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The Right to Abortion and the Bush-Trump Federal Courts
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For the Symposium on Mary Ziegler, Abortion and the Law in America: Roe v. Wade to the Present (Cambridge University Press, 2020).

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Mary Ziegler's three important books—*After Roe* (2015), *Beyond Abortion* (2018) and now *Abortion and the Law in America* (2020)—have already established her as the premier historian of abortion in the post-*Roe* era. *ALA*, to abbreviate its title, is both utterly comprehensive and consistently fair-minded; one of the hallmarks of Ziegler's scholarship is her outreach to activists and litigators on both sides of our ongoing divide. *ALA* perceptively stresses "how much the abortion debate has changed" in recent years, and anyone who keeps on top of what's taking place in abortion litigation in the lower federal courts in the wake of *June Medical Services v. Russo* (USSC, 29 June 2020) will readily appreciate the ongoing—and perhaps increasing—importance of that insight.

At the core of how the debate has changed has been the relative displacement of "abstract constitutional rhetoric" about the rights of women, and/or unborn fetuses, in large part because of abortion opponents' realization that direct assaults on *Roe v. Wade* were strategically unwise. Instead the debate has become primarily one about "the costs and benefits of abortion," with savvy anti-abortion litigators such as James Bopp and Clarke Forsythe successfully arguing that abortion-restrictive statutes should be presented as "woman-protective laws." The result is now trench-warfare litigation, concentrated in a trio of federal circuits whose states repeatedly enact anti-abortion measures targeting both providers—as in the hospital admitting privileges requirement at issue in *June Medical*—and the particular methods those doctors employ for second-trimester procedures. District Court judges such as Kristine G. Baker in Little Rock, and Lee Yeakel in Austin enter orders replete with literally hundreds of pages of factual findings only to run up against circuit panels, or en banc courts, where majorities of Bush-Trump jurists insistently exhibit anti-abortion desires notwithstanding the lower court findings-of-fact in any particular case. The Fifth Circuit—led by Judges Edith H. Jones, Priscilla R. Owen, Jennifer Walker Elrod, and Catharina Haynes, and now joined by recent Trump appointees Don R. Willett and James C. Ho—has long been notorious for such behavior, but now both the Eighth—where only one of eleven active judges is a Democratic nominee—and the Sixth are energetically vying to outdo the Fifth.

As Ziegler rightly observes, battling over "incremental restrictions," rather than fundamental rights, "has done nothing to make the conflict less bitter," nor, it must be emphasized, is there **any** prospect of it ever being resolved. Most committed pro-choicers have exaggerated fears (yes, you're reading that right) of *Planned Parenthood v. Casey* and *Roe* being vitiated by a Supreme Court majority that would have to include either Justice Brett M. Kavanaugh or Chief Justice John G. Roberts Jr., but the fundamental reality is that America will remain intensely—and, generally speaking, geographically—divided over abortion for as long as the nation endures. But **even** a hollowing-out of *Casey* and *Roe* will not fundamentally change anything. As Ziegler correctly notes, "pro-lifers actually want much more than the Court will likely ever deliver: recognition of a right to life and the criminalization of all or most abortions." In addition, a slowly increasing number of states have extended *Roe*-like protection of abortion through constitutional and/or statutory provisions, so for the truly infinite future abortion freedom will depend even more so than it does at present on simply **where** a woman lives or what her ability to travel interstate may be.

David S. Cohen and Carole Joffe's recent *Obstacle Course: The Everyday Struggle to Get an Abortion in America* (2020) richly details this reality. Seven states now feature only a single abortion clinic, and nationwide there are twenty-seven "abortion deserts"—areas where the closest clinic is at least one hundred miles away. Diana Greene Foster's landmark yet opaquely-titled *The Turnaway Study* (2020) powerfully illuminates this, bringing together the findings of dozens of scholarly papers published by researchers from the University of California, San Francisco. Only one-quarter of clinics perform late second trimester (i.e. 20 weeks LMP) procedures (just *five* providers perform third trimester procedures), yet even 23 percent of the several thousands of women in Foster's study who obtained *first* trimester abortions had to travel more than one hundred miles to do so. Although it's rarely noted in the popular press, Foster stresses how "abortion rates nationwide have plummeted in the past 30 years," and not solely or even largely because of obstructive state regulations. Medical abortions, using a combination of the well-known drugs mifepristone and misoprostol for pregnancies of ten weeks or less (rather than vacuum aspiration), are 96 percent successful (misoprostol alone has an efficacy rate of over 85 percent); Cohen and Joffe highlight another development rarely featured by the popular press: "abortion by mail" where pioneering groups such as Gynuity Health Projects and Aid Access ship the two drugs to women at a cost of less than $100. Foster's work highlights how the number one reason for a second trimester abortion is "they didn't realize they were pregnant," but for women who do quickly realize their status, "abortion by mail" is a solution no state

legislator will be able to successfully obstruct.

Chief Justice Roberts's concurring opinion in *June Medical* surprised most observers, yet disagreements about its meaning and impact have divided both scholars and lower federal court judges. Roberts's invocation of stare decisis per *Whole Woman's Health v. Hellerstedt* (2016)—this "Louisiana law imposes a burden on access to abortion just as severe as that imposed by the Texas law . . . Therefore Louisiana's law cannot stand under our precedents"—also resonates powerfully for anyone deeply familiar with the Souter-O'Connor-Kennedy opinion in *Casey*. Roberts's characterization of *Casey* as "intrinsically sounder" than *Hellerstedt* jumps out, as does his quotation of *Gonzales v. Carhart*'s (2007) perilous holding that legislatures have "wide discretion to pass legislation in areas where there is medical and scientific uncertainty." Rather than the *Hellerstedt* majority's explicit invocation of a balancing test, Roberts declared that *Casey* "looked to whether there was a substantial burden" placed upon a woman's abortion choice, "not whether benefits outweighed burdens." In familiar language, so long as a statute has a "legitimate purpose" and is "reasonably related to that goal"—the highly permissive reasonableness standard—"the only question for a court is whether a law has the 'effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus,'" quoting from *Casey*.

Roberts's opinion is of potentially momentous importance for three distinct reasons. Number one, he explicitly declares that "under principles of stare decisis . . . I would adhere to the holding of *Casey*." Number two, "I agree that the abortion providers in this case have standing to assert the constitutional rights of their patients," a longstanding practice in reproductive rights cases yet one that activist lower court judges like the Sixth Circuit's John K. Bush are insistently challenging. Indeed, while Justice Clarence Thomas's dissent in *June Medical* spits out the epithet "abortionist" no fewer than twenty times, Roberts instead acknowledges the existence of "well-credentialed abortion physicians." And, number three, Roberts "crucially"—his word—invokes the District Court findings in *June Medical* while emphasizing that District Court fact-finding is reviewed "only for clear error" and that those findings "bind us in this case" since they "are not clearly erroneous." Notwithstanding Roberts's firm conclusions, Justice Kavanaugh's temporizing dissent unpersuasively claimed that "additional factfinding is necessary to properly evaluate Louisiana's law."

While Laurence H. Tribe penned a *Washington Post* op-ed perceptively asserting that "Roberts' Approach Could End Up Being More Protective of Abortion Rights,

Not Less," Mary Ziegler responded in the negative, stating that "Roberts transformed the undue burden test, making it far less protective of abortion rights." That is a fair comment relative to *Hellerstedt*, but Roberts's stance that he was returning the test to its "intrinsically sounder" articulation in *Casey* manifests a vastly more important commitment than his offloading of *Hellerstedt*'s balancing act. Even deeply committed anti-abortion lawyers such as Mary E. Harned (like Ziegler, I too read 'the other side'!) acknowledge that the Court "does not appear prepared" to overturn *Roe* and *Casey*, but to my mind the most superb analysis of the import of the Chief Justice's opinion is Marc Spindelman's essay in 109 *Georgetown Law Journal Online*, rightly entitled "Embracing Casey." Spindelman repeats his central contention—namely Roberts's "endorsement of *Casey*"—multiple times while arguing that it "deals a significant setback to pro-life efforts to unravel women's constitutional and legal reproductive rights" and "provides a beachhead that safeguards the existing, foundational legal framework for constitutional protection of abortion rights." In doing so, Roberts "strengthens, rather than weakens, *Casey*'s jurisprudential force" and "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."

Spindelman rightly observes that Roberts's concurrence "makes *Casey* harder to overturn than before *June Medical* came down." He also believes the concurrence means that Roberts "has begun thinking that toppling *Casey* and what it preserves of *Roe* would be a jurisprudential mistake," one that "would involve the Court in wounding itself and its institutional legitimacy," yet Spindelman concedes that "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."

While the balance of professorial opinion may embrace the upside of the Chief's concurrence, a host of Fifth, Sixth and Eighth Circuit judges sees Roberts's rejection of *Hellerstedt*'s balancing test as a golden cudgel with which to beat down fair-minded District judges. In early August an Eighth Circuit panel remanded to Judge Baker *Hopkins v. Jegley*, an abortion providers' challenge to a 2017 Arkansas statute mandating fetal demise prior to the performance of any D&E (dilation and evacuation) abortion, *the* method used for second trimester procedures after 14 weeks LMP. [Fetal demise requires either transabdominal injection of digoxin into the fetus, a similar injection of potassium chloride (KCl) into the tiny fetal heart, or transection of the umbilical cord. All three present significant challenges for the doctor and/or the patient, and a comprehensive 2020 review of *all* prior studies of

digoxin and KCl found no reference to any use of digoxin prior to 17 weeks LMP while unsurprisingly also finding that "Studies reporting serious maternal adverse events showed an overall higher rate of adverse events in patients receiving feticidal agents than those not receiving the medications."] The circuit panel lectured repeatedly that Roberts' opinion "is controlling" and *twice* quoted Roberts's usage of *Gonzales*'s permissive "wide discretion" language. Judge Baker was undeterred, entering a 146-page temporary restraining order in December 2020 and following that up with a 253 page preliminary injunction ruling on January 5, 2021. She concluded that the state's "D&E mandate creates a substantial obstacle based solely on consideration of burdens, not weighing benefits and burdens," thus thrusting Roberts's analysis—and her own copious factual findings—right back at her lectors.

On that very same day, another Eighth Circuit panel reluctantly affirmed a 186 page preliminary injunction order that Judge Baker had issued in a different Arkansas case, *Little Rock Family Planning Services v. Rutledge*, which challenged state bans on any post-18 week LMP abortions and on any based upon a fetus having Down syndrome. Two members of the panel, Judges Bobby Shepherd (AR-GWB) and Ralph Erickson (ND-DJT) took the opportunity to attack *Casey* and urge the Supreme Court to "reevaluate" the viability standard as "unsatisfactory" per Seventh Circuit Judge Frank Easterbrook's argument in a 2018 dissent that *Casey* does not address, nor should it protect, eugenic abortions based on what Judge Shepherd termed "an unwanted immutable characteristic of the unborn child." Judge Erickson, whom the Senate confirmed to the Eighth Circuit by a vote of 95 to 1 (Elizabeth Warren), added that "Viability as a standard is overly simplistic and overlooks harms that go beyond the state's interest in a nascent life alone."

Meanwhile, in the Fifth Circuit, in *Whole Woman's Health v. Paxton*, a challenge to a 2017 Texas law requiring fetal demise prior to D&E abortions, a luck-of-the-draw panel featuring Judges Carl E. Stewart and James L. Dennis, both Clinton nominees, as well as Judge Willett in dissent, asserted that *Hellerstedt* "remains binding law in the Circuit" while affirming District Judge Yeakel's permanent injunction on the grounds that the fractured result in *June Medical* had not, per *Marks v. U. S.* (1977), furnished "a new controlling rule." Judge Willett, while acknowledging the "admitted awkwardness in treating as precedential an opinion that no one else joins," focused most of his energy on how the mandate protects "the dignity of fetal life" from "the barbarism of D&E" by "banning a doctor from tearing a live unborn child apart." Marshalling record evidence showing one MD had used vacuum aspiration as late as 16.6 weeks LMP, that

Planned Parenthood supports the use of digoxin from 18 weeks onward, and that one study of 400-plus cases had found transection to be 100% successful, Willett asserted that "the record doesn't support the finding that abortion doctors cannot safely cause fetal demise before dismemberment." Seventeen days later the Fifth Circuit vacated the panel decision and took the case en banc, where Judge Willett's perspective is certain to prevail.

Not to be outdone, the Sixth Circuit, in the space of five months managed to produce what Kentucky Attorney General Daniel Cameron calls an "intra-circuit" split in two decisions each named *EMW Women's Surgical Center v. Friedlander*. In one, a 2-1 panel majority (Senior Judge Gilbert S. Merritt and Judge Eric L. Clay) refused to allow General Cameron to intervene to seek en banc review of the panel's ruling against the state's fetal demise mandate after Health Secretary Friedlander declined to do so. In the other, with Judge Clay in dissent, Trump nominees Joan L. Larsen and Chad A. Readler vacated a permanent injunction against enforcement of a state statute requiring clinics to have written transfer and transportation agreements with a local hospital and ambulance service. In contrast to the evanescent Fifth Circuit panel in *Paxton*, Judge Larsen wrote that "Because the Chief Justice's controlling opinion . . . sets forth . . . a general standard for how to apply the undue burden test, we must treat that standard as authoritative" by holding that "the undue burden standard is not a balancing test." More significantly, Larsen and Readler held that if at least one of Kentucky's two clinics could receive successive 90-day discretionary waivers of the two statutory requirements from the state Inspector General, the law could stand. District Judge Gregory N. Stivers had dismissed the waiver provision, which had been added only after the case was underway, as leaving the clinics vulnerable to the IG's "administrative whim," but Larsen and Readler held that presuming successive waivers would not be granted was error. "So long as either EMW or Planned Parenthood would be able to operate with the provisions in effect, we cannot conclude that they impose a substantial obstacle." In dissent, Judge Clay, like Fifth Circuit Judges Stewart and Dennis, insisted that the Chief Justice's *June Medical* concurrence had not supplanted *Hellerstedt*. "There is no basis . . . for treating a single Justice's commentary on a prior decision in dicta as an overruling of an opinion issued by a majority." However, Clay added, "even if" Roberts's analysis did control, "a correct application of the test he enunciated" would require affirmance of the District Court, since "regardless of whether Kentucky's transfer and transport agreement requirement is reasonably related to a legitimate state interest, it undoubtedly presents a substantial obstacle to abortion access." On October 30 General Cameron petitioned for certiorari in the first *EMW* ruling, asserting, just as Judge Willett had

in *Paxton*, that the fetal demise mandate did not pose a "substantial obstacle" per Roberts's analysis in *June Medical* for here the fatal flaw in the plaintiffs' case was that "EMW's physicians have refused to obtain the necessary training to perform fetal demise." The plaintiffs' response is due February 5, 2021.

Other cases loom. The Sixth Circuit heard en banc argument back on March 11, 2020 in *Preterm-Cleveland v. Acton* (# 18-3329) following a 2 to 1 panel ruling upholding a preliminary injunction against an Ohio statute prohibiting abortions based upon Down syndrome. In September, in *Reproductive Health Services v. Parson*, the Eighth Circuit heard arguments concerning two enjoined Missouri statutes, one targeting Down syndrome (#19-3134) and the second seeking to prohibit abortions after 8, 14, 18, or 20 weeks. In *Bryant v. Woodall* (#19-1685), North Carolina has appealed an enjoined 20 week ban to the Fourth Circuit, and since June 18, 2020, the Supreme Court itself has repeatedly relisted Mississippi's petition for certiorari in *Dobbs v. Jackson Women's Health Organization* (#19-1392), where a Fifth Circuit panel—Judge Dennis, Senior Judge Patrick E. Higginbotham, and a very reluctant Judge Ho—affirmed a permanent injunction against a 15 week abortion ban. Perhaps Justice Thomas's chambers is penning an encyclopedic dissent from denial, but in the bigger picture's bottom line, this student of the Court's abortion jurisprudence finds it extremely difficult to imagine that Justice Kavanaugh would cast the determinative fifth vote necessary for any significant gutting of *Casey*, *Roe*, or the Chief Justice's position in *June Medical*. Ever since 1989 I have been repeatedly perplexed by how many pro-choice advocates behave as if they are *hoping* for *Roe*, and now *Casey*, to be overturned, but my expectation remains that the Chief Justice, *and* Justice Kavanaugh, however reluctantly, will in whatever cases lie ahead follow the same path of stare decisis and institutional self-preservation that Justices Souter, O'Connor, and a very reluctant Kennedy blazed over a quarter-century ago.

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