A Documentary History of the Legal Aspects of Abortion in the United States:

City of Akron v. Akron Center for Reproductive Health

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Introductory Essay

Decision Rules and Abortion Rights: Justice O'Connor, Trimesters, and *City of Akron*

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Roe v. Wade has been a contentious case. Some critics questioned the notion that Fourteenth Amendment liberty includes a presumptive right to end pregnancy. Others excoriated the Court's invalidation of fetal protection as a justification for overriding that right. Most critics, however, objected to *Roe's* trimester framework for analyzing abortion restrictions. In *Casey v. Planned Parenthood*, *Roe*'s right to a previability abortion survived but its trimester framework did not.[1]

City of Akron v. Akron Center for Reproductive Health contained the seeds for how the law would evolve. Rather than ban abortion outright, the city sought to impose informed consent, waiting periods, and facility requirements.[2] While such regulations paralleled a more moderate European approach to abortion, they conflicted with *Roe's* demand that regulations to protect a woman's health were not acceptable until the second trimester, and that fetal protection was not a sufficient basis until the third.[3] As a result, the Court in *City of Akron* declared them unconstitutional. Three justices dissented in an opinion written by the Court's most junior member, Justice Sandra Day O'Connor.[4]

Justice O'Connor's dissenting opinion is noteworthy because it contained the analysis that the Court was to use 9 years later to uphold the

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[1] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

[2] *City of Akron v. Akron Reproductive Center*, 462 U.S. 416, 422–424 (1983).

[3] *Id.* at 428–430 (citing *Roe v. Wade*, 410 U.S. 113 at 163–164 (1973)).

[4] *Id.* at 452 (O'Connor, S., White, B., and Rehnquist, W., dissenting).

heart but not the trimester framing of *Roe.*[5] Justice O'Connor's attack in *Akron* on *Roe*'s trimesters appeared to signal her dislike of *Roe*'s principles, sending shudders through the pro-choice movement. As became clear in *Casey*, however, she was objecting to the decision rule that *Roe* had adopted, not its operative meaning.[6] 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.

Her argument in dissent in *City of Akron* had two steps. First, she showed that the trimester approach had no credibility as a decision rule because it was "on a collision course with itself." As medical techniques improved, abortion became less dangerous than childbirth well into the second trimester.[7] At the same time improvements in neonatalogy and reproductive medicine were moving viability—the ability to survive outside the uterus—much earlier in the pregnancy toward conception itself.[8] Legislatures, much less courts, would be hard pressed to write or review abortion laws under such a shifting and contradictory framework.

Justice O'Connor's solution was to scrap trimesters and ask whether a restriction unduly burdened or infringed the ability to get an abortion.[9] She borrowed this formulation from *Maher v. Roe* and the abortion funding cases, which held that failure to fund did not infringe a right to abortion because it did not itself prevent women from having abortions.[10] In O'Connor's formulation restrictions on abortion might increase the costs or require other steps by the patient or provider as long as they did not "unduly burden" the right.[11] If so, they would then have to meet the terms of strict scrutiny justification. If they did not unduly burden, they then need only have a rational basis to be upheld.

The politics of abortion by the mid-1980s had polarized to the point that any move toward relaxation of *Roe v. Wade*, even if only in the trimester framework, had to be fiercely resisted for fear that the core right itself would be lost. Justice O'Connor's plurality opinion in *Casey*, which is her *City of*

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[5] *Planned Parenthood*, 505 U.S. 833.
[6] Mitchell N. Berman, "Constitutional Decision Rules," 90 Va. L. Rev. 1 (2004).
[7] *City of Akron*, 462 U.S. at 454–455.
[8] *Id.*
[9] *Id.* at 453.
[10] *Id.* (citing *Maher v. Roe*, 432 U.S. 464, 473 (1977)).
[11] *Id.* at 453.

Akron dissent *redux*, showed that this was not necessarily the case.[12] The essence of a right to end a pregnancy prior to viability survived, even if subjected to the waiting period and informed consent restrictions struck down in *City of Akron*. Shorn of its trimester dressing, the abortion right continued to stand tall and majestic as a beacon of a woman's liberty.

The more flexible "undue burden" test has its own problems, however, and will not persuade the staunchest opponents of abortion that some constitutional protection should continue. Lacking the numerical exactness of the trimester framework, it quite obviously is a balancing test. No one can pretend that the test is precise. Balancing tests by nature can only specify competing interests or factors to be balanced, not the answer that will automatically result in every case. We cannot live with law unless there is some play in the joints of the decision rules adopted to implement underlying principles. It would be self-defeating to require more.

Abortion rights in 2006 continue under attack. With President Bush's two new appointments to the Court some future shift in abortion rights may be in the offing. One cannot predict whether the undue burden test will survive nor how Chief Justice John Roberts and Justice Samuel Alito will apply it in future cases. If they become votes to reverse *Roe* and *Casey*, one more appointment will be necessary to deliver the *coup de grace.*

Despite the gathering storm, the undue burden test should continue to guide Supreme Court abortion jurisprudence for some time to come. The different ways in which the test could be applied may be seen in how Justice Samuel Alito used it when a circuit judge to uphold a spousal notice provision which his colleagues on the Third Circuit and then the Supreme Court found in *Casey* to be invalid. Judge Alito dissented from the Third Circuit's invalidation of spousal notice under *Roe* on the ground that the law affected so few women that it did not "unduly burden" pregnant women, which he saw as the developing standard.[13]

Justice O'Connor's plurality opinion in *Casey* upheld the informed consent and 24 hour waiting period that Pennsylvania had imposed, but struck down the spousal notice requirement.[14] The fact that had persuaded then-Judge Alito—that only 1% of women would be affected—had a different significance for Justice O'Connor:

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[12] *Planned Parenthood*, 505 U.S. 833.
[13] *Planned Parenthood v. Casey*, 947 F.2d 682 (1991) (Alito, S., dissenting).
[14] *Planned Parenthood*, 505 U.S. 833.

> The analysis does not end with the one per cent of women upon whom the statute operates; it begins there. Legislation is measured by its impact on those whose conduct it affects. The proper focus of constitutional inquiry is the group for whom the law is a restriction, not the group for whom the law is irrelevant. The unfortunate yet persisting conditions we document above will mean that in a large fraction of the cases in which the provision is relevant, it will operate as a substantial obstacle to a woman's choice to undergo an abortion. It is an undue burden, and therefore invalid.[15]

Viewed from the perspective of Justice O'Connor's plurality opinion, Judge Alito appeared to have committed the fallacy of misplaced significance. Because the entire class is so infrequently burdened, he ignored the burden on the specific individuals who are effectively barred from getting an abortion. The ostensible justification was to validate a husband's interest, but spousal notice exacted too high a price from women directly affected by it. As Justice O'Connor reminded us, to rule otherwise would be to give husbands sovereignty over women that equal respect for women could not abide:

> The husband's interest in the life of the child does not permit the State to empower him with this troubling degree of authority over his wife. Women do not lose their constitutionally protected liberty when they marry. The Constitution protects all individuals, male or female, married or unmarried, from the abuse of governmental power, even where the power is employed for the supposed benefit of the individual's family.[16]

This ringing defense of women's rights is far removed from the *City of Akron* dissent's demolishing *Roe*'s trimesters while seemingly signaling a readiness to reject its heart as well. But value-infused incrementalism has its uses. It helped turn Justice O'Connor into the icon of judicial moderation and equal rights which she has now become, earning the love and respect of millions of men and women throughout the land. Who knew that such fire would spring from her dissenting arguments in *City of Akron v. Planned Parenthood.*

February 20, 2006

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[15] *Id.* at 894–895.
[16] *Id.* at 897.