America Almost Took a Different Path Toward Abortion Rights

Roe v. Wade was never expected to be the case that made history.

Thousands of people marched through Manhattan on March 28, 1970, as part of a protest called the Coat Hanger Farewell.Credit...Graphic House/Hulton Archive/Getty

By [Emily Bazelon]
May 2022

To hear more audio stories from publications like The New York Times, [download Audm for iPhone or Android].

For three days in January 1970, they filled the 13th floor of the federal courthouse in Manhattan, women of all ages crowded into a conference room, sitting on the floor, spilling into the hallway. Some brought friends or husbands. One nursed a baby. Another was a painter who also taught elementary school. A third had gone to Catholic school. They'd come to give testimony in the case of Abramowicz v. Lefkowitz, the first in the country to challenge a state's strict abortion law on behalf of women.

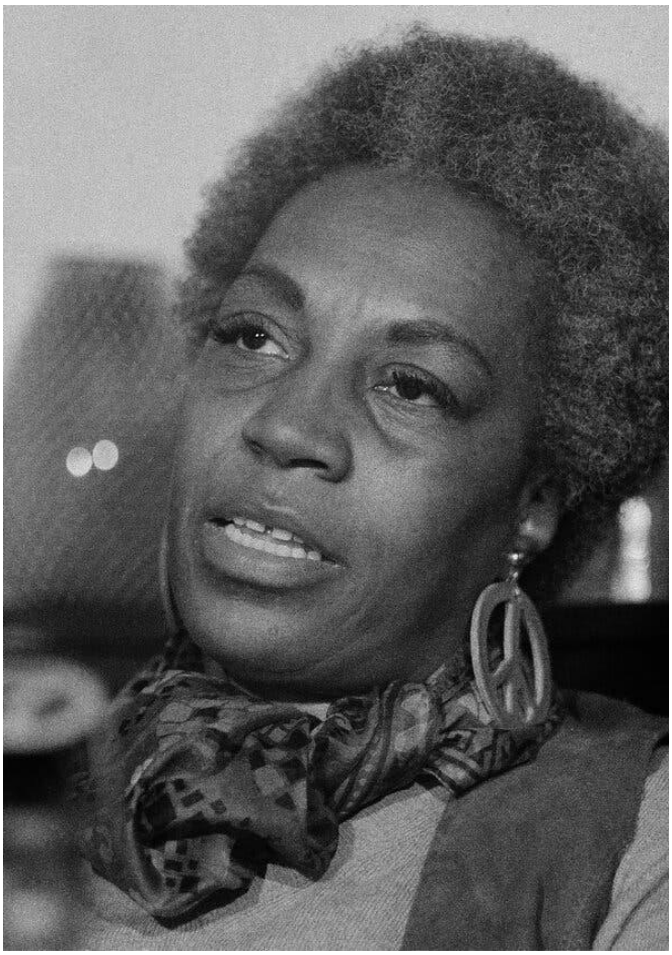
The witnesses in the courthouse were among 314 people, primarily women, brought together by a small team of lawyers, led by Florynce Kennedy and Nancy Stearns, to set up a legal argument no one had made before: that a woman's right to an abortion was rooted in the Constitution's promises of liberty and equal protection. New York permitted abortion only to save a woman's life. Kennedy and Stearns wanted the court to understand how risking an illegal procedure or carrying a forced pregnancy could constrict women's lives in ways that men did not experience.

In the conference room, the women were giving sworn depositions for the judges to read later. One testified that as a 19-year-old Vassar student, she was driven blindfolded to Washington, D.C., for an illegal abortion and bled for days afterward. She broke down as she described going to see a gynecologist in Poughkeepsie who threatened to call the police so they could take her to jail. Another woman, speaking matter-of-factly, said that when she became pregnant and had to carry the fetus to term, she was forced to take a leave of absence from Queens College and lost her scholarship. The press was allowed to attend, making the women's words public.

Lawyers representing the State of New York repeatedly objected to the testimony. When a freelance writer tearfully described giving a child up for adoption — "the most painful, difficult part of the experience was leaving the baby behind," she said — Joel Lewittes, from the state attorney general's office, stepped in. "I am going to move to strike all of the testimony as being irrelevant," he said. Someone yelled "Pig!" and the room burst into applause.

Florynce Kennedy scolded Lewittes for callousness. "I regard this case as a very definite platform for exploring the extent of the legalized oppression of women," she said. "And I personally don't, for one second, intend to lose sight of my objectives."

Image



Florynce Kennedy in 1971.Credit...Jim Wells/Associated Press

Those objectives started with forcing the courts to confront the impact of a near ban on abortion on women's lives. "When we couldn't control when we had a baby, we weren't free and we weren't equal," Nancy Stearns, the lead writer of the briefs in the case, explained to me recently over the phone. "That was our fundamental argument," she said of putting gender equality at the center of the case. "It was clearly even stronger for low-income women."

At the time, Stearns's framing was unheard-of as a legal theory. It wasn't just that the Supreme Court hadn't decided a case about abortion. The court "had never found a single law to violate the equal-protection clause because it discriminated on the

grounds of sex," Reva B. Siegel, a Yale Law professor, explained in The Boston University Law Review in 2010.

And so Stearns, Kennedy and the feminist movement they represented pursued a two-pronged strategy. As Kennedy put it, "When you want to get to the suites, start in the streets." She was a prominent figure in the civil rights and Black Power movements. As an experienced litigator, "she understood going to court as a one-ass-at-a-time proposition," Sherie M. Randolph, her biographer, told me. "To get anything to move, you needed activism." Stearns, who was just three years out of law school at the time, also came up in the civil rights movement, working for the Student Nonviolent Coordinating Committee in the South.

Three months after the depositions in Abramowicz, on March 28, 1970, thousands streamed through Manhattan for a protest called the Coat Hanger Farewell, which Kennedy helped organize. They "startled Easter shoppers" by marching across 34th Street, many wearing bell bottoms, The New York Times reported. (Kennedy was also known for her style, which included cowboy hats, fur coats and African jewelry.) On the steps of St. Patrick's Cathedral, the protesters handed out red-lacquered coat hangers, and Kennedy spoke to the crowd. "There is no need for any legislation on abortion," she said, "just as there is no need for legislation on an appendectomy."

Days later, the New York State Assembly took up a measure to legalize abortion until 24 weeks of pregnancy. "Nobody expected the bill to pass," said Diane Schulder Abrams, another feminist lawyer who worked on the Abramowicz case. At the time, the Legislature included only four women; Republicans controlled both houses and the governor's office, and in each of the three previous years, bills failed that would have allowed abortion only in very limited circumstances.

To everyone's surprise, the State Senate had passed the bill providing for full legalization. In the State Assembly, though members of both parties supported it, the measure fell short by one vote. But then an assemblyman, George M. Michaels, a Democrat from a heavily Catholic district in the central part of the state, rose to speak. He said that his two sons urged him not to let his vote be the one that defeated the bill. He changed from no to yes. "His hands were trembling, and there were tears in his eyes," Abrams said. "He lost his next election."

Assemblyman George M. Michaels after changing his vote on the bill to legalize abortion in New York.Credit...Bettmann Archive/Getty Images

The feminists had won legal abortion in New York. But the change in the law allowed the judges in Abramowicz to declare the case moot and throw it out. Without the New York case working its way through the courts, Stearns scrambled to start over. During the next two years, alongside other lawyers, she sued on behalf of women to strike down the abortion laws of New Jersey, Connecticut, and Rhode Island and helped others bring similar cases in Massachusetts and Pennsylvania. She kept pressing her claim that women had a right to abortion based on equal protection. She also sued

based on a constitutional right to privacy, which the Supreme Court recognized in 1965, in Griswold v. Connecticut, to protect the use of contraception by married couples.

But as Stearns worked on the East Coast, two lawyers, Sarah Weddington and Linda Coffee, who didn't have strong ties to the feminist movement, pursued a challenge to Texas' near ban of abortion that they filed in March 1970. Their case ended up being first on the Supreme Court's docket, after Abramowicz was dismissed — and would wind up making history. It was called Roe v. Wade. As Weddington wrote in her memoir decades later: "We never thought we were filing what would become *the* Supreme Court case."

A New York assemblyman casting an unexpected vote, a court throwing out Abramowicz, the time it took for judges to rule in Stearns's other cases — they are links in the long chain of reasons the country has arrived at a precarious moment for abortion rights.

When they filed suit in Roe, Weddington and Coffee based their case on the right to privacy in Griswold. But Stearns still did her best to bring equal protection to the attention of the justices. The court scheduled the argument in Roe for December 1971, and she filed a friend-of-the-court brief (a supplemental submission that courts may or may not take into account). She sent me a copy of the pages. "The express guarantee of equal protection was originally designed to protect Black people," Stearns wrote. "Since that time, its protection has been greatly extended."

Stearns cited Supreme Court precedents that recognized the 14th Amendment rights of Chinese immigrants, Mexican Americans and poor people. Turning to her claims on

behalf of women, she described the lack of protections for single mothers and employment policies that required pregnant women to take a leave of absence or quit their jobs. Stearns also pointed out that when Texas banned abortion in 1907, women did not have the right to vote.

Nancy Stearns at a rally in New York in the 1970s.Credit...Screen grab from "She's Beautiful When She's Angry," from Mary Dore and Music Box Films

Justice Harry Blackmun, nominated to the court by President Richard M. Nixon in 1970, was assigned to write the majority opinion in Roe striking down the Texas abortion ban. Blackmun's opinion, issued in January 1973, relied on the right to privacy in Griswold, "founded in the 14th Amendment's concept of personal liberty and restrictions upon state action." Linda Greenhouse, author of the 2005 book " Becoming Justice Blackmun ," has pointed out that Blackmun was as, if not more, concerned about the doctors who performed abortions as he was about the women who received them. "The decision vindicates the right of the physician to administer medical treatment according to his professional judgment," Blackmun wrote.

Blackmun also declared that the right to privacy was "broad enough to encompass a woman's decision whether or not to terminate her pregnancy." But he didn't fully explain why.

Months after the Supreme Court's ruling, John Hart Ely, a renowned and liberal Yale law professor, eviscerated Blackmun's opinion in The Yale Law Journal. Ely said that if he were a legislator, he would vote to legalize abortion. He understood why Griswold was about privacy, because forbidding the use of contraception would require "the most outrageous sort of governmental prying into the privacy of the home." But Roe was not a case about governmental snooping. Ely recognized that becoming pregnant, in the wrong circumstance, can ruin a person's life. But the potential life of the fetus also "hangs in the balance," creating a moral dilemma the court did not "even begin to resolve." Roe, as Blackmun wrote it, had "nothing to do with privacy in the Bill of Rights sense" and was thus untethered from the Constitution, making the decision "frightening."

Ely's article "sent Roe into the world disabled," Greenhouse told me. "It really was very damaging. Not because the American public cared about doctrine — they cared about results — but because it left Roe without friends in high places."

In law as in life, timing is everything. The court issued Blackmun's opinion in Roe just days after Ruth Bader Ginsburg, then a 39-year-old lawyer, argued before the court for the first time in a landmark sex-discrimination suit. The court ruled in Ginsburg's favor in that case a few months later and in a series of others in the years that followed. But at the time of Roe, "the court was only on the verge of constructing a jurisprudence of women's rights," Greenhouse and Reva Siegel, the Yale law professor, pointed out in an essay in the 2019 book "Reproductive Rights and

Justice Stories." The justices could have taken a leap toward equal protection in Roe. But they weren't prepared to.

It turns out, though, that Stearns and her fellow feminist lawyers got serious consideration from a court about equal protection in their Connecticut case, Abele v. Markle. Before the Supreme Court's ruling in Roe, a three-judge panel heard their challenge to Connecticut's near-ban on abortion, with more than 850 women as plaintiffs. Judge Jon O. Newman wrote the opinion for the majority. "I thought about invoking gender discrimination," Newman, now 90, told me this month. "But I concluded I would not go down that road." As a lower-court judge, he focused on Supreme Court precedent, which meant Griswold. "I thought, marital privacy is a part of liberty that the Supreme Court has told me exists," Newman said, explaining why that was the justification he gave for striking down Connecticut's law in September 1972.

The protest in New York on March 28, 1970.Credit...Graphic House/Hulton Archive/Getty Images

It's hard to claim, with any certainty, that Roe would have proved less divisive if the right to abortion in America had a sounder constitutional basis from the start. Many who support bans and restrictions do so because they think abortion is murder. Maybe they agree that carrying an unplanned pregnancy can impose a huge cost. But unless the person's life is *physically* at stake (the rare exception to almost every abortion ban), supporters of restrictions believe it's right, at some point in a pregnancy, to make a woman carry the fetus to term.

In important ways, the Supreme Court strengthened Roe decades ago. In June 1992, in the case Planned Parenthood of Southeastern Pennsylvania v. Casey , a new five-justice majority on the Supreme Court affirmed Roe's central holding and addressed its weaknesses. The authors of Casey included Sandra Day O'Connor, the first female justice. They spoke in clear terms of gender equality, recognizing that the right to choose whether and when to have a child made it easier for women "to participate equally in the economic and social life of the nation."

Casey satisfied Ely, and he wrote a letter to Blackmun supporting the decision. ("Blackmun never responded," Greenhouse told me. "I think he was still very hurt.") By then, however, Roe had other prominent critics, including Ruth Bader Ginsburg, who said sex discrimination would have been a stronger rationale for the decision in a 1985 article in The North Carolina Law Review. Nine months after Casey, Ginsburg made waves by giving a lecture at New York University's law school in which she said that Roe "might have been less of a storm center" if it had taken her incremental approach to building a jurisprudence about gender discrimination. Ginsburg's words troubled abortion rights leaders, some of whom questioned her nomination to the Supreme Court when Bill Clinton picked her in June 1993.

Justice Ginsburg almost got a chance to fill in what she saw as Roe's missing piece. In 2007, she wrote an opinion in Gonzales v. Carhart, a challenge to a type of late-term procedure, that squarely framed the constitutional right to abortion in terms of equal rights for women. But Justice Anthony M. Kennedy joined the court's four other conservatives to form a majority, leaving Ginsburg with a dissent, which had the force of her ardent feminism but not of law.

In 2009, when I interviewed Ginsburg for this magazine, she said her main concern about abortion was the lack of access for poor women (because the court decided, in 1980, that Congress could forbid the use of Medicaid for medically necessary abortions). I asked if repositioning Roe on the basis of women's equality was on the feminist wish list. "Oh, yes," she said. Timing, once more, was everything. Ginsburg's death, during Donald Trump's presidency, put that goal far out of reach.

In the current Supreme Court case about abortion, the lawyers for Jackson Women's Health Organization, the clinic suing to challenge a Mississippi restriction, stuck with the court's precedents and did not argue that the right to abortion is shielded by the equal-protection clause. This time around, a friend-of-the-court brief by Reva Siegel and two other law professors, Melissa Murray and Serena Mayeri, made the equality argument. They had more to work with than Stearns did in 1971 — in particular, two Supreme Court decisions, issued since then, that show how the Constitution's promise of equal protection shields against sex-based discrimination.

In one, a 1996 case, United States v. Virginia, Ginsburg wrote the majority opinion, which struck down the all-male admissions policy at a military institute on the basis of equal protection. Using the same legal rationale, in a 2003 case, Nevada Department of Human Resources v. Hibbs, Chief Justice William H. Rehnquist, a staunch

conservative, wrote for the majority that the state could not differentiate between maternity- and paternity-leave policies based on the assumption that "caring for family members is women's work." Siegel, Murray and Mayeri argued in their amicus brief that those cases, taken together, establish that laws regulating pregnancy "violate the equal-protection clause when they are rooted in sex-role stereotypes that injure or subordinate."

Justice Samuel A. Alito Jr. dismissed the equality argument for abortion rights in the leaked draft majority opinion, published by Politico this month, which would overturn Roe. "The regulation of a medical procedure that only one sex can undergo," he wrote, is constitutional unless it is a "mere pretext designed to affect an invidious discrimination."

Alito landed on this phrase by quoting a 1974 decision, Geduldig v. Aiello , which was a low point for feminists at the Supreme Court. In that case, six justices ruled that California could exclude women with pregnancy complications from receiving benefits from a state disability fund that covered other conditions. The state wasn't discriminating against women — it was merely distinguishing between "pregnant women and nonpregnant persons," the court said. Congress addressed the inequity by passing the Pregnancy Discrimination Act in 1978, and before Alito's opinion, the Supreme Court had not relied on the Geduldig decision for 30 years.

When I called Stearns to ask her about Alito's opinion, she hadn't yet brought herself to read it. But she had already gone with friends to a protest over the impending end of Roe. "We were the old ladies in tennis shoes," she said.

Stearns was thinking about the decades of backlash to Roe. Could anything have prevented it? “We made the argument,” she said. “It got lost for some people.” The feminists of the 1970s tried to give future generations freedom and equality, as they saw it. Now that era may end soon, Alito’s draft opinion suggests. Another generation will have their own stories to tell, in court and outside it.