. *Id.* If a parent could not be reached after reasonable effort, the statute provided for constructive notice by ordinary and certified mail forty-eight hours before the procedure. *Id.* A physician who violated the law was guilty of a criminal offense, liable for civil compensatory and punitive damages to the minor and her parents, and subject to suspension of his or her license to practice medicine. *Id.* §§ 2919.12 & 4731.22. A physician could assert the affirmative defenses that he or she was misled regarding the age, marital status, or emancipation of the woman, or that notification was impossible because of an immediate threat of serious risk to the minor's life or physical health required an emergency procedure. *Id.* § 2919.12(C).

²²⁸ *Id.* § 2151.85.

²²⁹ Issues of defendants' standing ran throughout the case and questions of whether the city prosecutor, the county prosecutor, the state Attorney General, or the Governor was the responsible party to defend the suit. *Akron II*, 633 F. Supp. at 1128–30. Regardless of the various name changes in the case caption, it was the Ohio Attorney General's office that actively litigated, briefed, and argued the case.

²³⁰ *Id.* at 1126. The court had also granted the request temporary restraining order and extended it for ten additional days to allow time for extensive briefing and preparation by the parties for the consolidated hearing on the preliminary injunction and the merits. *Id.*

²³¹ *Akron II*, 633 F. Supp. at 1131 (relying on *H. L. v. Matheson*, 450 U.S. 398 (1981) (upholding parental notification statute)).

²³² *Akron II*, 633 F. Supp. at 1131.

evidence confusing pleading requirements, and the lack of expedition and anonymity.²³³ Aldrich found the law had potential for “violations of the constitutional rights of mature minors and minors for whom notification would not be in their best interests.”²³⁴

Aldrich was concerned about the practical effect of the statute.²³⁵ She found that the evidentiary standard in the bypass procedure created “an unacceptably high risk of erroneous determinations,” since “the judge’s decision will necessarily be based largely upon subjective standards without the benefit of any evidence other than a woman’s testimony.”²³⁶ As Aldrich had suspected, when the law later went into effect, many of the judicial bypass decisions did in fact appear “to be at the whim of the judge.”²³⁷ One judge denied a judicial exemption to a seventeen-year-old, despite evidence of physical abuse by her father; another judge denied a bypass because a seventeen-year-old girl had not had enough “hard knocks”; and a third judge denied the exception because the teenager refused to file a paternity suit against her partner.²³⁸ Thus, Aldrich’s understanding of the practical implications of the law informed her otherwise legalistic interpretation of the statutory language.

Aldrich’s ruling was praised as a “constitutional victory of some great importance for young women, for the privacy of their bodies, and for adult women and their bodies.”²³⁹ But proponents of the law attacked the decision and Judge Aldrich herself. The sponsor of the bill, Representative Jerome Luebbers of Cincinnati, said, “I don’t know that she ruled in the right fashion, and it was not in tune with the feelings of the people of Ohio and of the Legislature.”²⁴⁰ He continued, saying, “I fully expected that the judge would do this. She’s predictable.”²⁴¹ Judge Aldrich was perhaps “predictable” because she quickly distinguished herself as one of the most liberal members of the court with a strong

²³³ *Id.* at 1144.

²³⁴ *Id.*

²³⁵ *See id.* at 1137.

²³⁶ *Id.* Twenty-five years later, defendant prosecutor Lynn Slaby (subsequently a judge and state legislator) would propose a law seeking to establish judicial standards to guide this discretionary decision. Reginald Fields, *Ohio Republican Lawmakers Introduce Slew of Bills Aimed at Restricting Access to Abortions*, PLAIN DEALER (Cleveland), Feb. 9, 2011, http://www.cleveland.com/open/index.ssf/2011/02/ohio_republican_lawmakers_intr.html. The proposed HB 63 is intended to make it more difficult for minors to get a juvenile court judge’s permission to get an abortion without parental consent by requiring a judge to ask whether the minor understands the potential physical and emotional complications of abortion and whether the minor has been coached into successfully avoiding parental consent. *Id.*

²³⁷ Rich Harris, *Abortion Law Faces New Challenge*, PLAIN DEALER (Cleveland), Mar. 13, 1992, at 2C.

²³⁸ *Id.*; *In re Jane Doe 1*, 566 N.E.2d 1181 (Ohio 1991); *see also* M.R. Kropko, *Judge Strikes Down Abortion Notification Law*, AP, Apr. 23, 1986 (detailing plaintiffs’ counsel’s argument at hearing that the law endangered plaintiff “Rachel Roe,” a seventeen-year-old mother of a two-year-old, because her parents threatened “to kick her out of the house if she became pregnant again”).

²³⁹ *Ohio Curb on Abortion is Struck Down*, N.Y. TIMES, Aug. 13, 1988, <http://www.nytimes.com/1988/08/13/us/ohio-curb-on-abortions-is-struck-down.html>.

²⁴⁰ *See* Kropko, *supra* note 237.

²⁴¹ *Id.*

commitment to social justice.²⁴² A framed needlepoint slogan hanging on the wall of her chambers read: “Women who seek to be equal to men lack ambition.”²⁴³

B. The Difference Gender Makes

The presence of women on the court can make a significance difference to the outcome for women.²⁴⁴ Empirical work has shown that there are measurable differences in voting patterns among judges in sex discrimination cases.²⁴⁵ Female judges are more likely than male judges to decide in favor of the female plaintiff.²⁴⁶ The presence of a woman judge also seems to influence her male colleagues and make them more inclined to vote in favor of the female plaintiff.²⁴⁷ With Judge Ann Aldrich on the court, the potential existed for litigants in gender cases, like abortion, to find a more receptive judicial audience.

Ann Aldrich was the first woman appointed to the Northern District of Ohio by President Jimmy Carter in March 1980.²⁴⁸ Aldrich was only the second woman from Ohio appointed to the federal bench, though it had been almost fifty years since Florence Allen had been appointed to the United States Court of Appeals for the Sixth Circuit in 1934.²⁴⁹ Carter deliberately sought to increase the number of women and black federal judges during his tenure, and he appointed 41 women to the bench during his four years in

²⁴² Grant Segall, Obituary, *Ann Aldrich Sets Firsts as Lawyer, Professor and Federal District Judge*, PLAIN DEALER (Cleveland), May 3, 2010, http://www.cleveland.com/obituaries/index.ssf/2010/05/ann_aldrich_set_firsts_as_lawy.html.

²⁴³ Mary Thornton, *Powerful, Controversial U.S. Judge in Cleveland Target of Probe*, WASH. POST, July 11, 1983, at A4.

²⁴⁴ There is of course reasoned debate about the nature and extent of this difference. See Mary L. Clark, *One Man's Token is Another Woman's Breakthrough? The Appointment of the First Women Federal Judges*, 49 VILL. L. REV. 487, 540–48 (2004) (summarizing the leading theories as to the significance of women's judicial appointments including anti-discrimination, representation, outsider perspective, inspirational, and difference hypotheses).

²⁴⁵ Christina Boyd, Lee Epstein & Andrew Martin, *Untangling the Causal Effects of Sex on Judging*, 54 AM. J. POL. SCI. 389 (2010); see Christina Boyd & Lee Epstein, *When Women Rule, It Makes a Difference*, WASH. POST, May 3, 2009, <http://www.washingtonpost.com/wp-dyn/content/article/2009/05/01/AR2009050103406.html>; see also Sue Davis et al., *Voting Behavior and Gender on the U.S. Court of Appeals*, 77 JUDICATURE 129, 130–32 (1993) (finding women judges were more sympathetic to plaintiffs' claims in employment discrimination cases based on race or sex).

²⁴⁶ Boyd, et al., *supra* note 243, at 390.

²⁴⁷ The study also found that the presence of a female judge causes male judges to vote differently on an appellate panel. When male and female judges serve together to decide a sex discrimination case, the male judges are nearly fifteen percent more likely to rule in favor of the party alleging discrimination than when they sit with male judges only. *Id.* at 390.

²⁴⁸ Fed. Judicial Ctr., Biographical Directory of Federal Judges: Ann Aldrich, <http://www.fjc.gov/servlet/nGetInfo?jid=22&cid=999&ctype=na&instat=na> (last visited Oct. 2., 2012).

²⁴⁹ *Florence E. Allen Named Federal Judge: First Woman to Get Place on Circuit Bench*, N.Y. TIMES, Mar. 7, 1934, at 9; see Clark, *supra* note 242, at 493–504 (providing biographical details of Allen's career and life); Ruth Bader Ginsburg & Laura W. Brill, *Women in the Federal Judiciary: Three Way Pavers and the Exhilarating Change President Carter Wrought*, 64 FORDHAM L. REV. 281, 281–84 (1995) (tracing Allen's judicial career from her first election to the Ohio Supreme Court in 1922, subsequent appointment to the federal bench, and her constant mention as a prospect for United States Supreme Court justice); see generally FLORENCE E. ALLEN, *TO DO JUSTLY* (1965); JEANETTE E. TUVE, *FIRST LADY OF THE LAW: FLORENCE ELLINWOOD ALLEN* (1984).

office.²⁵⁰ “Carter’s groundbreaking appointment of women judges was motivated by his commitment to women’s equality as a human right” and to the importance of making the judiciary more representative of the American citizenry.²⁵¹ He replaced political patronage and senatorial prerogative with citizen nominating commissions, merit selection principles, and affirmative action principles to diversify the bench, both for sex and race.²⁵² He was aided by the passage of a new federal law that created 152 new judgeships in 1978.²⁵³ Despite Carter’s efforts, his success was limited to moving beyond tokenism, rather than to full proportional representation, as even today, only twenty percent of federal and state judges are women.²⁵⁴

The litigants in Judge Aldrich’s courtroom seemed to appreciate practical difference a woman judge could make. Her law clerks often told a story from early in her tenure.²⁵⁵ The case involved a sex discrimination suit filed against a municipality relating to alleged discrimination in the hiring and promotion of the city’s fire department employees.²⁵⁶ The case had been previously assigned to a male judge, Thomas Lambros, who was significantly shorter than the six-foot-tall Aldrich.²⁵⁷ At a status conference held shortly after the case was re-assigned to Judge Aldrich, a member of the city council was in chambers and asked whether Judge Aldrich would consider recusing herself from the case.²⁵⁸ The reasons for the recusal request were not explicitly stated, but the implication was clear, the council member wanted Judge Aldrich to recuse because she was a woman. Without missing a beat, however, Judge Aldrich simply replied, “Why? Because I’m too tall?”²⁵⁹

Aldrich was an imposing woman. Strong and resourceful, she had been on her own since the age of eight when her mother died in a Rhode Island hurricane.²⁶⁰ She had an interesting life, rebuilding railroad lines in Yugoslavia after World War II, racing Siberian

²⁵⁰ Mary L. Clark, *Carter’s Groundbreaking Appointment of Women to the Federal Bench: His Other “Human Rights” Record*, 11 AM. U.J. GENDER SOC. POL’Y & L. 1131 (2003) [hereinafter Clark, *Carter’s Groundbreaking Appointment*]; Ginsburg & Brill, *supra* note 247, at 287–88 (“President Carter changed the face of the federal bench. Presidents who followed after him would be measured by his standard.”).

²⁵¹ Clark, *Carter’s Groundbreaking Appointment*, *supra* note 248, at 1132.

²⁵² *Id.* at 1133; Ginsburg & Brill, *supra* note 247, at 288.

²⁵³ Clark, *Carter’s Groundbreaking Appointment*, *supra* note 248, at 1134 (citing the Omnibus Judgeship Act of 1978, Pub. L. No. 95–486, 92 Stat. 1629 (1978)).

²⁵⁴ *Id.* at 1163. See CTR. FOR WOMEN IN GOV’T & CIVIL SOC’Y ET AL., WOMEN IN FEDERAL & STATE-LEVEL JUDGESHIPS (Spring 2010), available at http://www.albany.edu/womeningov/judgeships_report_final_web.pdf (providing gender ratios for courts). In 2011, the Northern District of Ohio, Aldrich’s court, was briefly comprised of 33% women with the appointment of Judge Benita Pearson in late December 2010, but the elevation of Judge Kathleen O’Malley to the Sixth Circuit Court of Appeals two months later reduced that gender representation to 26% of the court. Historical List of District Judges, United States District Court for the Northern District of Ohio, <http://www.ohnd.uscourts.gov/home/information-about-the-court/historical-lists/district-judges-2/> (last visited Oct. 2, 2011).

²⁵⁵ Funk Interview, *supra* note 36.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ *Id.*

²⁶⁰ Segall, *supra* note 242. .

huskies, and marrying a CIA agent, the first of three husbands.²⁶¹ Aldrich was the only woman in her law school class at New York University Law School, graduating second in her class at the early age of twenty-one.²⁶² She said that most of her classmates begrudged her presence, believing she was only there to get a husband and taking a space from a worthy GI returning from war.²⁶³ She continued her legal studies for advanced degrees, worked on the staff of the International Bank for Reconstruction and Development in Washington, D.C., and became a lawyer for the Federal Communications Commission (FCC) while raising four sons.²⁶⁴

As a private attorney, and later law professor, Aldrich focused her efforts on racial justice.²⁶⁵ She represented the United Church of Christ and two black plaintiffs who sued the FCC in 1964 to challenge the television license of the Mississippi NBC affiliate that refused to show black people on TV or broadcast news about the black civil rights movement.²⁶⁶ As the first tenure track law professor at Cleveland-Marshall Law School in 1968, Aldrich focused her efforts on developing the school's diversity student recruitment program.²⁶⁷ To recruit minority students, Aldrich drove to Mississippi to the historically all-black teachers' colleges of the South, and helped them through school, even allowing some of them, like future Ohio appellate judge, Patricia Blackmon, to live at her house.²⁶⁸

When a judicial position was created in the Northern District of Ohio, women's rights advocates went into high gear, tirelessly working to include women in this opportunity.²⁶⁹ The all-male judicial selection committee had initially met and proposed a list of all men.²⁷⁰ The list was rejected because President Carter had explicitly requested that the nominations include women and black candidates, departing from the historical practice of relying on personal recommendations from the senior U.S. senator from the

²⁶¹ *Id.*; Judge Patricia Blackmon, A Toast to the Honorable Ann Aldrich, Feb. 12, 2010.

²⁶² Segall, *supra* note 242; Blackmon, *supra* note 259.

²⁶³ Blackmon, *supra* note 259.

²⁶⁴ *Id.*; Proceedings, Presentation of Portrait, Honorable Ann Aldrich, 107 F.Supp.2d XXXIX, XLVII (2000).

²⁶⁵ See Aldrich Proceedings, *supra* note 262.

²⁶⁶ See Office of Comm'n of the United Church of Christ v. FCC, 359 F.2d 994 (1966) (holding in a case of first impression that representatives of the listening public have standing to intervene in a television license renewal proceeding); see KAY MILLS, CHANGING CHANNELS, THE CIVIL RIGHTS CASE THAT TRANSFORMED TELEVISION 117 (2004); see also Sidney A. Shapiro, *United Church of Christ v. FCC: Private Attorneys General and the Rule of Law*, 58 ADMIN. L. REV. 939 (2006) (discussing the legal significance of the cases that addressed the FCC's failure to police the racist behavior of a southern television station which stood at the forefront of the civil rights struggle in the south and the reformation of administrative law).

²⁶⁷ Segall, *supra* note 242; Blackmon, *supra* note 259. Women were still a small minority of law professors nationally at this time. There were about forty women law professors nationally at the time Aldrich became the first female law professor at Cleveland State. See Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5, 8 (1991). The first woman law professor, Barbara Armstrong, had been appointed to a tenure-track position at Berkeley in 1919, but the intervening fifty years had seen slow expansion of opportunities for female professors. *Id.*

²⁶⁸ Segall, *supra* note 242; Blackmon, *supra* note 259.

²⁶⁹ Moresky Interview, *supra* note 36. Similar efforts by women's advocates were in play at the national level. Mary L. Clark, *Changing the Face of the Law: How Women's Advocacy Groups Put Women on the Federal Judicial Appointments Agenda*, 14 YALE J.L. & FEMINISM 243 (2002); see Clark, *Carter's Groundbreaking Appointment*, *supra* note 245, at 1157–58 (detailing the lobbying and public relations efforts of the National Women's Political Caucus).

²⁷⁰ Moresky Interview, *supra* note 36.

state.²⁷¹ The nominating committee met again, and this time, with the input of women's rights lobbying, there were five women on the list.²⁷² The female candidates were primarily law professors since there were relatively few senior women lawyers in corporations or law firms at that time with the length of legal experience required.²⁷³ While the Ohio senators were only nominally supportive of the Committee's efforts to include women candidates, many years later, Senator Howard Metzenbaum made a point of saying to Judge Aldrich, when he sat next to her on a plane, that he was proud of her nomination and "job well done."²⁷⁴

Aldrich encountered collegial difficulties and turmoil soon after she joined the court. A year into her tenure, Aldrich accused the court's chief judge, Frank Battisti, of influence peddling, bribery, and kickbacks involving lucrative bankruptcy case referrals to a firm where his nephew worked.²⁷⁵ Controversy was nothing new to Battisti. He had served as chief judge for fourteen years, and "[had] drawn praise and angry criticism for his handling of some of the most difficult cases of his time, from his dismissal of federal charges against eight Ohio National Guardsmen in the 1970 Kent State shootings to his busing order for the Cleveland school system."²⁷⁶ In the process, he had become one of the most powerful men in Cleveland.²⁷⁷ Accusations were hurled back at Aldrich calling her a liar, and claiming she was lying to retaliate against her (much younger) lover, a member of the accused firm, who had refused to marry her.²⁷⁸ A federal investigator on the case,

²⁷¹ *Id.*; see Clark, *Carter's Groundbreaking Appointment*, *supra* note 248, at 1133.

²⁷² Moresky Interview, *supra* note 36.

²⁷³ *Id.*; see Clark, *Carter's Groundbreaking Appointment*, *supra* note 248, at 1144–46, 1162 (detailing how the American Bar Association standards preferring fifteen years of experience in large, law firm practice disadvantaged women candidates who on average were younger, had practiced fewer years, had less trial experience, and came disproportionately from government and public interest practice).

²⁷⁴ Funk Interview, *supra* note 36.

²⁷⁵ *Law: A Bad Courthouse Soap Opera*, TIME, June 20, 1983; Thornton, *supra* note 238; Fred McGunagle, *The Courthouse Capers*, CHRON-TEL, May 25, 1983. Aldrich prepared an affidavit for federal investigators, later released to the public, charging that in 1980 Judge Battisti arranged for lucrative bankruptcy cases to be channeled to the Cleveland law firm of Climaco, Seminatore, Lefkowitz & Kaplan, and in return the firm gave a \$40,000 bonus to the judge's nephew, Gino Battisti, then a twenty-five-year-old first-year associate at the firm fresh out of law school. Aldrich said that Gino had bragged about the deal at the law firm's 1981 Christmas party, which Aldrich attended with her then-boyfriend, Shimon Kaplan. Thornton, *supra* note 241.

²⁷⁶ Thornton, *supra* note 241.

²⁷⁷ *Id.*

²⁷⁸ The head of the accused firm, John Climaco, claimed that Aldrich was "dead drunk" the night of the Christmas party and that Aldrich came up with the story when Kaplan refused to marry her. Thornton, *supra* note 238; see also Diane Solov & Sandra Livingston, *Counsel with Clout John Climaco Succeeds on Grit, Connections*, PLAIN DEALER (Cleveland), Aug. 22, 1993. Kaplan corroborated the story, turning on Judge Aldrich, saying: "She believes that I chose to marry John R. Climaco's law firm and that is why I refused to marry her. . . . I believe that Judge Ann Aldrich's recent actions are an attempt to get even with me and my law firm for my refusing to marry her." Thornton, *supra* note 241. Kaplan was thirteen years younger than the fifty-five-year-old Aldrich, and had been one of her law students at Cleveland State University. McGunagle, *supra* note 273.

however, doubted the revenge theory, stating: “She isn’t a woman scorned. She is very much a federal judge who is concerned about the situation as she sees it.”²⁷⁹

The accusations shook the court and the legal community where “[e]ach development and lurid rumor has fallen like a bombshell, creating large headlines and sending shock waves through the federal courthouse.”²⁸⁰ The scandal diminished the dignity of Cleveland’s federal bench, and one judge said, “I wish this were all a bad dream and we could wake up and say it’s over.”²⁸¹ Aldrich had attacked one of the most powerful and controversial men in Cleveland, and she became “an outcast in the court.”²⁸² A federal grand jury investigation did not result in an indictment.²⁸³ The accused bankruptcy judge resigned, the nephew relocated to St. Louis, and the boyfriend returned to his home in Israel.²⁸⁴

Years later, Judge Aldrich joked during her honorary portrait presentation, that “[i]t does appear that my portrait will be hung somewhere to the great satisfaction of my colleagues, some of whom have been trying to hang me for the past two decades.”²⁸⁵ However, she distinguished her “current colleagues who are a totally different group than my original colleagues.”²⁸⁶ Aldrich was very humble and tongue-in-cheek about her legacy: “If things work out as usual for me, I will probably be lost in the basement”²⁸⁷ Reminiscing on her twenty years on the bench, she said, “I thought I was building a legacy of an independent creative jurist,” but noted that her family and clerks “all seem to remember me as Mrs. Nice Guy.”²⁸⁸

Aldrich’s judicial independence was evident on the face of her opinion in *Akron II*. The opinion carefully considered all of the relevant Supreme Court authorities, and placed them in their practical context to appreciate the ways in which the Ohio abortion law made it more difficult for young women to exercise their rights.²⁸⁹ But Aldrich had not foreseen

²⁷⁹ Thornton, *supra* note 241. Aldrich herself said, “Personally, I like Frank. And I’m sorry he blames me. But I think he has undermined the integrity of the federal judiciary. I really don’t want to see the whole judiciary dragged in the mud.” *Id.*

²⁸⁰ *Id.*

²⁸¹ *Soap Opera*, *supra* note 273.

²⁸² Thornton, *supra* note 241

²⁸³ *Ohio Judicial Inquiry Ends Without Indictments*, N.Y. TIMES, Aug. 31, 1984, at A9.

²⁸⁴ Thornton, *supra* note 241; McGunagle, *supra* note 273. The bankruptcy judge, Mark Schlachet, resigned after the Sixth Circuit’s judicial council completed a secret report on him recommending his suspension and public censure. Thornton, *supra*. The council found that Schlachet had channeled thirteen substantial bankruptcy cases to a former law partner, had assigned Battisti’s nephew and niece work on bankruptcy cases, and hired the niece as his clerk of court. *Id.* Schlachet was considered a long-time “Battisti protégé,” who served as Battisti’s clerk of court in 1974 and was appointed by him to the bankruptcy judgeship in 1977. *Id.*

²⁸⁵ Aldrich Proceedings, *supra* note 262 (“I told him [the artist] that I wanted to look like a sexy intellectual. I don’t think he quite managed that. I look a little lumpy, . . .”).

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Akron Ctr. for Reprod. Health v. Rosen*, 633 F. Supp. 1123 (N.D. Ohio 1986).

the jurisprudential shift that was taking place on the Court, calling into doubt the continued viability of the past decisions on which she relied.²⁹⁰

C. The Labyrinth of Obstacles

The United States Supreme Court was again asked to consider the constitutionality of Ohio abortion regulations when the Sixth Circuit Court of Appeals affirmed Judge Aldrich's decision striking down the law.²⁹¹ The Sixth Circuit applied a strict scrutiny analysis, and found the law to be a "procedural trap" with the six constitutional defects Aldrich had identified.²⁹² However, the majority of the Supreme Court chastised the appellate court for basing its decision on a "worst-case analysis that may never occur" when considering the facial challenge to the statute.²⁹³

The Supreme Court found that the key to the constitutionality of the law was the adequacy of the judicial bypass option to parental consent.²⁹⁴ The Court extended its prior precedent requiring bypass procedures for abortion parental consent laws to notification laws, holding that procedures were needed "to prevent another person from having an absolute veto power over a minor's decisions to have an abortion"²⁹⁵ It then concluded that the Ohio law satisfied the established criteria for a constitutionally valid statute.²⁹⁶ The Court found the Ohio bypass procedures satisfied "the dictates of minimal due process," and saw "little risk of erroneous deprivation under these provisions and no need to require additional procedural safeguards."²⁹⁷

Justice Blackmun vigorously dissented.²⁹⁸ He found that Ohio "acted with particular insensitivity" in creating a procedurally "tortuous maze" and unfair "labyrinth."²⁹⁹ He concluded that the statute deliberately placed a pattern of obstacles in the pregnant minor's path "in the legislative hope that she will stumble, perhaps fall, and at least ensuring that she 'conquer a multi-faceted obstacle course' before she is able to exercise her constitutional right to an abortion."³⁰⁰ He found the challenged provisions to be merely "poorly disguised elements of discouragement for the abortion decision."³⁰¹

²⁹⁰ See, e.g., *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

²⁹¹ *Akron Ctr. for Reprod. Health v. Slaby*, 854 F.2d 852 (6th Cir. 1988), *rev'd sub nom.*, *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990).

²⁹² *Akron II*, 854 F.2d at 863.

²⁹³ *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 514 (1990).

²⁹⁴ *Id.* at 510. The Court had previously upheld the general permissibility of parental notification statutes for immature dependent minors. *H. L. v. Matheson*, 450 U.S. 398 (1981).

²⁹⁵ *Akron II*, 497 U.S. at 510.

²⁹⁶ *Id.* at 511. A valid bypass procedure must allow the minor to show she possesses maturity to decide on her own, or that the abortion would be in her best interests, that the procedure insures the minor's anonymity, and that the judicial process must be expedited. *Id.* at 511-13.

²⁹⁷ *Id.* at 517.

²⁹⁸ *Id.* at 525.

²⁹⁹ *Id.* at 525, 529 (emphasis omitted).

³⁰⁰ *Id.* at 527.

³⁰¹ *Ohio v. Akron Ctr. for Reproductive Health*, 497 U.S. 502, 526 (1990) (citing *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 763 (1986)) (internal citations omitted). He expressed his frustration with what he saw as a legislative attempt to end run around the right articulated by *Roe*:

At oral argument, counsel for the plaintiffs, Linda Sogg, tried to make these practical points about the effect of the law and how it “stacks the decks” against minor women.³⁰² But Sogg’s shrill voice and presumptuous argument failed to appreciate the lack of support for her position among the justices and the tenuousness of the past abortion jurisprudence.³⁰³ Counsel for the Ohio Attorney General, Rita Eppler, more persuasively presented her argument supporting the law, arguing formalistically that the law was a reasonable approach that balanced the rights of minor women against the rights and interests of their parents.³⁰⁴

A plurality of the Court went on to conclude that the regulation did not impose an “undue burden” on a minor seeking an abortion, applying a lower level of judicial scrutiny than had been applied in *Roe v. Wade* and other precedent.³⁰⁵ Four Justices found that the law was a rational way for the state to regulate its health professions, to respect family dignity, and ensure that a young woman receives guidance from her parent.³⁰⁶ Kennedy opined:

A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophical choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo. The State is entitled to assume that, for most of its people, the beginnings of that understanding will be within the family, society’s most intimate association. It is both rational and fair for the State to conclude that, in most instances, the family will strive to give a lonely or even terrified minor advice that is both compassionate and mature.³⁰⁷

This undue burden standard applied by Justice Kennedy in *Akron II*, and first suggested by Justice O’Connor’s dissent in *Akron I*, was adopted by a controlling plurality

It is as though the legislature said: “‘If the courts of the United States insist on upholding a limited right to an abortion, let us make that abortion as difficult as possible to obtain’ because, basically, whether on professed moral or religious grounds or whatever, ‘we believe that is the way it must be.’”

Id. at 541–42 (Blackmun, J., dissenting).

³⁰² Transcript of Oral Argument at 22, *Akron II*, 497 U.S. 502 (1990) (No. 88-805).

³⁰³ *See id.*

³⁰⁴ *Id.*

³⁰⁵ *Akron II*, 497 U.S. at 519–20. Justices Rehnquist, White, and Scalia joined in this part of the opinion, while Justices O’Connor and Stevens who had joined the rest of the majority opinion, did not. Justice Stevens joined the majority on grounds of upholding a facial challenge, but wrote separately to express his view that “It would indeed be difficult to contend that each of the challenged provisions of the Ohio statute—or the entire mosaic—represents wise legislation.” *Id.* at 521 n.1. Justice Scalia also wrote separately to state his belief that the Constitution contains no right to an abortion. *Id.* at 520.

³⁰⁶ *Id.*

³⁰⁷ *Id.* at 520. Justice Blackmun decried these types of “paternalistic comments” and criticized the Court for writing this type of “hyperbole that can have but one result: to further incite an American press, public, and pulpit already inflamed. . .” *Id.* at 541 (Blackmun, J., dissenting).

of the Court two years later in an opinion written by O'Connor in *Planned Parenthood v. Casey*.³⁰⁸ The *Casey* Court adopted a lower standard of constitutional scrutiny than had been used in prior cases, which resulted in greater accommodation of government restriction of abortion.³⁰⁹ Under this more lenient standard, the Court upheld an informed consent provision and a twenty-four-hour waiting period, but struck down a spousal notice requirement.³¹⁰ The Court identified the protection of a minor's mental health from the psychological risk that she might later regret her abortion as an important government interest justifying the regulations.³¹¹

Fifteen years later, the Court extended this protective rationale to *all* women in *Gonzales v. Carhart*.³¹² *Carhart* upheld the federal Partial Birth Abortion Act that banned a rarely used late-term abortion procedure.³¹³ The *Carhart* Court held it was important to protect adult women from the alleged mental and emotional consequences of their decision to have an abortion.³¹⁴

In response, Justice Ruth Bader Ginsburg issued perhaps her most scathing dissent.³¹⁵ She deconstructed the rationale of "protecting women," revealing that it "reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited."³¹⁶ Scholars have elaborated on her point that the Court's abortion decisions reinforce stereotypes about women's primary role as mothers and the assumed irrationality of their decision-making — normative concerns of gender that reached beyond the issue of abortion.³¹⁷ This was the same argument plaintiffs

³⁰⁸ *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

³⁰⁹ *Id.* at 869–79 (upholding informed consent and twenty-four-hour waiting period, but striking down spousal notice requirement).

³¹⁰ *Casey*, 505 U.S. at 869–79; *but see* *Planned Parenthood of Southeastern Pa. v. Casey*, 947 F.2d 682 (3d Cir. 1991) (Alito, J., dissenting) (arguing to uphold spousal notice provision because it affected so few women that it did not unduly burden pregnant women generally).

³¹¹ *Casey*, 505 U.S. at 882.

³¹² 550 U.S. 124 (2007).

³¹³ *Id.*

³¹⁴ The Court held: "While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Id.* at 159. However, scientific studies conducted after the decision concluded that evidence does not support the claim that abortion causes mental health problems in women. Brenda Major et al., *Abortion and Mental Health: Evaluating the Evidence*, 64 AM. PSYCHOLOGIST 863 (2009); Jocelyn T. Warren et al., *Do Depression and Low Self-Esteem Follow Abortion Among Adolescents? Evidence from a National Study*, 42 PERSP. ON SEXUAL & REPRO. HEALTH 230 (2010).

³¹⁵ See generally Priscilla J. Smith, *Give Justice Ginsburg What She Wants: Using Sex Equality Arguments to Demand Examination of the Legitimacy of State Interests in Abortion Regulation*, 34 HARV. J. L. & GENDER 377, 411–12 (2011); Timothy R. Johnson, *Hear Me Roar: What Provokes Supreme Court Justices to Dissent from the Bench?*, 93 MINN. L. REV. 1560, 1564 (2009); Lani Guinier, *Foreword: Demosprudence Through Dissent*, 122 HARV. L. REV. 4 (2008).

³¹⁶ *Gonzales*, 550 U.S. at 185; see Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions Under Casey/Carhart*, 117 YALE L.J. 1694, 1793–94 (2008) (arguing that the women-protective rationale resurrects gender-protective arguments that seek to control women) [hereinafter Siegel, *Dignity and Politics*].

³¹⁷ See Jill Elaine Hasday, *Protecting Them from Themselves: The Persistence of Mutual Benefits Arguments for Sex and Race Inequality*, 84 N.Y.U. L. REV. 1464, 1478 (2009).

in the first *Akron* case had subtly argued to the Supreme Court.³¹⁸ In *Carhart*, Justice Ginsburg took the opportunity, for the first time in an opinion, to justify the right to abortion “squarely in terms of women’s equality rather than privacy.”³¹⁹ She rejected the medical model that has dominated much of the Court’s forty years of abortion jurisprudence in favor of a women’s rights model that engenders the constitutional right of equal citizenship and better captures the understanding of the abortion right widely shared in the women’s movement in the years before *Roe*.³²⁰

It may be that Justice Ginsburg’s analysis provides the outline of a way to legally evaluate first-term abortion regulations going forward. Given the Court majority’s acceptance of justifications for abortion laws based on stereotypes of women’s incapacity, weakness, and need for protection, a sex equality analysis that focuses on the discriminatory premises for such stereotypical protectionism may more directly address the concerns of women’s advocates.³²¹ This more searching inquiry may be required to better respond to the continued legislative attacks on women’s right to choose abortion at some time during a pregnancy.

V. CONCLUSION

The types of governmental restrictions that were first challenged in *Akron* shortly after *Roe*’s decriminalization of abortion have since become legal. Ohio, like many other

The problem with woman-protective antiabortion argument is not simply that it would treat individual women on the basis of generalizations about the group, or the stereotypes about women’s capacity and women’s roles on which the argument rests. . . .Like old forms of gender paternalism, the new forms of gender paternalism remedy harm to women through the control of women. Abortion restrictions do not provide women in need what they need: abortion restrictions do not alleviate the social conditions that contribute to unwanted pregnancies, nor do they provide social resources to help women who choose to end pregnancies they otherwise might bring to term.

Siegel, *Dignity and Politics*, *supra* note 310, at 1705–06.

³¹⁸ Transcript of Oral Argument, *supra* note 136, at 27.

³¹⁹ Cass R. Sunstein, Op-Ed., *Ginsburg’s Dissent May Yet Prevail*, L.A. TIMES, Apr. 20, 2007, at A31, <http://articles.latimes.com/2007/apr/20/opinion/oe-sunstein20>; see *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting) (“[L]egal challenges to undue restrictions on abortion procedures do not seek to vindicate some generalized notion of privacy; rather, they center on a woman’s autonomy to determine her life’s course, and thus to enjoy equal citizenship stature.”). Ginsburg had made these arguments previously in scholarly articles. See Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1200 (1992); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); see also Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815 (2007); Catharine MacKinnon, *Roe v. Wade: A Study in Male Ideology*, in *ABORTION: MORAL AND LEGAL PERSPECTIVES* 45, 52–53 (J.L. Garfield & Patricia Hennessey eds., 1984) (criticizing *Roe*’s foundation in privacy rather than equality).

³²⁰ Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 B.U. L. REV. 1875, 1878 (2010); see Jonathan Bullington, *Justice Ginsburg: Roe v. Wade Not “Woman Centered,”* CHICAGO TRIB., May 11, 2013 (reporting Justice Ginsburg’s remarks that the Court’s abortion precedent is not properly based on women’s choice, but rather is physician-centered).

³²¹ See Smith, *supra* note 315 (encouraging litigators to adopt sex equality arguments for abortion challenges as such theory as evolved to bolster the liberty challenge).

states, has re-enacted the specific abortion restrictions that had previously been declared invalid.³²² The fierce public debate surrounding abortion, continuing over decades and even centuries, reveals the depth and strength of the convictions held by those on both sides of the issue. These convictions are not easily silenced by a single court decision. Instead, both women's rights activists, and anti-abortion proponents have continued to press the courts for more acceptable resolutions of the issue. The *Akron* and *Akron II* informed consent cases bring us back to the grassroots nature of the issue that reveals the personal and political nature of the abortion issues that stands apart from its codification in lofty constitutional doctrine. The law is being shaped by these grassroots efforts, just as these pressures force the continued re-examination of an issue that never seems to be settled satisfactorily.

³²² OHIO REV. CODE § 2919.121 (eff. 1998) (parental consent and notification); OHIO REV. CODE § 2317.56 (eff. 2000) (informed consent); OHIO REV. CODE § 3701.79 (eff. 2006) (twenty-four-hour waiting period).