

Expert Analysis - Series

My Supreme Court Debut: 2 Courts To Convince

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As the end of the year draws near, all eyes are turning to the [U.S. Supreme Court](#) and the decisions it will issue during its October 2017 term. In this [Expert Analysis series](#), attorneys that have argued before the high court — from veterans to recent first-time arguers — reflect on their very first time standing before the justices.

I argued my first case before the U.S. Supreme Court in the fall of 1985. The case, *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 US 747 (1986) was a constitutional challenge to Pennsylvania abortion restrictions, among a continuing set of challenges to state legislation that attempted to restrict the scope of *Roe v. Wade*, 410 U.S. 113 (1973) in the decades following that seminal decision. I was deeply honored to represent the abortion providers and OB-GYN physicians in Pennsylvania before the high court yet petrified about the responsibility, as the case could affect millions of women across the country who depended upon legal access to abortion.



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The experience arguing *Thornburgh* taught me several lessons that would come in handy throughout my career as an appellate advocate and prove particularly useful in 1992, when I argued *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), the landmark case that is widely credited with saving *Roe*.

First and perhaps most importantly, I learned that my job as an advocate was not solely focused on convincing the Supreme Court of the wisdom of my constitutional analysis. I also served as a spokesperson for both my Pennsylvania clients and abortion providers across the nation in the wider political battle around abortion. The Supreme Court argument focused national attention on the question and provided substantial media coverage for the issue. Surely, my clients wanted to win their case, but they also wanted me to make strong arguments in the court of public opinion, for we all knew that whatever the outcome of *Thornburgh*, the political battle around abortion would continue. We fully expected additional legislative efforts in Pennsylvania and other states that would restrict women's access to medical care. That today, over 30 years later, the political and legal battles over abortion (and now contraception) are so heated, only reaffirms our concerns at the time.

It was immediately apparent that traditional legal concepts like strict scrutiny and rational basis review and the implications of the Supreme Court changing *Roe*'s standard of review were very difficult for nonlawyers to understand and could not be reduced to short sound

bites so critical to effective advocacy in the media and public arena. I quickly learned that I needed to use different languages for different audiences — the language of lawyering for the court and simpler yet quotable explanations in the court of public opinion.

Second, while all cases in the Supreme Court are important, I learned that high-profile cases, particularly those involving culture wars and presidential politics, are *sui generis* and that both advocates and the court treat them differently. In *Thornburgh*, despite a Supreme Court decision reaffirming *Roe v. Wade* less than two years before briefing, the solicitor general at the behest of Attorney General Edwin Meese, asked the Supreme Court to reverse *Roe v. Wade* and permit states to ban abortion. This was the first time in history that a solicitor general had urged the court to overturn a long-standing and recognized constitutional right. The fact that the case involved the constitutionality of a state, rather than federal law, underlined the political nature of the request. It is hard to imagine that the U.S. government would stray so far from precedent in a more typical criminal case or matter of commercial litigation.

Similarly, with so much attention on the case, I fully expected a hot court with numerous, unrelenting questions from the justices. Yet surprisingly, the justices asked very few questions of my opposing counsel, Pennsylvania Deputy Attorney General Andrew Gordon. Toward the end of his argument, he was able to speak without interruption for well over five minutes. He had prepared to answer questions and appeared to be thrown by having to make a full argument directly to the court without interruption. Wisely, he concluded his remarks before the end of allotted time. Several years later, in my opening argument in *Planned Parenthood v. Casey*, the Supreme Court let me talk without a question for over seven minutes, so long that the courtroom was filled with whispering onlookers wondering when the justices would interrupt. The experience in *Thornburgh* had prepared me for such an eventuality and I was able to use the time to emphasize the implications of reducing constitutional protections for women's choices.

Third, as experienced court advocates well know, I learned in *Thornburgh* that the justices often talk with each other through the questions they ask of counsel. The justices ask questions to better understand an argument or allay their own concerns but also to help persuade another justice, whose questions or prior opinions might indicate a concern with that particular area of the law. Not only was it important to know the cases supporting or opposing my position, I also needed to know the positions of individual justices in that case law so that I could understand why the questions were being asked and find the best way to answer them.

Fourth, I learned to take full advantage of the intimacy of the Supreme Court. Unlike many district court and courts of appeals courtrooms that are spacious with high ceilings, the Supreme Court is a smaller more intimate space. Because the justices sit very close to the podium, advocates can have a conversation with them rather than give a speech to them. I learned that having a conversation with the justices was much more effective than any oration I could make — a lesson, I was able to use in appellate arguments through the remainder of my career. I highly recommend that any newbie watch other oral arguments at the court before yours and if possible, sit within the lawyer's section, so you get a feel for the physical space.

Lastly, I learned the value of practice. Working closely with other women who had argued

before the high court, I spent considerable time honing the language I would use and ensuring that I had recall of both critical cases and judicial positions in those cases. Prior to the argument in Thornburgh, I participated in two moot court arguments with both experienced court advocates, academics and other abortion rights litigators. Together we could come up with potential, difficult questions and have answers for them.

During the moot courts, there was some tension between traditional high court advocates and those who took a more political view of the abortion wars and who understood that the court may not approach the legal issues in quite the same way they would a traditional case. There was no way to resolve this conflict. I learned that I needed to argue the case in a way that I was comfortable with and which reflected the stories and needs of my clients, rather than trying to adopt the strategies put forth by the advocates in the differing camps. Several years later in Casey, when the composition of the court had changed and everyone fully believed there were five firm votes to overturn Roe, this dilemma again became an issue. Do you argue the matter in a conservative way, presenting the court with several options for a new, less protective standard of review, or stick to your guns and argue that anything short of strict scrutiny was the overruling of Roe? The later approach, favored by the litigators in this area, was considered very radical by traditional Supreme Court advocates. The confidence I got from arguing Thornburgh allowed me to get input from many parties, but in the end trust my own gut instincts, however radical it seemed to onlookers. I am now convinced that this all-or-nothing approach was key to winning as much as we did in Casey.

Ironically, when Thornburgh was decided by the court in June 1986, my colleagues at the Women's Law Project in Philadelphia, my clients and I celebrated the court's 5-4 reaffirmation of Roe, by popping bottles of champagne. Because the most recent abortion case before the court had been decided by a 6-3 vote, the media reported this 5-4 decision as the beginning of the end of Roe. Most news outlets reported that the right to legal abortion was on tenuous ground, only one vote away from being overruled, and that the next Supreme Court appointment would become a battle over this issue. Indeed, that happened only several years later when Robert Bork was nominated but failed to be confirmed to the Supreme Court and again in 1991 when Justice Clarence Thomas joined the court. However personally happy I was for the victory, both my clients and abortion providers from across the country began to brace themselves for more intense battles over this issue, that have continued to today.

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