ANTI-ABORTION ACTIVISTS' LONG ROAD TO THE PROMISED LAND

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The struggle for reproductive freedom in America is set to reach a fever pitch later this year as the conservative right nears the pinnacle of their decades-long project to dismantle abortion rights. For years, conservatives have quietly been packing federal courts with right-leaning judges, a skillful strategy operating as an end run around increasing liberal popular sentiment towards a woman's right to choose.[1] Justice Brett Kavanaugh's 2018 confirmation marks a successful culmination of their campaign with the solidification of a conservative Supreme Court majority. Finally, a complete rollback of *Roe v. Wade* and *Casey*'s "undue burden" bar on regulations[2] appears within reach. In preparation for the current moment, a number of republican-led states passed restrictive abortion laws designed to provoke judicial challenge.[3] The Supreme Court, now ripe to hear such a challenge, will hold oral arguments this March over a Louisiana law requiring "admitting privileges" for abortion providers in *June Medical Services, LLC v. Gee*.[4]

The case is emblematic of the long road conservatives took to end abortion despite *Roe*—a methodical march of "pro-woman" paternalism designed to chip away at access since they could not overcome the right. And yet, the prospect of the case's imminent success has exposed conservatives' willingness to drop the facades of science and reason and march straight out against *Roe*. Where for decades anti-abortion activists found themselves needing to appear pro-woman—relying on protective paternalism to carry forward their true aims—now, on the brink of success, the jig is up, and even centuries of legal tradition need not be appeased. Abortion is on the chopping block, and conservative judges and lawmakers alike seem unconcerned with what legal framework carries the day, so long as *Roe* is dismantled.

The existential threat now facing abortion rights did not happen overnight; despite the inpouring of anti-abortion judges to the federal bench, fully eliminating abortion rights remained off the table until conservatives could claim a Supreme Court majority.[5] And anti-abortion strategists worried that even with such a bench, overcoming *stare decisis* could prove to be a tall order. [6] Therefore, in a deft move, conservative lawmakers turned to an effective "death by a thousand cuts" approach.[7] Instead of directly challenging *Roe*'s guaranteed right to abortion, piecemeal conservative regulations made abortions harder and harder to access—adopting so-

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[1] Julian E. Zelizer, *How Conservatives Won the Battle Over the Courts*, THE ATLANTIC (July 7, 2018), https://www.theatlantic.com/ideas/archive/2018/07/how-conservatives-won-the-battle-over-the-courts/564533/.

[2] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992).

[3] Jenny Jarvie, *Conservative States Enact Abortion Bans in Hope of Overturning Roe vs. Wade*, L.A. TIMES (May 11, 2019, 6:37 PM), https://www.latimes.com/nation/la-na-abortion-bans-states-roe-wade-supreme-court-20190511-story.html.

[4] Nina Totenberg, *Supreme Court Revisits Abortion with Louisiana Case*, NPR (Oct. 7, 2019, 6:24 PM), https://www.npr.org/2019/10/04/763863712/supreme-court-revisits-abortion-with-louisiana-case.

[5] *Roe v. Wade*, 410 U.S. 113 (1973); *Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 876 (1992).

[6] Zelizer, *supra* note 1.

[7] *Id.*

called "targeted restrictions on abortion providers," or "TRAP laws."[8] The Louisiana law at issue in *June Medical* is a prime example of a seemingly minor requirement that drastically cuts abortion access.[9]

This legal strategy required a new narrative: around the same time that conservatives began their conquest of judicial seats, anti-abortion activists reframed their struggle. In 1996, David Reardon, a quasi-father of the modern anti-abortion movement, argued for a recasting of the movement as pro-woman, a notable departure from earlier campaigns that were pro-fetus.[10] However, in contrast to the left's defense of a woman's right to choose, the right staked out a pro-woman position that advocates for protecting women—or rather, doing what is best for them on their behalf.[11] This transition moved the campaign from one trope to another: from woman as powerful villainess murdering an innocent child to woman as the hapless victim.[12] In the new narrative, women must be protected from a heartless left that co-opts and corrupts their choices in order to pursue political goals at the expense of women's best interests.

This seemingly pro-woman narrative is squarely paternalistic. Reardon asks, "[w]ho are we to say that post-aborted women have not suffered?" and yet, does not ask women themselves whether or not they have suffered and if so, in what ways.[13] Blinded by an all-too-familiar, self-righteous paternalism, he *assumes* women's suffering—in coincidentally politically expedient form—and offers the unquestionable cure. The epitome of this argument is "Post-Abortion Syndrome" (PAS)—a fake medical condition that supposedly afflicts women who have fallen prey to the left's pro-abortion rhetoric and elected to undergo the procedure.[14] The kicker: Reardon reports that many women never exhibit nor report experiencing symptoms of this disorder.[15] Instead, those who purport to know better ascribe PAS to a woman irrespective of her lived experiences and often at the expense of providing medical attention to actual harms.

In Reardon's world, where women need to be protected from their own bad instincts and the left's abuse, conservatives have found ample ways to craft regulations in the name of protection that undeniably restrict abortion access. Under this framing, the medical field has proven fertile ground for conservatives to wield paternalism as a tool for asserting conservative ideals over expressions of female agency—all under the guise of "science."[16] Current abortion restrictions from forced ultrasounds to impossible, hospital-like building codes are a mark of the

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[8] *Id.*; Ian Millhiser, *The Fight to End Roe v. Wade Enters its Endgame Next Week*, VOX (Sept. 27, 2019, 7:51 AM), https://www.vox.com/2019/9/26/20873873/supreme-court-gut-roe-v-wade-next-week-abortion.

[9] If the law goes into effect, the number of abortion providers servicing Louisiana will drop from three to one. Similar TRAP laws have already decreased the number of providers, which had been at seven in 2011. *June Medical Services, LLC v. Gee*, CENTER FOR REPRODUCTIVE RIGHTS, https://reproductiverights.org/june-medical-services-llc-v-gee (last visited Jan. 11, 2020).

[10] SUSANNA MANCINI & KRISTINA STOECKL, THE CONSCIENCE WARS. RETHINKING THE BALANCE BETWEEN RELIGION, IDENTITY, AND EQUALITY, 226 (Cambridge University Press, 2018).

[11] *Id.* at 226–27.

[12] *Id.* at 227.

[13] *Id.*

[14] *Id.*

[15] *Id.* at 230–31.

[16] *Cf. id.* at 227.

continuing success of Reardon's paternalistic arguments.[17] These restrictions, namely mandatory ultrasounds and waiting periods, supposedly assure that women are making the "right" decision. However, data showing that being forced to listen to fetal heartbeats actually traumatizes women—many of whom decide to go ahead with abortion anyway—belies the alleged protective intent.[18] Ultimately, the protections merely function to make the process more burdensome on providers and women—especially poor women—who have to travel to the often-distant clinic multiple times.[19]

Additionally, overemphasizing and corrupting the potential medical risks in abortions has allowed conservatives to stoke public misinformation and enact regulations that impose burdensome precautions on abortion providers. For example, requirements that clinics have elaborate facilities and unnecessary equipment, or that physicians have admittance privileges at nearby hospitals, are out of touch with low rates of documented risks (which typically occur after women leave the clinic).[20] Similar to requirements designed to protect women from decisions they may regret, regulations ostensibly designed to protect women during the procedure are rarely of consequence to the women themselves. Instead, physical, monetary, and other regulatory requirements have proven quite effective at shuttering clinics who cannot meet these standards, all the while solving for a medical risk that does not exist.[21]

The Supreme Court took on TRAP laws four years ago in *Whole Woman's Health vs. Hellerstedt*.[22] Giving dimension to *Casey*'s rule, the court declared that regulations on abortion access would not be an undue burden so long as they boasted "medical benefits sufficient to justify the burdens upon access" that they imposed.[23] Presented with evidence on the safety of the procedure, the Court could not find any medical benefits stemming from the state's regulations[24]—strikingly, neither could attorneys defending the law.[25] The Texas regulation the Supreme Court struck down in *Whole Women's Health* looked remarkably similar to the Louisiana law at issue in *June Medical*.[26] Thus, the Fifth Circuit's approval of Louisiana's law in the face of *Whole Woman's Health*—an outright flouting of controlling precedent—has been seen as a signal of the reception lower courts expect from the newly composed Supreme Court.[27]

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[17] *See* Frances Robles, *State Legislatures Put Up Flurry of Roadblocks to Abortion*, N.Y. TIMES (May 8, 2015), https://www.nytimes.com/2015/05/09/us/politics/state-legislatures-put-up-flurry-of-roadblocks-to-abortion.html.
[18] *See, e.g.*, Mark Joseph Stern, *Trump-Appointed Judge Upholds Anti-Abortion Law that Often Mandates Transvaginal Ultrasound*, SLATE (Apr. 4, 2019), https://slate.com/news-and-politics/2019/04/john-bush-trump-appointee-upholds-kentucky-anti-abortion-law-that-requires-transvaginal-ultrasounds.html.
[19] Government-Mandated Delays Before Abortion, ACLU, https://www.aclu.org/other/government-mandated-delays-abortion (last visited Jan. 5, 2020).
[20] *See* Millhiser, *supra* note 8.
[21] *See* K.K. Rebecca Lai & Jugal K. Patel, *For Millions of American Women, Abortion Access Is Out of Reach*, N.Y. TIMES (May 31, 2019), https://www.nytimes.com/interactive/2019/05/31/us/abortion-clinics-map.html.
[22] *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016).
[23] *Id.* at 2299.
[24] *Id.*
[25] Claire Landsbaum, *What Today's Supreme Court Decision Means for Abortion Rights*, THE CUT (June 27, 2016), https://www.thecut.com/2016/06/what-todays-scotus-ruling-means-for-abortion.html.
[26] Millhiser, *supra* note 8.
[27] *See* Mark Joseph Stern, *The Trick That Could Bring Down Roe v. Wade*, SLATE (Jan. 3, 2020, 5:48 PM) https://slate.com/news-and-politics/2020/01/roe-v-wade-scotus-brief-unworkable-trick.html.

Conservative lawmakers, too, have indicated that they expect the current Court will be comfortable departing from their 47-year-old line of precedent. Dropping pretexts of protecting women, 39 senators and 168 congresspeople signed on to an amicus brief in *June Medical* asking the court to overturn the recognized right to abortion.[28] The brief argues that Roe is "radically unsettled" and *Casey* is "unworkable," and thus must be set aside, despite the fact that subjective balancing tests and lower circuit division are part and parcel of American jurisprudence.[29] This disingenuous legal argument betrays that conservatives—with the finish line in sight—no longer feel the need to abide a slow "death by a thousand cuts" to abortion rights.[30] Having played by the "pro-women" rules of the middle majority while they were the under dogs,[31] anti-abortion activists no longer need to dissemble. Firmly in power at last, they can drop appeals to science—and to anyone but the republican base.

The outlook for women seeking abortions and pro-choice advocates is grim. Despite hints that some conservative Justices may be loath to upset *stare decisis*,[32] the Court is poised to uphold Louisiana's abortion restriction, and, in so doing, could decide to overturn *Roe* or simply render *Casey*'s "undue burden" standard toothless.[33] A decision upholding the restrictions by striking down *Roe*'s guaranteed right to abortion would allow states to outlaw abortion altogether—with no need for even long-abided exceptions in instances of rape, incest, or threat to the life of the mother.[34] Alternatively, upholding the Louisiana law on the grounds that its burden is not "undue" (perhaps because the supposed medical benefits are now convincing) would leave the judicial canon cosmetically intact. Yet this hollow appeal to precedent would

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[28] Sheryl Gay Stolberg, *More Than 200 Republicans Urge Supreme Court to Weigh Overturning Roe v. Wade*, N.Y. TIMES (Jan. 2, 2020), https://www.nytimes.com/2020/01/02/us/politics/republicans-abortion-supreme-court.html.

[29] Conservatives seem not to have an issue with these complexities where it would not serve them. For example, *D.C. v. Heller*, which confirmed the rights of individuals to bear arms, produced a morass of varying standards among circuit courts but has yet to raise conservative hackles. *See* Stern, *supra* note 27.

[30] In fact, the rush for the finish line has proven quite contentious among anti-abortion activists. Those in favor of dropping the methodical "pro-woman" act believe the moment is ripe for a direct challenge to *Roe* due to the Supreme Court's conservative majority and scientific advances they believe strengthen the case for outlawing abortion. More traditional anti-abortion groups are comfortable in the near-complete bans they have achieved in many states under the incremental TRAP strategy and worry that a rebuff of a *Roe*-challenge would curb their momentum. Jacob Gershman & Arian Campo-Flores, *Antiabortion Movement Begins to Crack After Decades of Unity*, WALL STREET J. (July 17, 2019, 1:36 PM), https://www.wsj.com/articles/antiabortion-movement-begins-to-crack-after-decades-of-unity-11563384713.

[31] MANCINI & STOECKL, *supra* note 10.

[32] Chief Justice Roberts indicated his awareness of the role he plays in assuring the Court maintains legitimacy despite increasing partisan rancor. This concern has led him to reach what some see as non-conservative decisions, but what others see simply as slick maneuvering towards ultimately conservative ends. David G. Savage, *Supreme Court with Roberts in Charge: Conservative, but not Always Predictable*, L.A. TIMES (June 29, 2019, 2:04 PM), https://www.latimes.com/politics/la-na-pol-supreme-court-roberts-kavanaugh-20190629-story.html. Justice Gorsuch has cited wanting to prevent "massive social upheaval" as counselling him to possibly stray from conservative outcomes in other social issues on the Court's docket this term—a condition that would seem also to apply to potentially reneging a right enjoyed in this country for nearly five decades. Mark Joseph Stern, *Only One Conservative Supreme Court Justices is Taking LGBTQ Discrimination Seriously*, SLATE (Oct. 8, 2019, 4:58 PM), https://slate.com/news-and-politics/2019/10/supreme-court-lgbtq-employment-discrimination.html. Of the current bench, only Justice Thomas has explicitly stated his willingness to overturn *Roe v. Wade*. Gershman & Campo-Flores, *supra* note 30.

[33] *See* Totenberg, *supra* note 4; Millhiser, *supra* note 8.

[34] States such as Ohio and Alabama have already eliminated these exceptions in their anti-abortion laws designed to challenge *Roe*. Gershman & Campo-Flores, *supra* note 30.

render practically the same outcome: giving states the green light to pass any number of TRAP laws closing every clinic in their jurisdiction. Either way, abortion access would become a state controlled right, and republican-run states—of which there are currently 21[35]—would be free to end abortions in their states as early as this summer.[36]

Abortion clinics in liberal-led states, many of which have served increasing numbers of women coming across state lines in recent years, are preparing for a future of abortion tourism.[37] Pro-choice activists, too, need to prepare for a future in which they cannot hang their hat on *Roe*. Reimagining the right to abortion may be easier with the rise of self-managed pill-induced abortions,[38] but realizing this right will require learning from the conservative playbook. The path to regaining a national right to abortion after *June* will likely require liberals to invest decades in judicial and legislative coalitions and to employ scientific fact as deftly as Reardon wielded "scientific" narrative.

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[35] *State Government Trifectas*, BALLOTPEDIA, https://ballotpedia.org/State_government_trifectas (last visited Jan. 13, 2020).
[36] Keeping with custom, the Court will likely announce their decision at the end of the 2020 term in late June. *See* Stolberg, *supra* note 28.
[37] Sabrina Tavernise, *New Illinois Abortion Clinic Anticipates Post-Roe World*, N.Y. TIMES (Oct. 22, 2019), https://www.nytimes.com/2019/10/22/us/missouri-illinois-planned-parenthood.html.
[38] *See id.*