

## WHY RESTRICT ABORTION? EXPANDING THE FRAME ON JUNE MEDICAL

As the Supreme Court prepares to roll back protections for the abortion right, this Article analyzes the logic of pro-life constitutionalism in *June Medical Services L.L.C. v. Russo*.<sup>1</sup>

I expand the frame on *June Medical* to examine the logic of women-protective health-justified restrictions on abortion.<sup>2</sup> Do these laws protect women or the unborn—and how? By considering the history of the law at issue in *June Medical* and locating it in broader policy context, we can see how legislators who restricted abortion to protect women’s health equated women’s health with motherhood; they supported laws that push women into motherhood while declining to enact laws that provide for the health of pregnant women and the children they might bear.<sup>3</sup> Expanding the frame on Louisiana’s pro-woman

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<sup>1</sup> 140 S. Ct. 2103 (2020).

<sup>2</sup> See *infra* Section II.B.

<sup>3</sup> See *infra* Section II.C.

pro-life law shows us sex-role stereotyping in action, and demonstrates the intersectional injuries it can inflict.

From this vantage point, we can see that judges who refuse to scrutinize pro-life law making—on the grounds that it would involve judges in politics—help legitimate the claims about protecting women’s health that supposedly justify the abortion restrictions, while revising the meaning of the Constitution’s liberty and equality guarantees.<sup>4</sup> Reading the doctrinal debate in *June Medical* in this context identifies open and hidden efforts to roll back protections for the abortion right—and suggests how the Supreme Court that President Donald Trump helped fashion values women, health, life, truth, and democracy.

At the root of the conflict in *June Medical* is a question we might ask in many contexts. What does it mean to be pro-life? During a 2020 campaign debate, Senator Kamala Harris warned voters that “Donald Trump is in court right now trying to get rid of the Affordable Care Act” “in the midst of a public health pandemic when over 210,000 people have died and 7 million people probably have what will be . . . a preexisting condition because [they] contracted the virus. . . .”<sup>5</sup> Vice President Mike Pence countered this attack on his administration’s health care policies by emphasizing its appointment of judges who oppose abortion: “I couldn’t be more proud to serve as vice president to a president who stands without apology for the sanctity of human life. I’m pro-life,” a claim he substantiated by appeal to the administration’s last Supreme Court nomination, “For our part, I would never presume how Judge Amy Coney Barrett would rule on the Supreme Court of the United States, but we’ll continue to stand strong for the right to life.”<sup>6</sup>

Neither Harris nor Pence connected judgments about abortion and healthcare during the pandemic, but many others have. It is becoming increasingly common to probe commitments in the abortion debate by asking whether they extend to other contexts. Conservatives who oppose mask and shutdown orders have advanced their freedom claims in the abortion rights context by arguing that

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<sup>4</sup> See *infra* Sections III.A, III.B.

<sup>5</sup> *October 07, 2020 Vice Presidential Debate Transcript*, COMM’N ON PRESIDENTIAL DEBATES (Oct. 7, 2020), <https://www.debates.org/voter-education/debate-transcripts/vice-presidential-debate-at-the-university-of-utah-in-salt-lake-city-utah/> (referencing the Patient Protection and Affordable Care Act of 2010, 42 U.S.C. § 18001 (2020)).

<sup>6</sup> *Id.*

liberals are inconsistent in their commitment to liberty. Representative Marjorie Taylor Greene attacked the House's mask rule by tweeting "my body, my choice,"<sup>7</sup> just as chants, signs, and T-shirts at shutdown protests have echoed the abortion rights slogan.<sup>8</sup> Claims about inconsistency run both ways. Critics of the Trump administration's public health response to the pandemic have regularly challenged its claim to be "pro-life." (Try searching "pro-life pandemic.")

We understand Pence's claim that he is "pro-life" and his pride in serving "as vice president to a president who stands without apology for the sanctity of human life" one way when we analyze abortion in a single-issue frame—and in another when we expand the frame to compare the Administration's policy choices about abortion with its other policy choices about life and health.<sup>9</sup> Expanding the frame and comparing the policy choices of pro-life advocates inside and outside the abortion debate can clarify beliefs and values espoused in the

<sup>7</sup> Nicole Via y Rada, *Rep.-elect Marjorie Taylor Greene Challenges House Mask Rule with 'My Body, My Choice'*, NBC News (Nov. 13, 2020, 12:57 PM), <https://www.nbcnews.com/politics/2020-election/live-blog/2020-11-13-trump-biden-transition-n1247607/ncrd1247735#blogHeader> (reporting that Greene, known for her "support for the far-right conspiracy theory QAnon," was employing a phrase used to reject mask mandates by "coronavirus protestors who opposed lockdowns and mask usage"). For use of the pro-choice slogan at shut-down protests, see Laura Vozella & Gregory S. Schneider, *With Picnic Baskets and Few Masks, Demonstrators Protest Virginia Stay-at-Home Orders*, WASH. POST (Apr. 16, 2020, 5:45 PM), [https://www.washingtonpost.com/local/virginia-politics/with-picnic-baskets-and-few-masks-demonstrators-protest-virginia-stay-at-home-orders/2020/04/16/fe08b016-8016-11ea-8013-1b6da0e4a2b7\\_story.html](https://www.washingtonpost.com/local/virginia-politics/with-picnic-baskets-and-few-masks-demonstrators-protest-virginia-stay-at-home-orders/2020/04/16/fe08b016-8016-11ea-8013-1b6da0e4a2b7_story.html), which documents protestors using "my body, my choice" language, and Justin Wingerter, *"My Body, My Choice": Inside Colorado's Growing Anti-Shutdown Movement*, DENVER POST (Apr. 25, 2020, 11:51 AM), <https://www.denverpost.com/2020/04/25/coronavirus-shutdown-protests-colorado-politics>.

<sup>8</sup> Marcie Bianco, *COVID-19 Mask Mandates in Wisconsin and Elsewhere Spark "My Body, My Choice" Hypocrisy*, NBC News (Aug. 3, 2020, 11:11 AM), <https://www.nbcnews.com/opinion/covid-19-mask-mandates-wisconsin-elsewhere-spark-my-body-my-ncna1235535>.

<sup>9</sup> Pence led the Trump Administration's Coronavirus Task Force, often bending health policy to serve the Administration's political interests but sometimes resisting. See Mark Mazzetti et al., *Under Pence, Politics Regularly Seeped into the Coronavirus Task Force*, N.Y. TIMES (Oct. 8, 2020), <https://www.nytimes.com/2020/10/08/us/politics/pence-coronavirus-task-force.html>. Stories of the Trump Administration's management of the pandemic will take books. For a glimpse of the Task Force during the era of the vice-presidential debate, see Yasmeen Abutaleb et al., *Trump's Den of Dissent: Inside the White House Task Force as Coronavirus Surges*, WASH. POST (Oct. 19, 2020, 6:00 AM), [https://www.washingtonpost.com/politics/trumps-den-of-dissent-inside-the-white-house-task-force-as-coronavirus-surges/2020/10/19/7ff8ee6a-0a6e-11eb-859b-f9c27abe638d\\_story.html](https://www.washingtonpost.com/politics/trumps-den-of-dissent-inside-the-white-house-task-force-as-coronavirus-surges/2020/10/19/7ff8ee6a-0a6e-11eb-859b-f9c27abe638d_story.html); Brett Samuels, *Trump Adviser Scott Atlas Criticizes Plans to Avoid Seeing Elderly for Thanksgiving*, HILL (Nov. 17, 2020, 12:31 PM), <https://thehill.com/policy/healthcare/526332-trump-adviser-scott-atlas-criticizes-plans-to-avoid-seeing-elderly-for>.

abortion debate, as I have argued in a study of the policy choices of pro-life states.<sup>10</sup>

By expanding the frame on *June Medical Services L.L.C. v. Russo*,<sup>11</sup> this Article analyzes the Supreme Court's emerging approach to restrictions on abortion that claim to be woman-protective and health-justified. These laws, called by critics Targeted Regulations on Abortion Providers (TRAP laws), impose on abortion providers burdensome health and safety regulations not imposed on other medical practices of similar or even greater risk.<sup>12</sup> Health-justified abortion restrictions defy simple characterization, as the laws on their face restrict abortion to protect women rather than the unborn. To analyze the constitutional questions these abortion restrictions pose, I begin inside Supreme Court case law; I then expand the frame to consider the law at issue in *June Medical* in larger historical and policy context, and I then bring this external perspective to bear on the Justices' reasoning in the case. By examining the judgments about women and health driving passage of the law in *June Medical*, we can better assess the practice of constitutionalism that would immunize this exercise of state power from judicial review.

With the Supreme Court's composition transformed by pro-life appointments, the Court seems poised to change its approach to reviewing abortion restrictions, and this change in composition plays a prominent role in *June Medical* itself.<sup>13</sup> In 2016 in *Whole Woman's Health v. Hellerstedt*,<sup>14</sup> the Supreme Court found a Texas law requiring abortion providers to have admitting privileges at a hospital within 30 miles to be an undue burden under *Planned Parenthood v. Casey*,<sup>15</sup> reasoning that the law's health benefits were negligible in comparison to the burdens on access the law imposed by closing many of the state's

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<sup>10</sup> See Reva B. Siegel, *ProChoiceLife: Asking Who Protects Life and How—and Why It Matters in Law and Politics*, 93 IND. L.J. 207, 207 (2018) (“If we expand the frame and analyze restrictions on abortion as one of many ways government can protect new life, we observe facts that escape notice when we debate abortion in isolation.”); *id.* at 209 (“[M]any prolife jurisdictions lead in policies that restrict women’s reproductive choices and lag in policies that support women’s reproductive choices. Comparing state policies in this way makes clear that the means a state employs to protect new life reflects views about sex and property, as well as life.”).

<sup>11</sup> 140 S. Ct. 2103 (2020).

<sup>12</sup> See *infra* notes 133–35 and accompanying text.

<sup>13</sup> See *infra* Section I.A.

<sup>14</sup> 136 S. Ct. 2292 (2016). See *infra* Section I.A.

<sup>15</sup> 505 U.S. 833, 877 (1992).

clinics.<sup>16</sup> In 2020 in *June Medical*, decided after Justice Kennedy retired, the four justices who voted to strike down the Texas law in *Whole Woman's Health* voted to strike down the Louisiana law modeled on it under the same standard. Chief Justice Roberts, who dissented in *Whole Woman's Health*, concurred in striking down the Louisiana law on grounds of *stare decisis*, but then joined the *June Medical* dissenters in attacking the plurality's "balancing" standard as requiring judges to make "legislative" judgments faithless to *Casey*.<sup>17</sup>

As this claim suggests, the fight over balancing is a fight about whether a Supreme Court transformed by pro-life appointments will dilute the protections *Casey* provides for decisions about abortion. The standard that conservatives attacked, which directs judges to compare the benefits of a health-justified abortion restriction to the law's burdens in closing clinics, is one way of determining the purpose of health laws—TRAP laws—that impose burdensome restrictions on abortion.

Why would legislatures adopt these indirect means of restricting access to abortion, and why would judges insulate legislative subterfuge from scrutiny? To answer these questions, I expand the frame and examine the debate over health-justified restrictions on abortion in wider historical and social context.

To examine the roots and logic of the admitting privileges restrictions at issue in *Whole Woman's Health* and *June Medical*, I return to the 1990s, a time when the nation was coming to understand women as constitutional rights holders differently than at the time of *Roe*.<sup>18</sup> I show how emergent understandings of women as equal citizens shaped the ways the Supreme Court revised the law governing abortion in *Casey* and the ways the antiabortion movement struggled to restrict abortion in *Casey*'s wake. Appropriating feminist frames, the antiabortion movement called this new generation of health-justified abortion restrictions pro-woman, pro-life laws. As movement sources show, pro-woman, pro-life laws restrict abortion to protect a pregnant woman's health and to protect unborn life, reasoning from the traditional sex-role-based assumption that becoming a mother promotes

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<sup>16</sup> *Whole Woman's Health*, 136 S. Ct. at 2311, 2313 (noting that the Texas law did not "advance[] Texas' legitimate interest in protecting women's health" and "led to the closure of half of Texas' clinics, or thereabouts").

<sup>17</sup> See *infra* Sections I.B, III.B.

<sup>18</sup> *Roe v. Wade*, 410 U.S. 113 (1973). See *infra* Sections II.A, II.B.

a woman's "health."<sup>19</sup> This historical perspective on the *June Medical* case makes clear why the admitting privileges statute and other health-justified restrictions on abortion implicate both the liberty and equality guarantees of federal and state constitutions.

I then analyze the traditional sex-role-based judgments the admitting privileges law enforced from a second vantage point. I expand the frame and examine how Louisiana protected women's health inside and outside the abortion context. At the same time as advocates for the admitting privileges statute spoke of the importance of protecting women's health and protecting life, the state enforced policies contributing to the state's exceedingly high maternal mortality and infant mortality rates.<sup>20</sup> We can read this disjuncture in policies as evidence that role-based judgments are in play and as an illustration of the harms these judgments can inflict, especially when directed against poor women of color.

Pro-life advocates who act from concern about intentional life-taking without a commitment to support life more generally may be prepared to impose costs on those they see as caregivers that the advocates are not prepared to impose on others or on the community as a whole. As we will see, pro-life advocacy of this kind is suspiciously selective, more concerned with control than care, and susceptible to status-based judgments when aimed at poor women and women of color. Not surprisingly, people and jurisdictions can express pro-life commitments for different reasons, and not all are simple expressions of care.

In short, expanding the frame allows us to be more discriminating in evaluating claims about protecting women and protecting life in the abortion debate. Expanding the frame on Louisiana's pro-woman pro-life law teaches us what sex-role stereotyping looks like in a wider range of contexts and demonstrates the intersectional injuries it can inflict.

It is only after examining the logic of the pro-woman, pro-life law at issue in *June Medical* that we can fully appreciate the doctrinal debate in the case. Examining *June Medical* in wider historical and policy context, we can see how the Justices who denounce balancing as legislative rather than judicial are directing judges to defer to state

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<sup>19</sup> See *infra* Sections II.B (examining national movement), II.C.1 (examining legislative record in Louisiana).

<sup>20</sup> See *infra* Section II.C.2.

claims about health. This adds the courts' imprimatur to modern forms of protectionism that inflict physical and dignitary injuries on poor women. The Justices who denounce balancing as legislative rather than judicial are engaged in a political project at the very moment they claim to be avoiding entanglement in politics.<sup>21</sup> Far from promoting democracy, judicial review of this kind undermines democracy by preventing robust debate over the constitutional, political, and human stakes of the questions raised by public power of this kind.

As we expand the frame on *June Medical*, we see courts, the very institutions we rely on to warrant facts amidst claims of fake news, promoting the confusion of facts and values in the abortion debate. Excavating the story of *June Medical* in the midst of debate about the 2020 election and the greatest pandemic in a century, I found that the distinction between background and foreground too often disappeared, as claims about truth, lies, democracy, life, and health ricocheted between them. In this story, the Roberts Court too often acts as the Trump Court in the ways it protects life.

Part I shows how President Trump's promise to nominate pro-life judges shaped the Supreme Court that decided *June Medical*, its membership continuing to evolve as President Trump replaced Justice Ruth Bader Ginsburg with Justice Amy Coney Barrett in the midst of the 2020 election. Part II expands the frame and situates the doctrinal debate in *June Medical* in historical and policy contexts. Part III returns to the terrain of doctrine and analyzes the Court's debate over balancing with attention to the kinds of pro-life lawmaking that federal judges will scrutinize or legitimate.

I close Part III by considering how the abortion question stands as Justice Barrett takes Justice Ginsburg's seat. Justice Barrett has already cast a vote in *Food and Drug Administration v. American College of Obstetricians*.<sup>22</sup> She was silent as the conservative majority allowed the federal government to enforce a TRAP regulation requiring women to travel to access medication abortion in the midst of the pandemic,<sup>23</sup> prompting Justices Sotomayor and Kagan to conclude their dissent in the words of Justice Ginsburg.<sup>24</sup> As an advocate and a Justice, Ginsburg understood the Constitution's guarantees of liberty and equality

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<sup>21</sup> See *infra* Sections III.A, III.B.

<sup>22</sup> 141 S. Ct. 578 (2021) (mem.).

<sup>23</sup> See *infra* Section III.C.1; text accompanying notes 313–27.

<sup>24</sup> See *infra* text accompanying note 327.

to limit the ways that government can regulate pregnant women. By considering the limits on coercion that Justice Ginsburg long defended, we can begin to appreciate how the abortion decisions of Justice Barrett and other conservative Justices may change the meaning of constitutional principles and the forms of constitutional protection generations of Americans have looked to the Court to enforce.<sup>25</sup>

Courts do not always have the last word. As I show, frame expansion is now a regular part of the abortion debate and may enable the public to probe the logic of abortion restrictions when federal courts no longer will. The Conclusion reflects on the ways this debate about the meaning of pro-life law has exploded in the era of the pandemic.

## I. THE QUESTION IN *JUNE MEDICAL*

Change in abortion law is imminent. After promising “I am pro-life, and I will be appointing pro-life judges” who will return broad power over abortion law to the states,<sup>26</sup> President Trump seated three justices on the Supreme Court with the goal of weakening, or eliminating, a half century of law that protects women’s liberty to decide whether to continue a pregnancy—a constitutional guarantee first announced in *Roe* and reaffirmed in 1992 in *Casey*. Through appointments battles that were each distinctively tumultuous, Justice Gorsuch took Justice Scalia’s seat, Justice Kavanaugh took Justice Kennedy’s seat, and Justice Amy Coney Barrett took Justice Ginsburg’s seat.<sup>27</sup>

<sup>25</sup> See *infra* Sections III.C.2, III.C.3.

<sup>26</sup> Aaron Blake, *The Final Trump-Clinton Debate Transcript, Annotated*, WASH. POST (Oct. 19, 2016, 9:29 PM), <https://www.washingtonpost.com/news/the-fix/wp/2016/10/19/the-final-trump-clinton-debate-transcript-annotated>. During the campaign, Trump repeatedly promised to nominate Supreme Court justices who would overturn *Roe* and called this a “litmus test” for selecting nominees. See Press Release, Senate Democratic Caucus, *President Trump Wants a Supreme Court That Will Overturn Roe v. Wade* (July 5, 2018), [https://www.democrats.senate.gov/newsroom/press-releases/president-trump-wants-a-supreme-court-that-will-overturn-roe-v-wade\\_thats-why-the-far-right-federalist-society-wrote-his-list-of-potential-high-court-picks](https://www.democrats.senate.gov/newsroom/press-releases/president-trump-wants-a-supreme-court-that-will-overturn-roe-v-wade_thats-why-the-far-right-federalist-society-wrote-his-list-of-potential-high-court-picks) (predicting the Court will overturn *Roe v. Wade* “automatically, in my opinion, because I am putting pro-life justices on the court”). In addition to these Supreme Court appointments, President Trump significantly changed the composition of the lower federal courts. See Rebecca R. Ruiz, Robert Gebeloff, Steve Eder & Ben Protess, *A Conservative Agenda Unleashed on the Federal Courts*, N.Y. TIMES (Mar. 16, 2020), <https://www.nytimes.com/2020/03/14/us/trump-appeals-court-judges.html>.

<sup>27</sup> See Amelia Thomson-DeVeaux, Laura Bronner & Anna Wiederkehr, *What the Supreme Court’s Unusually Big Jump to the Right Might Look Like*, FIFTYEIGHT (Sept. 22, 2020),

*June Medical* is a symptom of these shifts in the Supreme Court's composition. I first consider the question in *June Medical* as a question about the way a court functions through changes in its composition and then consider how the dispute over legal standards in the case is tied to the evolving shape of the abortion conflict.

#### A. WHICH COURT? HOW TRUMP'S APPOINTMENTS CHANGE THE COURT'S MIND

The question in *June Medical* was whether an abortion restriction the Court declared unconstitutional in 2016 in *Whole Woman's Health* would remain unconstitutional after President Trump replaced Justice Kennedy, who voted with the majority in *Whole Woman's Health*, with Justice Kavanaugh.<sup>28</sup> To determine whether the restriction imposed an undue burden having the purpose or effect of creating a substantial obstacle to abortion access under *Casey*,<sup>29</sup> the Court ruled in *Whole Woman's Health* that a judge should compare the benefits of the law to the burdens on access its enforcement posed.<sup>30</sup> In 2020, in *June Medical*, the four justices who voted to strike down the Texas admitting privileges law evaluated the Louisiana law under the same standard; Chief Justice Roberts, who dissented in *Whole Woman's Health*, concurred in striking down the Louisiana law on grounds of stare decisis but then joined the dissenters in attacking the plurality's "balancing" standard as requiring judges to make "legislative" judgments faithless to *Casey*.<sup>31</sup> "Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts," Roberts objected.<sup>32</sup>

Debate about whether Chief Justice Roberts had changed the law had barely begun when President Trump seized the opportunity of

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<https://fivethirtyeight.com/features/what-the-supreme-courts-unusually-big-jump-to-the-right-might-look-like>.

<sup>28</sup> Sheryl Gay Stolberg, *Kavanaugh Is Sworn in After Close Confirmation Vote in Senate*, N.Y. TIMES (Oct. 6, 2018), <https://www.nytimes.com/2018/10/06/us/politics/brett-kavanaugh-supreme-court.html>. This was not the first time a change in the Supreme Court's composition led to a change in abortion law. See GEOFFREY STONE, SEX AND THE CONSTITUTION 427 (2017) (discussing how shifts in the Court's composition led to the Court's decision in *Gonzales v. Carhart*, 550 U.S. 124 (2007)).

<sup>29</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992).

<sup>30</sup> See *infra* Section I.B.

<sup>31</sup> See *infra* Sections I.B., III.B.

<sup>32</sup> *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring).

Justice Ruth Bader Ginsburg's passing to appoint, in the midst of mail-in and early voting for the presidential election, Justice Amy Coney Barrett.<sup>33</sup> Vice President Pence pointed to Barrett as proof that his administration "stand[s] strong for the right to life."<sup>34</sup> Barrett had signed published statements making clear her strong opposition to abortion and "the Supreme Court's infamous *Roe v. Wade* decision" and calling "for the unborn to be protected in law," she had questioned the power of *stare decisis* to bind the Court, and she had voted to uphold abortion restrictions during her brief tenure on the Seventh Circuit.<sup>35</sup>

Several courts had already ruled that Chief Justice Roberts's opinion had modified the *Whole Woman's Health* framework<sup>36</sup> even before the nomination of Justice Barrett emboldened others to call for yet more dramatic changes in the Court's approach to health-justified restrictions on abortion. Only hours after Republicans on the Senate Judiciary Committee voted to approve Barrett's nomination to the Supreme Court, the Mississippi attorney general filed a supplemental brief urging the Court to review a Fifth Circuit decision striking down the state's 15-week health-justified abortion ban, "a case that directly challenges *Roe v. Wade* and has the potential to reverse the landmark 1973 decision."<sup>37</sup> The supplemental brief

<sup>33</sup> Joan Biskupic, *Amy Coney Barrett Joins the Supreme Court in Unprecedented Times*, CNN (Oct. 27, 2020, 11:09 AM), <https://www.cnn.com/2020/10/27/politics/amy-coney-barrett-joins-supreme-court-unprecedented/index.html>. In-person voting for the 2020 presidential election began in early September. See Sarah Almukhtar, Isabella Grullón Paz & Alicia Parlapiano, *2020 Presidential Election Calendar*, N.Y. TIMES (Sept. 21, 2020), <https://www.nytimes.com/interactive/2019/us/elections/2020-presidential-election-calendar.html>.

<sup>34</sup> COMM'N ON PRESIDENTIAL DEBATES, *supra* note 5.

<sup>35</sup> See Adam Liptak, *Barrett's Record: A Conservative Who Would Push the Supreme Court Right*, N.Y. TIMES (Nov. 2, 2020), <https://www.nytimes.com/article/amy-barrett-views-issues.html>; Anna North, *What Amy Coney Barrett on the Supreme Court Means for Abortion Rights*, Vox (Oct. 26, 2020, 8:17 PM), <https://www.vox.com/21456044/amy-coney-barrett-supreme-court-roe-abortion>; see also Andrew Kaczynski & Em Steck, *Amy Coney Barrett Initially Failed to Disclose Talks on Roe v. Wade Hosted by Anti-Abortion Groups on Senate Paperwork*, CNN (Oct. 9, 2020, 10:53 PM), <https://www.cnn.com/2020/10/09/politics/kfile-amy-coney-barrett-roe-v-wade-talks/index.html>; Rebecca R. Ruiz, *Amy Coney Barrett Signed an Ad in 2006 Urging Overturning the "Barbaric Legacy" of Roe v. Wade*, N.Y. TIMES (Oct. 1, 2020, 12:50 PM), <https://www.nytimes.com/2020/10/01/us/elections/amy-coney-barrett-roe-v-wade.html>. For other sources, see Section III.C.

<sup>36</sup> See *Hopkins v. Jegley*, 968 F.3d 912 (8th Cir. 2020); *EMW Women's Surg. Ctr. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020); see also *infra* Section III.B. But see *Whole Woman's Health v. Paxton*, 972 F.3d 649 (5th Cir. 2020).

<sup>37</sup> Kate Smith, *Mississippi Asks Supreme Court Again to Review Its 15-Week Abortion Ban*, CBS News (Oct. 29, 2020, 8:54 PM), <https://www.cbsnews.com/news/mississippi-abortion-ban>

pointed to the division of authority on how to read *June Medical* as raising the question “[w]hether the validity of a pre-viability law that protects women’s health, the dignity of unborn children, and the integrity of the medical profession and society should be analyzed under *Casey*’s ‘undue burden’ standard or *Hellerstedt*’s balancing of benefits and burdens.”<sup>38</sup>

#### B. BALANCING? THE QUESTION POSED BY WOMAN-PROTECTIVE ABORTION RESTRICTIONS

To understand the dispute in and about *June Medical*—that is, to understand why conservatives on and off the Court have attacked “*Hellerstedt*’s balancing of benefits and burdens”<sup>39</sup>—one has to ask a simple question: why restrict abortion? There is a stock answer to this question, so conventional in the abortion debate it passes without notice: states restrict abortion out of concern for unborn life.<sup>40</sup> But observe that states justified their admitting privilege laws in *Whole Woman’s Health* and *June Medical* on the grounds that the laws protected women’s health, not unborn life or its potentiality.<sup>41</sup> It is now common for states to defend burdensome and clinic-closing restrictions on abortion as health and safety laws that protect women rather than the unborn.<sup>42</sup> Is the claim to protect women’s health

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-supreme-court-considering-review; see *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 268–69 (5th Cir. 2019) (“In an unbroken line dating to *Roe v. Wade*, the Supreme Court’s abortion cases have established (and affirmed, and re-affirmed) a woman’s right to choose an abortion before viability. States may regulate abortion procedures . . . but they may not ban abortions. The law at issue is a ban.”).

<sup>38</sup> Petition for Writ of Certiorari Supplemental Brief at 1, *Dobbs v. Jackson Women’s Health Org.*, No. 19–1392 (U.S. Oct. 22, 2020).

<sup>39</sup> *Id.*

<sup>40</sup> See *Roe v. Wade*, 410 U.S. 113, 159 (1973) (“It is reasonable and appropriate for a State to decide that at some point in time another interest, that of health of the mother or that of potential human life, becomes significantly involved. The woman’s privacy is no longer sole and any right of privacy she possesses must be measured accordingly.”).

<sup>41</sup> See Brief for Respondents at 31, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15–274) (“Nothing close to clear proof of an unconstitutional purpose exists. . . . [Texas] HB2 was enacted to ‘increase the health and safety’ of abortion patients and provide them with ‘the highest standard of health care.’” (citation omitted)); Brief in Opposition at 9, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (No. 18–1323) (asserting “that [Louisiana] Act 620’s hospital admitting-privileges requirement would address serious safety concerns relating to the lack of any meaningful credentialing review of doctors who provide abortions in Louisiana”).

<sup>42</sup> See Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When “Protecting Health” Obstructs Choice*, 125 *YALE L.J.* 1428, 1446–49 (2016) (discussing targeted restrictions on abortion clinics).

credible? Why would it matter if, instead, the state sought to protect potential life, given that this purpose is generally thought to be benign, or even sacred?

This is the question lurking beneath the debate over doctrinal standards in *June Medical*. Writing for the *June Medical* plurality, Justice Breyer explained that the standard of review the Court employed in *Whole Woman's Health* derived from the Court's prior decisions in *Casey* and *Gonzales v. Carhart*:<sup>43</sup>

In *Whole Woman's Health*, we quoted *Casey* in explaining that “a statute which, while furthering [a] valid state interest has the effect of placing a substantial obstacle in the path of a woman’s choice cannot be considered a permissible means of serving its legitimate ends.” [*Whole Woman's Health*] at 2309 (quoting *Casey*). We added that “[u]nnecessary health regulations” impose an unconstitutional “undue burden” if they have “the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion.” [*Whole Woman's Health*] at 2309 (quoting *Casey*).<sup>44</sup>

To enforce *Casey*'s standard, the plurality explained, *Whole Woman's Health* directed courts to “consider the burdens a law imposes on abortion access together with the benefits those laws confer,” and emphasized that courts “retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake.”<sup>45</sup>

Why does *Whole Woman's Health* (1) direct judges to enforce *Casey*'s standard by considering the burdens and benefits of a health regulation and (2) reaffirm *Carhart*'s direction that the courts “retai[n] an independent constitutional duty to review factual findings where constitutional rights are at stake”?

Much of this law is concerned with probing purpose.<sup>46</sup> Is a legislature using a health regulation to obstruct access to abortion in ways that *Casey* proscribes?<sup>47</sup> The framework *Whole Woman's Health* adopted for enforcing *Casey*'s undue burden standard enables a judge to determine, as *Casey* requires, whether a legislature enacted a health

<sup>43</sup> 550 U.S. 124 (2007).

<sup>44</sup> *June Medical*, 140 S. Ct. 2103, 2120 (2020) (plurality opinion) (quoting *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877–78 (1992) (plurality opinion))) (citations partially omitted).

<sup>45</sup> *Id.* (quoting *Whole Woman's Health*, 136 S. Ct. at 2310, 2324 (quoting *Gonzales*, 550 U.S. at 165)).

<sup>46</sup> See *infra* Section III.A.

<sup>47</sup> See *infra* Section II.A.

regulation with the purpose or effect of imposing a substantial obstacle to abortion without entering into potentially protracted and inflammatory disputes about characterizing the purposes of legislatures that restrict abortion access.<sup>48</sup>

For empowering judges to enforce *Casey*'s undue burden standard by means that avoided impugning a legislature's purpose, Justice Breyer was attacked by Justice Thomas, who claimed in his *Whole Woman's Health* dissent that "the majority's free-form balancing test is contrary to *Casey*"<sup>49</sup> and asserted that the "Court should abandon the pretense that anything other than policy preferences underlies its balancing of constitutional rights and interests in any given case."<sup>50</sup> Chief Justice Roberts joined other conservatives in a dissent arguing that claim preclusion barred the Court's consideration of the case.<sup>51</sup>

In *June Medical*, Chief Justice Roberts voted to strike down Louisiana's admitting privileges law on the ground that the Court should treat the Texas and Louisiana laws alike<sup>52</sup> but then incorporated into his concurring opinion a critique of the *Whole Woman's Health* decision drawn from Justice Thomas's dissent in that case.<sup>53</sup> Chief Justice Roberts invoked *stare decisis* as a reason for enforcing precedent and as a reason for criticizing, and potentially revising, precedent: "*Stare decisis* principles also determine how we handle a decision that itself departed from the cases that came before it. In those instances, '[r]emaining true to an 'intrinsically sounder' doctrine established in prior cases better serves the values of *stare decisis* than would following' the recent departure."<sup>54</sup> In Justice Roberts's view, *stare decisis* did not

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<sup>48</sup> For an example of such an exchange, see *infra* text accompanying notes 377–79 (reporting heated exchange in the Fifth Circuit between Judge Carlton Reeves and Judge James Ho).

<sup>49</sup> *Whole Woman's Health*, 136 S. Ct. at 2324 (Thomas, J., dissenting).

<sup>50</sup> *Id.* at 2328. Justice Thomas also proffered a reading of the abortion cases as governed by rational basis review, but then attacked the tiers of scrutiny as a judicial graft at odds with the original understanding. *Id.* at 2323–31 ("A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment.").

<sup>51</sup> *Id.* at 2330 (Alito, J., dissenting).

<sup>52</sup> *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2134 (2020) (Roberts, C.J., concurring) ("The legal doctrine of *stare decisis* requires us, absent special circumstances, to treat like cases alike. The Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law, for the same reasons. Therefore Louisiana's law cannot stand under our precedents.").

<sup>53</sup> *Cf. supra* text accompanying notes 49–50.

<sup>54</sup> *June Med. Servs.*, 140 S. Ct. at 2134–35 (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (plurality opinion)).

require “adherence to the latest decision,”<sup>55</sup> but might be used as an instrument of its revision.<sup>56</sup>

Chief Justice Roberts employed his opinion proclaiming the importance of standing by *Whole Woman’s Health* to attack the decision’s direction to judges who are enforcing *Casey*’s undue burden standard to compare the burdens and benefits of a health-justified restriction on abortion:

[C]ourts applying a balancing test would be asked in essence to weigh the State’s interests in “protecting the potentiality of human life” and the health of the woman, on the one hand, against the woman’s liberty interest in defining her “own concept of existence, of meaning, of the universe, and of the mystery of human life” on the other. [*Casey*] at 851. . . . Pretending that we could pull that off would require us to act as legislators, not judges, and would result in nothing other than an “unanalyzed exercise of judicial will” in the guise of a “neutral utilitarian calculus.”<sup>57</sup>

In this remarkable passage, Chief Justice Roberts employed his opinion explaining the importance of the Court standing by its decision in *Whole Woman’s Health* to argue that the direction *Whole Woman’s Health* provided judges to consider burdens and benefits of a health-justified abortion restriction was not rooted in *Casey* and was beyond a court’s competence because it was legislative rather than judicial in nature. The passage criticizing *Whole Woman’s Health* for lack of fidelity to *Casey* itself mocked *Casey*<sup>58</sup> and raised questions about the scope of courts’ authority to enforce constitutional law protecting women’s decisions about abortion. Was the Chief Justice following *Whole Woman’s Health* and *Casey*—or instead rewriting

<sup>55</sup> *Id.* at 2135 (“Stare decisis is pragmatic and contextual, not ‘a mechanical formula of adherence to the latest decision.’” (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940))). See Melissa Murray, Comment, *The Symbiosis of Abortion and Precedent*, 134 HARV. L. REV. 308, 325 (2020) (arguing that “Chief Justice Roberts’s respect for precedent depended entirely on identifying those aspects of past decisions that he wished to follow and those that he did not”).

<sup>56</sup> This is not unprecedented in the Court’s abortion cases, as Melissa Murray has observed. See Murray, *supra* note 55, at 327 (“In this politically pitched context, the Court has developed an approach to precedent that at once has generated important, and often incremental, doctrinal changes and simultaneously preserved the appearance of fealty to its past decisions. In these cases, the Court has distinguished and cabined earlier decisions, forging a line of jurisprudence that entrenches the abortion right while sharply limiting its scope.”). For a close reading of the ways that Chief Justice Roberts’ concurrence in *June Medical* sought to revise *Casey*, see *infra* text accompanying notes 247–53 and Section III.B.

<sup>57</sup> *June Med. Servs.*, 140 S. Ct. at 2135–36 (citations partially omitted).

<sup>58</sup> See *infra* text accompanying notes 249–51.

them? Commentators in the wake of the decision immediately divided about its meaning and portents.<sup>59</sup>

Even if changes in the composition of the Court have undermined Chief Justice Roberts's power to control the direction of its abortion decisions, it remains important to answer the questions he raised about law governing woman-protective abortion restrictions. His opinion channeled conservative objections to law governing health-justified restrictions on abortion under *Casey* and subsequent decisions and so promises to play a role in coming cases, given the many statutes restricting abortion in the name of protecting women's health that will be reviewed in federal and state courts.<sup>60</sup>

Is there a constitutional problem if health-justified restrictions on abortion in fact reflect concern about the unborn rather than women?<sup>61</sup> Is there a constitutional problem if laws restricting abortion reflect concerns about women as they claim to—but the claims about women's health instead express views about women's roles?<sup>62</sup> Are all reasons for restricting abortion equally benign, or are some constitutionally suspect?

## II. CASEY: LIBERTY, EQUALITY, AND THE TURN TO HEALTH-JUSTIFIED ABORTION RESTRICTIONS

To surface the constitutional conflict lurking beneath arguments over balancing, I look back at the path from *Casey* to the

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<sup>59</sup> As Dahlia Lithwick observed, initial responses to *June Medical* split along gendered lines. Dahlia Lithwick, *What's Left of Roe v. Wade? Exploring the Division of Opinion in June Medical Services LLC v. Russo*, SLATE (July 4, 2020, 6:00 AM), <https://slate.com/podcasts/amicus/2020/07/john-roberts-june-medical>. Compare Noah Feldman, *Roberts Finally Makes His Position on Abortion Clear*, BLOOMBERG (June 30, 2020, 10:55 AM), <https://www.bloombergquint.com/gadfly/supreme-court-abortion-ruling-will-loom-over-2020-election>, and Jeffrey Toobin, *John Roberts Distances Himself from the Trump-McConnell Legal Project*, NEW YORKER (June 30, 2020), <https://www.newyorker.com/news/daily-comment/john-roberts-dissociates-himself-from-the-trump-mcconnell-legal-project>, and Laurence H. Tribe, *Roberts's Approach Could End Up Being More Protective of Abortion Rights—Not Less*, WASH. POST (July 1, 2020, 2:24 PM), <https://www.washingtonpost.com/opinions/2020/07/01/robertss-approach-could-end-up-being-more-protective-abortion-rights-not-less>, with Leah Litman, *June Medical as the New Casey*, TAKE CARE (June 29, 2020), <https://takecareblog.com/blog/june-medical-as-the-new-casey>.

<sup>60</sup> See *infra* Sections III.A, III.B.

<sup>61</sup> See O. Carter Snead, *The Way Forward After June Medical*, FIRST THINGS (July 4, 2020), <https://www.firstthings.com/web-exclusives/2020/07/the-way-forward-after-june-medical> (reviewing *June Medical* and observing “[w]e have no choice but to continue to fight for the lives and dignity of these most vulnerable members of the human family”).

<sup>62</sup> See *id.* (reviewing *June Medical* and observing “there is powerful evidence available that women have not, in fact, structured their lives around the freedom to choose abortion, nor does their flourishing depend on it”).

admitting privileges cases. This retrospective serves at least two purposes. It revisits the Court's decision to narrow and to reaffirm the abortion right in *Casey*, identifying the constitutional reasons the Court adopted the undue burden standard. And it reconstructs how, in the years after *Casey*, arguments against abortion increasingly focused on protecting women.

I show how in the 1990s, abortion jurisprudence and antiabortion advocacy in fact evolved together in response to an emergent understanding of women as equal rights-holders in the American constitutional order. This account suggests why, in the years after *Casey*, a movement calling itself "pro-life" increasingly came to call itself "pro-woman" and to advocate women's-health-justified restrictions on abortion, and how *Casey* speaks to this body of law.

One can see the Court and the antiabortion movement grappling with the same currents in Americans' understanding of abortion twenty years after *Roe*. But one can also read in these developments the antiabortion movement's self-conscious efforts to reshape its arguments and tactics in response to the *Casey* decision in an effort to narrow and evade *Casey*'s constraints in a world where appearing to respect women's rights and welfare matters.

After showing why health-justified restrictions on abortion spread in the years after *Casey*, I demonstrate how these national developments shape the passage and defense of the Louisiana law at issue in *June Medical*. Tracing the development of the laws the Court reviewed in *Whole Woman's Health* and *June Medical* shows the many ways that pro-woman, pro-life laws violate *Casey* and the understanding of the Constitution's liberty and equality guarantees it vindicates. This encounter with pro-woman, pro-life law vividly demonstrates the constitutional, political, and human stakes of the fight over "balancing," which we will return to in Part III.

#### A. UNDUE BURDEN: THE CONSTITUTIONAL VALUES

##### THE CASEY PRINCIPLE VINDICATES

In 1992, the Supreme Court was widely expected to reverse its decision protecting women's decisions about abortion; instead, the Court's decision in *Casey* reaffirmed and narrowed *Roe*.<sup>63</sup> The framework the Court adopted in *Casey* was responsive to contending

<sup>63</sup> See Serena Mayeri, *Undue-ing Roe: Constitutional Conflict and Political Polarization in Planned Parenthood v. Casey*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 137, 146–49

movement claims about the importance of protecting unborn life and about the importance of protecting women's decisions about abortion.<sup>64</sup>

Unlike *Roe*, *Casey* allowed states to restrict abortion in the interest of protecting potential life before viability,<sup>65</sup> but only so long as government protected potential life by means of persuading women, not obstructing or coercing them. This is the core principle that the undue burden standard enforces—why the undue burden standard is concerned with substantial obstacles to the exercise of free choice. The joint opinion defined an “undue burden” as “a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.”<sup>66</sup> It explained: “A statute with this purpose is invalid because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.”<sup>67</sup>

Before viability, any constraints on a woman's access to abortion must be designed to “inform” and not “hinder” a woman's free choice—to persuade, not interfere, obstruct, or coerce. The principle that government could “inform, not hinder” a woman's choice meant that government could impose some regulatory burdens in the effort to dissuade a woman from ending a pregnancy but only insofar as the law's purpose was to persuade.<sup>68</sup> The joint opinion extended the same framework to health-justified restrictions on abortion: “As with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion. Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on

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(Melissa Murray, Kate Shaw & Reva B. Siegel eds., 2019); STONE, *supra* note 28, at 415–20; see also Greenhouse & Siegel, *supra* note 42, at 1435 & n.34.

<sup>64</sup> Greenhouse & Siegel, *supra* note 42, at 1436.

<sup>65</sup> Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 873 (1992) (criticizing *Roe* as it “undervalues the State's interest in the potential life within the woman” in practice).

<sup>66</sup> *Id.* at 877.

<sup>67</sup> *Id.* See also *id.* (“Some guiding principles should emerge. What is at stake is the woman's right to make the ultimate decision, not a right to be insulated from all others in doing so. Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.”).

<sup>68</sup> *Id.* at 878 (“[T]he State may take measures to ensure that the woman's choice is informed, and measures designed to advance this interest will not be invalidated as long as their purpose is to persuade the woman to choose childbirth over abortion.”); see also Greenhouse & Siegel, *supra* note 42, at 1439–40.

the right.”<sup>69</sup> The joint opinion defined *Casey*’s undue burden standard through a principle designed to preserve constitutional protections for liberty—for women’s right to choose—at the heart of *Roe*.<sup>70</sup>

Yet the Court’s understanding of liberty had evolved. Two decades after *Roe*, *Casey* informed constitutional protections for women’s right to choose with an understanding of women’s equal citizenship that was only emergent at the time of *Roe*.<sup>71</sup> The Court handed down *Roe* just before the Court extended equal protection to sex discrimination in *Frontiero v. Richardson*<sup>72</sup> and at a time when Justice Blackmun and his brethren on an all-male bench had difficulty understanding the sex-role stereotyping women faced when pregnant.<sup>73</sup> (The year after *Roe*, Blackmun voted against a pregnancy discrimination claim in *Geduldig v. Aiello*.<sup>74</sup>) Two decades later in *Casey*, Justice Blackmun, responding to advocates’ arguments,<sup>75</sup> recognized that restrictions on abortion enforce traditional sex roles and so “also implicate constitutional guarantees of gender equality.”<sup>76</sup>

<sup>69</sup> *Casey*, 505 U.S. at 878.

<sup>70</sup> See *Roe v. Wade*, 410 U.S. 113, 153 (1973) (“This right of privacy, whether it be founded in the Fourteenth Amendment’s concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment’s reservation of rights to the people, is broad enough to encompass a woman’s decision whether or not to terminate her pregnancy.”).

<sup>71</sup> Before *Roe*, advocates had argued that abortion restrictions enforced sex, class, and race inequalities; the Burger Court was moved to recognize women as rights holders, but not to ground the abortion right in the Equal Protection Clause. See Linda Greenhouse & Reva B. Siegel, *The Unfinished Story of Roe*, in *REPRODUCTIVE RIGHTS AND JUSTICE STORIES* 53, 56–57, 63–65, 68–69 (Melissa Murray, Kate Shaw & Reva B. Siegel eds., 2019). But women’s rights challenges to abortion statutes plainly shaped the Court’s reasoning in *Roe*, so that over multiple drafts of the opinion the Court came to recognize that “women’s interest in retaining control over the decision whether to become a mother is of constitutional magnitude.” Reva B. Siegel, *Roe’s Roots: The Women’s Rights Claims that Engendered Roe*, 90 BOST. UNIV. L. REV. 1875, 1894 (2010); see *id.* at 1894–96 (showing how impact litigation influenced the Court’s understanding of the right).

<sup>72</sup> 411 U.S. 677 (1973).

<sup>73</sup> See Reva B. Siegel, *The Pregnant Citizen from Suffrage to the Present*, 108 GEO. L.J. 167, 191–94 (2020) (discussing opinions and papers of the justices discussing claims of pregnancy discrimination in the early 1970s); STONE, *supra* note 28, at 397.

<sup>74</sup> 417 U.S. 484 (1974).

<sup>75</sup> See Mayeri, *supra* note 63, at 150–52.

<sup>76</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 928–29 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part) (“The State does not compensate women for their services [bearing and caring for children]; instead, it assumes that they owe this duty as a matter of course. This assumption—that women can simply be forced to accept the “natural” status and incidents of motherhood—appears to rest upon a conception of women’s role that has triggered the protection of the Equal Protection Clause.”) (citations omitted).

Just as Blackmun presented the abortion right as protecting women against state action enforcing sex roles, the joint opinion described the liberty interest in *Roe* as protecting women against state action enforcing traditional conceptions of “the woman’s role, however dominant that vision has been in the course of our history and our culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.”<sup>77</sup>

In explaining how women relied on the right *Roe* protected—“[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives”<sup>78</sup>—and in applying the undue burden standard to a law requiring women to give their spouses notice before they could end a pregnancy,<sup>79</sup> the joint opinion protected women’s liberty on the premise that women are equal citizens who are entitled to protection from the forms of role-based coercion long employed to enforce and justify limits on their civic participation.<sup>80</sup> The joint opinion expressed “constitutional limitations on abortion laws in the language of its equal protection sex discrimination opinions, illuminating liberty concerns at the heart of the sex equality cases in the very act of recognizing equality concerns at the root of its liberty cases.”<sup>81</sup>

But the most fundamental expression of these sex-equality commitments is *Casey*’s core principle: government can protect potential life by persuading and enlisting women but not coercing and instrumentalizing women as means to protect the unborn. *Casey* allowed “government to protect potential life by means that recognize and preserve women’s dignity. . . . If government wants to protect unborn life, it has to respectfully enlist women in this project and cannot simply commandeer women’s lives for these purposes.”<sup>82</sup>

<sup>77</sup> *Id.* at 852 (plurality opinion).

<sup>78</sup> *Id.* at 835.

<sup>79</sup> See *id.* at 887–98; *id.* at 898 (“The husband’s interest in the life of the child his wife is carrying does not permit the State to empower him with this troubling degree of authority over his wife.”).

<sup>80</sup> Greenhouse & Siegel, *supra* note 42, at 1440–41 (discussing the sex-equality values the joint opinion invokes in holding that a spousal notice requirement is an undue burden).

<sup>81</sup> Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L.J. 815, 831 (2007).

<sup>82</sup> Greenhouse & Siegel, *supra* note 42, at 1437; see *id.* at 1439–42 (observing that the different applications of the undue burden framework illustrate that the government must employ “modes of persuasion that are consistent with the dignity of women”). Constraints on

In short, by the time the Court narrowed and reaffirmed *Roe* in *Casey*, the Court had come to reason about state action regulating the conduct of pregnant women through the lens of the antistereotyping and antisubordination values of its equal protection cases, expressed so powerfully by Justice Ginsburg only a few years later in *United States v. Virginia*<sup>83</sup> and Chief Justice Rehnquist in *Nevada Department of Human Resources v. Hibbs*.<sup>84</sup>

#### B. WOMEN AS MOTHERS, WOMEN AS EQUALS: CASEY AND THE SPREAD OF WOMAN-PROTECTIVE ANTIABORTION ARGUMENT

*Casey* was a bitter disappointment for Americans United for Life (AUL), a key organization in developing strategies to erode political and legal support for *Roe*. The organization hoped to legislate and litigate *Roe*'s reversal; instead, *Casey* entrenched *Roe* and explained the abortion right as protecting women's liberty as equal citizens.<sup>85</sup> Several months later, the nation elected Bill Clinton, its first strongly pro-choice president.<sup>86</sup> Violent attacks on abortion clinics and providers, which had escalated during the 1980s, "ticked up dramatically in the 1990s" with a series of high-profile murders of clinic doctors, employees, and security personnel.<sup>87</sup>

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the instrumentalization of women explain the joint opinion's requirement that government persuade by "the giving of truthful, nonmisleading" information. *Id.* at 1439 (quoting *Casey*, 505 U.S. at 882).

<sup>83</sup> 518 U.S. 515, 533–34 (1996); see also Siegel, *supra* note 73, 203–06 (discussing how *Virginia* reaffirms a heightened scrutiny standard for sex-based state action and addresses laws regulating pregnancy as containing sex-based classifications subject to heightened scrutiny).

<sup>84</sup> 538 U.S. 721, 736 (2003); see also Siegel, *supra* note 73, 206–09 (tracing evolution in Court's understanding of pregnancy discrimination). For nearly a half century, Justice Ginsburg understood the Constitution's equality and liberty guarantees to constrain laws regulating pregnancy, a view she espoused as an advocate and on the bench. See *infra* Section III.C.2.

<sup>85</sup> See Mayeri, *supra* note 63, at 139; *supra* Section II.A.

<sup>86</sup> See Gerald N. Rosenberg, *The Real World of Constitutional Rights: The Supreme Court and the Implementation of the Abortion Decisions*, in *PRINCIPLES AND PRACTICE OF AMERICAN POLITICS: CLASSIC AND CONTEMPORARY READINGS* 174–75, 185 (Samuel Kernell & Steven S. Smith eds., 5th ed. 2013) (describing President Clinton as "the first pro-choice president since *Roe*," recounting the numerous policies he implemented immediately after his election, and contrasting his positions on abortion to his predecessors).

<sup>87</sup> See Kimberly Hutcherson, *A Brief History of Anti-Abortion Violence*, CNN (Dec. 1, 2015, 7:51 AM), <https://www.cnn.com/2015/11/30/us/anti-abortion-violence/index.html>; Mireille Jacobson & Heather Royer, *Aftershocks: The Impact of Clinic Violence on Abortion Services*, AM. ECON. J.: APPLIED ECON., Jan. 2011, at 189, 220 ("In the 1980s and 1990s, radical anti-abortion activists unleashed a storm of violent attacks against abortion clinics and providers. Clinic arsons, bombings and even staff murders became widely-publicized tools in the anti-abortion effort to limit access to abortion services.").

Many in the antiabortion movement viewed these developments as exposing the limits of arguments that focused on saving babies and attacking women and doctors who put them at risk.<sup>88</sup> These confrontational and often violent tactics radiated hostility to women at a time when the nation professed commitment to the idea that women are equals whose dignity and welfare the law is obliged to respect.

After *Casey*, a growing number of antiabortion leaders began to respond to the views of women that shaped abortion rights jurisprudence in the decision. These antiabortion advocates shifted their arguments to focus on women and began to incorporate abortion rights frames into their attacks on abortion. A response of this kind is not uncommon in the midst of fierce conflict.<sup>89</sup> *Casey* recognized that “[t]he ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.”<sup>90</sup> Seeking to respond to *Casey*—and to appropriate the political authority of feminism— antiabortion advocates increasingly began to argue that women’s liberty, equality, and health required banning abortion.<sup>91</sup>

The antiabortion movement was responding to domestic and transnational expressions of women’s equality. Harvard professor Mary Ann Glendon headed a Vatican delegation opposing abortion at the 1995 Beijing Women’s Conference, reasoning on egalitarian grounds in an effort not to isolate the Vatican at the conference; Glendon’s “appointment had been quietly urged by the Clinton Administration,” the first time that a woman was named to head an official Vatican delegation.”<sup>92</sup> As Glendon recounted Pope John Paul II’s stance: “Not only

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<sup>88</sup> Reva B. Siegel, *The Right’s Reasons: Constitutional Conflict and the Spread of Woman-Protective Antiabortion Argument*, 57 DUKE L.J. 1641, 1660, 1664–68 (2008) (surveying advocates’ writing during this era).

<sup>89</sup> *Id.* at 1650 (“The quest to persuade disciplines insurgent claims about the Constitution’s meaning, and may lead advocates to express convictions in terms persuasive to others, to internalize elements of counterarguments and to engage in other implicit forms of convergence and compromise.”).

<sup>90</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 835 (1992).

<sup>91</sup> See Reva B. Siegel, *Dignity and the Politics of Protection: Abortion Restrictions under Casey/Carhart*, 117 YALE L.J. 1694, 1724 (2008) (showing how the antiabortion movement developed arguments designed “to appropriate feminism’s political authority and express anti-abortion argument in the language of women’s rights and freedom of choice”).

<sup>92</sup> See John Tagliabue, *Vatican Attacks U.S.-Backed Draft for Women’s Conference*, N.Y. TIMES (Aug. 26, 1995), <https://www.nytimes.com/1995/08/26/world/vatican-attacks-us-backed-draft-for-women-s-conference.html> (describing “efforts by the Vatican and the Clinton Administration to search for areas of agreement at the Beijing conference and to reduce attention to the

did the pope align himself with women's quest for freedom, he adopted much of the language of the women's movement, even calling for a 'new feminism' in *Evangelium Vitae*.<sup>93</sup> The Church opposed recognition of sexual and reproductive rights at the 1995 Beijing Women's Conference, while the Pope affirmed: "there is an urgent need to achieve *real equality* in every area."<sup>94</sup>

Leaders of the American antiabortion movement had already begun to employ woman-protective arguments to address audiences that increasingly expected expressions of respect for women's rights and welfare. In the aftermath of *Casey* and of President Clinton's election, advocates decided to foreground woman-protective arguments in an effort to persuade members of the public who supported abortion rights to support abortion restrictions and to explain to legislators and judges prepared to enforce abortion rights why they could nonetheless impose abortion restrictions on women.

1. *Woman-protective antiabortion argument in politics.* Woman-focused arguments for rejecting abortion had long circulated among women working at the antiabortion movement's crisis pregnancy centers,<sup>95</sup> and during the setbacks of the 1990s, the movement's male leadership began to draw upon these women-focused arguments for strategic reasons, to answer public concerns that the antiabortion movement cared only about babies and little about the women who bore and raised them.<sup>96</sup>

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more emotional issues like abortion"); *id.* ("The United States Ambassador to the Vatican, Raymond L. Flynn, a former Mayor of Boston, lobbied heavily in recent months in favor of Ms. Glendon's appointment to lead the Vatican delegation."); *see also* Mary Anne Case, *Trans Formations in the Vatican's War on 'Gender Ideology,'* 44 SIGNS: J. WOMEN IN CULTURE & SOC. 639, 642–43 (2019) (observing that Americans played roles on all sides of the debates in this transnational dialogue).

<sup>93</sup> Mary Ann Glendon, *The Pope's New Feminism*, CRISIS MAG. (Mar. 1, 1997), <https://www.crisismagazine.com/1997/the-popes-new-feminism>; *see also* *New Feminism*, WORLD HERITAGE ENCYCLOPEDIA, [http://www.self.gutenberg.org/articles/eng/New\\_feminism](http://www.self.gutenberg.org/articles/eng/New_feminism) ("New feminism is a philosophy which emphasizes a belief in an integral complementarity of men and women, rather than the superiority of men over women or women over men. New feminism, as a form of difference feminism, supports the idea that men and women have different strengths, perspectives, and roles, while advocating for the equal worth and dignity of both sexes. Among its basic concepts are that the most important differences are those that are biological rather than cultural.").

<sup>94</sup> *Letter of Pope John Paul II to Women*, LIBRERIA EDITRICE VATICANA (June 29, 1995), [http://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf\\_jp-ii\\_let\\_29061995\\_women.html](http://www.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii_let_29061995_women.html) (discussing "personal rights").

<sup>95</sup> Siegel, *supra* note 88, at 1658–60.

<sup>96</sup> *Id.* at 1668–81.

Jack Willke—who in the 1970s developed antiabortion arguments that spread world-wide featuring pictures of the fetus in utero<sup>97</sup>—bluntly recounted the findings that led him to embrace woman-protective antiabortion arguments in the 1990s. As he recalled, in the 1990s, abortion rights advocates “changed the question. No longer was our nation arguing about killing babies. The focus, through their efforts, had shifted off the humanity of the unborn child to one of women’s rights. They developed the effective phrase of ‘Who Decides?’”<sup>98</sup>

Willke did market research and changed the focus of his arguments:

We did the market research and came up with some surprising findings. . . . We found out that the basic problem in the minds of the general public was that, by their own evaluation, most were undecided on this issue. They felt that pro-life people were not compassionate to women and that we were only “fetus lovers” who abandoned the mother after the birth. They felt that we were violent, that we burned down clinics and shot abortionists. We were viewed as religious zealots who were not too well educated. Clearly, their image of us was one that had been fabricated and delivered to them in the print and broadcast media by a liberal press. After considerable research, we found out that the answer to their “choice” argument was a relatively simple straightforward one. We had to convince the public that we were compassionate to women. Accordingly, we test marketed variations of this theme. Thus was born the slogan “Love Them Both,” and, in fact, the third edition of our Question and Answer book has been so titled, specifically for that reason.<sup>99</sup>

Willke reasoned that if the movement hoped to persuade Americans to support candidates, policies, and jurists to change the law of abortion, it would have to use arguments from the movement’s crisis pregnancy centers: “We’ve got to go out and sing from the housetops about what we’re doing—how compassionate we are to women, how we are helping women—not just babies, but also women.”<sup>100</sup>

<sup>97</sup> See J.C. WILLKE, HANDBOOK ON ABORTION (1st ed. 1971), reprinted in BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT’S RULING 99 (Linda Greenhouse & Reva B. Siegel, eds., 2012), [https://documents.law.yale.edu/sites/default/files/beforeroe2nded\\_1.pdf](https://documents.law.yale.edu/sites/default/files/beforeroe2nded_1.pdf) (excerpting first edition of Willke’s *Handbook on Abortion*).

<sup>98</sup> Siegel, *supra* note 88, at 1670 (quoting J.C. Willke, *Life Issues Institute Is Celebrating Ten Years with a New Home*, LIFE ISSUES CONNECTOR (Feb. 2001), <https://web.archive.org/web/20110305213857/https://www.lifeissues.org/connector/01feb.html>).

<sup>99</sup> *Id.* at 1670–71.

<sup>100</sup> John Willke & Barbara Willke, *Why Can’t We Love Them Both?*, 7 LIFE & LEARNING 10, 10–25 (1997), <http://www.uffl.org/vol%207/willke7.pdf>. For many other contemporary sources reflecting these developments, see Siegel, *supra* note 88, at 1664–69.

Willke was joined by other advocates of the woman-protective turn. David Reardon, a leader in developing empirical claims about abortion regret, put the point simply: “While committed pro-lifers may be more comfortable with traditional ‘defend the baby’ arguments, we must recognize that many in our society are too morally immature to understand this argument. They must be led to it. And the best way to lead them to it is by first helping them to see that abortion does not help women, but only makes their lives worse.”<sup>101</sup>

Reardon claimed to show by empirical method that the interests of women and the unborn do not conflict.<sup>102</sup> “By finding this evidence and sharing it with others, we bear witness to the protective good of God’s law in a way which even unbelievers must respect.”<sup>103</sup> His claim of “no conflict” was a claim about sex roles—a religious and moral belief that a mother’s interests are defined by the needs of her child:

One cannot help a child without helping the mother; one cannot hurt a child without hurting the mother.

This intimate connection between a mother and her children is part of our created order. Therefore, protecting the unborn is a natural byproduct of protecting mothers. This is necessarily true. After all, in God’s ordering of creation, it is only the mother who can nurture her unborn child. All the rest of us can do is to nurture the mother.

This, then, must be the centerpiece of our pro-woman/pro-life agenda. The best interests of the child and the mother are always joined—even if the mother does not initially realize it, and even if she needs a tremendous amount of love and help to see it.<sup>104</sup>

Reardon expressed these religious and moral beliefs about abortion in the language of public health.<sup>105</sup> In a 1995 article called “Is the

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<sup>101</sup> Siegel, *supra* note 88, at 1672–73 (quoting David Reardon, *Politically Correct vs. Politically Smart: Why Politicians Should Be Both Pro-Woman and Pro-Life*, POST-ABORTION REV., Fall 1994, at 1, 1–3, <https://afterabortion.org/why-politicians-should-be-both-pro-woman-and-pro-life>).

<sup>102</sup> *Id.* at 1674.

<sup>103</sup> *Id.* (quoting DAVID C. REARDON, MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION 11 (1996)).

<sup>104</sup> *Id.* at 1675 (quoting David Reardon, *supra* note 101).

<sup>105</sup> See, e.g., Interview by Zenit News Agency with Dr. David C. Reardon, Director of the Elliot Inst., in Springfield, Ill. (May 12, 2003), [https://www.afterabortion.org/vault/Zenit\\_News\\_PoorChoice\\_Interview.pdf](https://www.afterabortion.org/vault/Zenit_News_PoorChoice_Interview.pdf) (“Abortion is not evil primarily because it harms women. Instead, it is precisely because of its evil as a direct attack on the good of life that we can know it will ultimately harm women. While the research we are doing is necessary to document abortion’s harm, good moral reasoning helps us to anticipate the results.”).

Post-abortion Strategy a Moral Strategy?”<sup>106</sup> he called his method “Teaching Morality By Teaching Science” and described his method as “an alternative way of evangelizing.”<sup>107</sup> On this view, emphasizing abortion’s risks to women in the form of trauma, sterility, and breast cancer would reduce the ambivalence of voters who were otherwise reticent to criminalize abortion out of concern that it would harm women.<sup>108</sup>

In addition to arguing that access to abortion threatened women’s health, Reardon also argued that access to abortion threatened women’s freedom. Women were coerced into abortions that traumatized them.<sup>109</sup> In his 1993 article, *Pro-Woman/Prolife Initiative*, Reardon explained that candidates could “project themselves as both pro-woman and pro-life . . . by emphasizing one’s knowledge of the dangers of abortion and the threat of women being coerced into unwanted abortions by others,” and pointing out that “[t]his approach breaks down the myth that pro-lifers care only about the unborn while ‘pro-choicers’ care about women.”<sup>110</sup>

In 1996, Reardon republished many of these arguments in a book taking its title from President Clinton’s arguments for abortion rights, *Making Abortion Rare: A Healing Strategy for a Divided Nation*.<sup>111</sup> If

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<sup>106</sup> David C. Reardon, *Is the Post-Abortion Strategy a Moral Strategy?*, POST-ABORTION REV., Summer 1995, <https://afterabortion.org/is-the-post-abortion-strategy-a-moral-strategy>.

<sup>107</sup> *Id.* Reardon continues:

Whenever we cannot convince others to acknowledge a moral truth for the love of God, our second best option is to appeal to their self interests. If an act is indeed against God’s moral law, it will be found to be injurious to our happiness. Thus, if our faith is true, we would expect to find compelling evidence which demonstrates that acts such as abortion, fornication, and pornography, lead in the end not to happiness and freedom, but to sorrow and enslavement. By finding this evidence, and sharing it with others, we bear witness to the protective good of God’s law in a way which even unbelievers must respect.

*Id.*

<sup>108</sup> See Siegel, *supra* note 88, at 1673.

<sup>109</sup> See Siegel, *supra* note 91, at 1722–23 (quoting Reardon in 1994 giving similar advice to pro-life candidates about making coercion claims).

<sup>110</sup> David C. Reardon, *Pro-Woman/Pro-Life Campaign*, POST-ABORTION REV., Winter 1993, <https://afterabortion.org/pro-woman-pro-life-campaign> (quoted in Siegel, *supra* note 91, at 1722).

<sup>111</sup> DAVID C. REARDON, *MAKING ABORTION RARE: A HEALING STRATEGY FOR A DIVIDED NATION*, *supra* note 103 at viii (1996) (“This book is about fundamentally redefining the abortion debate, redrawing the lines of battle to reemphasize our commitment to being both pro-woman and pro-life.”); see also *id.* at xii (reasoning from the standpoint of “we, the Church”).

Americans believed that abortion rights protected women's freedom, health and welfare, Willke, Reardon, and others would win over a resisting public by proving that banning abortion would protect women's freedom, health, and welfare. The appeal to traditional roles in the language of feminism was powerful, taking persuasive authority from each. Leaders of the antiabortion movement began to attack abortion in abortion-rights frames, arguing that laws pushing pregnant women into motherhood protected woman's health and freedom.

2. *Woman-protective antiabortion argument in law.* In the years after *Casey*, as antiabortion advocates in growing numbers embraced the arguments that abortion hurts women, Americans United for Life (AUL) set to work translating these new frames into a legislative and litigation strategy. In the wake of *Casey*, both AUL and the National Right to Life Committee elevated women to leadership positions to emphasize the organizations' woman-protectionist aims.<sup>112</sup> AUL lawyers focused on the importance of rebutting *Casey*'s assertion that "the ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."<sup>113</sup> The organization's records show that at an April 1993 board meeting, its new leader, Paige Comstock Cunningham, "announced 'a major shift in the rhetoric of AUL.' 'We must help people understand that abortion hurts women too';"<sup>114</sup> and the organization's director of public affairs urged that "only by focusing on 'the harm abortion does to the woman' could activists 'start changing hearts and minds.'"<sup>115</sup>

AUL leaders embraced arguments already circulating in the movement, but with an important difference. Lawyers would employ the claims about women funding woman-protective antiabortion arguments not simply to move public opinion but to enact laws and legitimate the use of state power against women and the doctors who sought to assist them.<sup>116</sup> Lawyers began to deploy the movement's

<sup>112</sup> See Mary Ziegler, *Some Form of Punishment: Penalizing Women for Abortion*, 26 WM. & MARY BILL RTS. J. 735, 767 (2018).

<sup>113</sup> Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833, 835 (1992); see MARY ZIEGLER, *ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT* 143 (2020) (discussing AUL lawyers and James Bopp, lawyer for the National Right to Life Committee, responding to *Casey*'s claims about women's reliance interests in the immediate aftermath of the decision).

<sup>114</sup> See ZIEGLER, *supra* note 113, at 144.

<sup>115</sup> *Id.* at 144–45 (quoting Myrna Gutiérrez).

<sup>116</sup> In this account, I offer a brief review of AUL's use of the abortion-hurts-women to enact and defend legislation. For another example of influential woman-protective lawyering from

sex-role-based arguments—the pro-woman claim that the interests of mother and child never conflict, that what is good for children is good for women—to justify legislation restricting abortion rights and to defend the laws’ constitutionality.

In 2001, *Mother Jones* published an article entitled *The Quiet War on Abortion* that showcased AUL’s work advocating for health-justified abortion restrictions in the years after *Casey*.<sup>117</sup> By then, AUL had thoroughly embraced the tactical shift to emphasize woman-focused antiabortion arguments. AUL lawyers could draft laws restricting abortion that claimed to protect women’s psychological and physical health and advocate for these public health measures through empirical claims that sounded credible and persuasive because they expressed religious and moral beliefs about women’s traditional roles.

An AUL lawyer named Dorinda Bordlee (who would go on to play a central role in *June Medical*) explained the organization’s new tactic for restricting abortion in the wake of *Casey*:

The *Casey* decision started abortion opponents rethinking their tactics. Since direct assaults on *Roe* wouldn’t fly, “there had to be a shift in strategy by regulation on the outskirts of abortion,” says Dorinda Bordlee, staff counsel for Americans United for Life. That’s when leaders developed a new approach: Couch the issue in terms of women’s health. By claiming that abortions take place in dirty facilities and cause such illnesses as depression and breast cancer, right-to-lifers realized they could subtly move the focus of the debate. “For 25 years, the pro-life movement focused on the baby, and the abortion-rights movement focused on the woman,” says Bordlee. “The baby and the woman were pitted against each other. What we have realized is that the woman and the child have a sacred bond that should not be divided. What’s good for the child is good for the mother. So now we’re advocating legislation that is good for the woman.”<sup>118</sup>

In 2003, Clark Forsythe, then president of AUL, explained the movement’s new legal tactic for restricting abortion to readers of the conservative Catholic journal *First Things*, emphasizing that those opposed to abortion need to “appeal to those who are currently

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this era, consider the work of Harold Cassidy, another innovator and proponent of the coercion claim. See Siegel, *supra* note 91, at 1727–33 (tracing the influence of Cassidy’s work in state legislation, and in court decisions, including *Gonzales v. Carhart*, 127 S. Ct. 1610 (2007)).

<sup>117</sup> Barry Yeoman, *The Quiet War on Abortion*, MOTHER JONES, Sept./Oct. 2001, <https://www.motherjones.com/politics/2001/09/quiet-war-abortion>.

<sup>118</sup> *Id.*

undecided or conflicted on the issue.”<sup>119</sup> “If Americans come to realize that abortion harms women as well as the unborn, it will not be seen as ‘necessary,’ and the ‘necessary evil’ may be converted into evil pure and simple.”<sup>120</sup>

In 2004, Denise Burke and Dorinda Bordlee, both then staff counsel at AUL, contributed to a volume edited by Erika Bachiochi entitled *The Cost of Choice: Women Evaluate the Impact of Abortion*<sup>121</sup> designed to present a feminist framing of the argument that abortion harms women. The editor and all the contributors were women.<sup>122</sup> The volume included chapters by women law professors (including Mary Ann Glendon), doctors, lawyers, and the president of Feminists for Life; it profiled women’s rights advocates who opposed abortion alongside chapters that recount the alleged psychological and physical health harms abortion inflicts on women, such as the “Abortion-Breast Cancer Link,”<sup>123</sup> and a chapter by Burke on AUL’s new campaign attacking abortion clinics as “the True ‘Back Alley.’”<sup>124</sup>

The volume presented purportedly empirical evidence of abortion’s harms—numerous chapters cite the work of David Reardon, John Thorp, Vincent Rue, and other movement authorities<sup>125</sup>—without educating readers about the findings of the many psychologists, psychiatrists, and government oncologists who have refuted these

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<sup>119</sup> Clarke D. Forsythe, *An Unnecessary Evil*, FIRST THINGS (2003), <https://www.firstthings.com/article/2003/02/an-unnecessary-evil>.

<sup>120</sup> *Id.*

<sup>121</sup> THE COST OF CHOICE: WOMEN EVALUATE THE IMPACT OF ABORTION (Erika Bachiochi ed. 2004) [hereinafter COST OF CHOICE].

<sup>122</sup> *Id.* at 139–42.

<sup>123</sup> Angela Lanfranchi, *The Abortion-Breast Cancer Link*, in COST OF CHOICE, *supra* note 121, at 72.

<sup>124</sup> Denise M. Burke, *Abortion Clinic Regulation: Combating the True “Back Alley,”* in COST OF CHOICE, *supra* note 121, at 122.

<sup>125</sup> For information on the credentials of David Reardon and other movement authorities cited in the book and offered as expert witnesses in support of woman-protective abortion restrictions, see Pam Chamberlain, *Politicized Science: How Anti-Abortion Myths Feed the Christian Right Agenda*, PUBLIC EYE (June 4, 2006), <https://www.politicalresearch.org/2006/06/04/politicized-sciencehow-anti-abortion-myths-feed-the-christian-right-agenda>; and *Fake Witnesses—David Reardon*, REWIRE NEWS GROUP, <https://rewirenewsgroup.com/false-witnesses/#david-reardon>. Vincent Rue has been judicially chastised for organizing and ghost-writing expert testimony on the health justification for admitting privileges laws, see Greenhouse & Siegel, *supra* note 42, at 1458–60, and Judge Richard Posner pointed out evident problems with the testimony of John Thorp in Wisconsin’s case, see *infra* note 261.

abortion-harms-women claims in studies accumulating in the years before the volume's publication and since.<sup>126</sup>

Current research confirms findings that were already reported at the time of the *Cost of Choice* book but omitted from or minimized in it. The American College of Obstetricians and Gynecologists reports that “[n]umerous studies have found no link between abortion and psychological trauma”<sup>127</sup> and that claims of a “purportedly heightened risk of mental health issues or substance abuse resulting from an abortion” are “unsubstantiated.”<sup>128</sup> A recent study compared the health and wellbeing of women who had abortions with those who were turned away because they were past a clinic's gestational limit for care and carried the pregnancy to term. The study tracked nearly 1,000 women over five years and nearly 8,000 interviews and found “no evidence that abortion causes negative mental health or well-being outcomes.”<sup>129</sup> The interviews showed how ending a pregnancy helped women negotiate financial, family, relationship, career, and health difficulties, as well as the ways that women who sought an abortion and were turned away coped with motherhood.<sup>130</sup>

Unsurprisingly, AUL was not interested in publicizing the facts found by these scientists and social scientists. Over the ensuing decade, AUL developed models that translated the abortion-harms-women frame into legislation that would encumber or shut down the provision of abortion under the rubric of health and safety regulation, including the passage of admitting privileges laws in numerous states; the organization's annual publication, which provides model legislation, began publishing a whole section of model bills under the

<sup>126</sup> See, e.g., Siegel, *supra* note 91, at 1719 n.81 (2008) (citing studies beginning in 1992 refuting claims of post abortion syndrome and citing 2003 studies of the National Cancer Institute refuting claims of association between abortion and breast cancer). For an update on the breast cancer studies, see Stephanie Watson, *Abortion and Breast Cancer Risk*, HEALTHLINE: PARENTHOOD (May 18, 2017), <https://www.healthline.com/health/abortion-and-breast-cancer>.

<sup>127</sup> Brief of Amici Curiae American College of Obstetricians and Gynecologists et al. in Support of June Medical Services at 8 n.12, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020) (Nos. 18–1323 & 18–1460) (quoting E.M. Dadlez & William L. Andrews, *Post-Abortion Syndrome: Creating an Affliction*, 24 *BIOETHICS* 445, 450, 452 (2009)), <https://reproductiverights.org/sites/default/files/documents/Major%20Medical%20Groups.pdf>.

<sup>128</sup> *Id.*

<sup>129</sup> See *Introduction to the Turnaway Study*, ANSIRH 2 (Mar. 2020), <https://www.ansirh.org/sites/default/files/publications/files/turnawaystudyannotatedbibliography.pdf>.

<sup>130</sup> *Id.* at 3–5 (summarizing findings); see also Joshua Lang, *What Happens to Women Who Are Denied Abortions?*, N.Y. TIMES MAG. (June 12, 2013), <https://www.nytimes.com/2013/06/16/magazine/study-women-denied-abortions.html>.

heading “Women’s Protection Project.”<sup>131</sup> The woman-protective arguments for banning abortion employed contested factual claims to advance a normative understanding of women’s roles and family relationships.

Denise Burke, Vice President of Legal Affairs at AUL, explained the premises of the “health and safety” laws AUL promoted for state adoption through the Women’s Protection Project, including the Texas admitting privileges law the Supreme Court was about to review in *Whole Woman’s Health*. As she described the premises of the health and safety laws that AUL promoted, “the unique focus of [AUL’s] mother-child strategy” was that it “recognizes that abortion harms both mother and child and demonstrates that the interests of women and their unborn children are inextricably intertwined. Simply, protecting and defending unborn babies also protects and defends women.”<sup>132</sup>

Health-justified TRAP laws impose on abortion providers burdensome health and safety regulations not imposed on other medical practices of similar or even greater risk.<sup>133</sup> TRAP laws are not dissuasive in form; they do not contemplate dialogue with a pregnant woman but instead are directed at medical professionals and healthcare delivery systems, typically raising the cost of practice, sometimes prohibitively. The laws present as ordinary health and safety regulations but for the extraordinary burdens they place on abortion providers and their tendency to target or single out abortion providers for forms of

<sup>131</sup> AMERICANS UNITED FOR LIFE, *DEFENDING LIFE* 280 (2015) [hereinafter *DEFENDING LIFE*]; see *id.* at 16 (“Among the laws enacted over the last four years are abortion facility regulations and admitting privilege requirements which AUL has championed for more than a decade.”); *id.* at 23 (discussing admitting privileges legislation enacted by 15 states); see also Erica Hellerstein, *Inside the Highly Sophisticated Group That’s Quietly Making It Much Harder to Get an Abortion*, THINKPROGRESS (Dec. 2, 2014, 3:11 PM), <https://archive.thinkprogress.org/inside-the-highly-sophisticated-group-thats-quietly-making-it-much-harder-to-get-an-abortion-9db723232471> (describing AUL role in passage of admitting privileges legislation); Janet Reitman, *The Stealth War on Abortion*, ROLLING STONE (Jan. 15, 2014, 2:00 PM), <https://www.rollingstone.com/politics/politics-news/the-stealth-war-on-abortion-102195/> (tracing the shift to woman-protective arguments and the AUL’s central role in translating abortion-hurts-women into TRAP legislation, describing the organization as “chiefly responsible for the most recent and highly successful under-the-radar strategy”).

<sup>132</sup> Denise M. Burke, *Restoring Mother-Child Bonds That Roe v. Wade Damaged*, WASH. TIMES (Jan. 12, 2016), <https://www.washingtontimes.com/news/2016/jan/12/denise-burke-restoring-mother-child-bonds-that-roe/>.

<sup>133</sup> Greenhouse & Siegel, *supra* note 42, at 1446. Judges often find fault with the empirical claims of experts who testify in support of health laws singling out abortion. See, e.g., *infra* text accompanying notes 259–61 (describing Judge Richard Posner criticizing expert testimony in support of admitting privileges requirement).

regulation not imposed on other procedures of equal or greater risk. TRAP laws have focused on the licensing of clinics and clinicians and the regulation of telemedicine, admitting privileges, prescriptions for off-label drugs, and abortion clinic zoning.<sup>134</sup> As the laws spread, judges began to raise concerns about differential treatment of abortion providers as an indicator of the laws' potentially constitutionally suspect character.<sup>135</sup>

AUL is proud of the TRAP laws the organization worked to develop, enact, and defend. Its leadership openly discusses the organization's goals, as the interviews considered above suggest, at times discussing the laws' purpose to hinder women's access to abortion. An interviewer pointed out to Dan McConchie, then the group's vice president of government affairs, that AUL was promoting policies, like admitting privilege requirements, that meant "abortion clinics have become fewer and further between, and some women are forced to make two appointments in order to get the procedure." McConchie replied that "[s]tates can't outlaw abortion" but "[t]hat does not mean there's a constitutional right to abortion being convenient."<sup>136</sup> In 2012,

<sup>134</sup> For information on TRAP laws currently in effect, see *Targeted Regulation of Abortion Providers (TRAP) Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/targeted-regulation-abortion-providers> (last updated Feb. 1, 2021) (reporting that 23 states have passed laws regulating abortion providers that "go beyond what is necessary to ensure patients' safety").

<sup>135</sup> Greenhouse & Siegel, *supra* note 42, at 1446 & n.96 (citing cases); see also Bonnie S. Jones et al., *State Law Approaches to Facility Regulation of Abortion and Other Office Interventions*, 108 AM. J. PUB. HEALTH 486 (2018) (finding that while nineteen states had regulated abortion and other office-based surgeries, fourteen had only singled out abortion for regulation).

The COVID-19 pandemic has thrown into stark relief the differential treatment of abortion providers, as eight states attempted to categorize abortion as a "non-essential" procedure subject to COVID restrictions. See *Center Lawsuits to Protect Abortion Access During the COVID-19 Pandemic Are Working*, CTR. FOR REPROD. RTS. (May 5, 2020), <https://www.reproductiverights.org/story/center-files-emergency-lawsuit-texas-protect-essential-abortion-access-during-pandemic>; see also Joanna L. Grossman & Mary Ziegler, *Unconstitutional Chaos: Abortion in the Time of COVID-19*, JUSTIA: VERDICT (Apr. 15, 2020), <https://verdict.justia.com/2020/04/15/unconstitutional-chaos-abortion-in-the-time-of-covid-19>. The Food and Drug Administration has singled out the drug used for medication abortion for a burdensome in-person distribution requirement; during the pandemic, it has refused to suspend this travel requirement. See *infra* text accompanying notes 313–27 (discussing Food and Drug Admin. v. Am. Coll. of Obstetricians, 141 S.Ct. 578 (2021) (mem.)).

<sup>136</sup> Olga Khazan, *Planning the End of Abortion*, ATLANTIC (July 16, 2015), <https://www.theatlantic.com/politics/archive/2015/07/what-pro-life-activists-really-want/398297>. McConchie currently serves as a Republican member of the Illinois Senate, where he has campaigned against abortion rights using women-protective frames. See, e.g., *McConchie Stunned Over Repeal of Provisions in Extreme Abortion Measure*, OFFICE OF SENATOR DAN MCCONCHIE (June 1, 2019), <http://www.senatormcconchie.com/News/693/McConchie-stunned-over-repeal-of-provisions-in-extreme-abortion-measure/news-detail> ("To make his argument, Sen. McConchie specifically pointed to

then-president Charmaine Yoest described the organization's aim in enacting state legislation: "As we're moving forward at the state level, we end up hollowing out *Roe* even without the Supreme Court. That's really where our strategy is so solid."<sup>137</sup>

Admitting privileges laws proved especially effective in shutting down clinics;<sup>138</sup> and their dramatic impact drew public notice. In 2013, after the AUL-modeled bill at issue in *Whole Woman's Health* was introduced in the Texas House, then-Lieutenant Governor David Dewhurst tweeted a photo of a map that showed all of the abortion clinics that would close as a result of the bill, announcing: "We fought to pass SB5 thru the Senate last night, & this is why!"; then, as if to qualify his admission of the state's clinic-closing purpose, the Lieutenant Governor immediately tweeted "I am unapologetically pro-life AND a strong supporter of protecting women's health. #SB5 does both."<sup>139</sup> The AUL-championed bill was openly discussed as clinic-closing by legislators and abortion-ending by then Governor Rick Perry (who thanked AUL for its assistance in drafting it).<sup>140</sup> In 2013, in calling for the enactment of Texas's admitting privileges law, "Governor Perry himself declared that his goal was to 'make abortion, at any stage, a thing of the past,' and that until we live in an 'ideal world . . . without abortion,' Texas's aim should be to 'continue to pass laws to ensure that abortions are as rare as possible.'"<sup>141</sup>

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the fact that SB 25 repeals a number of provisions [regulating abortion] that currently protect women's health. . .").

<sup>137</sup> Emily Bazelon, *Charmaine Yoest's Cheerful War on Abortion*, N.Y. TIMES MAG. (Nov. 2, 2012), <https://www.nytimes.com/2012/11/04/magazine/charmaine-yoests-cheerful-war-on-abortion.html>; see also Burke, *supra* note 132 (describing states like New York and California at the bottom of AUL's Life List as "[b]elieving women must have unfettered access to abortion clinics" and "content to place women at the mercy of an increasingly suspect abortion industry").

<sup>138</sup> Greenhouse & Siegel, *supra* note 42, at 1449–50 (describing the shutdown of clinics in Mississippi, Texas, Wisconsin, Alabama and Louisiana after the enactment of admitting-privileges laws).

<sup>139</sup> *Id.* at 1451–52.

<sup>140</sup> See Cary Franklin, *Whole Woman's Health v. Hellerstedt and What It Means to Protect Women*, in REPRODUCTIVE RIGHTS AND JUSTICE STORIES 223, 230–31 (Melissa Murray, Kate Shaw, & Reva B. Siegel eds. 2019) (describing AUL's multifaceted role in the Texas); Linda Greenhouse & Reva B. Siegel, *The Difference a Whole Woman Makes: Protection for the Abortion Right After Whole Woman's Health*, 126 YALE L.J. F. 149, 153 n.24 (2016).

<sup>141</sup> Franklin, *supra* note 140, at 231; see also Beth Cortez-Neavel, *Perry at Pro-Life Rally: Ideal World Is One Without Abortion*, TEX. OBSERVER (Jan. 27, 2013, 4:51 PM), <https://www.texasobserver.org/thousands-support-pro-life-legislation-on-40th-anniversary-of-roe-v-wade>.

Opponents of the admitting privileges law argued “that if pro-life lawmakers were truly motivated by a desire to safeguard women’s health, they would not single out abortion with unnecessary and even counter-productive regulation, but would instead direct their attention to the abysmal state of women’s health and healthcare in Texas,”<sup>142</sup> emphasizing that “for all its purported concern about women’s health, the Texas legislature had done little to address these statistics, and in fact had made matters worse.”<sup>143</sup> None of these arguments moved the law’s supporters and the state enacted the admitting privileges statute—which closed many of the state’s abortion clinics—for the claimed reason of protecting women’s health.

### C. LOUISIANA RESTRICTS ABORTION TO PROTECT WOMEN’S HEALTH

While the Texas admitting privileges law was challenged in federal courts, an admitting privileges law substantially the same as the Texas law was introduced in Louisiana.<sup>144</sup> Rather than recapitulating debate over the statute in judicial decisions, I add to that record by demonstrating the many ties between the Louisiana statute and the history of woman-protective abortion restrictions we have just considered. I show that, for its supporters, Louisiana’s admitting privileges law was a pro-woman, pro-life law of the kind the antiabortion movement began advocating in the aftermath of *Casey*. I then explore the understandings of its supporters with the questions prompted by these movement commitments in view.

I demonstrate that Louisiana officials discussed the TRAP law as a health and safety regulation during legislative debate but that once the official record closed, the law’s supporters began openly to describe the admitting privileges law as a pro-woman and pro-life law or simply described the law’s purpose as protecting unborn life.<sup>145</sup>

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<sup>142</sup> Franklin, *supra* note 140, at 234; *see also id.* at 233 (describing opponents pointing out that the Texas law singled out the practice of abortion for regulation not provided to many other outpatient procedures when complications from abortion practice were lower by far than for dental work).

<sup>143</sup> *Id.* at 234. For an account of Texas’s health care policy choices in the era that it was enacting and defending the admitting privileges law invalidated in *Whole Woman’s Health*, *see* Siegel, *supra* note 10, at 214–15.

<sup>144</sup> Chief Justice Roberts observed that “the two laws are nearly identical.” June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103, 2139 (2020) (Roberts, C.J., concurring).

<sup>145</sup> *See infra* Section II.C.1.

With an appreciation of the kind of beliefs about women associated with support for pro-woman, pro-life health laws, I then examine what supporters of Louisiana's admitting privileges law meant when they described the law as protecting women's health.<sup>146</sup> In Louisiana, as in Texas, opponents of the admitting privileges law compared the state's interest in protecting women's health in the abortion context with its lack of interest in protecting women's health outside the abortion context.<sup>147</sup> While at least one pro-life advocate advocated to improve healthcare for pregnant women, most focused on protecting women's health by restricting abortion.

Expanding the frame, I show that at the same time the state restricted abortion through an admitting privileges statute asserted to protect women and the unborn, the state enforced policies contributing to the state's exceedingly high maternal mortality and infant mortality rates. Expanding the frame on the abortion debate shows how role-based judgments shaped laws protecting women's health and demonstrates the physical as well as dignitary harm such judgments can inflict, especially when focused, as they were in Louisiana, on poor women of color. Analyzed from this vantage point, Louisiana's pro-woman, pro-life law raises questions of liberty, equality, and life that the Justices never discuss in *June Medical*.

1. *The law's aims: protecting women or the unborn?* Louisiana was a poster child for pro-life advocates at the time it enacted the Unsafe Abortion Protection Act<sup>148</sup>—and for many years beforehand. AUL, modeled on and affiliated with the American Legislative Exchange Council (ALEC), ranks states for their antiabortion advocacy in its annual publication *Defending Life*, which disseminates model anti-abortion legislation and profiles the accomplishments and shortcomings of every state for its success in enacting abortion laws.<sup>149</sup> Between 2010 and 2014, AUL ranked Louisiana first of all fifty states. After passage of the admitting privileges law in 2014, AUL would award first ranking to Louisiana again, selecting the state's governor,

<sup>146</sup> See *infra* Section II.C.2

<sup>147</sup> See *infra* Section II.C.2. For discussion of this debate in Texas, see *supra* text accompanying notes 142–43.

<sup>148</sup> Act 620, 2014 Leg., Reg. Sess. (La. 2014) (enacted), <https://law.justia.com/codes/louisiana/2015/code-revisedstatutes/title-40/rs-40-1061.10> (codified at LA. STAT. ANN. § 40:1061.10–26 (A)(2)(a) (West 2020)).

<sup>149</sup> See *DEFENDING LIFE*, *supra* note 131. For one account of AUL's relation to ALEC, see Franklin, *supra* note 140, at 229–30.

Bobby Jindal, to introduce the 2015 edition of *Defending Life*<sup>150</sup>—valuable publicity for Jindal’s campaign for the Republican Party presidential nomination launched that same year.<sup>151</sup> In his short bid for the presidency, Jindal cited these antiabortion ratings frequently as one of his chief qualifications for the presidency.<sup>152</sup>

As the state’s AUL ranking suggests, AUL was as influential in Louisiana as it was in Texas.<sup>153</sup> In Louisiana, the admitting privilege law was introduced with the assistance of Dorinda Bordlee, then counsel at the Bioethics Defense Fund. Previously, as counsel at AUL, Bordlee helped develop the organization’s woman-protective restrictions on abortion, a strategy which in 2001 she described as based on the role-based belief that “[w]hat’s good for the child is good for the mother.”<sup>154</sup> To bring to Louisiana the admitting privileges law that was so successful in closing clinics in Texas, Bordlee drafted the Louisiana admitting privileges law using Texas language and worked with State Representative Katrina Jackson, sponsor of the Louisiana law, to introduce it.<sup>155</sup>

<sup>150</sup> See *DEFENDING LIFE*, *supra* note 131, at vii (featuring preface by Louisiana’s governor Bobby Jindal); *id.* at 16 (reporting that Louisiana “has topped the Life List since 2010”); *id.* at 40 (2015 state rankings); see also Bill Barrow, *Bobby Jindal Touts Louisiana as ‘Most Pro-Life’ State*, ASSOCIATED PRESS (Nov. 2, 2016), [https://www.postandcourier.com/politics/bobby-jindal-touts-louisiana-as-most-pro-life-state/article\\_8af7aca0-6f67-5ecd-b12a-2d7312159d0e.html](https://www.postandcourier.com/politics/bobby-jindal-touts-louisiana-as-most-pro-life-state/article_8af7aca0-6f67-5ecd-b12a-2d7312159d0e.html) (describing Governor Jindal’s claims that Louisiana was America’s most pro-life state); *Jindal Signs Hoffmann’s, Jackson’s Pro-Life Bills*, OUACHITA CITIZEN (June 18, 2014), [https://www.hannapub.com/ouachitacitizen/news/local\\_state\\_headlines/jindal-signs-hoffmann-s-jackson-s-pro-life-bills/article\\_5a7800d2-f697-11e3-89f6-001a4bcf6878.html](https://www.hannapub.com/ouachitacitizen/news/local_state_headlines/jindal-signs-hoffmann-s-jackson-s-pro-life-bills/article_5a7800d2-f697-11e3-89f6-001a4bcf6878.html) (same).

<sup>151</sup> Manny Fernandez, *Bobby Jindal Enters Presidential Race, Saying ‘It Is Time for a Doer,’* N.Y. TIMES (June 24, 2015), <https://www.nytimes.com/2015/06/25/us/politics/bobby-jindal-announces-bid-for-president.html>.

<sup>152</sup> See, e.g., Maya Kliger, *Jindal Touts Conservative Record, Bashes Obama*, DES MOINES REG. (Aug. 8, 2015, 10:08 PM), <https://www.desmoinesregister.com/story/news/elections/presidential/caucus/2015/08/08/bobby-jindal-mason-city-iowa-falls/31362689> (documenting Jindal’s campaign stops in Iowa and his claims “that his state has been rated the most ‘pro-life’ state in the country”).

<sup>153</sup> See *supra* note 140 and accompanying text. Bordlee’s ties with AUL continued. She filed an amicus brief defending the Texas law in the Supreme Court in *Whole Woman’s Health*, which she wrote with Denise Burke of AUL. Bordlee and Burke have AUL ties. See *supra* notes 121–24 and accompanying text (describing Bordlee and Burke contributing to the *Cost of Choice* volume).

<sup>154</sup> See *supra* text accompanying notes 117–18, 121–26.

<sup>155</sup> Peter J. Finney, *State Rep. Katrina Jackson Is Pro-Life, Pro-Woman*, CLARION HERALD (June 3, 2014), <https://clarionherald.org/news/state-rep-katrina-jackson-is-pro-life-pro-woman> (noting that Bordlee crafted the bill, met with Jackson before the start of the legislative session to discuss it, and asked Jackson to be the lead sponsor); Sarah Zagorski, *HB 388 Passes Overwhelmingly in Louisiana Senate*, LA. RIGHT TO LIFE (May 14, 2014), <http://archive.constantcontact.com/fs191/1101796400807/archive/1117365764539.html> (describing Bordlee as the

In 2014, as the Texas bill was being litigated in the lower courts, Representative Jackson introduced HB 388 as a woman-protective bill, a “commonsense”<sup>156</sup> health measure that “was not denying anyone an abortion.”<sup>157</sup> Opponents of the bill offered extensive evidence that the bill was medically unnecessary<sup>158</sup> and would close three out of five existing outpatient clinics,<sup>159</sup> mirroring the effects of Texas’s admitting privileges law.<sup>160</sup> The bill’s proponents scarcely reacted.

To ensure that the Texas example was not overlooked, before the Senate committee hearing began, Dorinda Bordlee emailed Representative Jackson a story about the admitting privilege law’s success in closing clinics in Texas.<sup>161</sup> Bordlee began the email by stating, “La HB 388 follows this model”; the remainder of the email consisted of a story explaining how a state could use even unconstitutional statutes to get around courts and close clinics.<sup>162</sup> The story Bordlee emailed Jackson

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“principle architect of the bill” and Jackson as the “author[.]”). Bordlee described the Louisiana law as based on Texas language. See *Factsheet on La. HB 388, Unsafe Abortion Protection Act*, BIOETHICS DEFENSE FUND (2016), [https://bdfund.org/wp-content/uploads/2016/04/file\\_639.pdf](https://bdfund.org/wp-content/uploads/2016/04/file_639.pdf).

<sup>156</sup> Defendant’s Exhibit 119: Certified Transcripts of Legislative History of Act 620 at 38, June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27 (M.D. La. 2017) (No. 14-cv-00525-JWD-RLB) [hereinafter DX 119]. DX 119 contains, in relevant part, a transcription of publicly available video of committee hearings. See *Hearing on HB388 Before the H. Comm. On Health & Welfare*, 2014 Leg. Reg. Sess. (La. 2014), [https://house.louisiana.gov/H\\_Video/VideoArchivePlayer?v=house/2014/Mar\\_2014/0319\\_14\\_HW](https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2014/Mar_2014/0319_14_HW); *Hearing on HB388 Before the S. Comm. on Health & Welfare*, 2014 Leg. Reg. Sess. (La. 2014), <http://senate.la.gov/video/videoarchive.asp?v=senate/2014/05/050714H-W2014>.

<sup>157</sup> DX 119, *supra* note 156, at 9 (transcribing testimony of Rep. Katrina Jackson) (“It’s not denying anyone contraceptives. It’s not denying anyone an abortion. It’s not denying anyone the choice on whether or not to have one.”).

<sup>158</sup> *Id.* at 15–16 (transcribing the testimony of Ellie Schilling, describing the heightened requirements that HB 388 creates for abortion providers). The district court subsequently found that “admitting privileges do not improve health outcomes in the event of complications” and therefore HB 388/Act 620 “is not medically necessary and fails to actually further women’s health and safety.” June Med. Servs. LLC v. Kliebert, 250 F. Supp. 3d 27 at 87 (M.D. La. 2017).

<sup>159</sup> DX 119, *supra* note 156, at 13. After an extensive factual inquiry, the district court vindicated this claim; it found that, if implemented, HB 388/Act 620 would “result in a drastic reduction in the number and geographic distribution of abortion providers, reducing the number of clinics to one, or at most two, and leaving only one, or at most two, physicians providing abortions in the entire state.” June Med. Servs., 250 F. Supp. 3d 27 at 87.

<sup>160</sup> Legislators heard testimony that “the same bill” in Texas led to the closure of “half of the clinics. . . . The Rio Grande Valley has been left with no abortion clinics.” DX 119, *supra* note 156, at 28.

<sup>161</sup> See June Medical, 250 F. Supp. 3d 27, 55–56 (M.D. La. 2017); see also June Med. Servs. L.L.C. v. Kliebert, 158 F. Supp. 3d 473, 501–02 (M.D. La. 2016).

<sup>162</sup> Joint Exhibit 15: Email from Dorinda Bordlee to State Sen. Katrina Jackson, June Medical, 250 F. Supp. 3d 27 (M.D. La. 2017) (No. 14-cv-00525-JWD-RLB) [hereinafter Joint Ex. 15] (reproducing Bordlee’s email to Jackson attaching the National Journal.com story). Bordlee also

was entitled “Texas is Permanently Shutting Abortion Clinics and the Supreme Court Can’t Do Anything About It.”<sup>163</sup> The report pointed out that when Governor Perry “signed a sweeping anti-abortion law in 2013, he did so knowing the measure faced an uncertain future” and could “land in the hands of the Supreme Court.” But “back in the Lone Star State, the final judicial score won’t much matter” because “[t]he law has already had tremendous success in closing abortion clinics and restricting abortion access in Texas. And those successes appear all but certain to stick—with or without the Supreme Court’s approval of the law that created them.”<sup>164</sup>

Yet the Louisiana legislature didn’t talk about shutting down abortion clinics as officials did in Texas.<sup>165</sup> Before passage of the law, Louisiana legislators mostly stayed on message and talked about the admitting privileges law as protecting women’s health, even as officials in Texas were openly defending that state’s admitting privileges law as both woman protective and fetal-protective in the Fifth Circuit.<sup>166</sup>

Supporters did not always stay on message. Even before passage of the Louisiana admitting privileges law, the district court found that Governor Jindal and the state’s health director were characterizing the law as protecting unborn life.<sup>167</sup> In public statements, Governor Jindal boasted about his state’s AUL rankings<sup>168</sup> and observed that the admitting privileges law “will build upon all we have done the past six years to protect the unborn.”<sup>169</sup> In heated exchanges with witnesses

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tweeted out the story. See Dorinda Bordlee (@DorindaBordlee), TWITTER (May 5, 2014, 4:46 PM), <https://twitter.com/DorindaBordlee/status/463449659696889857>.

<sup>163</sup> Joint Ex. 15, *supra* note 162 (annotating email containing text of Sophie Novack, *Texas Is Permanently Shutting Abortion Clinics and the Supreme Court Can’t Do Anything About It*, NAT’L J. (May 5, 2014), <https://www.nationaljournal.com/s/58245>).

<sup>164</sup> *Id.* The AUL statute functioned as the story predicted. The Texas law forced over half of the state’s abortion clinics to close, “and only a few have reopened. Texans in some metropolitan areas must travel as far as 300 miles one way for the procedure” and the state “now has 10 cities of more than 50,000 without an abortion clinic within 100 miles.” Sophie Novack, *Texas Has the Most Cities More than 100 Miles from an Abortion Clinic, Study Finds*, TEX. OBSERVER (May 15, 2018, 5:03 PM), <https://www.texasobserver.org/texas-most-cities-more-than-100-miles-from-abortion-clinic>.

<sup>165</sup> See DX 119, *supra* note 156. On Texas, see *supra* notes 139–40 and accompanying text.

<sup>166</sup> Greenhouse & Siegel, *supra* note 42, 1452 n.117 & 1470 n.203.

<sup>167</sup> June Med. Servs. L.L.C. v. Kliebert, 250 F. Supp. 3d 27, 56 (M.D. La. 2017) (detailing references to “unborn children” in the drafting of Act 620).

<sup>168</sup> *Id.* (“In a press release regarding Act 620 released on March 7, 2014, Jindal declared his position that Act 620 was a reform that would ‘build upon the work . . . done to make Louisiana the most pro-life state in the nation.’”).

<sup>169</sup> *Id.*

who argued that the law would harm women, legislative sponsors of the law briefly shifted off the ground of women's health and instead emphasized the law's importance in protecting the unborn.<sup>170</sup>

But after the admitting privileges law was enacted, its proponents were much more forthright in discussing its purpose in protecting unborn life. Governor Jindal said he was "proud" to support legislation that "will help us continue to protect women and the life of the unborn in our state."<sup>171</sup> His successor, Governor John Bel Edwards, who as a legislator voted in support of the legislation, defended the law as protecting "the dignity and sanctity of life."<sup>172</sup> The state's Attorney General, Jeff Landry, reacted to the Supreme Court's decision staying enforcement of that law, promising "[w]e will not waver in defense of our state's pro-woman and pro-life laws; and we will continue to do all that we legally can to protect Louisiana women and the unborn."<sup>173</sup> Landry used the expression "pro-woman and pro-life law" (or similarly "pro-life and pro-woman law") when discussing the law,<sup>174</sup> while his campaign website boasted that "our pro-life Attorney General, Jeff Landry, is working to protect the unborn . . . [by] [d]efending Louisiana's landmark admitting privileges law."<sup>175</sup>

After the admitting privileges law was enacted, the law's sponsor, Rep. Katrina Jackson, also began talking about it as protecting both women and the unborn. In a message Jackson provided for members of Louisiana Right to Life in the summer of 2014, Jackson, a

<sup>170</sup> See *infra* notes 191–99 and accompanying text.

<sup>171</sup> Emily Lane, *Bobby Jindal Signs Anti-Abortion Bill Thursday Likely to Close Clinics in Baton Rouge, New Orleans*, TIMES-PICAYUNE (June 12, 2014, 7:25 PM), [https://www.nola.com/news/politics/article\\_c2380d71-70b6-513a-b24d-416674e49289.html](https://www.nola.com/news/politics/article_c2380d71-70b6-513a-b24d-416674e49289.html).

<sup>172</sup> Gov. Edwards' Statement on U.S. Supreme Court's Ruling on Louisiana's Abortion Law, OFFICE OF THE GOVERNOR (Feb. 8, 2019), <https://www.gov.louisiana.gov/index.cfm/newsroom/detail/1794> ("As a pro-life Catholic, I will always advocate for laws that protect the dignity and sanctity of life. I voted for the bill in 2014. I urge the Supreme Court to act quickly in this matter, so Louisiana may move forward.").

<sup>173</sup> Maria Clark, *Louisiana Reacts to Supreme Court Abortion Access Decision*, TIMES-PICAYUNE (July 22, 2019, 2:13 PM), [https://www.nola.com/entertainment\\_life/health\\_fitness/article\\_467c2c8c-46b4-55f7-9059-c19ee671243.html](https://www.nola.com/entertainment_life/health_fitness/article_467c2c8c-46b4-55f7-9059-c19ee671243.html).

<sup>174</sup> See, e.g., Adam Liptak, *Supreme Court Blocks Louisiana Abortion Law*, N.Y. TIMES (Mar. 4, 2016), <https://www.nytimes.com/2016/03/05/us/politics/supreme-court-blocks-louisiana-abortion-law.html>.

<sup>175</sup> *Protecting the Unborn*, LANDRY FOR LOUISIANA, <https://landryforlouisiana.com/protecting-the-unborn> (last visited Aug. 9, 2020).

Democrat, wrote that HB 388 represented “[u]nity for [l]ife.”<sup>176</sup> “God has created each of us, and He has called me to be true to my calling as a Christian and stand for life in the Legislature,” she wrote.<sup>177</sup> By passing the law, she argued, “[w]e have overcome the lines that divide us to protect life.”<sup>178</sup> Countering then-president of Planned Parenthood Cecile Richards’s claim that the bill was enacted “at the expense of women’s health and safety,”<sup>179</sup> Jackson argued that the bill was “drafted by women, authored by women, supported by women, and voted for by women.”<sup>180</sup> Dorinda Bordlee also discussed the Louisiana law as protecting women and the unborn. After the Supreme Court declared the admitting privileges law unconstitutional, Bordlee described it as concerned with “the health and safety of women” and “legislation that is both pro-woman and pro-life.”<sup>181</sup>

2. *Pro-woman? the meaning of “health.”* We have evidence about what “pro-woman and pro-life” means to Dorinda Bordlee. She has coined the term “holistic feminism” to describe her views.<sup>182</sup> Under the banner “Holistic Feminism: Abortion Harms Women & Children,”

<sup>176</sup> Katrina Jackson, *Unity for Life*, LA. RIGHT TO LIFE COMM. (Summer 2014), <https://myemail.constantcontact.com/Overcoming-Division-for-Life-August-15th-E-Newsletter.html?soid=1101796400807&aid=XbEDcJ9ZvnU>.

<sup>177</sup> *Id.*

<sup>178</sup> *Id.*

<sup>179</sup> Cecile Richards, Opinion, *Women Won’t Stand for Abortion Rights Roll Back*, CNN (May 28, 2014, 7:55 AM), <https://www.cnn.com/2014/05/28/opinion/richards-abortion-access-restrictions-south/index.html>.

<sup>180</sup> Jackson, *supra* note 176; see also Kurt Jensen, *Pro-Lifers Hopeful For Outcome of Court’s First Abortion Case in Four Years*, AM. MAG. (Mar. 4, 2020), <https://www.americamagazine.org/politics-society/2020/03/04/pro-lifers-hopeful-outcome-supreme-courts-first-abortion-case-four> (quoting Jackson as explaining at the time of oral argument in the Supreme Court that the Louisiana law showed “love for the women, for the unborn child, and for those we pass every day who unfortunately may make this decision (to have an abortion)”).

<sup>181</sup> *Supreme Court Decision in June Medical v. Russo Is a Loss for Health, Safety of Women*, LA. RIGHT TO LIFE (June 29, 2020), <https://prolifelouisiana.org/supreme-court-decision-in-june-medical-v-russo-%EF%BB%BFis-a-loss-for-the-health-safety-of-women>; see also Dorinda Bordlee (@DorindaBordlee), TWITTER (June 30, 2020, 3:52 AM), <https://twitter.com/DorindaBordlee/status/1277902847280123904> (tweeting that State Sen. Katrina Jackson “is a model of what it means to be pro-woman pro-life”); EWTN, *World Over - 2020-01-23 - Dorinda Bordlee with Raymond Arroyo*, YOUTUBE (Jan. 24, 2009), <https://youtu.be/A3mjVWmcfHo> (describing Louisiana’s admitting privileges law as a “common sense pro-woman pro-life law” and “what it is designed to do is to protect women” while speculating that a ruling on third-party standing could block 80 percent of abortion rights claims).

<sup>182</sup> *Holistic Feminism: Abortion Harms Women & Children*, BIOETHICS DEFENSE FUND, <http://bdfund.org/stories/holistic-feminism-abortion-harms-women-children> (“Holistic Feminism is a term coined by Dorinda Bordlee to discuss the reality of how abortion exploits women as sexual objects, and robs men of a meaningful life of loving care and respect for his family.”).

the website of the Bioethics Defense Fund announces: “‘Holistic Feminism’ is a term that BDF uses to describe policy strategies that integrate the interests of the woman, the unborn child, and the often ignored interests and duties of men who can easily rely on abortion to shirk their legal and moral duties of child support and fatherly guidance”<sup>183</sup>—echoing sex-role-based views about abortion (“What’s good for the child is good for the mother”) that Bordlee expressed at AUL.<sup>184</sup> Bordlee has employed woman-protective arguments to justify a variety of restrictions on access to contraception and abortion.<sup>185</sup>

But what did “pro-woman and pro-life” mean to Jindal, Jackson, Landry, and others who led the way in drafting, enacting, and defending Louisiana’s admitting privilege law?

In Louisiana, Texas, and across the nation, the coupling of “pro-woman and pro-life” openly announced a law’s fetal-protective aims. But what did advocates mean by calling a law “pro-woman and pro-life”? The history we have examined shows that leaders of the anti-abortion movement claimed concern about women because it was a useful way of moving resisting voters and judges to restrict abortion—which the antiabortion movement sought in order to protect unborn life.<sup>186</sup>

Were claims about women’s health a ploy to protect unborn life in a way the public and judges willing to dilute *Casey* would accept? We can assume that there were differences among them. Undoubtedly, over

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<sup>183</sup> *Id.*

<sup>184</sup> See *supra* text accompanying note 118.

<sup>185</sup> See, e.g., Brief for Breast Cancer Prevention Institute as Amicus Curiae Supporting Petitioners at 2, *Zubik v. Burwell*, 136 S. Ct. 1557 (2016) (Nos. 14–1418, 14–1453, 14–1505, 15–35, 15–105, 15–119, and 15–191) (Bordlee as counsel of record) (arguing contraceptives “pose dangerous risks to women’s health” in litigation challenging the ACA’s contraceptive mandate); Brief for Charlotte Lozier Institute, March for Life Education Fund, and National Pro-Life Women’s Caucus as Amicus Curiae Supporting Petitioners at 6, *Nat’l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (No. 16–1140) (Bordlee as counsel of record) (alleging harm to “vulnerable women and children” from a California statute that required covered facilities to provide information on comprehensive family planning services); Brief for Jérôme Lejeune Foundation USA et al. as Amicus Curiae Supporting Petitioners at 23–24, *Horne v. Isaacson*, 134 S. Ct. 905 (2014) (No. 13–402) (Bordlee as co-author) (arguing that sex-selective abortion constitutes discrimination on the basis of gender in litigation challenging an Arizona law that limited abortion after twenty weeks of gestation).

We cannot measure the influence of these briefs, which are read by the public and by judges, even when they do not cite them for support. But see *Gilardi v. U.S. Dep’t of Health & Hum. Servs.*, 733 F. 3d 1208, 1221 (D.C. Cir. 2013) (quoting Brief Amici Curiae of Breast Cancer Prevention Institute) (referencing an amicus written by Bordlee to justify a claim about the “increased risk for breast, cervical, and liver cancers” and “debatable science” of contraceptives).

<sup>186</sup> See *supra* Section II.B.

time, many who enacted and defended TRAP laws came to act on a sincere belief that a law pushing a resisting woman into becoming a mother was better for the pregnant woman herself. “Love them both,” as Jack Willke came to argue, after market-testing the frame.<sup>187</sup> But better in what sense?

It is not sufficient to ask whether advocates manipulated their audiences into enacting woman-protective restrictions on abortion in order to protect unborn life or whether, instead, they sincerely believed that imposing health-justified restrictions on abortion was better for women. If the drive to limit women’s access to abortion was based on a sincere belief about women’s welfare, what kind of a belief about women was it?

On the face of it, advocating for “pro-woman and pro-life” laws because they are good for women is advocating on the basis of a sex-role-based belief that, as Dorinda Bordlee (and others) emphasized, “the woman and the child have a sacred bond that should not be divided. What’s good for the child is good for the mother. So now we’re advocating legislation that is good for the woman.”<sup>188</sup> On this sex-role-based view, there is no conflict of interests between women and the unborn life they bear because, as Bordlee explained, what is good for the child is good for the mother. A state can restrict abortion to protect the unborn and it is good for women’s health because what is good for children is good for women’s health. The descriptive claim is also a normative claim about sex roles that are “good” for women.

The record, in Louisiana and elsewhere, shows that this belief, even when “sincere,”<sup>189</sup> was not a concern about women’s health as we understand the term “health” outside the abortion context. It is not normal to adopt health and safety standards for the practice of medicine that eliminate risk by means that shut down the regulated practice—and then to act as if the standard’s elimination of medical practitioners is of no consequence to patients’ health and safety.<sup>190</sup> In

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<sup>187</sup> See *supra* text accompanying note 99 (discussing polling that led him to change his argument for protecting unborn life).

<sup>188</sup> See *supra* text accompanying note 118. For similar views expressed by Denise Burke in 2016, see *supra* note 132.

<sup>189</sup> See ZIEGLER, *supra* note 113, at 145 (observing that “[m]any pro-lifers sincerely believed that abortion harmed women”). For women working in the movement’s crisis pregnancy centers expressing these beliefs, see Siegel, *supra* note 88, at 1654–55.

<sup>190</sup> See *supra* Section II.C.1.

the ordinary case, further investigation and a likely adjustment of course is warranted; it might even be ethically required. But the supporters of the admitting privileges law appeared utterly unconcerned that the health and safety regulations they advocated would have nearly eliminated the practice of abortion in the state.

Evidence that officials advocating for admitting privileges restrictions on abortion were talking about women's health in a special, coded, sex-role-based way concerned with the wrongs of a woman ending a pregnancy—and not otherwise concerned with women's physical wellbeing—appears in the legislative debate over the admitting privileges law and outside of the debate.

In Louisiana, as in Texas, opponents of the admitting privileges law described in concrete detail the health harms the law could inflict on women in the state.<sup>191</sup> Not only would a law shutting down abortion providers push women into having later, more dangerous abortions; it would restrict women's access to the contraception that the clinics provided and it would push resisting women into bearing children under unsafe conditions, often without adequate healthcare.<sup>192</sup> Louisiana was among the most dangerous places to give birth in the nation, and, at the time the legislature enacted the clinic-closing admitting privileges law, there was a shortage of medical care for pregnant women in the state. Alice Chapman, the head of Tulane University's Medical Students for Choice, emphasized that "Louisiana ranks 44th in the nation for maternal mortality, 49th for infant mortality, and has only one OB/GYN for every 13,136 women."<sup>193</sup>

The bill's proponents brushed off warnings about the health injuries the admitting privileges law could inflict by pushing women into late or unlawful abortions—or by pushing women without access to medical care or health insurance into pregnancy. On several occasions, legislators leading debate over the admitting privileges law rebutted accounts of the health harms the law would inflict on women by reverting, fleetingly, to life-justified arguments for restricting abortion.

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<sup>191</sup> For Texas, see *supra* text accompanying notes 142–43. For one example in Louisiana, see DX 119, *supra* note 156, at 18–20 (transcribing the statement of Alice Chapman, Tulane University Medical Students for Choice).

<sup>192</sup> *Id.* During the State Senate hearing, a witness urged the importance of addressing high rates of unintended pregnancy to bring down abortion rates. DX 119, *supra* note 156, at 64–66 (transcribing the statement of Autumn Fawn Gandolfi).

<sup>193</sup> DX 119, *supra* note 156, at 19.

In the most vivid of these exchanges, Representative Katrina Jackson, sponsor of the admitting privileges law, disparaged Alice Chapman and dismissed her concerns about the ways the law would injure women by announcing that abortion was genocide—a view she has elsewhere explained at greater length.<sup>194</sup> Jackson did not speak for all African Americans in the state.<sup>195</sup> Alfreda Tillman Bester, general counsel for the Louisiana State Conference of the NAACP, testified that the Louisiana state conference of the NAACP had voted to oppose the bill. Bestor gave impassioned testimony opposing the legislation as a threat to poor women’s lives, health, and freedom,

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<sup>194</sup> DX 119, *supra* note 156, at 20 (“I’ve heard it thrown around by the young ladies that were at the table today that this protects mostly minority women. . . . I’m not sure if you are aware, but the number one genocide right now in the African-American community . . . is because most of our babies are dying in the womb from abortions. Did you know that?”); *see also id.* (“But were you aware that more African-Americans die from abortions than any other illness? . . . I don’t want people advocating erroneously for African-American women. . . . If we protect one facet of African-Americans, we protect all of them.”). In other settings, Rep. Jackson speaks directly about these views, and is publicized by the antiabortion movement as holding them. Announcing that Rep. Jackson was chosen as a speaker at the 2020 March for Life (with the theme of “Life Empowers: Pro-Life is Pro-Woman”), Live Action quoted Rep. Jackson explaining her position on abortion: “I think it (abortion) mitigates our race’s voting power, it hurts our race’s power in the census. I really consider it to be modern-day genocide.” Anne Marie Williams, *2020 March for Life to Showcase How Being Pro-Life Is Pro-Woman*, LIVEACTION (Dec. 13, 2019, 2:52 PM), <https://www.liveaction.org/news/march-for-life-pro-life-pro-woman>; *see also* Anna Reynolds, *Black Female Democratic Lawmaker Says Abortion Is “Modern-Day Genocide,”* LIVEACTION (June 6, 2019, 12:51 PM), <https://www.liveaction.org/news/black-female-democrat-abortion-genocide>.

LiveAction reports Representative Jackson’s views selectively and does not discuss her beliefs as a “whole-life Democrat.” *See* Laurretta Brown, *Pro-Life Democrat Katrina Jackson Marches for Life, Writes Louisiana Legislation*, NAT’L CATHOLIC REGISTER (Jan. 21, 2020), <https://www.ncregister.com/news/pro-life-democrat-katrina-jackson-marches-for-life-writes-louisiana-legislation> (reporting State Sen. Jackson identifying as a “whole-life Democrat” which she defines as “ensuring protection of human life from the time of conception to the time of death, which means we not only advocate for the birth of the child but we also advocate for that child to have a true chance at what we call the American Dream regardless of its parents’ socioeconomic status, regardless of where they’re from, regardless of their background”); *id.* (reporting Rep. Jackson asserting that “[p]ro-lifers and those who are pro-abortion . . . might not ever agree on the sanctity of life, but we can agree on the woman receiving proper health care during her pregnancy; and around this country and in the state of Louisiana we’re having to address the high [maternal] mortality rate that has been developing”). Representative Jackson supported Medicaid expansion in Louisiana, as other supporters of the state’s admitting privileges law did not. *See infra* text accompanying notes 201–05.

<sup>195</sup> To locate Jackson’s views in the history of debates over race and reproduction before and after *Roe*, see Melissa Murray, *Race-ing Roe: Reproductive Justice, Racial Justice, and the Battle for Roe v. Wade*, 134 HARV. L. REV. (forthcoming 2021). For a wide-ranging race-conscious debate among reproductive justice advocates about Jackson’s pro-life views, see Bobbi-Jean Misick, *Black Advocates Take Different Views on What Louisiana’s Anti-Abortion Amendment Means for Inequity*, CRESCENT TO CAPITOL (Nov. 16, 2020), <https://crescenttocapitol.org/2020/11/16/black-advocates-take-different-views-on-what-louisianas-anti-abortion-amendment-means-for-inequity>.

stating that “[s]ince this law went into effect in Texas, women have died because they self-induced and did not have access to clinics or hospitals that provided them with restorative care.”<sup>196</sup> Representative Frank Hoffman, chair of the House Health and Welfare Committee, dismissed her testimony, countering: “I just want to make one point. You said women die in Texas. A person dies every day there’s an abortion too.”<sup>197</sup>

As Hoffman waved off the passionate testimony of two other opposition witnesses with the repeated retort that “someone dies,”<sup>198</sup> the third witness objected and emphasized that restricting abortion throughout Louisiana meant that *women* would die and urged the legislators to pursue their goal through policies that would actually reduce abortions and actually protect the lives and health of women. Bruce Parker, a community organizer with Louisiana Progress Action, emphasized that abortion restrictions would not in fact stop abortions but would lead to injuries and loss of life; he then identified the very different kinds of laws that Louisiana would have to enact to actually reduce abortion and protect life and health in the state:

Restricting access to safe legal abortion does not mean fewer abortions, it means more unsafe abortions, more women having abortions later in their pregnancies, and more women’s death[s]. Most women who have abortions are poor. Most are already mothers. If we want to be serious about wanting fewer abortions in Louisiana, that means giving women and girls access to reproductive healthcare so they can prevent unplanned pregnancies.

It means guaranteeing that jobs pay a living wage and that women can access affordable child care, support policies that will actually decrease abortion in Louisiana and improve the lives of women and children, such as comprehensive sex ed, Medicaid expansion, raising the minimum wage, and expanding early childhood education.

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<sup>196</sup> DX 119, *supra* note 156, at 26–27 (“This bill, in my opinion, reeks of interposition and nullification. We have a constitution in this nation. . . . And for this legislature to impose its religious opinions on women of this state is an absolute immorality, in my opinion.”). While directly linking deaths to the passage of Texas’s HB 2 is difficult, one study found that after HB 2 passed in 2011, deaths relating to pregnancy complications doubled in Texas. Marian F. MacDorman et al., *Recent Increases in the U.S. Maternal Mortality Rate*, 128 OBSTETRICS & GYNECOLOGY 447, 447, 454 (2016). Another study reported that 2 percent of Texas women report attempting to self-induce abortion, with 18 percent of those attempts occurring between the years of 2010–2015. Daniel Grossman et al., *Knowledge, Opinion, and Experience Related to Abortion Self-Induction in Texas*, 34 CONTRACEPTION 360 (2015).

<sup>197</sup> DX 119, *supra* note 156, at 27.

<sup>198</sup> *Id.* at 29; *see also id.* at 25 (transcribing Chairman Hoffman’s one-sentence reply to Dr. Alexis Lee, an opposition witness who discussed the dangers of pregnancy and giving birth).

If we are voting for this bill today because you believe it will save women's lives, I look forward to seeing you vote for those bills as well. You say you want to decrease the number of abortions, then do so.<sup>199</sup>

Where opponents reasoned about reducing abortion and protecting women's life and health as requiring coordinated policy choices, the bill's supporters steadfastly refused to discuss protection for women's lives and health in the broader policy context and enacted the admitting privileges law without addressing any of the concerns about the harms the law would inflict or discussing plans to mitigate them.

The silence of pro-life legislators aligned with their state's policy choices. At the time it enacted the admitting privileges law, Louisiana excelled in enacting abortion restrictions, enough for AUL annually to crown the state the most pro-life in the nation. But, outside the abortion context, the state did not have nearly the same appetite for promoting healthcare.

In a state where approximately 70 percent of women gave birth with the funding provided by the Medicaid program, Governor Jindal was in the news for cutting state budget contributions to Medicaid and lowering reimbursement to doctors and hospitals. (In 2011, an obstetrician reported being reimbursed by Louisiana Medicaid at 42 percent of the rate she was reimbursed from private insurance.<sup>200</sup>)

In 2013, the year before Louisiana enacted its clinic-closing admitting privileges law, Governor Jindal made headlines for refusing to expand Medicaid, with some reports estimating that about 400,000 people in the state had incomes at 138 percent of the federal poverty level—or \$26,952 for a family of three—which would have made them eligible for the health care coverage that the state refused.<sup>201</sup>

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<sup>199</sup> *Id.* at 29 (transcribing the statement of Bruce Parker with Louisiana Progress Action). For another especially fierce expression of this argument, see *id.* at 27 (transcribing the statement of Carrie Wooten with Louisiana Progress Action) (arguing that “[b]y shutting three of our five abortion service providers in the state, you are forcing women into desperate situations, and they will act accordingly,” predicting that “[l]ow-income women will suffer the most, women who are already mothers, women who work full-time at terribly low-wage jobs” and arguing that all who vote for legislation would be complicit in the desperation, illness and death enforcing the clinic-closing law would cause).

<sup>200</sup> See Robert Pear, *Cuts Leave Patients with Medicaid Cards, but No Specialist to See*, N.Y. TIMES (Apr. 1, 2011), <https://www.nytimes.com/2011/04/02/health/policy/02medicaid.html?searchResultPosition=2> (describing cuts to Louisiana's Medicaid program).

<sup>201</sup> Laura Maggi, *Sen. Landrieu Blasts Gov. Jindal, Says He's Spurning Federal Aid to Further Ambitions*, TIMES-PICAYUNE (Feb. 27, 2013, 4:14 AM), [https://www.nola.com/entertainment\\_life/health\\_fitness/article\\_3cb1a179-7317-5356-8775-fec85fda484.html#incart\\_m-rpt-2](https://www.nola.com/entertainment_life/health_fitness/article_3cb1a179-7317-5356-8775-fec85fda484.html#incart_m-rpt-2).

(Representative Katrina Jackson, a Democrat, co-authored the defeated Medicaid expansion bill.<sup>202</sup>)

In his statement justifying the state's refusal to accept federal healthcare for these families, Governor Jindal did not talk about his interest in protecting life and in protecting women's health. Instead, Jindal's statement refusing to accept federal support to expand Medicaid distinguished among citizens as more and less worthy of public assistance, denigrating the dependent and praising the virtues of limited government: "[W]e should design our policies so that more people are pulling the cart than riding in the cart. . . . We should measure success by reducing the number of people on public assistance. But the Left has been very clear—their goal is to transform all health care in America into government-run health care. . . . It seems that our federal government measures progress by how many Americans it can put onto public assistance programs."<sup>203</sup>

The state's decision to block Medicaid expansion harmed all low-income Louisianans, but the consequences were especially severe for pregnant people. According to Health Affairs, state Medicaid expansions have closed devastating coverage gaps for low-income women before, during, and after pregnancy.<sup>204</sup> Newborn children benefited enormously too, as Medicaid expansions were linked to higher rates of continuous perinatal care.<sup>205</sup>

Not only did Louisiana restrict access to abortion in 2014 while refusing money from the federal government that would have provided healthcare to hundreds of thousands of uninsured people in the state; the state restricted access to abortion without helping women avoid unwanted pregnancies. At a time when the state had one of the highest birth rates to teens between the ages of fifteen and nineteen,<sup>206</sup>

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<sup>202</sup> Sheila V. Kuman, *Louisiana Health Committee Rejects Medicaid Expansion Bill*, TIMES-PICAYUNE (Apr. 25, 2013, 5:30 AM), [https://www.nola.com/news/politics/article\\_c00eb45f-fbee-5797-9c1a-bfdd7e574709.html](https://www.nola.com/news/politics/article_c00eb45f-fbee-5797-9c1a-bfdd7e574709.html) ("Monroe Democrat Rep. Katrina Jackson, one of the six co-authors of the bill, said the expansion could bring over 400,000 currently uninsured residents onto the Medicaid rolls, while saving the state money.").

<sup>203</sup> Bobby Jindal, *Why I Opposed Medicaid Expansion*, TIMES-PICAYUNE (July 23, 2013, 9:30 PM), [https://www.nola.com/opinions/article\\_c0155e08-f87b-5c8f-b4e3-092a5b095991.html](https://www.nola.com/opinions/article_c0155e08-f87b-5c8f-b4e3-092a5b095991.html).

<sup>204</sup> Jamie R. Daw, Tyler N. A. Winkelman, Vanessa K. Dalton, Katy B. Kozhimannil, & Lindsay K. Admon, *Medicaid Expansion Improved Perinatal Insurance Continuity for Low-Income Women*, 39 HEALTH AFFAIRS 1531 (2020), <https://www.healthaffairs.org/doi/pdf/10.1377/hlthaff.2019.01835>.

<sup>205</sup> *Id.*

<sup>206</sup> See Kate Richardson, *Should Sex Education Be Required in Louisiana Public Schools: Voices from the Listening Post*, VIANOLAVIE (Aug. 22, 2019), <https://www.vianolavie.org/2019/08/22>

the state allowed schools to offer abstinence-focused sex education for students above the sixth grade but otherwise lacked a standardized sex education curriculum.<sup>207</sup> In 2014, the legislature refused to redress the “the state’s high rates of teenage pregnancies . . . by implementing ‘age appropriate’ sex education standards in public elementary and secondary schools.”<sup>208</sup>

During the same session that the legislature enacted the admitting privileges law restricting access to abortion, the legislature declined to enact a bill that modestly expanded required coverage of developmentally appropriate sexual education in public schools.<sup>209</sup> Accurate sexual education including information about contraception has been shown to reduce teen pregnancy rates and reduce abortion.<sup>210</sup> Yet Governor Jindal and groups including the Louisiana Conference of Catholic Bishops and the Louisiana Family Forum opposed even this measure on the grounds “that parents should maintain exclusive control of their children’s exposure to sex education.”<sup>211</sup> Jindal once again opposed government involvement: “These are

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/should-sex-education-be-required-in-louisiana-public-schools-voices-from-the-listening-post (reporting on program that aired April 10, 2014); *see also* Teddy Wilson, *Louisiana Committee Passes Bill to Ban Abortion Providers from Guiding Public School Discussion on Sex Ed*, REWIRE NEWS GROUP (Apr. 11, 2014, 4:01 PM), <https://rewirenewsgroup.com/article/2014/04/11/louisiana-committee-passes-bill-ban-abortion-providers-guiding-public-school-discussions-sex-ed> (“According to the federal Office of Adolescent Health, Louisiana has the sixth highest rate of teenage births in the nation and the eighth highest rate of teenage pregnancies.”).

<sup>207</sup> See LA. STAT. ANN. § 17:281 (asserting that any public school “may, but is not required to, offer instruction in subject matter designated as ‘sex education,’” and asserting that the major emphasis of such a course “shall be to encourage sexual abstinence between unmarried persons”). For a look at Louisiana’s choices in comparative perspective today, see *Sex and HIV Education*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education> (last updated Feb. 1, 2021) (graphing policy choices of all 50 states).

<sup>208</sup> Shadee Ashtari, *Louisiana Lawmaker Says Lack of Sex Education Is ‘Really A Form of Child Abuse’*, HUFFINGTON POST (Mar. 17, 2014, 1:55 PM), [https://www.huffpost.com/entry/louisiana-sex-education-patricia-smith-\\_n\\_4979641?guccounter=1](https://www.huffpost.com/entry/louisiana-sex-education-patricia-smith-_n_4979641?guccounter=1).

<sup>209</sup> *Id.*

<sup>210</sup> See Leah H. Keller & Laura D. Lindberg, *Expanding the Scope of Sex Education and the Teen Pregnancy Prevention Program: A Work in Progress*, GUTTMACHER INST. (Feb. 27, 2020), <https://www.guttmacher.org/article/2020/02/expanding-scope-sex-education-and-teen-pregnancy-prevention-program-work-progress> (reporting that “evidence has long demonstrated that declining adolescent pregnancy rates are being driven by improved contraceptive use—not declines in sex (with no evidence that abstinence-only programs actually contribute to such declines)”).

<sup>211</sup> See Ashtari, *supra* note 208. The sex ed bill asserted “abstinence is the most reliable way to prevent pregnancy” and directed that “no part of sex education instruction shall in any way advocate or support abortion.” *Id.*

decisions that are best made by parents and local communities, not state government.”<sup>212</sup>

But Louisiana did update its sex-ed laws during the same session it enacted the admitting privileges law. Governor Jindal signed into law a bill that Dorinda Bordlee helped draft prohibiting Planned Parenthood from having any role in sexual education.<sup>213</sup> (In opposing passage of the law, one witness warned against abstinence-only curricula, pointing out that in Mississippi, the curriculum “called on students to unwrap a piece of chocolate, pass it around class and observe how dirty it became.”<sup>214</sup>)

Questioning the values these legislative choices expressed, the director of Planned Parenthood in Louisiana located the state’s 2014 abortion restrictions in the larger policy context: “When given an opportunity to expand Medicaid, ensure equal pay, increase access to health education and raise the minimum wage, the legislators refused to support Louisiana families.” She asked: “If we don’t provide access to health care or education to prevent pregnancy, how does eliminating access to abortion care make sense?”<sup>215</sup>

Those professing to restrict abortion in the interest of protecting women’s health claimed concern about women’s health of a kind that transcends the abortion context. Yet during the legislative hearings, those who called for passage of the admitting privileges statute as a health and safety, pro-woman, and pro-life law were unwilling to address, and even sought to silence, witnesses who raised questions

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<sup>212</sup> *Id.*

<sup>213</sup> See Emily Lane, *Bill Bans Planned Parenthood, Other Abortion Providers from Instructing Schools on Sex Education*, TIMES-PICAYUNE (Apr. 10, 2014, 12:18 AM), [https://www.nola.com/news/politics/article\\_ad7e8c9a-2897-52fe-bdbe-9452870370fe.html](https://www.nola.com/news/politics/article_ad7e8c9a-2897-52fe-bdbe-9452870370fe.html) (reporting that Rep. Frank Hoffman sponsored House Bill 306 prohibiting employees or representatives of providers from involvement in instruction or distribution of information in schools); Sarah Zagorski, *Governor Jindal Signs Bills to Protect Women and Children from Louisiana’s Abortion Industry*, L.A. RIGHT TO LIFE (June 12, 2014), <http://archive.constantcontact.com/fs191/1101796400807/archive/1117626538741.html> (identifying Bordlee “as principal architect of both bills” and quoting Bordlee detailing women’s involvement and characterizing H.B. 388 as “by women and for women”).

<sup>214</sup> See Lane, *supra* note 213 (citing recent article). The article linked to a report of a Mississippi class providing sex ed by circulating chocolate among children. See Alana Semuels, *Sex Education Stumbles in Mississippi*, L.A. TIMES (Apr. 2, 2014, 6:53 PM), <https://www.latimes.com/nation/la-na-ms-teen-pregnancy-20140403-story.html> (“‘They’re using the Peppermint Pattie to show that a girl is no longer clean or valuable after she’s had sex—that she’s been used,’ said Barnard, who works in public health. ‘That shouldn’t be the lesson we send kids about sex.’”).

<sup>215</sup> Melissa Flournoy, *Letter: Legislators Failed to Address Health*, ADVOCATE (June 8, 2014, 12:40 PM), [https://www.theadvocate.com/baton\\_rouge/opinion/letters/article\\_de65dc7f-08e0-5932-acc6-7b3554f57f9c.html](https://www.theadvocate.com/baton_rouge/opinion/letters/article_de65dc7f-08e0-5932-acc6-7b3554f57f9c.html).

about the health risks the legislature was imposing on women by enacting a law that would dramatically restrict opportunities to end a pregnancy.<sup>216</sup> They did not discuss the health needs of citizens the state was pushing into motherhood as we ordinarily understand the meaning of “health.”

If we consider the circumstances of pregnant women in Louisiana, we can better understand the different conceptions of women’s health circulating in the legislative debate. Evaluating the public health data provides perspective on statements about women’s health and safety expressed by supporters and opponents of Louisiana’s admitting privilege law and sheds light on the values, priorities, and policy choices of a state that AUL long deemed the most pro-life in the nation.<sup>217</sup>

The United States has the highest rate of maternal deaths in the developed world, and the rate of pregnancy-related death is especially acute among black women.<sup>218</sup> And, five years after passage of its admitting privileges law, Louisiana’s maternal mortality rate is among the highest in the nation.<sup>219</sup>

<sup>216</sup> See *supra* text accompanying notes 191–202.

<sup>217</sup> See, e.g., *Louisiana Ranked No.1 Pro-Life State*, LOUISIANA RIGHT TO LIFE (Jan. 23, 2020), <https://prolifelouisiana.org/louisiana-ranked-no-1-pro-life-state>; *Louisiana Number One: Americans United for Life Releases Life List 2020*, AMERICANS UNITED FOR LIFE (Jan 23, 2020), <https://aul.org/2020/01/23/louisiana-number-one-americans-united-for-life-releases-life-list-2020>.

<sup>218</sup> Nina Martin & Renee Montagne, *U.S. Has the Worst Rate of Maternal Deaths in the Developed World*, NPR (May 17, 2017, 10:28 AM), <https://www.npr.org/2017/05/12/528098789/u-s-has-the-worst-rate-of-maternal-deaths-in-the-developed-world> (reporting that the rate is rising in the U.S. as it declines elsewhere and observing that, in the U.S., funding is targeted at saving infants rather than focusing on the health of pregnant and post-partem women); see also Nicholas J. Kassebaum et al., *Global, Regional, and National Levels of Maternal Mortality, 1990–2015: A Systematic Analysis for the Global Burden of Disease Study 2015*, 388 LANCET 1775 (2016) (showing increasing maternal mortality in the US compared to similar countries); Pooja Mehta et al., *Racial Inequities in Preventable Pregnancy-Related Deaths in Louisiana, 2011–2016*, 135 OBSTETRICS & GYNECOLOGY 276, 277, 279 (2020) (“Non-Hispanic black women are three to four times as likely as non-Hispanic white women to experience a pregnancy-related death nationally.”). Khiara Bridges has recently reviewed the literature on the sources of racial disparities in maternal mortality. See Khiara M. Bridges, *Racial Disparities in Maternal Mortality*, 95 N.Y.U. L. REV. 1229, 1248–67 (2020).

<sup>219</sup> See Laura Ungar & Caroline Simon, *Which States Have the Worst Maternal Mortality?*, USA TODAY (Nov. 1, 2018), <https://www.usatoday.com/list/news/investigations/maternal-mortality-by-state/7b62a48-0b79-40c2-a44d-8111879a8336> (ranking Louisiana first out of forty-six states with available data); Emily Woodruff, *What Contributes to Louisiana’s High Maternal Mortality Rate? The Distance to Care, Research Says*, NOLA.COM (Oct. 20, 2020, 10:45 PM), [https://www.nola.com/news/healthcare\\_hospitals/article\\_c3cf355e-131f-11eb-851a-6b04dbf7e8d0.html](https://www.nola.com/news/healthcare_hospitals/article_c3cf355e-131f-11eb-851a-6b04dbf7e8d0.html) (“Louisiana has among the highest rate of death for pregnant women in the U.S.”). But see Marian F. MacDorman & Eugene Declercq, *The Failure of United States Maternal Mortality Reporting and Its Impact on Women’s Lives*, 45 BIRTH 105 (2018) (reporting that because of inconsistencies in reporting and coding state data, the United States has only intermittently published data on

These health outcomes are not simply the expression of poverty. They are the expression of policy. A recent study identified as an important cause of Louisiana's high maternal mortality the absence of prenatal care in the state.<sup>220</sup> Over a third of the state's parishes lack "a hospital offering obstetric care, a birth center or any OB/GYNs or certified nurse-midwives."<sup>221</sup> More than one in four women in the state need to travel out of their parish for routine appointments, and they may not have the money, the ability to miss work, and the resources to secure child care. According to the study's findings, "women in these 'maternity care deserts' had a threefold higher risk for deaths directly related to the pregnancy, such as severe bleeding or preeclampsia, a dangerous complication involving high blood pressure."<sup>222</sup> The risk for pregnancy-associated deaths (deaths of any cause—such as homicide or suicide—up to a year after pregnancy) was dramatically higher as well.<sup>223</sup>

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maternal mortality, and, citing Texas as an example, observing that this failure to report has allowed escalations in maternal mortality to go unnoticed and unremedied); Nina Martin, *Lost Mothers: The New U.S. Maternal Mortality Rate Fails to Capture Many Deaths*, PROPUBLICA (Feb. 13, 2020, 12:40 PM), <https://www.propublica.org/article/the-new-us-maternal-mortality-rate-fails-to-capture-many-deaths>.

<sup>220</sup> Low Medicaid reimbursement rates aggravate shortages, with the impact falling on the poorest, who are unable to find coverage for which they may be eligible, or unable to access a doctor until late in pregnancy. On the ways that low Medicaid reimbursement rates aggravate shortages, see Pear, *supra* note 200; and Elizabeth Renter, *You've Got Medicaid – Why Can't You See the Doctor?*, U.S. NEWS & WORLD REP. (May 26, 2015, 9:00 AM), <https://health.usnews.com/health-news/health-insurance/articles/2015/05/26/youve-got-medicaid-why-cant-you-see-the-doctor>. See also Karen N. Brown, *How Is OB/GYN Medicaid Reimbursement Impacting the Shortage of Doctors?*, VOLUSON CLUB: EMPOWERED WOMEN'S HEALTH (Jan. 17, 2019), <https://www.volusonclub.net/empowered-womens-health/how-is-ob-gyn-medicaid-reimbursement-impacting-the-shortage-of-doctors> (reporting that "about 31 percent of physicians do not accept Medicaid, largely because its reimbursement is the lowest of all third-party payers. Many patients who have Medicaid have trouble finding a doctor and, therefore, wait longer to see one—which means that they are likely to need more care by the time of their appointment").

On the ways that Medicaid administration and lack of insurance affect pregnant women, see Julia Belluz & Nina Martin, *The Extraordinary Danger of Being Pregnant and Uninsured in Texas*, VOX (Dec. 19, 2019, 10:08 AM), <http://www.vox.com/science-and-health/2019/12/6/20995227/women-health-care-maternal-mortality-insurance-texas> (describing, in a state that refused the Medicaid expansion, the large numbers of uninsured women as well as the brief and late Medicaid coverage provided pregnant women and relating the consequences of these health care deprivations in maternal and infant illness and death).

<sup>221</sup> Woodruff, *supra* note 219; see also Maeve Wallace et al., *Maternity Care Deserts and Pregnancy-Associated Mortality in Louisiana*, WOMEN'S HEALTH ISSUES (Sept. 8, 2020); Elizabeth Dawes Gay, *The Challenges and Solutions to Accessing Maternity Care in Louisiana*, EVERY MOTHER COUNTS (Nov. 30, 2017), <https://blog.everymothercounts.org/why-louisiana-494cf0b487fc> ("Almost half of Louisiana's counties do not have a single Ob/Gyn.").

<sup>222</sup> Woodruff, *supra* note 219.

<sup>223</sup> *Id.*

Women of color in Louisiana bear the brunt of the state's policy choices. At a time when Louisiana (repeatedly) decided to restrict access to abortion without significantly improving women's access to healthcare or to sex education, the "rate of pregnancy-related death among non-Hispanic black women was 4.1 times the rate among non-Hispanic white women," and "among non-Hispanic black women who experienced pregnancy-related death, 59% . . . of deaths were deemed potentially preventable, compared with 9% . . . among non-Hispanic white women."<sup>224</sup>

It should go without saying that these policy investments harm infants. The Department of Health and Human Services found that newborns whose mothers had no prenatal care are almost five times more likely to die than babies born to mothers who had early prenatal care.<sup>225</sup> In 2013, the year the state refused to expand Medicaid, the state ranked among the worst in infant health, one survey finding that "Louisiana performs worse than nearly every other state in the nation on measures of infant mortality, preterm birth, low birth weight, and caesarian sections."<sup>226</sup> Today, the Centers for Disease Control reports that Louisiana has the second highest infant mortality rate in the nation.<sup>227</sup>

Louisiana's decision to enact its admitting privileges law, obstructing women's access to abortion without making significant changes in the state's provision of Medicaid or sex education, compromised women's autonomy and women's health. The decision to enact the admitting privilege statute was not a benign expression of pro-life sentiment. It was an expression of antiabortion animus concerning women as well

<sup>224</sup> Mehta et al., *supra* note 218, at 276.

<sup>225</sup> See OFFICE ON WOMEN'S HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., *Prenatal Care Fact Sheet*, <https://www.womenshealth.gov/a-z-topics/prenatal-care> (last updated Apr. 1, 2019) ("Babies of mothers who do not get prenatal care are three times more likely to have a low birth weight and five times more likely to die than those born to mothers who do get care.").

<sup>226</sup> Vida Foubister, *Case Study: Louisiana's Poor Rankings Make Improving Birth Outcomes a State Imperative*, COMMONWEALTH FUND (Mar. 2013), <https://www.commonwealthfund.org/publications/newsletter-article/case-study-louisianas-poor-rankings-make-improving-birth-outcomes>.

<sup>227</sup> In 2014, when Act 620 was passed, Louisiana was tied for 4th in infant mortality. See *Linked Birth / Infant Death Records, 2007–2018 Results*, CTRS. FOR DISEASE CONTROL & PREVENTION, <https://wonder.cdc.gov/controller/saved/D69/D96F850> (Nov. 30, 2020) (filtered set). By 2018, Louisiana had the 2nd-worst infant mortality rate in the country. See *Linked Birth / Infant Death Records, 2007–2018 Results*, *supra*.

as the unborn that threatened the lives and health of women and the children they might bear.

### III. “PRO-WOMAN,” HEALTH-JUSTIFIED RESTRICTIONS ON ABORTION IN THE COURTS

Expanding the frame to consider *June Medical* in its larger historical and policy context brings into view the constitutional, political, and human stakes of the doctrinal dispute in the case. Expanding the frame explains why, in concurring, Chief Justice Roberts picked a seemingly technical fight over “balancing.”<sup>228</sup> He was attacking judges who scrutinized the underlying logic of admitting privileges restrictions on abortion—assuming a stance toward the record not wholly unlike the committee chair who dismissed the testimony of opposition witnesses.

Integrating the accounts of *June Medical* in Parts I and II of this Article enables us to appreciate the role judges are playing in the political conflicts we have just examined. At the same time, the examination of doctrine serves the ordinary function of identifying forms of argument on which participants are drawing in the fight over revising and reversing *Casey*. The exercise identifies resources on which willing judges can still draw to scrutinize TRAP laws in the wake of *June Medical* and identifies the next points of conflict for judges seeking to legitimate TRAP laws.

It is no secret that conservative judges are weakening constitutional protections for the abortion right. At times, they shout out opposition to the right *Roe* recognized.<sup>229</sup> But where woman-protective abortion restrictions are concerned, judges often play another less appreciated role.

As opponents of abortion have come to package restrictions on abortion as protections for women, judges who oppose the abortion right embrace standards that insulate these legislative constructions from judicial scrutiny. In this role, judges are not shouting out moral, political, or jurisprudential opposition to the abortion right; they invoke a judge’s commitment to democracy to enable a movement

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<sup>228</sup> See *supra* Part I.

<sup>229</sup> Justice Clarence Thomas has reiterated that he “remain[s] fundamentally opposed to the Court’s abortion jurisprudence.” *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2324 (2016) (Thomas, J., dissenting).

strategy that, as we have seen, in design and implementation avoids forthrightness about its aims.

Leaders of the antiabortion movement have adopted strategies to end abortion incrementally through TRAP laws that legislatures present as health and safety laws protecting women. Judges who make law requiring deference to legislatures not only uphold these restrictions; they insulate them from scrutiny, credit their woman-protective aims and justifications—and declare these modes of reasoning about and regulating women constitutional.<sup>230</sup>

It is a remarkable project for judges, whose logic seems more political than ethical or jurisprudential. Judges have voiced ethical and jurisprudential objections to *Roe* since the dissents in that case.<sup>231</sup> But more is involved if a judge acts on those objections by upholding abortion restrictions that push resisting women into childbearing for the announced reason of protecting women. It is one thing to reverse *Roe* and *Casey*; it is another to pursue that aim through forms of rational basis review that elude the public's grasp. What view of women, or democracy, does this reflect? These judicial moves invite a different ethical and constitutional dialogue.

Judges reviewing TRAP laws are reviewing laws that depend on indirection. Legislatures interested in restricting abortion can enact directive counseling mandates or reason-based bans on abortion, but these efforts to dissuade and to discredit do not prevent as many abortions as a woman-protective health and safety regulation of providers can. Yet as Part II suggests, enacting these laws requires obscuring their fetal-protective and abortion-restrictive aims for reasons that are political as well as legal. The incrementalist strategy seeks to decimate the remaining clinic infrastructure without triggering backlash from a public that expects at least nominal consideration of

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<sup>230</sup> Cf. *Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) (“A military commander may overstep the bounds of constitutionality, and it is an incident. But if we review and approve, that passing incident becomes the doctrine of the Constitution. There it has a generative power of its own, and all that it creates will be in its own image. Nothing better illustrates this danger than does the Court’s opinion in this case.”).

<sup>231</sup> Justice Rehnquist asserted that the Court should have applied rational basis review and objected that the decision revived *Lochner*. See *Roe v. Wade*, 410 U.S. 113, 173–74 (1973) (Rehnquist, J., dissenting) (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483, 491 (1955) and *Lochner v. New York*, 198 U.S. 45 (1905)). Justice White, joined by Justice Rehnquist, raised concerns about protecting unborn life and expressed contempt for women who seek abortions: “During the period prior to the time the fetus becomes viable, the Constitution of the United States values the convenience, whim, or caprice of the pregnant woman more than the life or potential life of the fetus.” *Id.* at 221 (White, J., dissenting).

women's interests and that, by large majorities, opposes overruling *Roe* and banning abortion. In 2019, a Pew poll reported that 70 percent of Americans oppose overturning *Roe v. Wade* and 61 percent believe abortion should be legal in all or most cases.<sup>232</sup>

Does an appreciation of these political constraints inform the reasoning of judges as well as advocates and legislators? Conservative scholars mercilessly criticized Chief Justice Roberts for engaging in political calculations in *June Medical* and elsewhere; in their view, his tendency to let political calculations shape his judgments sets him apart from judges they view as principled conservatives.<sup>233</sup> At the end of a Term Josh Blackman called “Blue June,”<sup>234</sup> Varad Mehta and Adrian Vermeule reported that “[c]onservatives . . . thought Roberts’s invocation of precedent [in *June Medical*] was desperately unconvincing and served only to rationalize what appears to be a fear of signing on to more sweeping, and therefore more controversial, pro-life rulings.”<sup>235</sup> Mehta and Vermeule blamed the Chief Justice for “the very politicization of the Supreme Court he sought to prevent” and concluded “Republicans’ determination to install Barrett on the Supreme Court a week before a presidential election can be seen as a sign of conservatives’ distrust of the chief justice . . . a political gambit designed to thwart a master of political gamesmanship.”<sup>236</sup>

But is Chief Justice Roberts acting more politically than the conservative judges who would uphold woman-protective health-justified abortion restrictions on rational basis review? Once we read the doctrinal debate in *June Medical* as part of the story of woman-protective health-justified abortion restrictions this article recounts, we can better

<sup>232</sup> See U.S. Public Continues to Favor Legal Abortion, Oppose Overturning *Roe v. Wade*, PEW RES. CTR. (Aug. 29, 2019), <https://www.pewresearch.org/politics/2019/08/29/u-s-public-continues-to-favor-legal-abortion-oppose-overturning-roe-v-wade>.

<sup>233</sup> Josh Blackman, *Chief Justice Roberts Has Fallen into a “Truly Bottomless Pit from Which There Is Simply No Extracting [Himself]”*, REASON: VOLOKH CONSPIRACY (Dec. 17, 2020, 6:24 PM), [https://reason.com/volokh/2020/12/17/chief-justice-roberts-has-fallen-into-a-truly-bottomless-pit-from-which-there-is-simply-no-extracting-itself/?amp&\\_\\_twitter\\_impression=true](https://reason.com/volokh/2020/12/17/chief-justice-roberts-has-fallen-into-a-truly-bottomless-pit-from-which-there-is-simply-no-extracting-itself/?amp&__twitter_impression=true) (“For Roberts, every decision has to [be] refracted through some bizarre political lens. His jurisprudential lodestar is the Gallup poll.”).

<sup>234</sup> Josh Blackman, *The Ten Phases of Blue June*, REASON: VOLOKH CONSPIRACY (July 2, 2020, 7:30 AM), <https://reason.com/volokh/2020/07/02/the-ten-phases-of-blue-june>.

<sup>235</sup> Varad Mehta & Adrian Vermeule, *John Roberts’s Self-Defeating Attempt to Make the Court Appear Nonpolitical*, WASH. POST (Dec. 17, 2020, 2:25 PM), [https://www.washingtonpost.com/outlook/john-roberts-self-defeating-attempt-to-make-the-court-appear-nonpolitical/2020/12/17/d3d1df5a-3fd5-11eb-9453-fc36ba051781\\_story.html](https://www.washingtonpost.com/outlook/john-roberts-self-defeating-attempt-to-make-the-court-appear-nonpolitical/2020/12/17/d3d1df5a-3fd5-11eb-9453-fc36ba051781_story.html).

<sup>236</sup> *Id.*

appreciate the interlocking roles that advocates, officials, and judges have played in decimating abortion access over the years.

At the time the Court was to hear *June Medical*, there were six states with only one remaining abortion clinic.<sup>237</sup> With enforcement of its admitting privileges law, Louisiana would have joined their ranks, or, as a CBS News story announced, “Louisiana could become the first state not to have legal abortion access since the practice was legalized in 1973.”<sup>238</sup> CBS reported that “the author of the law, Representative Katrina Jackson, denied the requirement was intended to shut down abortion access and called the regulation ‘common-sense women’s health care.’”<sup>239</sup>

Given the history of Louisiana’s admitting privileges law we have considered, what kind of an answer is this? Is a judge considering a constitutional challenge to the law obliged to answer this question any differently than its legislative sponsor did? Observe that the Supreme Court nearly validated Representative Jackson’s account of the admitting privileges law. In *June Medical*, four of the Court’s conservative justices—including Justice Gorsuch, whom President Trump appointed to replace Justice Scalia, and Justice Kavanaugh, whom President Trump appointed to replace Justice Kennedy—voted to allow Louisiana to enforce the admitting privileges law to protect women’s health and safety. Without Justice Kennedy, the last remaining justice who participated in *Casey* and who voted to strike down the Texas admitting privileges law in *Whole Woman’s Health*, the Supreme Court, reshaped by President Trump’s appointments, was poised to uphold Louisiana’s admitting privileges law as a health and safety law adopted for women’s benefit.

But with the approach of the 2020 election, in which debate over President Trump’s judicial appointments and the decisions of the Court figured,<sup>240</sup> Chief Justice Roberts acted to protect the Court,

<sup>237</sup> Holly Dan, *These 6 States Have Only 1 Abortion Clinic Left. Missouri Could Become the First with Zero*, CNN (June 21, 2019, 12:48 PM), <https://www.cnn.com/2019/05/29/health/six-states-with-1-abortion-clinic-map-trnd/index.html>.

<sup>238</sup> Kate Smith, *Louisiana Could Become the First State Without Abortion Access as Soon as Next Year*, CBS NEWS (Oct. 18, 2019, 7:01 AM), <https://www.cbsnews.com/news/louisiana-abortion-case-supreme-court-state-could-become-first-without-abortion-access-next-year-2019-10-18>.

<sup>239</sup> *Id.* Before a conservative audience, Dorinda Bordlee predicted that a ruling on third-party standing could block eighty percent of abortion cases. See EWTN, *supra* note 181.

<sup>240</sup> See *supra* text accompanying notes 5–6 (reporting on argument about Supreme Court decisions and judicial appointments during the Vice-Presidential debate on the eve of the 2020 election); Mehta & Vermeule, *supra* note 235 (“Recently, as Democrats threatened to

institutionally and politically. Asserting that *stare decisis* required the Court to treat like cases alike, Roberts crossed over to vote with the four justices from the *Whole Woman's Health* majority in a concurring opinion in which he repeated some, but not all, of the objections asserted by the conservative justices who dissented in *Whole Woman's Health* and *June Medical*.<sup>241</sup> The “maneuver” avoided openly reversing *Whole Woman's Health* while voicing objections to the standard the Court adopted in that case, inviting lower courts discretely to narrow constitutional protections for the abortion right without outright overturning them.<sup>242</sup>

In what follows, I integrate the doctrinal dispute in *Whole Woman's Health* and *June Medical* into the history of TRAP laws we have just examined. Analyzed from this vantage point, we can see that conservative judges attacking balancing are embracing standards that will legitimate the woman-protective health justifications of TRAP laws and weaken the restrictions that *Casey* imposes on them. The standards conservative judges embrace do not preserve the distinction between law and politics;<sup>243</sup> they empower antiabortion advocates, validating their claim that TRAP laws protect women and eroding constitutional protections for the abortion right.

I take as a focal point of this discussion the concurring opinion of Chief Justice Roberts in *June Medical*. On the best view of the law, because Chief Justice Roberts' concurring opinion in *June Medical* diverged so greatly from the plurality, it did not modify *Whole Woman's Health*.<sup>244</sup> Yet there is keen interest in Chief Justice Roberts' opinion

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pack the court if Judge Amy Coney Barrett were confirmed, left-leaning commentators urged Roberts to tack in their direction to ‘save’ the institution.”).

<sup>241</sup> See *infra* Section III.B.

<sup>242</sup> See Mehta & Vermuele, *supra* note 235 (noting that “observers on both left and right have concluded that Roberts has engaged in strategic maneuvering: His goal appears to be to preserve what he takes to be the legitimacy of the Supreme Court, by disproving any suspicion that the justices vote ideologically or otherwise engage in political behavior” and calling out his decision in *June Medical* as avoiding “more sweeping, and therefore more controversial, pro-life rulings”).

<sup>243</sup> See *supra* text accompanying note 57 (quoting Chief Justice Roberts in *June Medical*).

<sup>244</sup> In *Marks v. United States*, the Court reasoned that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . . .’” 430 U.S. 188, 193 (1977) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell, and Stevens, JJ)). As expounded by an en banc panel of the D.C. Circuit, “the narrowest opinion must represent a common denominator of the Court’s reasoning; it must embody a position implicitly approved by at least five Justices who support the judgment.” *King v. Palmer*, 950 F.2d 771, 781 (D.C.

precisely because it signals the direction of a Court whose views are expected to evolve with its membership.

By reading the doctrinal debate in *Whole Woman's Health* and *June Medical* in light of the political history of the TRAP laws we have examined, we can better understand the path along which Chief Justice Roberts would incrementally move the law. The exercise shows the role judges play in constraining or enabling TRAP laws, and it allows us to inventory the constitutional limitations that remain on TRAP laws.

Once we decipher the path Chief Justice Roberts chose in *June Medical*, we can see that even if courts read his concurring opinion as changing the law, a willing judge *still* has authority and doctrinal resources to scrutinize TRAP laws.<sup>245</sup> Mapping the law in this way in turn identifies how the Supreme Court might next move to insulate TRAP laws from these forms of judicial scrutiny.

In short, reconstructing the debate over *Casey* that led to *June Medical* helps us understand not only the past but the future. It identifies choices that any judge—including Justice Barrett—unavoidably confronts in reviewing TRAP laws and other woman-protective abortion restrictions.<sup>246</sup>

#### A. THE TRAP STRATEGY AND THE JUDICIAL ROLE

In *June Medical*, Chief Justice Roberts argued that *Whole Woman's Health* was faithless to *Casey* because it directed judges to enforce the undue burden standard through a balancing test. He made this point

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Cir. 1991) (en banc). See also *United States v. Epps*, 707 F.3d 337, 348 (D.C. Cir. 2013) (accord). In *June Medical*, members of the plurality did not support Chief Justice Roberts's dicta, including the Chief Justice's criticism of the balancing test. If there is a "common denominator" to be found between the *June Medical* plurality and Chief Justice Roberts's concurrence, it is that the "five justices who support the judgment" support adherence to *Whole Woman's Health*. See *June Med. Servs. v. Russo*, 140 S. Ct. 2103, 2133 (2020) (Roberts, C.J., concurring) ("The question today however is not whether *Whole Woman's Health* was right or wrong, but whether to adhere to it in deciding the present case."). See also *Ramos v. Louisiana*, 140 S. Ct. 1390, 1402 (2020) (rejecting the "new and dubious proposition" of a single Justice overturning prior precedent as "not the rule . . . for good reason" and noting this potential practice "would do more to destabilize than honor precedent"). For other approaches under *Marks* to read a fractured opinion like *June Medical*, see *infra* note 302 (discussing case law interpreting *June Medical*); see also Ryan C. Williams, *Questioning Marks: Plurality Decisions and Precedential Constraint*, 69 STAN. L. REV. 795, 806–07 (2017).

<sup>245</sup> See *infra* text accompanying notes 304–08.

<sup>246</sup> See *infra* Section III.C.

by invoking Justice Scalia's attack on balancing tests as endowing judges with discretion that rules, supposedly, do not.<sup>247</sup>

Of course, it is odd to object to balancing because it introduces discretion into a judge's determination of an "undue burden." But the appeal to Scalia clarifies the nature of the objection. Justice Scalia did not author *Casey*; he ferociously dissented from it.<sup>248</sup> Chief Justice Roberts also attacked balancing by invoking the "mysteries of life" passage in *Casey* that Justice Scalia famously mocked in his *Casey* and in *Lawrence v. Texas* dissents.<sup>249</sup> These signals at the very least suggest Chief Justice Roberts was establishing authority with those who revere the memory of Justice Scalia. They do not portend an altogether even-handed account of *Casey*.

We can get another perspective on the question whether balancing is faithless to *Casey* by consulting Justice Kennedy. Justice Kennedy, who coauthored *Casey*'s joint opinion, explained in *Gonzales v. Carhart*,<sup>250</sup> an opinion restricting abortion access, that *balancing was central to Casey's core holding* and the undue burden test that enforced it:

Before viability, a State "may not prohibit any woman from making the ultimate decision to terminate her pregnancy." It also may not impose upon this right an undue burden, which exists if a regulation's "purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion

<sup>247</sup> See *June Medical*, 140 S. Ct. 2103, 2135–56 (2020) (Roberts, C.J., concurring) ("Under such tests, 'equality of treatment is . . . impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.'") (quoting Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1182 (1989)).

<sup>248</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part) (arguing that the question is "not whether the power of a woman to abort her unborn child is a 'liberty' in the absolute sense. . . . The issue is whether it is a liberty protected by the Constitution of the United States. I am sure it is not."). When Justice Scalia balanced, for example, in limiting application of Second Amendment rights, he never drew attention to it. Compare *Dist. of Columbia v. Heller*, 554 U.S. 570, 634 ("We know of no other enumerated constitutional right whose core protection has been subjected to a freestanding 'interest-balancing' approach.") with *id.* at 628–33 (limiting Second Amendment rights in favor of the state's interest in regulating arms in a variety of settings).

<sup>249</sup> See *supra* text accompanying note 57 (quoting Chief Justice Roberts's opinion). For Justice Scalia's attack on Justice Kennedy's reasoning in *Casey*, see *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 980 (1992) (Scalia, J., concurring in part and dissenting in part); and *Lawrence v. Texas*, 539 U.S. 558, 588 (2003) (Scalia J., dissenting), which attacks "the dictum of [*Casey*'s] famed sweet-mystery-of-life passage" as "the passage that ate the rule of law." The Scalia attack is notorious amongst conservatives. See, e.g., Joe Carter & Collin Hansen, *Anthony Kennedy's 'Sweet Mystery of Life' and the Self's Impossible Demands*, GOSPEL COALITION COUNCIL (June 29, 2018), <https://www.thegospelcoalition.org/article/anthony-kennedys-sweet-mystery-life-self-impossible-demands>.

<sup>250</sup> *Gonzales v. Carhart*, 550 U.S. 124 (2007).

before the fetus attains viability.” On the other hand, “[r]egulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman’s exercise of the right to choose.” *Casey*, in short, struck a balance. The balance was central to its holding.<sup>251</sup>

As this passage explains, *Casey* balances when it coordinates a woman’s right to choose with the state’s interest in protecting unborn life through the principle the undue burden standard vindicates: that, prior to viability, government may only protect potential life by informing, not hindering, a woman’s choice.<sup>252</sup> This same concern about obstructing women’s choices explains *Casey*’s holding that “[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”<sup>253</sup> Because balancing is central to *Casey*’s logic, balancing is required—and expressly built into—the standards the joint opinion directed judges to enforce. How would a judge determine whether health regulations are “unnecessary” or impose an “undue burden” without making judgments about weighing, comparing, or balancing of the kind Chief Justice Roberts attacked?

In short, by invoking Justice Scalia, who dissented in *Casey*, to attack “balancing” as unfaithful to *Casey*, Chief Justice Roberts was signaling positions in a fight over enforcing *Casey* that, as we will see, divided the Court in *Whole Woman’s Health*—a case in which Chief Justice Roberts himself dissented.

If we look back to the first cases evaluating admitting privileges laws, we can see how judges fighting over *Casey*’s application to TRAP laws came to focus on the so-called “balancing standard” the Chief Justice attacks as faithless to *Casey*. This brief retrospective on the balancing debate throws into sharp relief competing claims about the judge’s proper role—and inverts the story about law and politics that the Chief Justice tells.

When courts were first called upon to review the constitutionality of laws imposing admitting privilege requirements on abortion providers, they faced a question about whether to call out legislatures as

<sup>251</sup> *Id.* at 146 (quoting *Casey*, 505 U.S. at 877–79).

<sup>252</sup> See *supra* Section II.A.

<sup>253</sup> *Casey*, 505 U.S. at 878.

purposefully imposing obstacles to women's abortion access under the guise of protecting women's health. A purpose to impose a substantial obstacle violates *Casey*'s undue burden standard—and its underlying “inform, not hinder” principle—but were courts prepared to enforce *Casey* by determining whether legislators were hiding an unconstitutional purpose to obstruct women's access to abortion? The balancing standard that Chief Judge Roberts attacked allows judges to draw inferences about whether a legislature was obstructing access to abortion without requiring judges expressly to characterize the government's purposes.

It was Judge Richard Posner who first developed this approach in a case where the government's hostility to abortion was only barely concealed. In preliminarily enjoining Wisconsin's admitting privileges law, Judge Posner pointed out that the state gave doctors one weekend to come into compliance with a law that would have shut down two of the state's four abortion clinics.<sup>254</sup> The state justified the law as protecting women's health, Judge Posner observed, yet the state introduced no evidence in support of this claim, as *Casey* required: “The cases that deal with abortion-related statutes sought to be justified on medical grounds require not only evidence (here lacking as we have seen) that the medical grounds are legitimate but also that the statute not impose an ‘undue burden’ on women seeking abortions. The feebler the medical grounds, the likelier the burden, even if slight, to be ‘undue’ in the sense of disproportionate or gratuitous.”<sup>255</sup>

The comparative standard Posner adopted provided a disciplined way of vindicating *Casey*'s “inform, not hinder” principle without directly accusing the Wisconsin legislature of misrepresenting its aims or concealing an unconstitutional purpose to deprive women of their constitutional rights.

But in a subsequent decision in Wisconsin's admitting privileges case, Judge Posner was a great deal more direct. He never used the term “balance” but repeatedly probed the question whether “the statute would have substantially curtailed the availability of abortion in Wisconsin, without conferring an offsetting benefit (or indeed any benefit) on women's health”<sup>256</sup> and he was blunt in explaining why. In

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<sup>254</sup> *Planned Parenthood of Wis., Inc. v. Van Hollen*, 738 F.3d 786, 789 (7th Cir. 2013).

<sup>255</sup> *Id.* at 798 (citations omitted).

<sup>256</sup> *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 916 (7th Cir. 2015).

a passage of his opinion aimed at the nation and the Supreme Court, Judge Posner called attention to the distinction between legitimate moral opposition to abortion and the covert use of state power to obstruct the exercise of constitutional rights:

A great many Americans, including a number of judges, legislators, governors, and civil servants, are passionately opposed to abortion—as they are entitled to be. But persons who have a sophisticated understanding of the law and of the Supreme Court know that convincing the Court to overrule *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* is a steep uphill fight, and so some of them proceed indirectly, seeking to discourage abortions by making it more difficult for women to obtain them. They may do this in the name of protecting the health of women who have abortions, yet as in this case the specific measures they support may do little or nothing for health, but rather strew impediments to abortion. This is true of the Texas requirement, upheld by the Fifth Circuit in the *Whole Woman's* case now before the Supreme Court. . . .<sup>257</sup>

Emphasizing the Wisconsin legislature's failure to provide the doctors adequate notice, Posner pointed to the legislature singling out abortion as evidence of a hidden purpose:

Opponents of abortion reveal their true objectives when they procure legislation limited to a medical procedure—abortion—that rarely produces a medical emergency. A number of other medical procedures are far more dangerous to the patient than abortion, yet their providers are not required to obtain admitting privileges anywhere, let alone within 30 miles of where the procedure is performed.<sup>258</sup>

The state's principal witness, Dr. John Thorp,<sup>259</sup> submitted a report claiming that abortion was more dangerous than childbirth, which relied on a paper by David Reardon and Priscilla Coleman, which Judge Posner found, failed to control for many relevant factors; Judge Posner credited the study submitted by plaintiff's expert, which concluded "that the risk of death associated with childbirth is 14 times higher than that associated with abortion."<sup>260</sup> Judge Posner emphasized

<sup>257</sup> *Id.* at 920–21.

<sup>258</sup> *Id.* at 920.

<sup>259</sup> Dr. Thorp has repeatedly testified on behalf of admitting privileges laws for AUL, despite judges repeatedly questioning the accuracy and credibility of his testimony. See Imani Gandy, *When Does an Error Become Lie? The Case of the Missing Decimal Point*, REWIRE NEWS GROUP (Apr. 24, 2015, 11:07 AM), <https://rewirenewsgroup.com/article/2015/04/24/error-becomes-lie-missing-decimal-point> (discussing Thorp's pattern of inflating abortion complication rates when acting as an expert witness); see also Burke, *supra* note 132 (quoting Thorp).

<sup>260</sup> *Schimmel*, 806 F.3d at 921–22.

that probing facts and determining credibility was critical to determining the state's purposes.<sup>261</sup>

In addressing the nation and the Court, Posner emphasized the rule-of-law values at stake in the government misrepresenting its “true objectives” for enacting the admitting privileges law: Neither legitimate ethical convictions nor passionate disagreement could justify using state power to surreptitiously and unlawfully deprive others of constitutional rights.<sup>262</sup>

Soon the technique of comparing benefits and burdens Posner introduced was adopted by other judges as an important technique (among many, including the singling-out test<sup>263</sup>) for drawing inferences about purpose in cases challenging admitting privileges statutes and other TRAP laws.<sup>264</sup>

But in 2014, the Fifth Circuit ferociously repudiated this approach in the cases that would become *Whole Woman's Health*. In these cases, the Fifth Circuit worked out the elements of a framework for legitimating TRAP laws and avoiding the rule-of-law questions that Judge Posner raised. Looking back at these decisions, we can identify the doctrinal elements of the framework that Chief Justice Roberts incorporated into, and omitted from, his *June Medical* concurrence.

In reversing a district court finding that the Texas admitting privileges law had no rational relationship to protecting women's health, Judge Edith Jones advanced a radically transformative account of the *Casey-Carhart* framework. Note the critical claims about rational basis and judicial factfinding:

<sup>261</sup> *Id.* (concluding that evidence of the law's benefits was “nonexistent,” since Dr. Thorp “could not substantiate” his claim that the death rate for women who undergo abortions was the same as the maternal mortality rate or cite a single case where admitting privileges would have benefitted a woman who experienced complications from an abortion).

<sup>262</sup> In a fierce dissent, Judge Manion refused to engage with Judge Posner on these grounds and in a lengthy opinion which followed the Fifth Circuit, he insisted that rational basis governed the case and concluded: “There is no question that Wisconsin's admitting-privileges requirement furthers the legitimate, rational basis of protecting women's health and welfare.” *Id.* at 935 (Manion, J., dissenting).

<sup>263</sup> See *supra* text accompanying notes 133–35 (discussing TRAP laws as singling out abortion for burdensome regulation).

<sup>264</sup> See Greenhouse & Siegel, *supra* note 42, at 1460–63 (discussing cases in the Eleventh and Ninth Circuit employing variants of this test). For discussion of other techniques courts have employed to draw inferences about purposes, see Thomas B. Colby, *The Other Half of the Abortion Right*, 20 J. CONST. L. 1043, 1092–100 (2018) (discussing inferences from face of law, comparison with the regulation of similar practices, bad fit between means and ends, foreseeable effects, legislative history and statements of legislators and others involved in the legislative process, historical background and specific sequence of events leading to enactment, departures from normal lawmaking procedures and discriminatory application).

Nothing in the Supreme Court's abortion jurisprudence deviates from the essential attributes of the rational basis test, which affirms a vital principle of democratic self-government. It is not the courts' duty to second guess legislative factfinding, "improve" on, or "cleanse" the legislative process by allowing relitigation of the facts that led to the passage of a law. . . . As the Supreme Court has often stressed, the rational basis test seeks only to determine whether any conceivable rationale exists for an enactment. . . . A law "based on rational speculation unsupported by evidence or empirical data" satisfies rational basis review.<sup>265</sup>

Judge Jones's characterization of the Court's abortion cases as all applying the rational basis test is wildly at odds with Justice Kennedy's own reading of *Casey* in *Carhart* itself.<sup>266</sup> Recall that it was the dissenters in *Casey*, Chief Justice Rehnquist and Justice Scalia, who asserted that the abortion right is an ordinary liberty properly subject to rational basis review of the most deferential kind.<sup>267</sup> Judge Jones then rejected Judge Posner's approach to applying undue burden, attacking his view that it was important for a judge to examine the facts justifying restrictions on abortion: "The first-step in the analysis of an abortion regulation, however, is rational basis review, not empirical basis review."<sup>268</sup>

Judge Jennifer Elrod next built the Fifth Circuit rational basis decision into an attack on Judge Posner's method of conducting the undue burden inquiry.<sup>269</sup> She admonished a district court for examining facts bearing on the question whether a health-justified restriction "would actually improve women's health and safety," and

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<sup>265</sup> *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 748 F.3d 583, 594 (5th Cir. 2014) (citations omitted). In criticizing the trial court's application of rational basis, Judge Jones cited many rational basis decisions but postponed invoking *Lee Optical* until a bit deeper into her analysis, where she sought to refute Judge Posner's singling out analysis. See *id.* at 596 ("States 'may select one phase of one field and apply a remedy there, neglecting the others'" (quoting *Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955))).

<sup>266</sup> See *supra* text accompanying note 251.

<sup>267</sup> *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 966 (1992) (Rehnquist, C.J., dissenting) ("[W]e think that the correct analysis is that set forth by the plurality opinion in *Webster*. A woman's interest in having an abortion is a form of liberty protected by the Due Process Clause, but States may regulate abortion procedures in ways rationally related to a legitimate state interest." (citing *Lee Optical*, 348 U.S. at 491)); *id.* at 981 (Scalia, J., dissenting) ("I will not swell the United States Reports with repetition of what I have said before; and applying the rational basis test, I would uphold the Pennsylvania statute in its entirety.").

<sup>268</sup> *Abbott*, 748 F.3d at 596.

<sup>269</sup> *Whole Woman's Health v. Lakey*, 769 F.3d 285, 304–05 (5th Cir. 2014) (overturning the district-court injunction against the Texas ambulatory surgical center requirement), *vacated in part*, 135 S. Ct. 399 (2014).

announced that “[i]n our circuit we do not balance the wisdom or effectiveness of a law against the burdens the law imposes” and “[u]nder our precedent, we have no authority by which to turn rational basis into strict scrutiny under the guise of the undue burden inquiry.”<sup>270</sup>

As Linda Greenhouse and I observed, the Fifth Circuit at times treated “only the question of whether an abortion restriction serves the interests of women’s health as subject to rational-basis review,” but elsewhere “the circuit makes a broader claim: that the entirety of the undue burden framework is a form of rational-basis review.”<sup>271</sup> Both these claims are in direct conflict with many features of *Casey* and of *Carhart*, including *Casey*’s requirement that “the means chosen by the State to further the interest in potential life must be calculated to inform the woman’s free choice, not hinder it”<sup>272</sup> and *Carhart*’s direction that “[t]he Court retains an independent constitutional duty to review factual findings where constitutional rights are at stake.”<sup>273</sup>

When the challenge to the Texas law reached the Supreme Court, the justices divided between the approaches of the Seventh and Fifth Circuits. By revisiting this divide in *Whole Woman’s Health*, we can better appreciate how Chief Justice Roberts positioned himself in *June Medical*.

Writing for the majority in *Whole Woman’s Health*, Justice Breyer embraced Judge Posner’s approach. Justice Breyer directed judges enforcing *Casey* to compare the benefits and burdens of an abortion restriction, and he directed judges to follow *Carhart* and independently review facts on which the law was premised.<sup>274</sup> His opinion for the majority expressly repudiated the Fifth Circuit’s claim that rational basis of the *Lee Optical* kind was the appropriate standard of review for enforcing a constitutional right.<sup>275</sup> Justice Kennedy joined the majority opinion in full.

<sup>270</sup> *Id.* at 297.

<sup>271</sup> Greenhouse & Siegel, *supra* note 42, at 1466–67 (citations omitted).

<sup>272</sup> *Casey*, 505 U.S. at 877.

<sup>273</sup> *Gonzales v. Carhart*, 550 U.S. 124, 165 (2007). For a full account of the ways that the Fifth Circuit misreads *Casey* and *Carhart*, see Greenhouse & Siegel, *supra* note 42, at 1466–73.

<sup>274</sup> See *supra* text accompanying notes 44–46.

<sup>275</sup> *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292, 2309–10 (2016) (observing Fifth Circuit was “wrong to equate the judicial review applicable to the regulation of a constitutionally protected personal liberty with the less strict review applicable where, for example, economic legislation is at issue” (citing *Williamson v. Lee Optical of Okla.*, 348 U.S. 483, 491 (1955))).

Justice Ginsburg joined the majority, but then, to clarify the stakes of the dispute, she wrote a brief concurring opinion that forthrightly discussed the relationship between the standard directing judges to compare a law's benefits and burdens and the majority's concerns about unconstitutional purpose. In her *Whole Woman's Health* concurrence, Justice Ginsburg repeatedly cited Judge Posner's opinion expressing rule-of-law objections to the surreptitious use of public power to obstruct the exercise of constitutional rights.<sup>276</sup> She observed that the Texas law singled out abortion, a relatively safe procedure, for burdensome regulation not imposed on other more dangerous procedures: "Many medical procedures, including childbirth, are far more dangerous to patients, yet are not subject to ambulatory-surgical-center or hospital admitting-privileges requirements."<sup>277</sup> Reviewing the record, she declared "it is beyond rational belief that H.B. 2 could genuinely protect the health of women, and certain that the law 'would simply make it more difficult for them to obtain abortions.'"<sup>278</sup> The state put the health and safety of poor women at risk,<sup>279</sup> she concluded, quoting Judge Posner's appeal to the nation, and observing "Targeted Regulation of Abortion Providers laws like H.B. 2 that 'do little or nothing for health, but rather strew impediments to abortion,' cannot survive judicial inspection."<sup>280</sup>

Remarkably, none of the Justices who dissented in *Whole Woman's Health* ever acknowledged, much less addressed, Justice Ginsburg's claim that the Texas admitting privileges law was obstructing women's access to abortion. Justice Alito (joined by Chief Justice Roberts and Justice Thomas) focused on claim preclusion, causation, and severability.<sup>281</sup> Justice Thomas then went on in a separate dissent, aligned with the Fifth Circuit, to eviscerate *Casey*'s purpose inquiry, arguing that "the majority's free-form balancing test is contrary to *Casey*"<sup>282</sup> and asserting that "the majority overrules another central aspect of

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<sup>276</sup> *Id.* at 2320–21 (Ginsburg, J., dissenting) (citing four times *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908 (7th Cir. 2015)).

<sup>277</sup> *Id.* at 2320.

<sup>278</sup> *Id.* at 2321 (citing *Schimel*, 806 F.3d at 910).

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* (quoting *Schimel*, 806 F.3d at 921).

<sup>281</sup> *Id.* at 2330 (Alito, J., dissenting).

<sup>282</sup> *Id.* at 2324 (Thomas, J., dissenting).

*Casey* by requiring laws to have more than a rational basis even if they do not substantially impede access to abortion.”<sup>283</sup>

B. CHIEF JUSTICE ROBERTS, RATIONAL BASIS AND THE DRIVE  
TO TAME *CASEY*

Reading the various judicial opinions seeking to uphold TRAP laws and reverse *Roe* and *Casey* through rational basis review helps locate Chief Justice Roberts’ *June Medical* opinion on that path. It shows that Chief Justice Roberts aligned himself with the attack on “balancing” under *Casey* yet held back from embracing the most ambitious of judicial efforts to reverse *Roe/Casey* by extension of rational basis review. In *June Medical*, it was not Chief Justice Roberts, but instead Justice Alito dissenting with Justices Gorsuch, Kavanaugh, and Thomas, who argued that Louisiana’s admitting privileges law should be reviewed under the most deferential rational basis review.

A brief account of Justice Alito’s dissent in *June Medical* clarifies what is distinctive in Chief Justice Roberts’s position and forecasts claims about the Constitution that shifts in the composition of the Court could soon make law.

Speaking for the conservative justices in dissent, Justice Alito attacked balancing and urged “*Whole Woman’s Health* should be overruled insofar as it changed the *Casey* test.”<sup>284</sup> Instead of balancing, the dissent insisted, the true *Casey* test was “whether the challenged Louisiana law places a ‘substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus.’”<sup>285</sup> By selectively quoting *Casey*, it was the dissenters who “changed the *Casey* test,” omitting mention of the purpose prong of the undue burden standard, as well as the “inform, not hinder” principle that the undue burden standard vindicates. These changes in the law would block judicial scrutiny of the health justifications of laws that single out abortion for burdensome regulation. But this was only part of the dissent’s attack on *Casey*.

<sup>283</sup> *Id.* at 2325. Justice Thomas then attacked the tiers of scrutiny as a judicial graft at odds with the original understanding. *Id.* at 2329–30 (“A law either infringes a constitutional right, or not; there is no room for the judiciary to invent tolerable degrees of encroachment.”). In *Whole Woman’s Health* the rational basis claim was also presented to the Court in an amicus brief by written lawyers for AUL and the Bioethics Defense Fund including Denise Burke and Dorinda Bordlee. See Amicus Curiae Brief of More Than 450 Bipartisan and Bicameral State Legislators and Lieutenant Governors in Support of the Respondents and Affirmance of the Fifth Circuit, *Whole Woman’s Health v. Hellerstedt*, 136 S. Ct. 2292 (2016) (No. 15–274).

<sup>284</sup> *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2154 (Alito, J., dissenting).

<sup>285</sup> *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 877 (1992)).

After arguing for a deferential approach to reviewing purpose, the dissent then argued for a deferential approach to reviewing effects. As part of their argument that clinics have no third-party standing, the dissenters suggested that clinics lack standing to invoke even their selective account of the undue burden standard. Once again, Justice Alito reasoned in ways that seem designed to confuse. Justice Alito suggested that “unless an abortion law has an adverse effect on women, there is no reason why the law should face greater constitutional scrutiny than any other measure that burdens a regulated entity in the name of health or safety.”<sup>286</sup> Justice Alito then misdescribed an exchange in oral argument in order to hypothesize a case of a TRAP law with no burden on women<sup>287</sup> and began to discuss Louisiana’s admitting privileges law as a garden-variety safety measure, emphasizing that many laws “justified as safety measures rest on debatable empirical grounds” and are subject to rational basis review of the kind employed in *Williamson v. Lee Optical*.<sup>288</sup>

In the fight over abortion rights, a judge’s appeal to *Lee Optical* seeks *Roe*’s overruling; a judge’s citation to the rational basis test recalls Chief Justice Rehnquist’s dissents in *Roe*<sup>289</sup> and, joined by Justice Scalia, in *Casey*.<sup>290</sup> In calling for *Lee Optical*-style rational basis review, the *June Medical* dissenters were relitigating the Court’s decision in *Whole Woman’s Health*. The Supreme Court explicitly rejected this rational basis–*Lee Optical* reading of *Casey* when it reversed the Fifth Circuit in *Whole Woman’s Health*.<sup>291</sup>

With this account of the dissent in *June Medical*, we can better appreciate how Chief Justice Roberts positioned himself in the case. We can begin by observing that the Chief Justice did not attack the passage in *Whole Woman’s Health* that explicitly rejected rational basis as the standard for reviewing laws restricting abortion. Given the

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<sup>286</sup> *Id.*

<sup>287</sup> Compare *id.* with Transcript of Oral Argument at 18–19, *June Medical*, 140 S. Ct. 2103 (2020) (No. 18–1323) (transcribing an interaction in which Justice Kavanaugh asks Julie Rikelman about a law that neither benefits nor burdens abortion access and she responds that the hypothetical “may pose a much harder question than this case,” where “the district court . . . found that the burdens of this law would be severe”).

<sup>288</sup> *June Med. Servs.*, 140 S. Ct. at 2154 (Alito, J., dissenting) (citing *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955)).

<sup>289</sup> See *supra* note 231.

<sup>290</sup> See *supra* note 267.

<sup>291</sup> See *supra* note 275 and accompanying text.

citation practices of the most hostile judges, it is also noteworthy that in *June Medical*, Chief Justice Roberts did not invoke *Williamson v. Lee Optical*-style rational basis review, mandating deference to legislation if a judge can surmise any reason for it.

That said, the Chief Justice did offer resources to judges interested in weakening the *Casey* framework. In *June Medical*, the Chief Justice concluded his summary of *Casey* by quoting “reasonably related” language from the joint opinion: “Laws that do not pose a substantial obstacle to abortion access are permissible, so long as they are ‘reasonably related’ to a legitimate state interest.”<sup>292</sup> This summary of *Casey* somewhat resembled the diluted *Casey* standard the *June Medical* dissenters proposed.<sup>293</sup> Like the dissenters, the Chief Justice selectively quoted *Casey* to legitimate judicial deference to the health justifications of TRAP laws.

Readers interested in the Chief Justice’s practice of stare decisis (or the making of sausage) should compare his two-word quotation of *Casey* to the full sentence in its surrounding context. In *Casey*, the joint opinion held: “Unless it has that effect [*i.e.* imposing a substantial obstacle] on her right of choice, a state measure designed to persuade her to choose childbirth over abortion will be upheld if reasonably related to that goal.”<sup>294</sup> The “goal” or “legitimate state interest” (Chief Justice Roberts’s term) to which the state measure must be “reasonably related” is “persuad[ing] a pregnant woman to choose childbirth over abortion.” In short, the language of “reasonably related” in the joint opinion does not mandate *Lee Optical*-style rational basis review of health-justified restrictions on abortion. The very page Chief Justice Roberts quoted ends in the observation: “Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.”<sup>295</sup>

The Chief Justice again employed language out of context when he quoted *Carhart* to attack balancing as interference with the law-making process:

Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts. On the contrary, we have

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<sup>292</sup> *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 878 (1992)).

<sup>293</sup> See *supra* text accompanying note 285.

<sup>294</sup> *Casey*, 505 U.S. at 878.

<sup>295</sup> *Id.*

explained that the “traditional rule” that “state and federal legislatures [have] wide discretion to pass legislation in areas where there is medical and scientific uncertainty” is “consistent with *Casey*.”<sup>296</sup>

In this passage the Chief Justice quoted *Carhart* without explaining that the “medical and scientific uncertainty” to which Justice Kennedy referred in *Carhart* was established through independent fact-finding by two courts.<sup>297</sup>

That said, in *June Medical* the Chief Justice did rely extensively on the findings of the district court. In relying on the facts found by the trial court, the Chief Justice was sending a message about the value of judicial fact-finding, and he went out of his way to criticize the dissenting Justices for failing to respect the valuable fact-finding capacities of trial courts: “Clear error review follows from a candid appraisal of the comparative advantages of trial courts and appellate courts.”<sup>298</sup>

Taking all the pieces together, what does this contextualization of Chief Justice Roberts’s concurring opinion reveal? The Roberts opinion reasoned about *Casey* without ever mentioning the “inform, not hinder” principle guiding the undue burden test. In that respect, the Roberts opinion embarked on revising *Casey*’s undue burden test by disconnecting the standard from the principled statement of the constitutional values the standard was designed to serve.

A judge or Justice who is seeking to uphold TRAP laws would find resources to do so in the Chief Justice’s opinion. Little more than a month after the Court handed down *June Medical*, the Sixth Circuit reviewing a TRAP law requiring abortion providers to have “transfer agreements” with a local hospital decided that the Chief Justice’s concurrence constituted *June Medical*’s holding under *Marks v. United States*<sup>299</sup> and so provided the governing standard to follow.<sup>300</sup>

<sup>296</sup> *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)).

<sup>297</sup> As Linda Greenhouse and I observed: “The medical uncertainty of which the Court spoke in *Carhart* was anchored in the factfinding of the two district courts whose judgments were on review,” while by contrast in the Texas litigation, the Fifth Circuit “finds uncertainty by rejecting the factfinding of the district court.” Greenhouse & Siegel, *supra* note 42, at 1468.

<sup>298</sup> *June Med. Servs.*, 140 S. Ct. at 2141 (Roberts, C.J., concurring) (“While we review transcripts for a living, they listen to witnesses for a living. While we largely read briefs for a living, they largely assess the credibility of parties and witnesses for a living.” (quoting Taglieri v. Monasky, 907 F.3d 404, 408 (6th Cir. 2018) (en banc))).

<sup>299</sup> 430 U.S. at 193.

<sup>300</sup> *EMW Women’s Surg. Ctr. v. Friedlander*, 978 F.3d 418, 433 (6th Cir. 2020).

The Sixth Circuit then read Chief Justice's concurring opinion as an invitation to reverse the trial court for following the balancing standard of *Whole Woman's Health*; and, relying on the passages of *Casey* and *Carhart* that the Chief Justice had quoted without discussion of their context, the Sixth Circuit then read the Chief Justice's opinion in *June Medical* as mandating the highly deferential rational basis review of *Williamson v. Lee Optical*, citing the same rational basis case that the dissenters in *Roe*, *Casey*, and *June Medical* invoked—and not Chief Justice Roberts.<sup>301</sup>

In short, the Sixth Circuit employed *June Medical* as an excuse to eviscerate abortion rights. The Sixth Circuit invoked the concurring opinion in *June Medical* as a cover to espouse views endorsed by the dissent.

The Sixth Circuit is not following the law. Under the best reading of the precedent that directs judges about how to enforce divided decisions, the portions of the Chief Justice's concurring opinion in *June Medical* that criticize *Whole Woman's Health* do not alter *Whole Woman's Health*'s authority as law.<sup>302</sup> And, crucially, even if a court decided that the Chief Justice's concurring opinion in *June Medical* modified *Whole Woman's Health*, the Chief Justice's concurring opinion does not mandate the Sixth Circuit's approach.

As we saw, in *June Medical*, the Chief Justice reaffirmed *Whole Woman's Health* while criticizing it. In his concurring opinion, the Chief Justice attacked balancing and offered a selective account of the *Casey* standard. Unsurprisingly, pro-life advocates read the concurring opinion as allowing states to enforce TRAP laws.<sup>303</sup> Yet, as we

<sup>301</sup> See *id.* at 437–38 (quoting *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 487 (1955)).

<sup>302</sup> See *supra* note 244 and accompanying text (discussing *United States v. Marks*, 430 U.S. 188, 193 (1977), requiring a court to treat the “position taken by [the Justice or Justices] who concurred in the judgment[] on the narrowest grounds” as “the holding of the Court”). There is presently a debate over the application of the *Marks* rule to *June Medical*. Compare *Hopkins v. Jegley*, 968 F.3d 912, 915 (8th Cir. 2020) (holding that “Chief Justice Roberts’s vote was necessary in holding unconstitutional Louisiana’s admitting privileges law, so his separate opinion is controlling”), and *EMW Women’s Surg. Ctr. v. Friedlander*, 978 F.3d 418 (6th Cir. 2020) (agreeing with the 8th Circuit’s interpretation of *June Medical*), with *Whole Woman’s Health v. Paxton*, 972 F.3d 649, 652 (5th Cir. 2020) (finding that the Chief Justice’s test did not control under *Marks* and concluding “*June Medical* has not disturbed the undue-burden test, and *Whole Woman’s Health* remains binding law in this Circuit.” (citations omitted)).

<sup>303</sup> See *supra* Section II.A. After *June Medical*, Dorinda Bordlee described the “good news” that the Chief Justice’s opinion returned the law to the undue burden standard “and that is something that means that our pro-life laws can stand, and the pro-life movement can continue to be creative in moving forward with policies that help women choose life.” EWTN, *World Over* – 2020-07-02 – Dorinda Bordlee and Carrie Severino with Raymond Arroyo, YouTube (July 2, 2020),

saw, the Roberts opinion reasoned about *Casey* in ways that are significantly different from the dissenting judges in *June Medical*.

For this reason, even if a court concluded that the Chief Justice's opinion in *June Medical* modifies *Whole Woman's Health*, the Chief Justice's opinion in *June Medical* offers a willing judge authority and resources to review TRAP laws. To recall, the Chief Justice voted to reaffirm *Whole Woman's Health*; while Chief Justice Roberts criticized balancing, he did not mandate *Lee Optical*-style deference and left more than enough of *Whole Woman's Health* and *Casey* intact for a judge or Justice who is skeptical about the underlying purpose of a health-justified abortion restriction to probe the law. The judge could cite the *Casey* undue burden standard, which Chief Justice Roberts quotes in *June Medical*, that expressly prohibits laws serving the potential life or women's health interest that have the *purpose or effect* of imposing a substantial obstacle.<sup>304</sup> The judge could cite *Casey*'s "inform, not hinder" principle, which the Chief Justice did not criticize.<sup>305</sup> The judge could cite the repudiation of *Lee Optical*-style rational-basis deference in *Whole Woman's Health*<sup>306</sup> and appeal to the Chief Justice's emphasis on the important fact-finding role of a trial court.<sup>307</sup> Even if the judge avoided relying on the balancing standard, the judge could conduct singling-out analysis to probe whether the law was plausible as an ordinary health and safety regulation and employ the many tools judges use to "smoke out" hidden purpose.<sup>308</sup>

### C. TRAP LAWS, JUSTICE BARRETT, AND JUSTICE GINSBURG

But now that Justice Barrett has replaced Justice Ginsburg on the Court, does this analysis of Chief Justice Roberts's concurring opinion even matter?

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<https://www.youtube.com/watch?v=ZY637UZ49Ng>. Like Bordlee, David Reardon saw good news. As he read *June Medical*, the Chief Justice "signaled that *he will continue to entertain regulations that protect women's health*," and Reardon concluded, "[t]he good news for abortion opponents is that provisions in *Roe* allowing laws to protect health can be expanded to prevent 80% or more of all abortions." David Reardon, *Making Abortion Rare, the Chief Justice Roberts Way*, AFTERABORTION.ORG (Aug. 13, 2020), <https://afterabortion.org/making-abortion-rare-the-chief-justice-roberts-way>.

<sup>304</sup> See *supra* Section II.A.

<sup>305</sup> *Id.*

<sup>306</sup> See *supra* text accompanying note 275.

<sup>307</sup> See *supra* text accompanying note 298.

<sup>308</sup> See *supra* notes 263–64 and accompanying text.

In this simple sense, it does. As the Court presently interprets the Constitution, the Constitution directs judges to enforce its liberty and equality guarantees by scrutinizing restrictions on abortion that claim to protect women's health. There are sitting judges as well as judges yet to be appointed who are ready to do so. But as Justice Barrett's appointment signals, the Supreme Court might soon change that law.

There are many cases that the Court could choose as vehicles to change the law. Rather than speculate about how Justice Barrett and the other conservative Justices would reason in these different cases, I focus simply on the constitutional law governing health-justified restrictions on abortion. How will Justice Barrett's arrival on the Court alter the way the Court reviews the constitutionality of TRAP laws? What understandings of the modern constitutional tradition are at risk, now that Justice Ginsburg is no longer there to defend them? If the Court as currently constituted upholds a TRAP law, how might that decision transform its interpretation of the Constitution's liberty and equality guarantees?

There is much we know and yet much to learn. Before her Supreme Court nomination, Justice Barrett publicly attested to her opposition to abortion more clearly than any recent nominee. Justice Barrett's expressed opposition to abortion and her statements of a more limited commitment to stare decisis would seem to suggest she is likely to join the dissenting justices in *Whole Woman's Health* and *June Medical*.<sup>309</sup> That is what Vice President Pence signaled to voters.<sup>310</sup>

Yet unlike Justice Ginsburg, who answered questions about the constitutional basis of the abortion right in her confirmation hearing, Barrett was unwilling to answer questions about her constitutional views on abortion during her confirmation hearing.<sup>311</sup> For example,

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<sup>309</sup> See *supra* text accompanying notes 35–36 (sources discussing her prior expression of opposition to abortion and her Seventh Circuit decisions on abortion). At the University of Notre Dame, Barrett was a member of the University Faculty of Life organization. See S. Comm. on the Judiciary, *Questionnaire for Nominee to the Supreme Court*, SENATE COMM. ON THE JUDICIARY (Sept. 29, 2020), [https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20\(Public\)%20\(002\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf) (listing Amy Coney Barrett's membership in the University Faculty for Life from "approximately 2010–2016"). For an open letter that she signed attesting to her faith, see *infra* note 371 (discussing a *Letter to Synod Fathers from Catholic Women* Barrett signed).

<sup>310</sup> See *supra* text accompanying note 6.

<sup>311</sup> Compare *infra* text accompanying note 348 (quoting then-Judge Ginsburg answering a question in her confirmation hearings about whether she believed the abortion right was grounded in due process or equal protection), with North, *supra* note 35 (reporting that "[d]uring

Barrett's prior public commentary does not shed much light on how she would evaluate woman-protective abortion restrictions, other than a lecture she gave just before the 2016 election in which she briefly remarked that the Supreme Court was likely to allow states to impose more restrictions on clinics, a noteworthy way to respond to *Whole Woman's Health* and a result she seemed to support on federalism grounds.<sup>312</sup>

1. *Food and Drug Administration v. American College of Obstetricians in a changing court.* A recent decision of the Supreme Court adds to our understanding of Justice Barrett's views on the constitutionality of woman-protective abortion restrictions and highlights how differently Justice Ginsburg viewed the question. In January 2021, the conservative Justices voted to allow the Food and Drug Administration (FDA) to single out the drug used for medication abortion for burdensome health-justified regulation.<sup>313</sup> The FDA required patients to "go to a clinic in person to pick up their mifepristone prescriptions, even though physicians may provide all counseling virtually, women may ingest the drug unsupervised at home, and any complications will occur long after the patient has left the clinic."<sup>314</sup>

The Trump administration's FDA waived in-person requirements for other drugs during the COVID-19 pandemic but not for

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her confirmation hearings, Barrett did not directly answer questions about how she would rule on abortion rights").

<sup>312</sup> See Nina Totenberg & Domenico Montanaro, *Who Is Supreme Court Nominee Amy Coney Barrett?*, NPR (Sept. 24, 2020, 2:02 PM), <https://www.npr.org/sections/supreme-court-nomination/2020/09/24/915781077/conenator-who-is-amy-coney-barrett-front-runner-for-supreme-court-nomination> (reporting that in 2016 then-Professor Barrett observed that "I don't think the core case, *Roe's* core holding that women have a right to an abortion, I don't think that would change. . . . But I think the question of whether people can get very late-term abortions, you know, how many restrictions can be put on clinics, I think that will change"); *Hesburgh Lecture 2016: Professor Amy Barrett at the Jacksonville University Public Policy Institute*, YouTube (Dec. 5, 2016), <https://www.youtube.com/watch?v=7yJTEdZ81II&feature=youtu.be> (discussing *Whole Woman's Health* just before the 2016 election and describing clinic regulation as a "who decides" question about federalism (without any mention of individual liberty or discussion of clinic closings) and observing that "[i]n the case out of Texas, after the Kermit Gosnell affair and all of that, states have imposed regulations on abortion clinics, and I think the question is how much freedom the Court is willing to let states have in regulating abortion").

<sup>313</sup> *Food and Drug Admin. v. Am. Coll. of Obstetricians*, 141 S. Ct. 578 (2021) (mem.). Before the COVID-19 pandemic, the American College of Obstetricians and Gynecologists supported removing the heightened regulations on mifepristone, finding them "inconsistent with requirements for other drugs with similar or greater risks." *ACOG Statement on Medication Abortion*, ACOG (Mar. 30, 2016), <https://www.acog.org/news/news-releases/2016/03/acog-statement-on-medication-abortion>. See also *infra* text accompanying note 323 (discussing how the FDA singled out mifepristone).

<sup>314</sup> *Food and Drug Admin. v. Am. Coll. of Obstetricians*, 141 S. Ct. 578, 580 (2021) (mem.).

mifepristone.<sup>315</sup> The case presented a classic case of a TRAP regulation in action.

In *Food and Drug Administration v. American College of Obstetricians*,<sup>316</sup> the Court granted an application for stay of a district court opinion preliminarily enjoining enforcement of the FDA's requirement during the COVID-19 pandemic.<sup>317</sup> The conservative Justices voted to grant the stay but gave no account of their reasons.<sup>318</sup> Their silence about the constitutional stakes of the case was ominous, especially by contrast to cases involving pandemic policies they believed affected religious liberty, where a range of conservative justices felt compelled to express the particulars of their position.<sup>319</sup> Chief Justice Robert concurred in the decision to grant the stay, insisting that the case did not involve the question whether the FDA requirements for mifepristone impose an undue burden but instead concerned the question whether courts should defer to government's judgments about public health emergencies.<sup>320</sup> Justice Breyer voted to deny the application to stay enforcement of the district court's opinion.<sup>321</sup>

In a fierce dissent, Justices Sotomayor and Kagan agreed with the district court that the FDA regulation singling out mifepristone for burdensome regulation during the pandemic violated *Casey*, *Whole Woman's Health*, and *June Medical*.<sup>322</sup> The dissenters pointed out that "[o]f the over 20,000 FDA-approved drugs, mifepristone is the only one that the FDA requires to be picked up in person for patients to take at home"<sup>323</sup> and emphasized that "[t]his country's laws have long singled out abortions for more onerous treatment than other medical procedures that carry similar or greater risks."<sup>324</sup> They objected that

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<sup>315</sup> *Id.*

<sup>316</sup> 141 S. Ct. 578 (2021) (mem.).

<sup>317</sup> *Id.* at 578.

<sup>318</sup> *Id.*

<sup>319</sup> See *South Bay United Pentecostal Church v. Newsom*, 141 S. Ct. 716 (2021) (mem.).

<sup>320</sup> *Food and Drug Admin. v. Am. Coll. of Obstetricians*, 141 S. Ct. 578, 578–79 (Mem.) (2021) (Roberts, C.J., concurring).

<sup>321</sup> *Id.* at 578.

<sup>322</sup> *Id.* at 581 (Sotomayor, J., dissenting). Justice Breyer indicated he would deny the application but did not join the dissent. See *id.* at 578.

<sup>323</sup> *Id.* at 579.

<sup>324</sup> *Id.* at 585 (citing Linda Greenhouse & Reva B. Siegel, *Casey and the Clinic Closings: When "Protecting Health" Obstructs Choice*, 125 YALE L.J. 1428, 1430 (2016)).

the record was “bereft of any reasoning”: “The Government has not submitted a single declaration from an FDA or HHS official explaining why the Government believes women must continue to pick up mifepristone in person, even though it has exempted many other drugs from such a requirement given the health risks of COVID-19.”<sup>325</sup>

Recounting the wide range of pandemic-related health harms and delays in treatment that the FDA travel requirement could inflict on women, especially low-income women who depend on public transportation, and the ways enforcement of the regulation heightened the risk of infection for communities already affected by health disparities, the dissenters called for the government to “exhibit greater care and empathy for women seeking some measure of control over their health and reproductive lives in these unsettling times.”<sup>326</sup> In concluding, Justices Sotomayor and Kagan invoked Justice Ginsburg: “[Women’s] ability to realize their full potential . . . is intimately connected to their ability to control their reproductive lives.”<sup>327</sup>

In this context, Justice Barrett’s silence was telling. While it is widely assumed that Justice Barrett voted with the majority,<sup>328</sup> there is a possibility, however slim, that she cast a vote in dissent and chose not to reveal it.<sup>329</sup> But even if that is so, Justice Barrett’s refusal publicly to object to a health-justified restriction on abortion that exposed women to myriad health harms spoke volumes, given the stakes of the constitutional controversy. Through this silence, Justice Barrett separated herself from Justices Sotomayor and Kagan, whose dissent invoked Justice Ginsburg to express how laws taking from women control of their reproductive lives injure women.

This split among women on the Court was almost a matter of design. Years before nominating her, President Trump spoke of Barrett

<sup>325</sup> *Id.* at 584–85.

<sup>326</sup> *Id.* at 585.

<sup>327</sup> *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting)).

<sup>328</sup> Many reports describe it as a 6–3 decision. See, e.g., Jaclyn Diaz, *Supreme Court OKs White House Request to Limit Abortion Pill Access During Pandemic*, NPR (Jan. 13, 2021, 2:56 AM), <https://www.npr.org/2021/01/13/956279232/supreme-court-oks-white-house-request-to-limit-abortion-pill-access-during-pande>; Alice Miranda Ollstein, *Democratic Lawmakers Push FDA to Lift Restrictions on Abortion Pill*, POLITICO (Feb. 9, 2021, 4:27 PM), <https://www.politico.com/news/2021/02/09/democrats-house-fda-abortion-restrictions-467871>.

<sup>329</sup> The order does not record the votes of the individual Justices. The Court does not always record the votes on its orders. See William Baude, *Foreword: The Supreme Court’s Shadow Docket*, 9 N.Y.U. J. OF L. & LIBERTY 1, 14 (2015).

as his choice to replace Justice Ginsburg.<sup>330</sup> Conservative strategists reasoned that appointing a woman who opposed *Roe* would ensure that women on the Court would divide about abortion and that a woman's vote against abortion rights could be justified as a new form of women's rights. "I think the optics do matter. It's harder to make the case that a woman is against women's rights," Curt Levey of the conservative Committee for Justice explained.<sup>331</sup> Or as Ramesh Ponnuru put it, "If *Roe v. Wade* is ever overturned . . . it would be better if it were not done by only male justices, with every female justice in dissent."<sup>332</sup> Some depicted Barrett as a new kind of feminist. Erika Bachiochi, editor of *The Cost of Choice*<sup>333</sup> and a long-time critic of the sex-equality argument for abortion rights,<sup>334</sup> has explained that "Judge Barrett embodies a new kind of feminism, one that builds upon, while remaking, RBG-style feminism."<sup>335</sup>

<sup>330</sup> Jonathan Swan, *Scoop: Trump "Saving" Judge Amy Barrett for Ruth Bader Ginsburg Seat*, AXIOS (Mar. 31, 2019), <https://www.axios.com/supreme-court-trump-judge-amy-barrett-ruth-bader-ginsburg-11d25276-a92e-4094-8958-eb2d197707c8.html> (noting that before announcing Justice Kavanaugh's nomination for Justice Kennedy's seat, President Trump was reported to have said of then-Judge Barrett, "I'm saving her for Ginsburg").

<sup>331</sup> See Josh Gerstein, "The Optics Do Matter": Trump Nudged to Pick Woman for Supreme Court, POLITICO (June 29, 2018, 5:06 AM), <https://www.politico.com/story/2018/06/29/trump-supreme-court-female-justice-abortion-685929>.

<sup>332</sup> Ramesh Ponnuru, *In the Wings: Anthony Kennedy's Replacement Should Be Amy Barrett*, CHI. TRIB. (June 29, 2018, 2:45 PM), <https://www.chicagotribune.com/opinion/commentary/ct-perspec-vetting-supreme-court-replacement-kennedy-amy-barrett-0702-story.html>. Recall Representative Jackson's effort to rebut the "war on women" charge by describing the Louisiana admitting privileges law as "drafted by women, authored by women, supported by women, and voted for by women." See *supra* text accompanying note 180.

<sup>333</sup> See *supra* text accompanying notes 121–30.

<sup>334</sup> In articles and talks, Bachiochi has challenged sex equality arguments for abortion rights. See Erika Bachiochi, *A Putative Right in Search of a Constitutional Justification: Understanding Planned Parenthood v. Casey's Equality Rationale and How It Undermines Women's Equality*, 3 QUINNIPIAC L. REV. 593 (2017); Erika Bachiochi, *Embodied Equality: Debunking Equality Protection Arguments for Abortion Rights*, 34 HARV. J. L. & PUB. POL. 889 (2011); see also Erika Bachiochi, *Revisiting "Reliance Interests" in Casey: Does "Relying" on Abortion for Equality Actually Serve Women's Equality?* (Apr. 19, 2019) <https://catholicwomensforum.org/erika-bachiochi-presented-susan-b-anthony-award> (reporting title of talk at Harvard Law School co-sponsored by the Federalist Society and Harvard Law Students for Life).

<sup>335</sup> Erika Bachiochi, *ACB: A New Feminist Icon – at Politico*, MIRROR OF JUSTICE (Sept. 27, 2020), <https://mirrorofjustice.blogs.com/mirrorofjustice/2020/09/acb-a-new-feminist-icon-at-politico.html> (announcing on a Catholic legal theory blog that Justice Barrett's feminism was about "remaking" "RBG-style feminism"). See Erika Bachiochi, *Amy Coney Barrett: A New Feminist Icon*, POLITICO (Sept. 27, 2020, 7:00 AM), <https://www.politico.com/news/magazine/2020/09/27/amy-coney-barrett-supreme-court-nominee-feminist-icon-422059> (describing to a different audience Barrett's "new kind of feminism, a feminism that builds upon the praise-worthy antidiscrimination work of Ginsburg but then goes further"). For related commentary, see Anna North, *Why Republicans Keep Talking About Amy Coney Barrett's 7 Kids*, VOX (Oct. 13,

For her part, Barrett observed: “I have been nominated to fill Justice Ginsburg’s seat, but no one will ever take her place.”<sup>336</sup> The statement can be read many ways.

Together, *June Medical* and the FDA decision tell us that the law concerning abortion is about to change, and in ways that could reverberate beyond the abortion context. To what forms of sex-role-based coercion is Justice Barrett, or Justice Kavanaugh, or Chief Justice Roberts prepared to subject women in the name of protecting their health?

Justice Ginsburg opposed laws that impose traditional sex roles on men and women, including laws that bring government pressure to bear on their decisions about having children. A brief account of Justice Ginsburg’s approach to laws regulating pregnancy identifies foundational understandings of the modern tradition that could be transformed by a decision upholding woman-protective restrictions on abortion.

2. *How Justice Ginsburg understood liberty and equality limits on the regulation of pregnancy.* Justice Ginsburg fought for rights of pregnant women for almost a half century.<sup>337</sup> She built her approach to equal protection with pregnancy at the core, not periphery. Ginsburg’s second brief in the Supreme Court argued the case of a Catholic Air Force officer who challenged a regulation authorizing her discharge from the military on grounds of pregnancy or new motherhood—pressuring the officer to end her pregnancy to keep her job—while male Air Force officers who were about to become fathers were not similarly threatened with discharge from the military.<sup>338</sup> Officer Susan

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2020, 5:40 PM), <https://www.vox.com/2020/10/13/21514390/amy-coney-barrett-children-kids-supreme-court> (“[C]onservatives have applauded Barrett as the apotheosis of a new form of feminism.”).

<sup>336</sup> Marianne Levine & John Bresnahan, *Barrett Praises Ginsburg Ahead of Supreme Court Hearing*, POLITICO (Oct. 11, 2020, 1:22 PM), <https://www.politico.com/news/2020/10/11/barrett-ginsburg-supreme-court-428622>.

<sup>337</sup> For Ginsburg’s recollection of her personal experiences of pregnancy discrimination, see Siegel, *supra* note 73, at 182. See generally *id.* (tracing Ginsburg’s efforts with other feminist advocates to challenge laws discriminating against pregnant women—arguing under equal protection, employment discrimination law, and the Equal Rights Amendment—and connecting this work to her judgments on the Supreme Court).

<sup>338</sup> See Brief for the Petitioner, *Struck v. Sec’y of Def.*, 409 U.S. 1071 (1972) (No. 72–178), 1972 WL 135840. The *Struck* case, which was overlooked because it was mooted before argument in the Supreme Court, was very important to Justice Ginsburg. For more on the case, see Neil S. Siegel & Reva B. Siegel, *Struck by Stereotype: Ruth Bader Ginsburg on Pregnancy Discrimination as Sex Discrimination*, 59 DUKE L.J. 771 (2010), reprinted in *THE LEGACY OF RUTH BADER GINSBURG* (Scott Dodson ed., 2015). For a recent interview with the plaintiff and other

Struck, Ginsburg wrote in 1972, “was presumed unfit for service under a regulation that declares, without regard to fact, that she fits into the stereotyped vision . . . of the ‘correct’ female response to pregnancy.”<sup>339</sup> (Ginsburg included in her brief, filed just before *Roe*, a due process challenge to the regulation as violating the plaintiff’s right to sexual privacy and her autonomy in deciding “whether to bear . . . a child” and asserted Struck’s right to free exercise of religion.<sup>340</sup>)

And, just as Ginsburg challenged laws penalizing pregnant women who failed to conform to sex roles, she challenged laws that penalized men who engaged in care work rather than breadwinning<sup>341</sup>—arguing that women and men both should be free to choose care work and not coerced into proper sex-roles by the state because of the dignitary and status-based injuries coercion of this kind can inflict.<sup>342</sup>

As a Justice on the Supreme Court, Ginsburg wrote one of her most famous majority opinions in *United States v. Virginia*.<sup>343</sup> In *Virginia*, the Supreme Court for the first time discussed a law mandating the accommodation of pregnancy as classifying on the basis of sex and subject to heightened scrutiny. *Virginia* directs judges to look to history in enforcing the Equal Protection Clause to ensure that laws classifying on the basis of sex, including laws regulating pregnancy, are not “used, as they once were . . . to create or perpetuate the legal, social,

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commentary on the case, see Dahlia Lithwick, Loretta Ross, Neil Siegel & Reva B. Siegel, *Body of Law: Beyond Roe*, WNYC: ON THE MEDIA (Dec. 13, 2019), <https://www.wnycstudios.org/podcasts/otm/episodes/on-the-media-body-law-beyond-roe>.

<sup>339</sup> See Brief for the Petitioner, *supra* note 338, at 50–51 (citation and internal quotation marks omitted).

<sup>340</sup> *Id.* at 56–58. For Justice Ginsburg’s remarks about the *Struck* case and account of a similar Air Force dismissal, see Nicole Flatow, *Single Mother’s Air Force Dismissal Mirrors Justice Ginsburg’s Dream Test Case—from 40 Years Ago*, THINKPROGRESS (Nov. 2, 2012), <https://archive.thinkprogress.org/single-mothers-air-force-dismissal-mirrors-justice-ginsburg-s-dream-test-case-from-40-years-ago-c6a273a0e168>.

<sup>341</sup> The same year as Ginsburg challenged the Air Force regulation in *Struck*, Ginsburg litigated *Moritz v. Commissioner of Internal Revenue*, 469 F.2d 466 (10th Cir. 1972), which struck down a tax deduction for the cost of a caregiver the IRS allowed only for women and formerly married men. She continued to challenge laws that enforced sex-role conformity around caregiving for both sexes. See, e.g., *Weinberger v. Wiesenfeld*, 420 U.S. 636 (1975) (striking down a law denying social security survivor’s benefits earned by a wage earner who died in childbirth to her widower who sought to draw on them to care for their infant son).

<sup>342</sup> For an account locating the *Struck* case in Ginsburg’s efforts over the course of her career as advocate and as judge to challenge pregnancy discrimination, see Siegel, *supra* note 73, which discusses her arguments under equal protection law, employment discrimination law, and the ERA, both as an advocate and as a Justice.

<sup>343</sup> 518 U.S. 515 (1996).

and economic inferiority of women.”<sup>344</sup> *Virginia* makes clear that the Constitution forbids the use of state power to enforce traditional sex roles, especially where the coercion subordinates women.<sup>345</sup>

Ginsburg approached abortion through the lens of the same commitments that guided her 1970s antidiscrimination work, whether on behalf of pregnant women or caregiving men, as the *Struck* case illustrates.<sup>346</sup> She continued to emphasize interconnections between the liberty and equality cases in lectures of the 1970s, 1980s, and 1990s<sup>347</sup> and in her Supreme Court confirmation hearing in 1993. Asked her views about constitutional protections for abortion, she answered forthrightly that the due process and equal protection guarantees each protected a woman’s decision about pregnancy from government control: “[Y]ou asked me about my thinking about equal protection versus individual autonomy, and my answer to you is it’s both. This is something central to a woman’s life, to her dignity. It’s a decision that she must make for herself. And when Government controls

<sup>344</sup> *Id.* at 534. See Siegel, *supra* note 73, at 204–06 (locating *Virginia*’s discussion of pregnancy in the Court’s equal protection case law).

<sup>345</sup> See generally Siegel, *supra* note 73 (challenging the common assumption that the Court’s decision in *Geduldig v. Aiello*, 417 U.S. 484 (1974), insulates the regulation of pregnancy from equal protection scrutiny and demonstrating, through an account featuring Ruth Ginsburg as advocate and judge, how the Supreme Court came to integrate the regulation of pregnancy into its equal protection sex discrimination framework, in cases including *Virginia*, 518 U.S. at 204–06, and *Nev. Dep’t of Hum. Res. v. Hibbs*, 538 U.S. 721, 736 (2003)).

<sup>346</sup> In 2012 Justice Ginsburg recalled the *Struck* case:

Nonetheless, her choice was, you get an abortion or you get out. That’s the reproductive choice case I wish had come to the Supreme Court first. Because what it was about was a woman’s decision about her life’s course. Would she bear the child or not? And perhaps the court’s understanding of the issue would have been advanced if a woman took the position: I don’t want the government to dictate my choice. Flatow, *supra* note 340.

<sup>347</sup> Ruth Bader Ginsburg, *Sex Equality and the Constitution: The State of the Art*, 4 WOMEN’S RTS. L. REP. 143, 143–44 (1978) (“Not only the sex discrimination cases, but the cases on contraception, abortion, and illegitimacy as well, present various faces of a single issue: the roles women are to play in society. Are women to have the opportunity to participate in full partnership with men in the nation’s social, political, and economic life?”); Ruth Bader Ginsburg, *Sex Equality and the Constitution*, 52 TUL. L. REV. 451, 462 (1978) (hoping the Court would “take abortion, pregnancy, out-of-wedlock birth, and explicit gender-based differentials out of the separate cubbyholes in which they now rest, acknowledge the practical interrelationships, and treat these matters as part and parcel of a single, large, sex equality issue”). For the 1980s, see Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375, 386 (1985). See generally Reva B. Siegel, *Equality and Choice: Sex Equality Perspectives on Reproductive Rights in the Work of Ruth Bader Ginsburg*, 25 COLUM. J. GENDER & L. 63 (2013).

that decision for her, she's being treated as less than a fully adult human responsible for her own choices."<sup>348</sup>

It is therefore not surprising that Ginsburg's challenge to woman-protective antiabortion justifications for the Partial Birth Abortion Ban Act in *Gonzales v. Carhart*<sup>349</sup> expressed these same understandings—the same constitutional understandings that led her to challenge the Air Force regulation requiring Officer Struck to choose between her pregnancy and her job. The statute at issue in *Carhart*, which banned a method of performing abortions late in pregnancy, was enacted on fetal-protective reasoning, but Justice Kennedy added a woman-protective justification to the majority opinion upholding the statute, influenced by an amicus brief quoting abortion-regret affidavits in support of a suit reopening *Roe* and its companion case<sup>350</sup> (abortion-regret claims for which Norma McCorvey recently explained she was coached and paid<sup>351</sup>).

Justice Ginsburg began her opinion in *Carhart* by quoting the many passages of sex equality reasoning in *Casey*<sup>352</sup> and, on the basis of this authority, emphasized that “legal 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.”<sup>353</sup>

Then, invoking equality principles she had helped establish over a lifetime of litigating and deciding constitutional cases, Justice Ginsburg challenged the woman-protective justification for restricting abortion as violating women’s dignity, safety, equality, and freedom. “[T]he Court deprives women of the right to make an autonomous choice even at the expense of their safety.”<sup>354</sup> “This way of thinking

<sup>348</sup> *The Supreme Court: Excerpts from Senate Hearing on the Ginsburg Nomination*, N.Y. TIMES (July 22, 1993), <https://www.nytimes.com/1993/07/22/us/the-supreme-court-excerpts-from-senate-hearing-on-the-ginsburg-nomination.html>.

<sup>349</sup> 550 U.S. 124 (2007).

<sup>350</sup> For a movement genealogy of the abortion-regret claims in *Carhart*, see Siegel, *supra* note 88, at 1641–47.

<sup>351</sup> For McCorvey’s end-of-life repudiation of her claims of abortion regret, see Jenny Gross & Aimee Ortiz, *Roe v. Wade Plaintiff Was Paid to Switch Sides, Documentary Says*, N.Y. TIMES (May 19, 2020), <https://www.nytimes.com/2020/05/19/us/roe-v-wade-mccorvey-documentary.html>, which recounts that “[b]efore dying in 2017, Norma McCorvey said she had supported anti-abortion groups only for the money.”

<sup>352</sup> See *Carhart*, 550 U.S. at 171 (Ginsburg, J., dissenting).

<sup>353</sup> *Id.* at 172.

<sup>354</sup> *Id.* at 184.

reflects ancient notions about women's place in the family and under the Constitution—ideas that have long since been discredited,”<sup>355</sup> Justice Ginsburg emphasized, directing her readers to compare *Muller v. Oregon*<sup>356</sup> and *Bradwell v. State*<sup>357</sup> with *United States v. Virginia*<sup>358</sup> and *Califano v. Goldfarb*.<sup>359</sup> She then invoked the joint opinion in *Casey* expressing these core principles, quoting *Casey*'s direction that “[t]he destiny of the woman must be shaped . . . on her own conception of her spiritual imperatives and her place in society,” and then its core “inform, not hinder” principle. “[M]eans chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it.”<sup>360</sup> In challenging woman-protective justifications for abortion restrictions, Justice Ginsburg invoked an understanding of women as equal citizens that is vindicated through cases interpreting both the Constitution's liberty and its equality guarantees.

3. *The constitution's liberty and equality guarantees in a changing court.* Let us assume, on the basis of the evidence we now have, that Justice Barrett would vote to uphold at least some woman-protective health-justified restrictions on abortion, as the rest of the conservative Justices have.<sup>361</sup> In choosing how she would justify such a vote, Justice Barrett would be taking positions about the meaning of the Constitution's liberty and equality guarantees—perhaps most dramatically if she joined Justice Alito in applying rational basis review to such a law, on the premise that the law burdens no constitutional rights.<sup>362</sup>

Would Justice Barrett even acknowledge that a pro-woman, pro-life law like Louisiana's raises concerns under *Casey*—or under *Virginia*? Given that the text of an admitting privilege statute like Louisiana's Unsafe Abortion Act addresses the pregnant woman as well as the

<sup>355</sup> *Id.* at 185.

<sup>356</sup> 208 U.S. 412 (1908). *See id.* at 421–22 (arguing that “as healthy mothers are essential to vigorous offspring, the physical wellbeing of woman becomes an object of public interest and care in order to preserve the strength and vigor of the race . . . legislation designed for her protection may be sustained even when like legislation is not necessary for men, and could not be sustained”).

<sup>357</sup> 16 Wall. 130 (1873) (reasoning that the Fourteenth Amendment allows states to bar a woman from practicing law on account of her special family role).

<sup>358</sup> 518 U.S. 515 (1996).

<sup>359</sup> 430 U.S. 199 (1977); *see Carhart*, 550 U.S. at 185 (Ginsburg, J., dissenting).

<sup>360</sup> *Carhart*, 550 U.S. at 186 (quoting *Casey*, 505 U.S. at 869–70 (plurality opinion)).

<sup>361</sup> For some of this background information, see, for example, *supra* notes 309–12 and notes 328–35 and accompanying text.

<sup>362</sup> *See supra* text accompanying notes 284–91.

physician,<sup>363</sup> would Justice Barrett scrutinize the assumptions about women on which the law's claim to protect women from "unsafe" abortions rests? (Would Justice Barrett view these assumptions about women as "discredited,"<sup>364</sup> as Justice Ginsburg did when she compared woman-protective justifications for abortion restrictions to the views about women expressed by the Court in 1908 in *Muller v. Oregon*?<sup>365</sup>) Would Justice Barrett endeavor to distinguish *Virginia* on the ground that because pregnancy is a real difference, no sex-role stereotyping of pregnant women is possible—a position a majority of the Supreme Court rejected in *Virginia* and in *Nevada Department of Human Resources v. Hibbs*?<sup>366</sup>

Or would Justice Barrett avoid equal protection scrutiny under *United States v. Virginia* because her views about equal protection are closer to Justice Scalia's originalist dissent in that case (which she has discussed with some measure of approval)?<sup>367</sup> Do her originalist commitments lead her to reject the Court's cases holding that the Constitution prohibits sex discrimination, as Justice Scalia did,<sup>368</sup> or might

<sup>363</sup> See LA. STAT. ANN. § 40:1061.10(A)(2)(b) (West 2020) (directing the provision of information to the pregnant woman so that she can contact the physician with admitting privileges and locate the hospital at which the physician has privileges); see also Act 620, 2014 Leg., Reg. Sess. (La. 2014) (enacted).

<sup>364</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 185 (2007) (Ginsburg, J., dissenting).

<sup>365</sup> See *id.* (citing *Muller v. Oregon*, 208 U.S. 412, 421 (1908)).

<sup>366</sup> See *Nev. Dep't Hum. Res. v. Hibbs*, 538 U.S. 721, 729 (2003). See generally Siegel, *supra* note 73, at 204–09 (demonstrating that the majority opinions in *Virginia* and *Hibbs* supersede *Geduldig v. Aiello*, 417 U.S. 484, 494, 496 n.20 (1974)).

<sup>367</sup> See *United States v. Virginia*, 518 U.S. 515, 568 (1996) (Scalia, J., dissenting) ("But in my view the function of this Court is to *preserve* our society's values regarding (among other things) equal protection, not to *revise* them. . . . For that reason it is my view that, whatever abstract tests we may choose to devise, they . . . ought to be crafted *so as to reflect*—those constant and unbroken national traditions that embody the people's understanding of ambiguous constitutional texts."); see also *id.* at 601–03 (celebrating and defending from constitutional challenge the "old-fashioned" gender code on which women's exclusion from VMI was based).

For Barrett's views, see Amy Coney Barrett, *Originalism and Stare Decisis*, 92 NOTRE DAME L. REV. 1921, 1923, 1926 & n.20 (2017), which discusses *Virginia*, sex discrimination case law, and *Brown v. Board of Education*, 347 U.S. 483 (1954), as "arguably nonoriginalist precedents." See also *id.* at 1943 (considering how Justice Scalia reconciled his commitment to originalism and to stare decisis and concluding that "[n]othing is flawless, but I, for one, find it impossible to say that Justice Scalia did his job badly").

<sup>368</sup> For Justice Scalia's most direct originalist challenge to sex discrimination law, see Stephanie Condon, *Scalia: Constitution Doesn't Protect Women or Gays from Discrimination*, CBS News (Jan. 4, 2011, 5:33 PM), <https://www.cbsnews.com/news/scalia-constitution-doesnt-protect-women-or-gays-from-discrimination> ("Certainly the Constitution does not require discrimination on the basis of sex. The only issue is whether it prohibits it. It doesn't. Nobody ever thought that that's what it meant. Nobody ever voted for that. If the current society wants to outlaw discrimination by sex, hey we have things called legislatures, and they enact things

she practice a more dynamic brand of originalism<sup>369</sup> aligned with her writings recognizing that the Court decides cases responsively with public debate.<sup>370</sup>

In short, does Justice Barrett interpret the Constitution as allowing government policies designed to pressure women—especially poor women—into motherhood? If she does, is that because the injuries to women’s dignity, health, and family that TRAP laws inflict are simply not of constitutional significance or instead because she believes that state action pushing resisting women into traditional roles protects “women’s health”?<sup>371</sup> However she resolves these questions, would Justice Barrett acknowledge that there is fierce debate about the dignitary and physical harms that woman-protective abortion restrictions inflict? Or would she join with other conservative justices in deferential review that refuses even to recognize constitutional concerns about the dignitary and health impact of laws that pressure poor women into childbearing?

This is the critical juncture where we learn what Erika Bachiochi meant when she explained “Judge Barrett embodies a new kind of feminism, one that builds upon, while remaking, RBG-style feminism.”<sup>372</sup> This is the critical juncture in which those conservative

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called laws.”). Justice Barrett clerked for Justice Scalia from 1998–1999. See S. Comm. on the Judiciary, *Questionnaire for Nominee to the Supreme Court*, SENATE COMM. ON THE JUDICIARY (Sept. 29, 2020), [https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20\(Public\)%20\(002\).pdf](https://www.judiciary.senate.gov/imo/media/doc/Amy%20Coney%20Barrett%20Senate%20Questionnaire%20(Public)%20(002).pdf); Ruth Marcus, *Amy Coney Barrett’s Alignment With Scalia Has Implications Far Beyond Roe v. Wade*, WASH. POST (Oct. 2, 2020, 6:51 PM), [https://www.washingtonpost.com/opinions/amy-coney-barretts-alignment-with-scalia-has-implications-far-beyond-roe-v-wade/2020/10/02/d9278210-04e4-11eb-b7ed-141dd88560ea\\_story.html](https://www.washingtonpost.com/opinions/amy-coney-barretts-alignment-with-scalia-has-implications-far-beyond-roe-v-wade/2020/10/02/d9278210-04e4-11eb-b7ed-141dd88560ea_story.html) (“Speaking in the Rose Garden after President Trump announced his selection, Barrett invoked the ‘incalculable influence’ of her ‘mentor,’ Justice Antonin Scalia, adding: ‘His judicial philosophy is mine, too—a judge must apply the law as written.’”).

<sup>369</sup> See, e.g., Steven G. Calabresi & Julia T. Rickert, *Originalism and Sex Discrimination*, 90 TEX. L. REV. 1 (2011).

<sup>370</sup> See Amy Coney Barrett, *Introduction: Stare Decis and Nonjudicial Actors*, 83 NOTRE DAME L. REV. 1147, 1171–72 (2008); Amy Coney Barrett, *Precedent and Jurisprudential Disagreement*, 91 TEX. L. REV. 1711, 1723–24 (2013).

<sup>371</sup> See *supra* Part II (surveying beliefs about women espoused by advocates of pro-woman, pro-life laws). For a statement about faith, life, sex, and family, as well as views on poverty to which Justice Barrett has attested, see *Letter to Synod Fathers from Catholic Women*, ETHICS & PUB. POL. CTR (Oct. 1, 2015), <https://eppc.org/synodletter>. The open letter is of course best read in full. Among the many prominent Catholic leaders who signed this statement are Amy Barrett (signing as professor of law), as well as Erika Bachiochi and Dorinda Bordlee. Others include Carrie Severino, head of the Judicial Crisis Network, and Marjorie Dannenfelser, President of Susan B. Anthony List. It would take another article to consider how beliefs of this kind bear on constitutional interpretation.

<sup>372</sup> Bachiochi, *supra* note 335.

Justices who claim to respect women as equals demonstrate the beliefs about women and the Constitution on which that claim rests. As they change constitutional law in the midst of wide-ranging public debate, are the Justices forthright about the constitutional understandings they repudiate and embrace? This is the critical juncture in which the Justices will demonstrate their beliefs about the role of a judge in a constitutional democracy.

#### IV. CONCLUSION: WHAT EXPANDING THE FRAME ON *JUNE MEDICAL* TEACHES ABOUT PRO-LIFE LAW

For a half century, equal protection and due process cases have promised a pregnant woman freedom from the kind of government “protection” that deprives a woman of the ability to make decisions about her own health, family, and “life’s course.”<sup>373</sup> For a half century, the Supreme Court has interpreted the Constitution’s liberty and equality guarantees to distinguish between an undertaking responsibly chosen and an undertaking that is government coerced. Constitutional protections for choice matter most when the undertaking coerced is one that the community disparages and disrespects, as the story of *June Medical* illustrates.

We see disrespect when government protects women’s health by restricting abortion with a single-minded focus it does not devote to protecting the health of women who are bearing children, giving birth, and caring and providing for new life. Under *these* circumstances, antiabortion animus seems to concern control more than care.

Americans are now asking what values pro-life jurisdictions are enforcing when the government has a robust appetite for abortion restrictions—but notably less interest in choice-respecting policies that reduce abortion and support life in all its forms. Expanding the

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<sup>373</sup> See *Gonzales v. Carhart*, 550 U.S. 124, 172 (2007) (Ginsburg, J., dissenting). For analysis of how woman-protective restrictions conflict with equal protection case law, see Reva B. Siegel, *The New Politics of Abortion: An Equality Analysis of Woman-Protective Abortion Restrictions*, 2007 U. ILL. L. REV. 991. For analysis of how woman-protective restrictions conflict with substantive due process case law, see Siegel, *supra* note 73.

For analysis of how fetal-protective abortion restrictions conflict with equal protection case law, see Reva B. Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection Reasoning*, 44 STAN. L. REV. 261 (1992); Reva B. Siegel, *Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression*, 56 EMORY L. J. 815 (2007); and Siegel, *supra* note 10. See also Reva B. Siegel, *The Nineteenth Amendment and the Democratization of the Family*, 129 YALE L.J.F. 450 (2020) (tracing claims for voluntary motherhood and the democratization of family care work from the decade before the Civil War to the present).

frame and pointing out inconsistencies in the policies of pro-life jurisdictions is another way of piercing the claimed justifications for these policies and exposing the status-based judgments antiabortion animus can express and the injuries to dignity, health, and life that antiabortion animus can inflict.<sup>374</sup>

As the Court unravels *Roe*, these frame-expansion arguments probing the meaning of pro-life will escalate in constitutional politics. Questions about pro-life legislators' inconsistent commitments to life and health arose in the fierce legislative debate over admitting privilege laws in Texas and in Louisiana.<sup>375</sup> And these questions shaped the Reverend William Barber's opposition to a near total ban on abortion in Alabama. Pointing to the state's high infant mortality rate and large numbers of uninsured people, Barber questioned "whether Alabama officials were really pro-life": "They won't support life by addressing poverty . . . They won't support life by addressing health care. They won't support life by pushing for living wages. And so their claim is immoral hypocrisy."<sup>376</sup>

Emphasizing these very inconsistencies, Judge Carleton Reeves called the woman-protective health justifications for Mississippi's fifteen-week ban "gaslighting"<sup>377</sup>:

[T]his Court concludes that the Mississippi Legislature's professed interest in "women's health" is pure gaslighting. In its legislative findings justifying the need for this legislation, the Legislature cites *Casey* yet defies *Casey*'s

<sup>374</sup> Siegel, *supra* note 10, at 209 (observing that "many prolife jurisdictions lead in policies that restrict women's reproductive choices and lag in policies that support women's reproductive choices. Comparing state policies in this way makes clear that the means a state employs to protect new life reflects views about sex and property, as well as life").

<sup>375</sup> See *supra* text accompanying notes 142–43 & 191–99; see also Elizabeth Nash, *Louisiana Has Passed 89 Abortion Restrictions Since Roe: It's About Control, Not Health*, GUTTMACHER INST. (Feb. 11, 2020), <https://www.guttmacher.org/article/2020/02/louisiana-has-passed-89-abortion-restrictions-roe-its-about-control-not-health>.

<sup>376</sup> Brian Lyman, *At Rally Against Abortion Ban, Barber Denounces 'Immoral Hypocrisy'*, MONTGOMERY ADVERTISER (May 28, 2019, 1:58 PM), <https://www.montgomeryadvertiser.com/story/news/2019/05/28/rally-against-abortion-ban-barber-denounces-immoral-hypocrisy/1257820001>; see also Rev. Dr. William Barber II, *Exposing the Lie of 'Pro-Life' Politicians*, NATION (May 30, 2019), <https://www.thenation.com/article/archive/alabama-abortion-william-barber>.

<sup>377</sup> Jackson Women's Health Org. v. Currier, 349 F. Supp. 3d 536, 540 n.22 (2018); *supra* text accompanying notes 41–42. Mississippi's law justified the 15-week ban with a legislative finding that "[a]bortion carries significant physical and psychological risks to the maternal patient, and these physical and psychological risks increase with gestational age" and that "[t]he State of Mississippi also has 'legitimate interests from the outset of pregnancy in protecting the health of women.'" H.B. 1510, 2018 Leg., Reg. Sess. (Miss. 2018) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 847 (1992)).

core holding. The State “ranks as the state with the most [medical] challenges for women, infants, and children” but is silent on expanding Medicaid. Its leaders are proud to challenge *Roe* but choose not to lift a finger to address the tragedies lurking on the other side of the delivery room: our alarming infant and maternal mortality rates.

No, legislation like H.B. 1510 is closer to the old Mississippi—the Mississippi bent on controlling women and minorities. The Mississippi that, just a few decades ago, barred women from serving on juries “so they may continue their service as mothers, wives, and homemakers.” The Mississippi that, in Fannie Lou Hamer’s reporting, sterilized six out of ten black women in Sunflower County at the local hospital—against their will. And the Mississippi that, in the early 1980s, was the last State to ratify the 19th Amendment—the authority guaranteeing women the right to vote.<sup>378</sup>

Expanding the frame revealed Mississippi’s claim to protect women by banning abortion as a project of gender and racial control, not care, Judge Reeves objected. On appeal in the Fifth Circuit, Judge James Ho rebuked Judge Reeves, asserting that his opinion displayed “alarming disrespect for the millions of Americans who believe . . . that abortion is the . . . violent taking of innocent human life. . . .”<sup>379</sup>

But increasingly, each side makes claims to protect life and looks to government to intervene in very different ways. Expanding the frame, the Reverend William Barber explained: “You can’t be for life inside the womb and not be for life outside the womb.”<sup>380</sup> Highlighting inconsistency in policy choices across contexts can identify the role that gender, race, and class-based judgments as well as beliefs about sex and property play in shaping pro-life policy.<sup>381</sup> When financial resources are among the most common reasons given for a women’s decision to end a pregnancy,<sup>382</sup> when “[h]alf of all women who got an abortion in 2014 lived in poverty, double the share from

<sup>378</sup> *Jackson Women’s Health*, 349 F. Supp. 3d at 540 n.22 (citations omitted).

<sup>379</sup> *Jackson Women’s Health Org. v. Dobbs*, 945 F.3d 265, 277 (5th Cir. 2019) (Ho, J., concurring) (writing lengthy opinion criticizing Judge Reeves, never addressing his argument that the woman-protective rationale was “gaslighting,” while objecting that “[t]he opinion issued by the district court displays an alarming disrespect for the millions of Americans who believe that babies deserve legal protection during pregnancy as well as after birth, and that abortion is the immoral, tragic, and violent taking of innocent human life”).

<sup>380</sup> David Marchese, *Rev. William Barber on Greed, Poverty and Evangelical Politics*, N.Y. TIMES (Dec. 28, 2020), <https://www.nytimes.com/interactive/2020/12/28/magazine/william-barber-interview.html> (quoting Rev. William Barber).

<sup>381</sup> See Siegel, *supra* note 10.

<sup>382</sup> See M. Antonia Biggs, Heather Gould & Diana Greene Foster, *Understanding Why Women Seek Abortions in the U.S.*, 13 BMC WOMENS HEALTH 29 (2013), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3729671>.

1994,”<sup>383</sup> when “being denied a wanted abortion results in economic insecurity for women and their families, and an almost four-fold increase in odds that household income will fall below the Federal Poverty Level,”<sup>384</sup> why do antiabortion groups like AUL not list or advocate for redistributive measures as pro-life laws?<sup>385</sup> The organization’s ethical opposition to abortion does not explain this silence. Or might it?

How exactly is it pro-life to coerce and forsake? The seeming inconsistency is resolved if government intervention is justified to prevent what is seen as intentional life-taking by women who should give themselves over to caring for life as others will not. Observe that this is an agent-focused, blame-centered account of the pro-life principle, not the only way of understanding the pro-life principle,<sup>386</sup> and one especially likely to become infused with status-based judgments precisely because it locates responsibility for care selectively on blameworthy agents rather than approaching responsibility for care as shared by the whole community.

What appears to be a universal theory of responsibility in the abstract turns out to involve judgments about poor women in practice. On this agent-focused, blame-centered account of the pro-life principle, government actors can assert commitments to life, private property, and

<sup>383</sup> Sabrina Tavernise, *Why Women Getting Abortions Now Are More Likely to Be Poor*, N.Y. TIMES (July 9, 2019), <https://www.nytimes.com/2019/07/09/us/abortion-access-inequality.html>.

<sup>384</sup> See *Introduction to the Turnaway Study*, *supra* note 129, at 3.

<sup>385</sup> See DEFENDING LIFE, *supra* note 131 (detailing AUL’s legislative advocacy in Louisiana and elsewhere). Also note AUL’s long current list of model pro-life laws. See *Legislation*, AMERICANS UNITED FOR LIFE (Jan. 1, 2021), <https://aul.org/what-we-do/legislation>.

<sup>386</sup> For a debate about the proper application of the life principle, see Symposium, *Whole Life v. Pro-Life?*, 43 HUMAN LIFE REV. 21 (2017). Many Catholics understand the commitment to protect life to require action in a wide range of contexts. See Robert Christian, *What Is the Whole Life Movement?*, MILLENNIAL (Feb. 3, 2016), <https://millennialjournal.com/2016/02/03/what-is-the-whole-life-movement/> (explaining that “it is never permissible to intentionally and directly take an innocent life. But the wanton disregard for life present in unjust social structures and the dehumanization of others in ways short of direct killing are also incompatible with the whole life commitment to human life and dignity”); *Equally Sacred Priorities for Voters in the 2020 Presidential Election*, NETWORK ADVOC. FOR CATHOLIC SOC. JUST. (2020), <https://networkadvocates.org/wp-content/uploads/sites/2/2020/08/EquallySacredScorecard.pdf> (describing the consistent-life ethic and the belief that protecting life is a seamless garment of “equally sacred priorities”); see also Brown, *supra* note 194 (quoting Rep. Katrina Jackson identifying as a “whole-life Democrat[.]”); Valerie Richardson, *Whole Life Democrats’ Seek to Redefine Party’s Stance on Abortion*, WASH. TIMES (June 6, 2019), <https://www.washingtontimes.com/news/2019/jun/6/katrina-jackson-whole-life-democrat-abortion-posit/> (explaining that Jackson as a “whole-life Democrat” is concerned with a range of policy questions not limited to abortion).

the limited state—and so absolve themselves of responsibility for the lives of the women and children they have intervened in, whom they view as unworthy dependents, people who are “riding in the cart,” not “pulling the cart.”<sup>387</sup> As Judge Reeves explained, the apparent inconsistency in pro-life policy choices can be resolved if pro-life means control and not care.

Let’s expand the frame again and return to the pandemic. An agent-focused, blame-centered account of the pro-life principle seems to explain the policy choices of those who call themselves “pro-life” where government action on abortion is concerned but who are unwilling to support government mask mandates<sup>388</sup> or to provide people health care and rudimentary means of support—even in a pandemic.<sup>389</sup>

Those opposing shut-down orders and mask mandates under the banner of “my body, my choice” are not announcing their sudden conversion in the abortion debate;<sup>390</sup> they are demanding that the government respect the liberty of those they view as especially deserving of freedom and respect—cart-pullers, not cart-riders—in circumstances where they recognize that human life is at stake, but, they believe, wrongful life-taking is not.<sup>391</sup>

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<sup>387</sup> See *supra* text accompanying note 203 (quoting Governor Jindal explaining his refusal to accept federal health insurance for hundreds of thousands of people in Louisiana on the grounds that “we should design our policies so that more people are pulling the cart than riding in the cart. . . . We should measure success by reducing the number of people on public assistance.”).

<sup>388</sup> See LLCoolJ (@llcoolj), TWITTER (Nov. 17, 2020, 12:45 AM), <https://twitter.com/llcoolj/status/1328575048001744897> (asking “How can you be pro life but unwilling to wear a mask ??”).

<sup>389</sup> See *supra* text accompanying notes 5–10.

<sup>390</sup> See *supra* text accompanying notes 7–8.

<sup>391</sup> For example, Rusty Reno, editor of the conservative Catholic magazine *First Things*, made headlines as a pro-life leader who opposed public health shut-down orders and minimized the pandemic. These views focused attention on the limited pro-life principle to which Reno subscribes, and its distance from the care ethic. See Damon Linker, *A Pro-Lifer Shrugs in the Face of Mass Death*, THE WEEK (Mar. 25, 2020), <https://theweek.com/articles/904580/prolifer-shrugs-face-mass-death> (“Abortion is about killing. Public health is about dying. That difference is everything for Reno. Ending a pregnancy is a great evil because it is the intentional taking of an innocent human life. But other forms of dying that happen by nature (a virus killing its victim is a natural process), like deaths that follow indirectly from social and economic structures that prevail in the United States, are matters of moral indifference.”). See generally Dan McLaughlin, *It Is Not Hypocrisy for Pro-Lifers to Accept a Risk of Death*, NAT’L REV. (May 13, 2020, 6:28 PM), <https://www.nationalreview.com/2020/05/it-is-not-hypocrisy-for-pro-lifers-to-accept-a-risk-of-death/> (“To the pro-lifer, looking at a particular person and taking their life away—actively, or by refusing life-or-death assistance—is a deliberate choice that is different in a morally meaningful way from simply adopting this or that public policy that is statistically projected to increase risks of death.”).

Whatever pro-life means and whether the Constitution speaks to these questions through its liberty or equality guarantees or not at all, it is better to fight this out as a fight about constitutional values as Justice Kennedy, Justice Ginsburg, and Justice Scalia did than to bury the constitutional question in law jargon about balancing. Why is the Chief Justice of the United States Supreme Court mocking as un-judicial judges who are acting to protect the vulnerable from government coercion? Is it beyond the judicial role for a judge to smoke out inconsistency in the use of state power when state power inflicts the form of coercion and the kind of harms to dignity, health, and life that this use of state power does?

However painful it may be to make sense of this strange mix of policies as expressing pro-life commitments, it is worse still for judges to bury this mix of policies under cites to *Williamson v. Lee Optical*.<sup>392</sup> Attacking “balancing” allows judges to license double-speak about state action enforcing gender roles that can injure as well as degrade; to sanction without naming forms of government coercion that many Americans oppose; and to eradicate public contest over the Constitution’s meaning while elevating white-washing into a practice of democratic principle.<sup>393</sup> The Trump Court has the power to practice constitutionalism this way. History will judge the constitutional vision and values it demonstrates.

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<sup>392</sup> 348 U.S. 483 (1955); see, e.g., *supra* text accompanying notes 288–91.

<sup>393</sup> See *supra* text accompanying note 265 (quoting Judge Edith Jones explaining that abortion restrictions are subject to rational basis review “which affirms a vital principle of democratic self-government [that it] is not the courts’ duty to second guess legislative factfinding”). Cf. Amanda Marcotte, *How Anti-Choice Propaganda Trained Republicans to Accept Trump’s Coronavirus Denialism*, SALON (Sept. 2, 2020, 4:58 PM), <https://www.salon.com/2020/09/02/how-the-anti-choice-movement-trained-republicans-to-accept-trumps-coronavirus-denialism>.