

Embracing Casey: *June Medical Services L.L.C. v. Russo* and the Constitutionality of Reason-Based Abortion Bans

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June Medical Services L.L.C. v. Russo has already begun gaining a certain reputation as a Trojan Horse: in form, a pro-choice ruling that overturns a Louisiana anti-abortion measure, but in substance, an anti-choice, pro-life decision that sets the stage for future reversals of the Supreme Court's reproductive rights jurisprudence. Without denying that prospect, this work identifies different possibilities afoot in June Medical, specifically, in Chief Justice John Roberts's key fifth-vote concurrence in the case. A close reading of this opinion shows that its reliance on stare decisis principles exceeds a jurisprudential commitment to a narrow understanding of the Supreme Court's decision in Whole Woman's Health v. Hellerstedt, the concurrence's immediate point of reference within the Court's abortion rights jurisprudence. In a wider sense, the concurrence demonstrates a commitment to Planned Parenthood of Southeastern Pennsylvania v. Casey, and, by extension, what Casey preserved of Roe v. Wade.

Seen this way, Chief Justice Roberts's June Medical opinion does not set a course for incrementalist reversals of abortion rights that will snowball into Casey's and Roe's shared demise. Subtly, if not perhaps finally, the Chief Justice's June Medical concurrence signals an embrace of Casey that, functioning as a beachhead, should prospectively secure the constitutional foundations of women's abortion rights.

Interwoven with the case for this understanding of the Chief Justice's June Medical concurrence are multiple tallies of the constitutionality of an important set of pro-life legal measures—so-called “reason-based” abortion bans—that take direct aim at Casey's post-Roe doctrinal framework, including one such measure from Ohio, presently pending before the U.S. Court of Appeals for the Sixth Circuit sitting en banc. Analysis of these measures demonstrates why “reason-based” abortion bans—which make the availability of abortions depend on the reasons that women have for choosing them—are unconstitutional both under Casey's basic doctrinal framework and under the Chief Justice's approach in June Medical. No

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matter how the Sixth Circuit decides the case on Ohio's reason-based abortion ban now that June Medical has been handed down, the issue of the lawfulness of reason-based abortion bans may soon find its way to the Supreme Court. One way or another, the question of the meaning of the Chief Justice's June Medical concurrence certainly will.

INTRODUCTION

Though brand new, the Supreme Court's decision in *June Medical Services L.L.C. v. Russo* has already begun gaining currency as a Trojan Horse: in form, a case that strikes down a Louisiana anti-abortion measure, but in substance, an anti-choice, pro-life ruling that effectively tees up future reversals of the Supreme Court's reproductive rights jurisprudence.¹

¹ June Med. Servs. L.L.C. v. Russo, 140 S. Ct. 2103 (2020). For relevant commentary on *June Medical* that focuses on Chief Justice John Roberts's concurrence in the case, see, for example, Dahlia Lithwick, *Roberts Isn't a Liberal. He's a Perfectionist Who Wants to Win*, SLATE (June 29, 2020, 3:57 PM), <https://slate.com/news-and-politics/2020/06/roberts-june-medical-strategy.html> [<https://perma.cc/YW8M-Q5L3>] (describing Chief Justice Roberts's decision as one that “cloak[s] a major blow to the left in what appears to be a small victory for it”); Leah Litman, *June Medical As The New Casey*, TAKE CARE (June 29, 2020), <https://takecareblog.com/blog/june-medical-as-the-new-casey> [<https://perma.cc/238X-83BX>] (noting how the Chief Justice's concurrence “gave abortion supporters a victory while . . . laying the groundwork for much weaker protections for abortion rights” that will “allow[] states to chip away at abortion over time and in very significant ways”); Maya Manian, *Winning by Losing: Chief Justice Roberts's Strategy to Eviscerate Reproductive Rights and Justice*, HARV. L. & POL'Y REV., <https://harvardlpr.com/2020/08/10/winning-by-losing-chief-justice-robertss-strategy-to-eviscerate-reproductive-rights-and-justice/> [<https://perma.cc/W2ZJ-U7UG>] (last visited Nov. 16, 2020) (“Anti-abortion advocates lost the battle against abortion rights this time, but Chief Justice Roberts set forth a strategy for winning the war against reproductive rights.”); Melissa Murray, *The Supreme Court's Abortion Decision Seems Pulled From the 'Casey' Playbook*, WASH. POST (June 29, 2020, 8:51 PM), <https://www.washingtonpost.com/opinions/2020/06/29/problem-with-relying-precedent-protect-abortion-rights/> (describing Chief Justice John Roberts's concurring opinion in *June Medical* as “preserv[ing] the outer shell of” *Whole Woman's Health* “while gutting its substance” and “invi[te] states to push the envelope on abortion legislation”); Mary Ziegler, *Courts Are Already Cutting Off Abortion Access—Without Saying a Word About Roe*, WASH. POST (Aug. 17, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/08/17/jegley-undue-burden-roe/> (“So what kinds of abortion restrictions count as unduly burdensome now? Not many, it seems. . . . States might not be able to pass wholesale bans that criminalize all abortions, without exceptions for rape and incest—but up to that limit, almost everything else might be fair game. . . . If almost no restrictions count as an undue burden, there won't be much of [*Roe*] left to overrule.”); Mary Ziegler, *Upholding Precedent While Rewriting It in June Medical Services v. Russo*, HARV. L. BILL OF HEALTH BLOG (July 17, 2020), <https://blog.petrieflom.law.harvard.edu/2020/07/17/precedent-abortion-stare-decisis-supreme-court/> [<https://perma.cc/QQ6Z-TBNR>] [hereinafter Ziegler, *Upholding Precedent*] (“*June Medical* previews just how the Roberts Court may move past *Roe* and *Casey*.”). For signs of some consensus on *June Medical* across the political and viewpoint spectrum, see Richard Wolf, *Supreme Court's Split Decision for Abortion Rights Gives Opponents an Unlikely Boost*, USA TODAY (Aug. 31, 2020, 5:00 AM), <https://www.usatoday.com/story/>

June Medical may well prove to imperil the Supreme Court's landmark *Planned Parenthood of Southeastern Pennsylvania v. Casey* decision and what *Casey* reaffirmed and preserved of *Roe v. Wade*.² But if events unfold this way, it will be because a majority of the Supreme Court has declined to pursue the different path for decision found in Chief Justice John Roberts's fifth-vote separate concurrence in *June Medical*, which, as the opinion of the swing Justice in the case, is key to its meaning and possibly its future significance.³

A careful reading of Chief Justice Roberts's *June Medical* concurrence shows that its reliance on stare decisis principles is more than a means by which the opinion expresses a jurisprudential commitment to the Supreme Court's 2016 decision in *Whole Woman's Health v. Hellerstedt*, the last major abortion rights decision before *June Medical*, which serves as the concurrence's immediate point of reference and reaffirmation.⁴ In a deeper and wider sense, the Chief Justice's *June Medical* opinion evinces a jurisprudential commitment to—and even an embrace of—*Casey* and what *Casey*, in turn, committed to embracing from *Roe*.⁵

news/politics/2020/08/31/abortion-supreme-courts-ruling-abortion-rights-boosts-opponents/5624869002/ [https://perma.cc/YVC4-MMXU].

² See generally *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973). This is particularly so in view of Justice Ruth Bader Ginsburg's passing and her replacement on the Court by Justice Amy Coney Barrett, which opens the prospect that a majority of the Supreme Court may now be prepared to overturn *Casey* and *Roe*—or at least to begin the process in earnest. Recognizing that possibility, another is that if not Justice Barrett, then one or more of the Justices who dissented in *June Medical* might in a future case yet be persuaded to join the position that Chief Justice Roberts's *June Medical* concurrence stakes out. Justices Neil Gorsuch and Brett Kavanaugh may be the most likely contenders on this front. This, of course, is to speak only of possibilities.

³ Against the realist practice of predictive vote counting are technical rules about whether and in what respect Chief Justice John Roberts's concurrence in *June Medical* formally is or is not the Supreme Court's opinion in the case. For the perspective that it does not simply announce the holding of the case, see, for example, *Whole Woman's Health v. Paxton*, 972 F.3d 649, 652 (5th Cir. 2020) ("*June Medical* was a 4-1-4 decision. . . . [T]he only common denominator between the plurality and the concurrence is their shared conclusion that the challenged Louisiana law constituted an undue burden."); *Am. Coll. of Obstetricians and Gynecologists v. FDA*, No. TDC-20-1320, 2020 WL 3960625, at *16–17 (D. Md. July 13, 2020) (indicating that *Whole Woman's Health*, with its balancing test, "remains binding on this Court"). For a possible contrary indication that should not be overlooked, see *June Medical Services L.L.C.*, 140 S. Ct. at 2135 n.1 (Roberts, C.J., concurring).

⁴ See *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2300 (2016); *June Med. Servs.*, 140 S. Ct. at 2133, 2141–42 (Roberts, C.J., concurring) ("I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. 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.").

⁵ For one of many early perspectives on what *Casey* preserved of *Roe*, see Kathleen M. Sullivan, *A Victory for Roe*, N.Y. TIMES, June 30, 1992, at A23 ("[C]rucially, the Court ringingly reaffirmed the core of [*Roe*]. It reaffirmed that the ultimate decision-making

Seen this way, Chief Justice Roberts's *June Medical* concurrence may not—certainly, it need not—function as a jurisprudential pivot toward an incrementalist set of reversals of constitutionally protected abortion rights that will snowball into *Casey*'s and *Roe*'s shared demise. Nothing in *June Medical*, including the Chief Justice's concurrence, foreordains this future. Nor may the eventuality ever come to pass if the Chief Justice's *June Medical* opinion functions as its textual indications suggest it should. For its part, the opinion's endorsement of *Casey* provides a beachhead that safeguards the existing, foundational legal framework for constitutional protection of abortion rights afforded by the Supreme Court. Certain additional pro-life strictures may yet be permissible after *June Medical*, but only those that accord with *Casey*'s basic doctrinal framework. What is more, the Chief Justice's concurrence significantly shores up that long-established and continually followed framework. The Chief Justice's concurrence is thus an opinion that deals a significant setback to pro-life efforts that aim to unravel women's constitutional and legal reproductive rights in the name of protecting the lives of the unborn.⁶

While this account of *June Medical* and its relation to *Casey*, focused on the Chief Justice's concurrence, functions as the central through-line in these pages, it arrives interwoven with a set of engagements with the lawfulness of one important set of abortion restrictions: "reason-based abortion bans."⁷ These laws make the legal availability of abortion turn on the reasons pregnant people have for exercising their constitutionally protected abortion rights. Both before and after *June Medical*, and consistent with Chief Justice Roberts's concurrence in the case, reason-based abortion bans, like other abortion restrictions that attack *Casey*'s foundations, should be ruled unconstitutional.

That, anyway, is a significant part of the argument, which proceeds along the following lines. Discussion substantively begins in Parts I and II by centering analysis against the backdrop of *Planned Parenthood v. Casey*, its doctrinal framework, and what that framework means for the

authority about whether to continue or end a pregnancy must rest with a pregnant woman, at least throughout the greater part of the pregnancy before the fetus is 'viable'").

⁶ Here and elsewhere, the text focuses on women's constitutional and legal reproductive rights, but textual references have in places been gender-neutralized as a way to recognize and affirm that it isn't only cis-women or those with binary gender identifications who become pregnant and make reproductive choices for themselves in relation to pregnancy. See, e.g., Alexis D. Light, Juno Obedin-Maliver, Jae M. Sevelius & Jennifer L. Kerns, *Transgender Men Who Experienced Pregnancy After Female-to-Male Gender Transitioning*, 124 *OBSTETRICS & GYNECOLOGY* 1120, 1120 (2014).

⁷ One early use of the term in the legal academic literature is in Jaime Staples King, *Not This Child: Constitutional Questions in Regulating Noninvasive Prenatal Genetic Diagnosis and Selective Abortion*, 60 *UCLA L. REV.* 2, 27 (2012) (discussing "reasons-based abortion prohibitions").

constitutionality of reason-based abortion bans, using Ohio's Down syndrome abortion ban as a concrete example.⁸ With this understanding of *Casey* and its application in place, the argument in Parts III, IV, and V shifts to *June Medical* and supplies a detailed treatment of Chief Justice Roberts's concurrence in the case. Analysis here tracks the concurrence's own indication that it is following *Whole Woman's Health v. Hellerstedt*, a position that cuts back on *Whole Woman's Health* by refusing to follow its "balancing test," according to which abortion restrictions are measured by weighing their benefits against their burdens on reproductive choice.⁹ Rejecting that test, the Chief Justice's *June Medical* concurrence reverts back to what it portrays as *Whole Woman's Health*'s underlying foundations in *Casey*'s "undue burden" rule.¹⁰ In the process, Chief Justice Roberts's concurrence does not simply reaffirm *Whole Woman's Health* and mechanically apply *Casey*'s undue burden test. As a multi-layered analysis of the concurrence's text shows, it ultimately delivers a legally significant pledge to "remain[] true to" *Casey* in a deeper sense, as a function of its fidelity to principles of stare decisis.¹¹

Having supplied the textual case for the concurrence's jurisprudential endorsement of *Casey*, discussion returns in Part VI to the constitutionality of reason-based abortion bans. This time around, instead of processing their constitutionality strictly as a function of *Casey*'s doctrine governing previability abortion restrictions, the constitutionality of these bans is treated as turning on the stare decisis principles and the concrete touchstones for judgment about them that the Chief Justice's *June Medical* concurrence supplies. Recognizing that reason-based abortion bans, like Ohio's Down syndrome abortion ban, operate both by design and in effect to take aim at *Casey*'s framework, and with it *Roe v. Wade*, these measures conflict with the instructions in the Chief Justice's *June Medical* concurrence and its commitment to *Casey* and so—consistent with those instructions—should fall. While the Sixth Circuit's en banc decision on Ohio's Down syndrome abortion ban is still pending, its outcome after *June Medical* should not be in serious doubt. Depending on how the Sixth Circuit rules on the law, its decision may yet find its way to reconsideration by the Supreme Court. The question of the meaning of the Chief Justice's concurrence in *June*

⁸ See OHIO REV. CODE ANN. § 2919.10 (West, Westlaw through File 41 of the 133rd General Assembly 2019–2020); *Preterm-Cleveland v. Himes*, 944 F.3d 630 (6th Cir. 2019) (mem.). For a running tally of reason-based abortion bans, see *Abortion Bans in Cases of Sex or Race Selection or Genetic Anomaly*, GUTTMACHER INST. (Nov. 1, 2020), <https://www.guttmacher.org/state-policy/explore/abortion-bans-cases-sex-or-race-selection-or-genetic-anomaly> [https://perma.cc/99FD-L52X].

⁹ *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2309 (2016) ("The rule announced in *Casey*, however, requires that courts consider the burdens a law imposes on abortion access together with the benefits those laws confer.").

¹⁰ See *id.*; *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2136 (2020) (Roberts, C.J., concurring) ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.").

¹¹ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

Medical—and whether it is a Trojan Horse or a more enduring affirmation of constitutionally protected abortion rights—certainly will.

By way of conclusion, the work collects the wider lesson that the Chief Justice’s *June Medical* concurrence teaches about what its embrace of *Casey* means. Lower courts and other governmental actors should heed this lesson, not only in cases involving reason-based abortion bans, but in all cases involving restrictions on abortion rights.

I. SOME CONTEXT: *PLANNED PARENTHOOD V. CASEY*, ITS RULE, AND AN INITIAL LOOK AT REASON-BASED ABORTION BANS

In contrast with Justice Stephen Breyer’s plurality opinion in *June Medical*, which builds upon a robust understanding of the protections for abortion rights provided by *Planned Parenthood v. Casey*, Chief Justice John Roberts’s *June Medical* concurrence positions itself as the faithful heir to the more modest jurisprudential legacy that *Casey* staked out.¹²

There is a certain historical recurrence in the Chief Justice’s concurrence. Famously, *Casey*’s controlling opinion, an unusual joint opinion co-authored by Justices Sandra Day O’Connor, Anthony Kennedy, and David Souter, defied expectations at the time for how the Supreme Court would rule at a critical moment for abortion rights.¹³ Back in 1992, not wholly unlike in 2020, many hoped, as others feared, that a conservative-controlled Supreme Court would deliver pro-life forces the decisive victory that they had long been seeking.¹⁴ In *Casey*’s case, that was a ruling at last overturning *Roe v. Wade*, along with the broad constitutional abortion protections it announced.¹⁵ In *June Medical*, it was *Whole Woman’s Health* that was supposed to give way, with the prospect that the Court’s opinion overruling it would do so in a way that—if *Casey* and *Roe* weren’t immediately felled—

¹² See *id.* at 2135–39 (“Under principles of stare decisis, I agree with the plurality that the determination in *Whole Woman’s Health* that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law. Under those same principles, I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.”). On the concurrence being the law of the case, see *id.* at 2135 n.1 (“Although parts of *Casey*’s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court under *Marks v. United States*, 430 U. S. 188, 193 . . . (1977), as the narrowest position supporting the judgment.”).

¹³ *Casey*, 505 U.S. at 843 (noting the co-authorship of the joint opinion).

¹⁴ For important aspects of the history, which sheds productive light on *Casey*’s undue burden test, as it exfoliates the complex meanings of the idea of *Casey* and its test as a setback, see MARY ZIEGLER, ABORTION AND THE LAW IN AMERICA: ROE V. WADE TO THE PRESENT 88–120 (2020).

¹⁵ *Roe*, 410 U.S. at 164–65 (summarizing and repeating how the Court’s opinion vindicates the abortion right it recognizes as a function of the constitutional right to privacy).

would set up that eventuality through a ruling making clear and public that those decisions' days were numbered.¹⁶

To many people's surprise, *Casey* ultimately decided to reaffirm *Roe*, though it did so while significantly trimming *Roe*'s sails back to its "essential holding."¹⁷ This cut-back, attended by the promulgation of a new doctrinal framework for evaluating abortion restrictions, allowed for many more anti-abortion measures earlier in pregnancy than *Roe*'s rules would have allowed.¹⁸ *Casey*'s reworking of *Roe*'s protective solicitude for abortion rights was in no small part a compromise position among the Justices who co-authored the *Casey* joint opinion. Through it, the joint opinion's co-authors attempted to mediate and diminish the intensity of pro-choice/pro-life political and cultural struggles in a ruling that re-struck the measure of existing constitutional values—pro-choice, pro-equality, and pro-life—in a manner meant to endure for years to come: a "*Pax Roeana*," as Justice Antonin Scalia derisively put it in a separate opinion in *Casey* that emphatically rejected it.¹⁹

Concretely, *Casey*'s legal position on *Roe* meant—as it continues to mean—that the government is forbidden from outlawing abortion entirely prior to the point of fetal viability.²⁰ What is more, pre-viability abortion restrictions that do not ban but merely regulate the procedure must satisfy—or, more precisely, must not fail—the undue burden test the joint opinion

¹⁶ See Ziegler, *Upholding Precedent*, *supra* note 1 ("Before the Supreme Court's decision in *June Medical* . . . , many wondered if the Supreme Court's new conservative majority would begin to do away with precedents, starting with . . . *Whole Woman's Health*").

¹⁷ This surprise is recorded in the opinion that *Roe*'s author, Justice Harry Blackmun, filed in *Casey*. See *Casey*, 505 U.S. at 922 (Blackmun, J., concurring in part and dissenting in part) ("Three years ago, in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), . . . four Members of this Court appeared poised [to overturn *Roe*]. . . . All that remained between the promise of *Roe* and the darkness of the plurality [in *Webster*] was a single, flickering flame. . . . But now, just when so many expected the darkness to fall, the flame has grown bright." (citations omitted)). On trimming *Roe*'s sails back to the decision's "essential holding," see *Casey*, 505 U.S. at 845–46 (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("After considering the fundamental constitutional questions resolved by *Roe*, principles of institutional integrity, and the rule of *stare decisis*, we are led to conclude this: the essential holding of *Roe v. Wade* should be retained and once again reaffirmed.").

¹⁸ For one prominent example, see *Gonzales v. Carhart*, 550 U.S. 124, 132–33, 168 (2007) (upholding the federal Partial-Birth Abortion Ban Act as consistent with *Casey* notwithstanding the fact that the measure applied pre-viability and contained no health exception). See also *id.* at 169–71 (Ginsburg, J., dissenting) (discussing absence of health exception).

¹⁹ See *Casey*, 505 U.S. at 996 (Scalia, J., concurring in the judgment in part and dissenting in part).

²⁰ *Id.* at 846 (joint opinion of O'Connor, Kennedy & Souter, JJ.) ("Before viability, the State's interests are not strong enough to support a prohibition of abortion . . .").

announced.²¹ According to this test, abortion regulations that have either “the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus” violate the U.S. Constitution and its protection of women’s abortion rights.²² What the Court regards as constitutionally insubstantial abortion restrictions are, by contrast, broadly allowed. But these restrictions—in order to be deemed insubstantial, and not an undue burden on reproductive choice—must be calculated, even if and when they advance the state’s interest in the life or potential life of the fetus, to “inform the woman’s free choice, not hinder it.”²³ Prior to viability, the “ultimate” decision about whether to continue a pregnancy—or not—belongs to the pregnant woman.²⁴

Casey’s rules inform a straightforward case for why reason-based abortion bans, which limit the availability of abortion based on the reasons a person has for exercising reproductive choice, are unconstitutional prior to viability.²⁵ Ohio’s Down syndrome abortion ban, which works in its basic

²¹ *Id.* at 874 (“Only where state regulation imposes an undue burden on a woman’s ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause.”).

²² *Id.* at 877.

²³ *Id.* (“[T]he 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. . . . 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.”).

²⁴ *Id.*

²⁵ For pre-*June Medical* sources, see, for example, B. Jessie Hill, *Regulating Reasons: Governmental Regulation of Private Deliberation in Reproductive Decision Making*, in *LAW, RELIGION, AND HEALTH IN THE UNITED STATES* 348, 352 (Holly Fernandez Lynch, I. Glenn Cohen & Elizabeth Sepper eds., 2017) (“There is, therefore, a difference between deliberation-forcing mechanisms, such as reasonable informed consent requirements, and coercion, such as taking abortion off-limits altogether when it is sought for certain reasons.”); *id.* at 355 (“Indeed, though the contours of the substantive due process right to privacy are unclear, the ability to deliberate and make decisions without coercive governmental judgments as to what are appropriate and inappropriate reasons is surely at the core of the right.”); B. Jessie Hill, *The Deliberative-Privacy Principle: Abortion, Free Speech, and Religious Freedom*, 28 *WM. & MARY BILL RTS. J.* 407, 410 (2019) (describing reason-based abortion bans as “fundamentally incompatible with recognition of a constitutional privacy right—a right to autonomous decision-making”); *id.* (“[These] laws . . . reach into women’s minds, interfere with their most intimate deliberations, and tell them what reasons for this private action are acceptable or not in the eyes of the state.”); King, *supra* note 7, at 36 (“Because [reasons-based abortion prohibitions] proscribe providers from knowingly performing abortions sought for designated reasons, this alone could constitute an undue burden for all women seeking abortions for those reasons.”); Marc Spindelman, *On the Constitutionality of Ohio’s “Down Syndrome Abortion Ban”*, 79 *OHIO ST. L.J. ONLINE* 19 (2018) (explaining why Ohio’s Down syndrome abortion ban is unconstitutional); Mary Ziegler, *The Disability Politics of Abortion*, 2017 *UTAH L. REV.* 587, 589 (2017) (“Disability-based statutes likely create an impermissible undue burden under [*Casey*] and seem impossible to enforce.”); Greer Donley, Note, *Does the Constitution Protect Abortions Based on Fetal Anomaly?: Examining the Potential for Disability-Selective Abortion Bans in the Age of Prenatal Whole Genome Sequencing*, 20

form like other reason-based bans do—targeting the types of reasons pregnant women may have for choosing abortions if they are to be legally available—supplies a convenient example.²⁶ This state law makes it a crime at any point during pregnancy for doctors to perform abortions when they know or have reason to believe a pregnant woman is seeking an abortion in whole or in part because of the actual or possible Down syndrome status of the fetus she is carrying.²⁷ When these terms are satisfied, women are legally forbidden from choosing for themselves whether to end pregnancies that they do not wish to continue to term.

By its own terms of operation, Ohio’s Down syndrome abortion ban does not inform, but “hinder[s]” pregnant “wom[e]n’s [pre-viability] free choice.”²⁸ It does not simply require giving women material information that will make their choices more meaningfully informed. It says when they seek an abortion because of the actual or believed Down syndrome status of the fetus they are carrying, that choice is foreclosed. Hence the law is impermissible under *Casey*’s pre-viability rule banning abortion bans.

This same conclusion obtains if Ohio’s Down syndrome abortion ban is regarded as a pre-viability abortion “regulation.”²⁹ Seen this way, the measure’s regulatory terms still substitute the state’s choice for pregnant women’s. For the nearly thirty years since *Casey*, however, and consistent with *Roe*’s rules from the start, the Supreme Court’s steady instruction has been that before fetal viability, pregnant women get to make the final abortion choice without having to give the state an account. Capturing this sentiment in *Belotti v. Baird*, a case involving the invalidation of “an absolute third-party veto” on minors’ abortion rights, Justice John Paul Stevens

MICH. J. GENDER & L. 291, 324 (2013) (discussing a North Dakota “disability-based abortion ban” and observing that, as a legal measure that “actually outlaws certain pre-viability abortions[,] [i]t is . . . “an explicit rejection of the Court’s holding in *Roe*, as interpreted by *Casey*, that the government cannot prevent women from obtaining a pre-viability abortion”); Justin Gillette, Comment, *Pregnant and Prejudiced: The Constitutionality of Sex- and Race-Selective Abortion Restrictions*, 88 WASH. L. REV. 645, 649 (2013) (arguing that reason-based abortion bans infringe on constitutional rights on several grounds, including “a woman’s liberty interest in reproductive decisionmaking” and the ability to obtain a pre-viability abortion).

²⁶ For adjudication of other states’ reason-based bans, which provides perspective on the typicality of Ohio’s Down syndrome abortion ban, see, for example, *Planned Parenthood of Ind. & Ky., Inc. v. Comm’r of Ind. State Dep’t of Health*, 888 F.3d 300, 302–03 (7th Cir. 2018) (upholding permanent injunction against Indiana statutes prohibiting abortion based on reasons of race, sex, or Down syndrome or other disabilities); *Hopkins v. Jegley*, 267 F. Supp. 3d 1024, 1111 (E.D. Ark. 2017) (preliminarily enjoining Arkansas’s prohibition on sex-selection abortion).

²⁷ OHIO REV. CODE ANN. § 2919.10 (West, Westlaw through File 41 of the 133rd General Assembly 2019–2020). For detailed discussion of the law, see generally Spindelman, *supra* note 25.

²⁸ *Casey*, 505 U.S. at 877.

²⁹ *See id.*

observed that: “It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”³⁰ *Casey*’s categorical endorsement of the rule that before fetal viability, the state’s attempts to regulate abortion must leave room for and honor the “ultimate” abortion decisions pregnant women make, keeps faith with this general view.³¹ Nothing in *Casey* or in any Supreme Court abortion decision since blesses reason-based abortion bans that—like Ohio’s—make women’s lawful access to abortion turn on having the right sorts of reasons in the state’s policy view when they exercise their constitutionally protected rights.³²

II. ANTICIPATING *JUNE MEDICAL*

Earlier in 2020, while *June Medical* was still pending, it seemed possible—even likely—that the Supreme Court was on the verge of inaugurating a new era in its abortion jurisprudence: one in which the Court would sooner or later set a plain course for the wholesale reversal of *Planned Parenthood v. Casey* and, by extension, *Roe v. Wade*.³³ In that setting, *Casey*, including its diminished-but-still-significant post-*Roe* restrictions on anti-abortion laws, appeared vulnerable. Indeed, *Casey*’s foundations seemed sufficiently vulnerable in the face of the expected oncoming attack that, as oral arguments about Ohio’s Down syndrome abortion ban took place before the Sixth Circuit, it seemed conceivable that the court might say the Ohio

³⁰ *Bellotti v. Baird*, 443 U.S. 622, 654–55 (1979) (Stevens, J., concurring in the judgment).

³¹ *See Casey*, 505 U.S. at 877.

³² Brief of Plaintiffs-Appellees at 18–19, *Preterm-Cleveland v. Himes*, 944 F.3d 630 (6th Cir. 2019) (No. 18-3329) (“‘The existence and recognition of this constitutional right means that the choice whether to exercise it—including the reasons why—ultimately belongs to the pregnant woman when the decision is hers to make’; she has a right to make it ‘without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.’” (quoting Spindelman, *supra* note 25, at 38)).

³³ *See, e.g.*, Mary Ziegler, *The Question No One is Asking About the Supreme Court and Abortion*, WASH. POST (Mar. 5, 2020, 6:00 AM), <https://www.washingtonpost.com/outlook/2020/03/05/question-no-one-is-asking-about-supreme-court-abortion/> (“Most Americans following *June Medical* want to know what will happen to *Roe*. The court probably won’t undo abortion rights altogether this time around. But . . . [i]t seems likely that the court as currently constituted will undo *Roe* at some point.”). The same holds true for how the situation looked in 2019. *See, e.g.*, Leah Litman, *June Medical and the End of Reproductive Justice*, TAKE CARE (Oct. 2, 2019), <https://takecareblog.com/blog/june-medical-and-the-end-of-reproductive-justice> [<https://perma.cc/7CML-C4ES>] (“The papers in *June Medical* also underscore how much reproductive rights and justice have to lose—and to lose quickly—with the current Court. While *June Medical* does not ask the Court to overturn *Roe v. Wade* or *Planned Parenthood v. Casey*, the practical effect of the state’s positions in *June Medical* would allow states to regulate abortion out of existence.”).

measure, which flies in the face of the *Casey* framework, could nevertheless be squared with it.³⁴

Adapted to these purposes, one thought that achieved a certain upper hand during the oral arguments in the Sixth Circuit was that the targeted way that the Ohio law blocked women's access to abortions did not constitute an undue burden under *Casey*.³⁵ The argument here was that no undue burden should be found in these circumstances, because pregnant women hold the key to the state's lock on the exercise of their constitutional rights.³⁶ To obtain an abortion of a fetus that has or might have Down syndrome, a pregnant woman need only keep her mouth shut and not share her reasons for wanting an abortion or not be plainspoken about them with her physician.³⁷ What a doctor does not know and cannot be legally imputed to know cannot be a triggering condition for the law's ban on performing an abortion of a fetus with Down syndrome.³⁸ Silence thus equals rights. The noteworthy under-inclusiveness of the legal measure on these grounds—perhaps no fetal life being actually saved by it—did not appear to count in the calculus of whether the measure was an undue burden that constituted a substantial obstacle to choice. It might have shown, however, that the measure was strictly symbolic, or worse—one that threatened women's health by breaking down the trust and communication between doctor and patient for no certain, positive, material effects, making the law's burdens also undue in this respect.³⁹

³⁴ For more comprehensive discussion of how the measure conflicts with *Casey*'s framework, see generally Spindelman, *supra* note 25.

³⁵ See Oral Argument at 2:00, *Preterm-Cleveland v. Acton*, No. 18-3329 (6th Cir. argued Mar. 11, 2020) (currently on docket as *Preterm-Cleveland v. Himes*), https://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=recent/03-11-2020%20-%20Wednesday/18-3329%20Preterm-Cleveland%20v%20Amy%20Acton%20et%20al.mp3&name=18-3329%20Preterm-Cleveland%20v%20Amy%20Acton%20et%20al [<https://perma.cc/2FYT-BD4N>] (argument by Ohio Solicitor General Benjamin Flowers on behalf of the State that pre-viability abortions would be unimpeded so long as physicians have no knowledge of a patient's reasoning); *id.* at 2:32 (“If we assume that the undue burden test applies, the reason that this law does not violate it is because women can continue to get those abortions.” (remarks of Benjamin Flowers)).

³⁶ See *id.* at 2:04 (“[E]very single woman can get an abortion at any point before viability. She may of course do so for a reason other than Down syndrome. And she can even do so because of Down syndrome if her doctor is unaware of her reason.” (remarks of Benjamin Flowers)); see also Defendants-Appellants' Supplemental Reply Brief on Rehearing en Banc at 5, *Preterm-Cleveland v. Acton*, No. 18-3329 (6th Cir. Feb. 20, 2020) [hereinafter “Defendant-Appellants' Supplemental Reply Brief, filed Feb. 20, 2020”] (“The law thus allows any woman to abort any pregnancy for any reason; women may even get a Down-syndrome-selective abortion using a doctor unaware of the motive.”).

³⁷ *Id.*

³⁸ See Defendant-Appellants' Supplemental Reply Brief, filed Feb. 20, 2020, *supra* note 36, at 5.

³⁹ Compare Supplemental Brief of Plaintiffs-Appellees *Preterm-Cleveland, et al.* on Rehearing en Banc, at 6–8. (arguing that Ohio's Down syndrome ban, H.B. 214, bans pre-viability abortions), with Defendants-Appellants' Supplemental Reply Brief, filed Feb. 20,

III. *JUNE MEDICAL*'S ARRIVAL: AN INITIAL LOOK

Then the Supreme Court's decision in *June Medical* arrived.⁴⁰ And with it a liberation of women's abortion rights from the strictures of the Louisiana anti-abortion law at issue in the case, which sought to impose a hospital admitting privileges requirement on abortion providers in the state.⁴¹ According to the district court in *June Medical*, the admitting privileges law would have "reduce[d] the number of clinics from three to 'one, or at most two,' and the number of physicians providing abortions from five to 'one, or at most two,' and 'therefore cripple[d] women's ability to have an abortion in Louisiana.'"⁴² Instead of affirming the state's authority to regulate abortion like this—disparaging abortion rights and their realities along the way—the Supreme Court struck the admitting privileges measure down.

June Medical is noteworthy for not only what it says and does, but also what it refuses to say and do. Its voluble non-announcement of that expected new era in the Supreme Court's abortion rights jurisprudence is still ringing and being sorted out. Over strong dissents, a majority of the Supreme Court in *June Medical* did not deliver the simultaneously hoped for and feared upending of *Whole Woman's Health*—or of *Casey* and *Roe*.⁴³ Nor did *June Medical* plainly foreshadow these far-reaching outcomes.

Of course, nothing of the sort was expected from the Justices who joined Justice Stephen Breyer's plurality opinion in *June Medical*, including Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan.

2020, *supra* note 36, at 5 ("Nothing in the record suggests these rules will materially—let alone *substantially*—burden the abortion right."), and Defendants-Appellants' Supplemental Reply Brief on Rehearing en Banc at 18, *Preterm-Cleveland v. Acton*, No. 18-3329 (6th Cir. Jan. 13, 2020) (noting that the law "does not impose a 'substantial' burden or much of a burden at all—especially since there is no evidence that women who want an abortion for a reason foreclosed by law volunteer that information to their doctors").

⁴⁰ Oral arguments before the Sixth Circuit in *Preterm-Cleveland v. Acton* took place on March 11, 2020—just a week after oral arguments for *June Medical* before the Supreme Court, which took place on March 4, 2020. *June Medical* came down on June 29, 2020. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103 (2020).

⁴¹ The admitting privileges requirement in the law, which required physicians performing abortions to have admitting privileges at nearby hospitals, enabling them to admit and provide care to patients in those settings, circumscribed the availability of abortion in Louisiana in ways discussed in *June Medical*. *Id.* at 2112–13, 2120–32 (plurality opinion) (noting the impact of the measure on physicians who perform abortions and finding the district court properly determined that it had "nothing to do with the State's asserted interests in promoting women's health and safety"); *id.* at 2133, 2139–2141 (Roberts, C.J., concurring) (discussing the measure and finding it to be an undue burden under *Casey*).

⁴² *Id.* at 2134 (quoting *June Med. Servs. L.L.C. v. Kliebert*, 250 F. Supp. 3d 27, 87 (M.D. La. 2017)).

⁴³ See *id.* at 2142–53 (Thomas, J., dissenting); *id.* at 2153–71 (Alito, J., dissenting); *id.* at 2171–82 (Gorsuch, J., dissenting); *id.* at 2182 (Kavanaugh, J., dissenting).

Predictably, because all these Justices were in the majority in *Whole Woman's Health*, the Breyer plurality sticks with that opinion's full doctrinal scope, including its interpretation of *Casey*'s undue burden test as involving a balancing of benefits and burdens of restrictions on abortion rights. In this respect, Justice Breyer's plurality opinion in *June Medical*—like his majority opinion in *Whole Woman's Health*—is a reaffirmation of *Casey* that is in some ways distinctively *Roe*-like.⁴⁴

Perhaps more significantly, the Chief Justice's concurring opinion in *June Medical* did not involve or prefigure *Casey*'s and *Roe*'s demise either. While the concurrence pulls *Whole Woman's Health*, a decision the Chief Justice did not originally join, back within what the concurrence represents as the strict four corners of *Casey*'s doctrine—corners that entail no general balancing test—nothing in the concurrence announces the dawning or the soon-to-be dawning of a muscular conservative revolution in the Court's abortion jurisprudence.⁴⁵ The fundamentals of the abortion right—its basic status as constitutionally protected as *Casey* announced it—are not placed in active doubt.⁴⁶

To the contrary, Chief Justice Roberts's concurrence in *June Medical* announces that *Whole Woman's Health* should henceforth be held to its own underlying terms, according to which it is an application of *Casey*'s undue

⁴⁴ See *id.* at 2112 (plurality opinion). For one indication of *Whole Woman's Health*'s *Roe*-likeness, see *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Thomas, J., dissenting) (“Whatever scrutiny the majority applies to Texas’ law, it bears little resemblance to the undue-burden test the Court articulated in [*Casey*], and its successors. Instead, the majority eviscerates important features of that test to return to a regime like the one that *Casey* repudiated.”); *id.* at 2326 (“The majority’s undue-burden test looks . . . far more like the strict-scrutiny standard that *Casey* rejected, under which only the most compelling rationales justified restrictions on abortion.”).

⁴⁵ For Chief Justice Roberts's concurrence's treatment of *Whole Woman's Health*'s balancing test as a derivation from *Casey*, see *June Medical Services L.L.C.*, 140 S. Ct. at 2138 (Roberts, C.J., concurring) (“To be sure, the [*Casey*] Court at times discussed the benefits of the regulations, including when it distinguished spousal notification from parental consent. But in the context of *Casey*'s governing standard, these benefits were not placed on a scale opposite the law's burdens.”).

⁴⁶ For opinions indicating some willingness to take aim at the Court's abortion jurisprudence, see *June Medical Services L.L.C.*, 140 S. Ct. at 2142 (Thomas, J., dissenting) (“Our abortion precedents are grievously wrong and should be overruled.”); *id.* at 2171 (Alito, J., dissenting) (“The decision in this case, like that in *Whole Woman's Health*, twists the law, and I therefore respectfully dissent.”); *id.* at 2182 (Kavanaugh, J., dissenting) (“Today, five Members of the Court reject the *Whole Woman's Health* cost-benefit standard.”). For a line that might at least partly track this idea into Chief Justice Roberts's concurrence, see *id.* at 2133 (Roberts, C.J., concurring) (“I joined the dissent in *Whole Woman's Health* and continue to believe that the case was wrongly decided. 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.”). But that line meets its limits given the remainder of the Chief Justice's concurrence's text.

burden framework.⁴⁷ The Chief Justice’s concurrence treats *Whole Woman’s Health* precisely this way, as involving no doctrinal departure from *Casey*’s steady, stable foundations, including its undue burden test.⁴⁸ So far at least as the Chief Justice’s opinion is concerned, *Whole Woman’s Health*’s broad balancing test of the benefits and burdens of anti-abortion measures is now off the table—a highly significant move. But while the Chief Justice’s concurrence jettisons the *Whole Woman’s Health*’s balancing test, it nevertheless honors *Whole Woman’s Health* as a variation on *Casey* and its undue burden framework.⁴⁹ Thus, the Chief Justice’s opinion, seeing the Louisiana admitting privileges law at issue in *June Medical* as indistinguishable from the Texas admitting privileges law that *Whole Woman’s Health* rejected, treats this measure as an unconstitutional undue burden on the abortion right.⁵⁰

IV. A CLOSER LOOK AT CHIEF JUSTICE ROBERTS’S CONCURRENCE, TAKE 1: PRACTICING FIDELITY TO *CASEY*

Bridging political and perspectival splits, a number of thoughtful commentators have elsewhere observed in different ways—sometimes ruefully, sometimes hopefully—that Chief Justice Roberts’s *June Medical* concurrence reduces *Whole Woman’s Health* to *Casey* redux, but while neither “endorses[ing]” nor “reaffirms[ing]” *Casey* itself.⁵¹ A search in the

⁴⁷ *Id.* at 2138–39 (Roberts, C.J., concurring) (discussing *Whole Woman’s Health* and noting that it itself “explicitly stated that it was applying ‘the standard, as described in *Casey*,’ and reversed the Court of Appeals for applying an approach that did ‘not match the standard that this Court laid out in *Casey*.’”). For *Whole Woman’s Health*’s description of itself as an extension of *Casey*, see *Whole Woman’s Health*, 136 S. Ct. at 2300, 2309–10.

⁴⁸ See *June Med. Serv.*, 591 U.S. at 2138–39 (Roberts, C.J., concurring) (“We should respect the statement in *Whole Woman’s Health* that it was applying the undue burden standard of *Casey*. . . . I would adhere to the holding of *Casey*, requiring a substantial obstacle before striking down an abortion regulation.”).

⁴⁹ See *id.*

⁵⁰ *Id.* at 2141–42 (“*Stare decisis* instructs us to treat like cases alike. The result in this case is controlled by our decision four years ago invalidating a nearly identical Texas law. The Louisiana law burdens women seeking previability abortions to the same extent as the Texas law”). For additional discussion of the parallels between the laws, see *id.* at 2134, 2139, 2140–42.

⁵¹ The quoted language, as an expression of hope, comes from 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> [https://perma.cc/YD3F-UMNP] (suggesting that those concerned with the “intrinsic dignity of every human being, born and unborn,” should take heart that Chief Justice Roberts did not “endorse or reaffirm *Casey* as a precedent”). For a rueful perspective on the general possibility, see Ziegler, *Upholding Precedent*, *supra* note 1 (describing how the move away from the *Whole Woman’s Health* balancing test and the Chief Justice’s invocation of “scientific uncertainty[,] . . . the justification for many of the abortion restrictions on their way to the Supreme Court[,]” display “how the Roberts Court may move past *Roe* and *Casey*”). See also, e.g., Eric Segall, *June Medical and How to Talk About Abortion Part III*, DORF ON LAW, <http://www.dorfonlaw.org/2020/07/june-medical-and-how-to-talk-about.html>

concurrence for direct language doing either is in vain, it is true. But the sentiment behind the observation—that the Chief Justice’s concurrence only goes through the motions in its application of *Casey*’s rule, which is thus not meaningful in a stare decisis sense—while understandable, isn’t quite right. The concurrence’s notation that nobody in the case asked the Court “to reassess the constitutional validity” of *Casey*’s undue burden standard is the best and most direct support for this line of thought, but taken along with the remainder of what the concurrence does and says, it does not carry its point through.⁵²

Viewed comprehensively, the Chief Justice’s relatively short concurrence not only avoids casting aspersions on *Casey*, but it also practically affirms and embraces *Casey* in a ruling that relies on stare decisis principles as its modal justification. Unflinchingly and without detectable disparagement, the Chief Justice’s concurrence applies *Casey*’s undue burden standard in *June Medical* like it’s its job. Through this effort, the concurrence practically strengthens, rather than weakens, *Casey*’s jurisprudential force. Along the way, the formal mechanics of the concurrence’s *Casey*-based disposition of the case give *Casey* a new jolt of jurisprudential energy and life at a vital juncture in the history of the Court’s abortion jurisprudence.

The Chief Justice’s concurrence’s doctrinal reliance on *Casey* demonstrates that *Casey* is functioning perfectly well as a still-eminently workable decision that pregnant people and the wider American public may continue to rely upon. Indeed, within the Chief Justice’s concurrence, *Casey* persists as a valid constitutional and rule of law decision that meets and legitimates the socio-legal frameworks of intimacy and abortion rights the American people have lived with for nearly fifty years now, since *Roe*, relying on these frameworks to structure their relationships, intimacies, and personal and professional interactions, not to mention their future lives and plans.⁵³ Even in its mechanical aspects, the Chief Justice’s concurrence adds a vital new cross-stitch to the way in which *Roe*, as understood by *Casey*, remains an enduring element in the still-unfolding constitutional quilt that undergirds and bears the imprints of American life.

To be sure, Chief Justice Roberts’s *June Medical* concurrence does not appear to undertake this work from a place of underlying agreement with

[<https://perma.cc/69NB-DD8F>] (“*June Medical* signals trouble to come for supporters of abortion rights. . . . Roberts entirely rewrote precedent in *June Medical*. . . . Roberts also made a point of saying that no one had officially asked him to overturn *Roe* or its progeny. He might be game if someone makes that request. The future of abortion rights remains pretty uncertain if Roberts remains the swing justice.” (quoting Mary Ziegler)).

⁵² The full quotation from the Chief Justice’s concurrence is: “Neither party has asked us to reassess the constitutional validity of [*Casey*’s undue burden] standard.” *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring).

⁵³ See *id.* at 2138.

Casey and *Roe*, presuming they were rightly decided as an initial matter. As Laurence Tribe has pointed out, Chief Justice Roberts “is no pro-choice hero—[his decision in *June Medical*] was his first vote against an abortion restriction[.]”⁵⁴

But what a first vote it was—and is. Judging from the structure of what the Chief Justice’s concurrence does and says, its reliance on *Casey* as the doctrinal basis for its decision is not an exercise in a purely detached, mechanical jurisprudence.⁵⁵ In context, the Chief Justice’s concurrence is not simply going through the motions of following *Casey*’s rule. A close look at the opinion reveals a discernible, indeed palpable if not perhaps finally final, investment in the Court’s *Casey* decision, securing it at a moment when its future has been subject to doubt.

The basic reasons that Chief Justice Roberts’s concurrence offers for its reliance on stare decisis in *June Medical*—which ultimately takes the opinion back to *Casey* through its interpretation of *Whole Woman’s Health*—suggest that the Chief Justice has begun thinking that toppling *Casey* and what it preserves of *Roe* would be a jurisprudential mistake with real effects not only on the Court and its institutional legitimacy but also on the fabric of American public and private life.⁵⁶

Along the lines that *Casey*’s joint opinion spelled out in a ruling that was also grounded in stare decisis principles, a decision now toppling *Casey* and *Roe* would dramatically alter the constitutional and legal landscape, as well as the public, private, and political landscape, achieving whatever gains it might be taken to achieve in terms of “constitutional correctness” by elevating a contestable and contested constitutional method that, followed in this setting, would involve the Court wounding itself and its institutional legitimacy.⁵⁷ In doing so, such a decision would threaten injury to what presently remains of the broad American faith, which many in the

⁵⁴ Laurence H. Tribe, *Roberts’s Approach Could End Up Being More Protective of Abortion Rights – Not Less*, WASH. POST (July 1, 2020), <https://www.washingtonpost.com/opinions/2020/07/01/robertss-approach-could-end-up-being-more-protective-abortion-rights-not-less/>.

⁵⁵ For a classic exposition of “mechanical jurisprudence,” see generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

⁵⁶ *Cf. June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) (“Both Louisiana and the providers agree that the undue burden standard announced in *Casey* provides the appropriate framework to analyze Louisiana’s law. . . . *Casey* reaffirmed “the most central principle of *Roe v. Wade*,” “a woman’s right to terminate her pregnancy before viability.”” (citation omitted) (quoting *Planned Parenthood v. Casey*, 505 U.S. 833, 871 (1992)).

⁵⁷ For *Casey*’s grounding in stare decisis, see *infra* note 61. A different perspective on stare decisis in *Casey* is in *Casey*, 505 U.S. at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part) (“We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases.”).

legal profession and the wider public still aspire to share, in constitutionalism, rule of law legalism, and their possibilities of guiding and constraining both political and institutional practices.⁵⁸

In its own terms, Chief Justice Roberts's *June Medical* concurrence is organized around a conservative jurisprudential case for a "pragmatic" and "contextual" approach to stare decisis as its basic rationale. As the opinion puts it: "Stare decisis is pragmatic and contextual, not 'a mechanical formula of adherence to the latest decision.'" ⁵⁹

Embracing pragmatism and contextualism this way, the Chief Justice's concurrence generates a delightful little irony. It repudiates *Whole Woman's Health* because it ventured open-ended balancing of costs and benefits of anti-abortion legislation to women while staking out a position of its own that, on another level, involves an analysis of stare decisis principles that pragmatically and contextually weighs the costs and benefits of following precedent amidst a practical accommodation of conflicting constitutional values, both for the abortion right and against it. The outcome of this deeper jurisprudential balancing is a reminder that the constitutional rules we have and must live with are not always or even necessarily a simple function of any one account of the "right" or "best" interpretation of the Constitution's text.⁶⁰

In any event, by making stare decisis the touchstone for its judgment the way it does, the Chief Justice's concurrence sutures its theory of the case for applying *Casey* to *Casey*'s own theory of itself, grounded in stare decisis principles.⁶¹ At the same time, the Chief Justice's concurrence

⁵⁸ See *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) ("The doctrine [of stare decisis] also brings pragmatic benefits. Respect for precedent 'promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.'" (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))).

⁵⁹ *Id.* at 2135 (quoting *Helvering v. Hallock*, 309 U.S. 106, 119 (1940)).

⁶⁰ See *id.* at 2134. Laurence Tribe holds out some hope that there are actually benefits from the Chief Justice's repudiation of *Whole Woman's Health*'s balancing of interests for the abortion right itself. See Tribe, *supra* note 54 ("Roberts's bright-line approach might have benefitted the liberal [balancing] analysis lacks. . . . [T]he Roberts approach might not be the looming disaster that some advocates fear.").

⁶¹ For the stare decisis considerations at work in *Casey*'s joint opinion, see, for example, *Casey*, 505 U.S. at 845 ("institutional integrity"); *id.* at 854 ("prudential and pragmatic considerations" involving "the consistency of overruling a prior decision with the ideal of the rule of law"); *id.* at 855 (the standard's administrability); *id.* at 855–56 (significance of reliance interests); *id.* at 857 (noting that "[n]o evolution of legal principle" has rendered the precedent obsolete); *id.* at 860 (commenting "that no change in *Roe*'s factual underpinning has left its central holding obsolete"). For the contextual consideration of these factors, including the joint opinion's distinction between the *Roe* decision line and two other decisional lines involving "national controversies," see *Casey*, 505 U.S. at 854–69.

demonstrates the strength of the case for preserving *Casey* as a stare decisis matter, taking account of considerations like administrative ease (the concurrence follows *Casey* without difficulty), non-repudiation of the ruling, and “the reliance interests that the precedent has engendered.”⁶² Without expressly declaring that *Casey*, including its interpretation of *Roe*, is being reaffirmed, the concurrence enacts and thereby spotlights the reasons for thinking it should be.⁶³ Thus aligned with *Casey*, the concurrence makes *Casey* harder to overturn than before *June Medical* came down. This being the case, Chief Justice Roberts’s concurrence reads as though the Chief Justice is prepared—or preparing—to live with the conclusion that *Casey* stays, not goes. If so, the concurrence is less a decision that lays the groundwork for overturning *Casey* and ultimately *Roe* than a cautious and judicious trial balloon for preserving them that does not fully, finally, and openly commit itself to that position before it absolutely must.⁶⁴

V. CHIEF JUSTICE ROBERTS’S CONCURRENCE, TAKE 2: STAYING TRUE TO *CASEY* AND *ROE*

Nor does Chief Justice Roberts’s *June Medical* concurrence only reach for *Casey*, and by extension *Roe*, in these ways.

Understood as resulting from the Chief Justice’s thinking about and application of principles of stare decisis, described in his concurrence as that “old friend of the common lawyer,” the concurrence’s text invokes the authority of the great traditionalist Edmund Burke, whose words enable the opinion briefly to discourse on the wisdom of respecting the general “stock of reason” of those who came before us.⁶⁵ In view of his dissenting position

⁶² See *id.*; *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

⁶³ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) (“The Court accordingly considers additional factors before overruling a precedent, such as its administrability, its fit with subsequent factual and legal developments, and the reliance interests that the precedent has engendered.”).

⁶⁴ Seen this way, the Chief Justice’s *June Medical* concurrence may be read as formally leaving open the prospect of strategically steering the Court in future cases toward *Casey*’s and *Roe*’s demise, but only slowly, incrementally, so that the proper groundwork is in place to answer predictable charges that overturning those decisions is purely political work. For that groundwork to be established, however, substantial changes outside of constitutional doctrine—in political culture and support for women’s reproductive rights—will have to occur. There is a separate question here on what may be sustained in keeping with *Casey* and a “proper” application of its undue burden standard and related debates about what “proper” in that context, and perhaps “principled” as well, does and does not mean. Even if the Chief Justice is committed to upholding *Casey* and *Roe*, that commitment may not be nearly as broad as many supporters of women’s reproductive rights would like and say is called for by a proper reading of the precedent.

⁶⁵ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring); see also *id.* (describing the humility of stare decisis: “Because the ‘private stock of reason . . . in each man is small, . . . individuals would do better to avail themselves of the general bank and capital of

in *Whole Woman's Health* and his repudiation in *June Medical* of the earlier case's interpretation of *Casey* as over-reaching, it is scarcely imaginable that the Chief Justice's opinion, in talking about the wisdom in the traditional "stock of reason," has in mind Justice Breyer's opinion for the Court in *Whole Woman's Health*.⁶⁶ In context, the concurrence's bows to the force of accumulated and received thinking from past generations that, with time and practical experience, can make a tradition worth respecting, are, however, perfectly suited to bringing to mind the judicial struggles, deliberations, and the concerted action of the three Justices in *Casey* who coordinated their joint opinion in the case. Like the Chief Justice's concurrence, which follows in its doctrinal footsteps, the *Casey* troika's joint effort understood in "pragmatic and contextual" terms the wider stakes for the Court and the country of repudiating "the most central principle of *Roe*," even as it adjusted *Roe*'s particular accommodation, or balancing, of the competing interests in the case.⁶⁷

All this in *Casey*, as now in *June Medical*, functioned—or was meant to function—as a way to temper, not enflame, the political passions around the legal status of abortion rights and their conflict with pro-life, cultural conservative commitments. Given ongoing public support for abortion rights and a newly active American political street that has marched for women's rights, Chief Justice Roberts undoubtedly comprehends that abandoning *Casey* and *Roe* could unleash a massive political storm.⁶⁸

In what reads as homage, the Chief Justice's *June Medical* concurrence deals with *Whole Woman's Health* the same way that *Casey* dealt with *Roe*.⁶⁹ It reaffirms what it treats as the earlier decision's core or necessary

nations and of ages" (quoting 3 EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 110 (1790)).

⁶⁶ *Id.* The Chief Justice joined Justice Alito's dissent in *Whole Woman's Health*. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2330–53 (2016) (Alito, J., dissenting).

⁶⁷ See *June Med. Servs.*, 140 S. Ct. at 2135 (Roberts, C.J., concurring) ("*Casey* reaffirmed 'the most central principle of *Roe v. Wade*' . . ." (quoting *Casey*, 505 U.S. at 871)). For *Casey*'s stare decisis template, see *Casey*, 505 U.S. at 845, 854–60 (noting the pragmatic considerations supporting application of stare decisis).

⁶⁸ See Scott Clement & Emily Guskin, *A Slim Majority of Voters Oppose Barrett Hearings, Though a Consistent Majority Support High Court Upholding Roe v. Wade*, *Post-ABC Poll Finds*, WASH. POST (Oct. 12, 2020, 6:00 AM), https://www.washingtonpost.com/politics/poll-trump-court-abortion/2020/10/12/ec11a880-0bd1-11eb-8a35-237ef1eb2ef7_story.html (finding that sixty-two percent of voters in a recent poll say "the Supreme Court should uphold" *Roe v. Wade*, "the decision that guarantees a woman's right to abortion"); Domenico Montanaro, *Poll: Majority Want to Keep Abortion Legal, But They Also Want Restrictions*, NPR (June 7, 2019, 5:00 AM), <https://www.npr.org/2019/06/07/730183531/poll-majority-want-to-keep-abortion-legal-but-they-also-want-restrictions> [<https://perma.cc/MMK3-9VNE>] (finding that seventy-seven percent of Americans support upholding *Roe*).

⁶⁹ Others have reached the same conclusion. See, e.g., Litman, *supra* note 1 ("[T]he Court in *Casey* gave abortion rights a significant victory that also left the abortion rights

teaching, which in this setting is nothing other than the teaching of *Casey* itself.⁷⁰ Indeed, in making clear that holding fast to precedent may help the Court to preserve “the actual and perceived integrity of the judicial process,” and hence the Court’s role in our overlapping constitutional and rule of law orders, the Chief Justice’s concurrence—at just that moment when it brings its peroration on *stare decisis* to a close—offers a telling, parting thought that demonstrates its investments in *Casey* in the most unmistakable terms yet.⁷¹

As background, recall that Chief Justice Roberts’s concurrence is rejecting *Whole Woman’s Health*’s balancing test to the extent it believes that test exceeds the formal bounds of *Casey*, which thus supplies the decision’s authority and doctrinal apparatus to decide the case. (Notice that the Chief Justice’s opinion’s interpretation of *Casey*’s rule must be pliable enough to support the same result reached in *Whole Woman’s Health*.) Ending its discussion of *stare decisis*—and immediately before the opinion establishes its reading of *Casey* as the governing law it will apply—the concurrence speaks in striking terms about “[r]emaining true to an “intrinsically sounder” doctrine established in prior cases [as something that] better serves the values of *stare decisis* than [a decision] following’ the recent departure.”⁷²

The “recent departure” in this setting is, of course, a reference to *Whole Woman’s Health*. This makes *Casey* by implication the “intrinsically sounder’ doctrine” the concurrence indicates it will be “[r]emaining true to.”⁷³ To recognize this detail is to appreciate that *Casey* is functioning in the Chief Justice’s concurrence as part of both its text and its subtext. Subtext here, *Casey* is a formally unnamed, proper object of the concurrence’s *stare decisis* discussion. Between or beneath its lines, *Casey*—and not just *Whole Woman’s Health*—is what the Chief Justice’s concurrence is about.

To be sure, the Chief Justice’s concurrence is figuring *Casey* in comparative terms. *Casey* is an “intrinsically sounder” precedent than *Whole Woman’s Health*, which, in the dissent’s view, departs from it. The

considerably more vulnerable going forward. That is precisely what the Chief Justice did in *June Medical*.”); Murray, *supra* note 1 (“Roberts’s decision in *June Medical Services* does to *Whole Woman’s Health* what *Casey* did to *Roe*.”).

⁷⁰ See, e.g., *June Med. Servs.*, 140 S. Ct. at 2139 (Roberts, C.J., concurring) (“In this case, *Casey*’s requirement of finding a substantial obstacle before invalidating an abortion regulation is therefore a sufficient basis for the decision, as it was in *Whole Woman’s Health*. In neither case, nor in *Casey* itself, was there call for consideration of a regulation’s benefits, and nothing in *Casey* commands such consideration.”).

⁷¹ See *id.* at 2134.

⁷² *Id.* (quoting *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 231 (1995) (plurality opinion)).

⁷³ See *id.*

concurrence does not flatly declare that *Casey* is “intrinsically sound,” but portraying it as “intrinsically sounder” is sufficient grounding in this setting for the concurrence to pledge to “[r]emain[] true to” it.⁷⁴

Now, the language of staying “true to” is somewhat dated. Whatever its traditional associations, this expression of fidelity sounds a discernible note of affinity, attachment, and investment—here, to *Casey*’s rules. This is not a love song to *Casey*, but neither is it an entry in the judicial playbook under “repudiating precedent,” especially *sub silentio*.⁷⁵ Irony aside, if the game afoot in Chief Justice Roberts’s concurrence were to begin slowly tearing *Casey* up from its roots, the move would not be to characterize the precedent as “intrinsically sounder” and to describe it as worth “[r]emaining true to.”⁷⁶ That is more in keeping with the thought—if not the fully formulated plan—to keep *Casey* around.⁷⁷

Even if this were intended as nothing more than a temporizing strategy—a result others seem to glean—it would still be significant.⁷⁸

Here is why. Chief Justice Roberts’s *June Medical* concurrence places on the table not only a decision that in various ways approves of *Casey*, and *Roe* by extension, but also a framework for thinking about how lower courts and other governmental actors should likewise be “true to” the “intrinsically sounder” caselaw and doctrine that the concurrence affirms. Disfavored by the concurrence are judicial rulings in the abortion setting that will “change” the law “erratically” as contrasted with decisions that involve the orderly, incremental development of “principled and intelligible” legal rules that are “evenhanded, predictable, and consistent.”⁷⁹ Even assuming that the Chief Justice still harbors sympathies for overturning *Casey* and what it preserved of *Roe*—and his concurrence’s observation that “[n]either party has asked us to reassess the constitutional validity of [*Casey*’s undue burden] standard” may be taken to reflect such sympathies—the concurrence has now effectively framed a category of cases involving anti-abortion rules that,

⁷⁴ *See id.*

⁷⁵ *Cf.* THE BEATLES, *All My Loving*, on WITH THE BEATLES (Parlophone Records 1963) (“All my, lovin’, I will send to you / All my lovin’, darlin’, I’ll be true / . . . Ooh ooh, all my lovin’, I will send to you”).

⁷⁶ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

⁷⁷ *See* Litman, *supra* note 1 (giving voice to the view that “[t]he Chief Justice’s emphasis on the importance of adhering to the Court’s prior decisions does not sound like the thinking of a person who is inclined to overrule *Roe v. Wade*”).

⁷⁸ For sources reading the Chief Justice’s concurrence along these lines, see, for example, Lithwick, *supra* note 1; Litman, *supra* note 1; Murray, *supra* note 1; Ziegler, *Upholding Precedent*, *supra* note 1.

⁷⁹ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring) (internal quotation marks omitted).

when judged pragmatically and contextually, are beyond the constitutional pale.⁸⁰

Chief Justice Roberts's concurrence's talk of "pragmatic" and "contextual" judgments in this setting supplies no algorithm for assessing what sorts of anti-abortion rules would involve judicial decisions that move too quickly in steps that are too large or otherwise unprincipled—decisions that, in the opinion's terms, might be characterized as "arbitrary" or "erratic."⁸¹ The one example on hand being *June Medical*, the problem here was that the law challenged in the case swiftly and directly struck at *Whole Woman's Health's* foundations. That attack precipitated a rollback of sorts to *Casey* in the Chief Justice's concurrence, with *Casey* now standing in *Whole Women's Health's* shoes. Improper now—according to the concurrence, based on its considerations of stare decisis values—are attacks on *Casey* and its essential postulates.⁸²

VI. THE CASE AGAINST REASON-BASED BANS AFTER *JUNE MEDICAL*

Consistent with the terms that Chief Justice Roberts's concurrence sets, which anti-abortion laws are normal variations within the reasonable play of *Casey's* joints and which anti-abortion laws should be taken as attacks on it? Recognizing the art of judgment involved here, and that there will be

⁸⁰ See *id.* at 2134–35.

⁸¹ See *id.* Sometimes, math or math-like "pragmatic" and/or "contextual" calculations may be enough to determine results, as in the case of certain pre-viability abortion bans or regulations that do not square with, say, *Casey's* focus on viability as a vital constitutional line within the Supreme Court's abortion rights jurisprudence. For further discussion of a few of these measures and how they should fare after *June Medical*, see *infra* notes 82 and 89.

⁸² The concurrence's invocation of a principle of judicial deference to legislative judgments "in areas where there is medical and scientific uncertainty," citing the Supreme Court's decision in *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007), appears in this light to be limited to those cases where deference would be consistent with *Casey*. See *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring). In *June Medical*, Chief Justice Roberts deferred not to whatever "medical and scientific uncertainty" might have been behind the legislative judgment about the hospital admitting-privileges rule, but rather to the lower court's judgment on the effect of the measure. *Id.* at 2140–42. Along these lines, the Chief Justice's concurrence seems to offer an easy way to handle "medical and scientific uncertainty" involved in say, twenty-week abortion bans, sometimes known as "fetal pain" measures, or so-called "dismemberment abortion bans," which "ban the most common dilation and evacuation procedure, the technique most often used after the first trimester of abortion." Ziegler, *Upholding Precedent*, *supra* note 1. Insofar as those measures are variously attacks on the viability line that would significantly curtail pre-viability abortion choices, they challenge foundational aspects of *Casey's* reaffirmation of *Roe's* "essential holding," *Planned Parenthood v. Casey*, 505 U.S. 833, 846 (1992), which are plainly not "consistent with *Casey*." See *June Med. Servs.*, 140 S. Ct. at 2136 (Roberts, C.J., concurring) (quoting *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007)). For a different view, see Ziegler, *Upholding Precedent*, *supra* note 1 (suggesting these measures might square with the Chief Justice's concurrence's views).

close cases, reason-based abortion bans—to return to them once more—are not among them.⁸³ Consistent with the judgment in the Chief Justice’s concurrence, they are easy marks that fall short of the respect that *Casey* deserves.

Proponents of reason-based abortion bans have been remarkably forthcoming at times about how they intend these laws as measures that have toppling *Casey*, hence *Roe*, in their sights, regularly as elements within a larger political-legal strategy to present to the Supreme Court with a menu of options it can choose from to work toward eliminating the constitutional right to abortion.⁸⁴ This program assumes a judicial appetite for the undertaking. Chief Justice Roberts’s *June Medical* concurrence indicates no hunger for it.

But even if the intentions behind these reason-based abortion bans were not at times publicly pronounced, there would be the matter of their effects. To a number, reason-based abortion bans assail *Casey*’s elementary promise—unbroken for nearly thirty years, and traceable to *Roe* for another nineteen before that—that pre-viability abortion decisions are finally for those who are pregnant to make, without the state blocking their choices because it deems their reasons for choosing an abortion not to be morally straight.⁸⁵ To uphold a reason-based abortion ban prior to fetal viability, and thus significantly to reconfigure the abortion right and who has the final say in its exercise, a court would have to be prepared in principle to countenance the state possibly seeking to place additional restrictions on abortion decisions—perhaps up to and including any reason there might ordinarily be for it. For many, including many supporters of reason-based abortion bans, no reason for abortion—or next to no reason for it—is ever enough.

Squarely in the teeth of Chief Justice Roberts’s *June Medical* concurrence, no solid jurisprudential foundation for upholding reason-based abortion bans has yet been laid, making it difficult to defend such a ruling as “principled and intelligible,” or “evenhanded, predictable, and

⁸³ Perhaps the closest cases involve twenty-week abortion bans, sometimes known as “fetal pain” measures, on which see *supra* note 82. See also *infra* note 89 (discussing fetal “heartbeat bills”).

⁸⁴ For discussion of Ohio’s Down syndrome abortion ban as one such legislative effort, see Spindelman, *supra* note 25, at 50–81.

⁸⁵ See *Casey*, 505 U.S. at 846 (“It must be stated at the outset and with clarity that *Roe*’s essential holding, the holding we reaffirm, has three parts. First is a recognition of the right of the woman to choose to have an abortion before viability and to obtain it without undue interference from the State. Before viability, the State’s interests are not strong enough to support a prohibition of abortion or the imposition of a substantial obstacle to the woman’s effective right to elect the procedure.”); see also Spindelman, *supra* note 25, at 52–56 (discussing legislative testimony on Ohio’s Down syndrome abortion ban and its relation to *Casey* and *Roe*).

consistent.”⁸⁶ Jurisprudentially speaking, reason-based abortion laws—which limit the abortion right from the outset of a pregnancy, barring the availability of physicians’ assistance with abortion in those cases where a pregnant person has what the state deems the “wrong” sort of reasons—come from nowhere and seek not peace with *Casey* but rather war against it.

Nor are reason-based abortion bans supportable by neutral constitutional principles outside the abortion rights setting, assuming, as the Chief Justice’s concurrence’s treatment of *stare decisis* indicates, that principles like these still matter.⁸⁷ Any court that is prepared to uphold a reason-based abortion ban must in principle stand ready to recognize and approve the operations of such a ban in the setting of other constitutionally protected rights. What if the state were to condition the exercise of other constitutional freedoms—say, the right to free speech, the right to marry, the right to shape a child’s education—on a rights bearer’s reasons for exercising his, her, or their choice? If reason-based limits on the exercise of *those* rights seem outlandish, and they might, it is at least in part because Justice Stevens’s observation back in *Belotti v. Baird* captures not just what it means to have the right to decide to have an abortion, but what having a right is generally understood to mean within our constitutional tradition.⁸⁸

Within this tradition, to have a constitutional right to do a thing ordinarily means having the right to do it free from state interference. That, in turn, ordinarily means that the state does not have the authority to decide as a policy matter whether a rights holder’s (or rights holders’) reasons for exercising a right are up to snuff based on the state’s assessment of the goods or harms, or the net balance of goods and harms, that flow from them.⁸⁹ The

⁸⁶ See *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

⁸⁷ See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959).

⁸⁸ See *Bellotti v. Baird*, 443 U.S. 622, 655 (1979) (Stevens, J., concurring) (“It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”). See *supra* text accompanying note 30.

⁸⁹ The same holds true, if in different ways, for so-called “heartbeat bills,” which may operate to outlaw abortions from six to eight weeks of pregnancy on, or even earlier, and in some cases may effectively operate as a total ban on abortion. See Sanaz Keyhan, Lisa Muasher & Suheil J. Muasher, *Spontaneous Abortion and Recurrent Pregnancy Loss: Etiology, Diagnosis, Treatment*, in COMPREHENSIVE GYNECOLOGY 329, 342 (Roger A. Lobo, David M. Gershenson, Gretchen M. Lentz & Fidel A. Valea, eds., 7th ed. 2016) (“The earliest cardiac activity was noted to have occurred 5 weeks after the last menstrual period in a 28-day cycle.”). How does the Supreme Court go from a promise that pregnant women will have the ultimate decision on abortion until fetal viability to allowing a law like this to stand? Even “fetal pain” or twenty-week abortion bans may seem from one perspective small in terms of the timeline shift they involve—just cutting back on abortion rights by a few weeks. But the displacement of the viability line, which has remained largely sacrosanct since *Roe*, and which was held to be “essential” to the framework *Casey*

designation of a certain individual choice as a constitutional “right” conventionally lifts that choice out of any legal obligation to offer anyone else an account, let alone having that account—if and when provided—doubled back to, to become the basis for stopping the exercise of the right.⁹⁰

If an exception to this constitutional tradition is to be recognized in the context of abortion rights—overcoming the deference and respect that the tradition deserves, consistent with Chief Justice Roberts’s traditionalist concurrence—it is likely because the thought is afoot that abortion rights, whatever they are, are not properly constitutionally founded. Constitutional affirmation of reason-based bans in this sense widely—if imperfectly—hang together with the thought that *Casey* was wrong to preserve any part of *Roe*, and that both decisions, to the extent they give abortion the status of a constitutional right, are errors that should be fixed.

Insofar as the Chief Justice’s *June Medical* concurrence’s *stare decisis* discussion is discernibly indexed to wider rule of law conventions and concerns, which it thinks courts should uphold and defend, defenses for reason-based bans—like those ventured in the litigation surrounding Ohio’s Down syndrome abortion ban—seem equally hard to accept as “principled and intelligible” rules.⁹¹ They are, by contrast, readily accounted for as jurisprudentially “arbitrary” in another respect.⁹²

Return here to the striking idea that pregnant women remain at liberty—their abortion rights unaffected, notwithstanding Ohio’s Down syndrome

announced, are highly significant. *See Casey*, 505 U.S. at 871 (joint opinion of O’Connor, Kennedy & Souter, JJ.) (“The woman’s right to terminate her pregnancy before viability is the most central principle of *Roe v. Wade*. . . . [W]e have concluded that the essential holding of *Roe* should be reaffirmed.”). The same applies to bans on common abortion procedures early in pregnancy, which would have the effect of radically reducing abortion’s availability where it is still otherwise available. These laws might, with time, and as a result of smaller changes in doctrine, be or seem to be more modest and more in keeping with the incrementalist craft the Chief Justice’s concurrence touts. But for now, they are big, bold moves, and upholding these measures runs the same risk of institutional legitimacy that led the Chief Justice to stick with the bottom line from *Whole Woman’s Health*, even as he disapproved of that decision. *See June Med. Servs.*, 140 S. Ct. at 2133 (Roberts, C.J., concurring) (“I joined the dissent in *Whole Woman’s Health* and continue to believe that the case was wrongly decided.”); *id.* at 2134 (“Adherence to precedent is necessary to . . . ‘promote[] the evenhanded, predictable, and consistent development of legal principles, foster[] reliance on judicial decisions, and contribute to the actual and perceived integrity of the judicial process.’” (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991))); *id.* at 2139 (“Under principles of *stare decisis*, I agree with the plurality that the determination in *Whole Woman’s Health* that Texas’s law imposed a substantial obstacle requires the same determination about Louisiana’s law.”).

⁹⁰ *Bellotti*, 443 U.S. at 655 (“It is inherent in the right to make the abortion decision that the right may be exercised without public scrutiny and in defiance of the contrary opinion of the sovereign or other third parties.”).

⁹¹ *See June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

⁹² *See id.*

abortion ban—because they can choose whether to be forthcoming with their physicians about their reasons for wishing to end their pregnancies. Could it really be that the constitutional legitimacy of a reason-based ban on abortion depends on grounds of decision that undermine, rather than foster, practices and conditions of openness and candor in legally and socially valued relationships, like those between doctors and patients? Seen in the rule of law terms found in Chief Justice Roberts’s concurrence, the question is how significant—and how principled—such a ruling would be.

How much of a departure, and what kind of a departure, from established legal traditions would it be for a court of law to make a constitutional decision turn on the normative tolerance and even promotion of women refusing to be forthcoming in their relationships with their physicians—relationships in which openness and candor conduce to mutual respect and the provision of first-rate health care? How much should courts embrace a rule of decision that encourages the law’s subjects to evade its clear textual import by finding and leveraging an arguable loophole in its terms?

In answering these questions, there is perhaps reason to be mindful of the wider context in which abortion decisions typically arise and how such a ruling would run against the grain of the Supreme Court’s sex discrimination jurisprudence, stoking old, discriminatory sex stereotypes about women’s “secretive” and “manipulative” natures.⁹³ To breathe life back into sex stereotypes like these as the basis for a constitutional ruling might help save a reason-based abortion ban from legal defeat, but at the expense of re-legitimizing sex-stereotypical thinking about women and their credibility that the Supreme Court’s anti-sex-stereotyping doctrines—part of Justice Ginsburg’s larger legal legacy—have rejected now, for years.⁹⁴

CONCLUSION

Past its details, Chief Justice Roberts’s concurring opinion in *June Medical* offers a wider lesson that other legal actors, including lower courts, should hear and heed. It indicates that the particular constitutional moment we are in is not the time for aggressive, conservative constitutional activism

⁹³ One thoughtful, recent engagement of these discriminatory stereotypes is in Deborah Epstein & Lisa A. Goodman, *Discounting Women: Doubting Domestic Violence Survivors’ Credibility and Dismissing Their Experiences*, 167 U. PA. L. REV. 399, 399, 453–59 (2019) (venturing “a full, considered look at when, how, and why the justice system and other key social institutions discount women’s credibility” and proposing “steps toward eradicating credibility discounts in the justice system”). Another perspective on the power of these stereotypes and their gendered and gendering determinants and effects is found in Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 127, 144 (1987).

⁹⁴ For an important perspective on this legacy, see Wendy W. Williams, *Ruth Bader Ginsburg’s Equal Protection Clause: 1970–80*, 25 COLUM. J. GENDER & L. 41 (2013).

from the Bench in the abortion arena, because of its meaning within and potential impacts on the strength of our courts and our constitutional and rule of law systems.

June Medical is scarcely the only decision from the Supreme Court's last October Term that actively demonstrates the Court's—and especially the Chief Justice's—deep commitments to the rule of law that undergirds our Constitution and laws and that finds expression through and in them.⁹⁵ But the Chief Justice's concurrence in *June Medical* is another reminder—hearkening back to *Casey*, which spelled it out as an historical matter—that those general lessons have particular bearing in the context of abortion rights.

Here in *June Medical*, Chief Justice Roberts's concurrence teaches that the judicial commitment to the rule of law should not be placed into doubt for the sake of partisan interests in the political and cultural struggles over abortion that, embraced by courts injudiciously—too boldly, too quickly, without secure foundations—smack of being “arbitrary,” “erratic,” both, or worse.⁹⁶ Those decisions imperil the vital credentials of neutrality and principled decisionmaking on which the judicial department and our wider legal orders depend for their authority and that must be safeguarded if our great national experiment, including our constitutional system, is to function as the *Casey* joint opinion described it: “a covenant running from the first generation of Americans to us and then to future generations,” a “coherent succession,” that is to “survive more ages than one.”⁹⁷

Heeding this lesson, reason-based abortion bans, like Ohio's Down syndrome abortion ban, should be struck down. The larger reverberations and implications of that conclusion are that other anti-abortion laws that challenge the basic structure of the abortion right as *Casey* protected it should be struck down as well. Embracing *Casey* the way Chief Justice Roberts's *June Medical* concurrence does, means—and requires—nothing less.

⁹⁵ For the leading decisions from the Court's last October Term that, in different ways, emphasized rule of law values, see, for example, *Trump v. Mazars USA, LLP* 140 S. Ct. 2019, 2036 (2020); *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1916 (2020); *Bostock v. Clayton Cty., Ga.*, 140 S. Ct. 1731, 1754 (2020); *DOC v. New York*, 139 S. Ct. 2551, 2576 (2019). On some of the rule of law stakes in *Bostock*, see Marc Spindelman, *Bostock's Paradox: Textualism, Legal Justice, and the Constitution*, 69 *BUFF. L. REV.* (forthcoming 2021) (on file with author).

⁹⁶ *June Med. Servs.*, 140 S. Ct. at 2134 (Roberts, C.J., concurring).

⁹⁷ *Casey*, 505 U.S. at 901.