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ESSAY

REASONED JUDGMENT

RICHARD C. BOLDT*

In 1989, in *Webster v. Reproductive Health Services*,¹ the U.S. Supreme Court, by a fractured 5 to 4 vote, upheld provisions adopted by the Missouri legislature that restricted access to abortion in the state. Although the plurality decision authored by Chief Justice Rehnquist cast significant doubt on the constitutional legitimacy of *Roe v. Wade*'s² trimester framework and reliance on viability as a constitutional marker for the protection of fundamental rights,³ it ultimately concluded that the challenged state provisions could be upheld without revisiting the holding in *Roe*.⁴

In 1990, Justice Souter was confirmed and took his place on the Court replacing Justice Brennan. The following year, Justice Thomas's appointment to the Court was confirmed and he replaced Justice Marshall. Thus, the stage was set for the next significant abortion case to reach the Court, *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁵ All five of the Justices who had voted to uphold the Missouri provisions in *Webster* were still on the Court, including Justice O'Connor who had made clear that she was open to reexamining *Roe* in an appropriate case. Two of the four dissenters in *Webster* had been replaced by more conservative Justices, and Court watchers were pretty sure, based on the surrounding narratives associated with their nomination and confirmation, that they were inclined to reconsider *Roe*. I was teaching constitutional law at the University of

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1. 492 U.S. 490 (1989).
2. 410 U.S. 113 (1973).
3. *Webster*, 492 U.S. at 519–20.

4. *Id.* at 521. In a concurring opinion, Justice Scalia made clear his view that *Roe* should be overruled forthwith. *Id.* at 532–37 (Scalia, J., concurring). Crucially, Justice O'Connor also wrote a separate concurrence in which she explained that the Missouri law could be upheld without considering the validity of *Roe*. “When the constitutional invalidity of a State’s abortion statute actually turns upon the constitutional validity of *Roe*,” she explained, “there will be time enough to reexamine *Roe*, and to do so carefully.” *Id.* at 531 (O'Connor, J., concurring).

5. 505 U.S. 833 (1992).

Maryland School of Law in 1992, and I was also pretty sure that *Roe* was up for grabs.

We all know, of course, that the Court did indeed reconsider the constitutional validity of *Roe* in the *Casey* decision, and that a joint opinion issued by Justices O'Connor, Souter, and Kennedy provided a new framework for evaluating state efforts to limit reproductive rights,⁶ which persisted until June 24, 2022. Much of *Roe*'s constitutional infrastructure, including importantly its reliance on strict scrutiny and its treatment of the right to an abortion as fundamental, effectively was set aside.⁷ But the joint opinion asserted in a glass-half-full sort of way that *Roe*'s "essential holding" was reaffirmed, albeit now policed by a less rights-protective undue burden analysis.⁸ Perhaps most importantly, the joint opinion, citing the Ninth Amendment, explained that "[n]either the Bill of Rights nor the specific practices of States at the time of the adoption of the Fourteenth Amendment marks the outer limits of the substantive sphere of liberty which the Fourteenth Amendment protects."⁹ Instead, "adjudication of substantive due process claims may call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment."¹⁰

In 1992, these conservative Justices embraced this practice of reasoned judgment to generate, at the least, a rhetorical endorsement of the Court's prior abortion jurisprudence. Even if the politics of the early 1990s counseled against their confronting *Roe*'s symbolic footprint head on, it is nevertheless clear that these Justices, who held the power to do precisely what Justice Alito has now done, chose not to do so, at least in part because of the constraining power of what Justice Felix Frankfurter termed "the judicial judgment in applying the Due Process Clause."¹¹

As a colleague and I wrote a few years ago in the *Maryland Law Review*: "When the Justices on the Supreme Court accord significant precedential authority to prior decisions of that Court within a system of *stare decisis*, they are in effect adopting the embedded value choices that animated those prior decisions."¹² In affirming at least a portion of *Roe*, the authors of the joint opinion in *Casey* thus adopted the earlier decision's recognition that

6. *Id.* at 856 (plurality opinion).

7. *Id.* at 872–79.

8. *Id.* at 846.

9. *Id.* at 848.

10. *Id.* at 849.

11. *Adamson v. California*, 332 U.S. 46, 68 (1947) (Frankfurter, J., concurring).

12. Richard Boldt & Dan Friedman, *Constitutional Incorporation: A Consideration of the Judicial Function in State and Federal Constitutional Interpretation*, 76 MD. L. REV. 309 (2017); see Geoffrey R. Stone, *Precedent, the Amendment Process, and Evolution in Constitutional Doctrine*, 11 HARV. J.L. & PUB. POL'Y 67, 67–68 (1988).

“reproductive control is integral to many women’s identity and their place in the Nation. . . . It reflects that she is an autonomous person, and that society and the law recognize her as such.”¹³ Importantly, the *Casey* joint opinion’s (partial) adherence to precedent demonstrated an appreciation of the Court’s complex role as a participant in public discourse with special authority to frame and organize competing positions, but with an obligation to do so in a way that links past commitments to ongoing practice.¹⁴ In this respect, the common law tradition has a “constraining effect on constitutional adjudication by channeling the exercise of discretion within established paths and ensuring that new commitments ordinarily are consistent with the warp and weave of the constitutional fabric already in place.”¹⁵

Understood as a substantive due process case, *Dobbs v. Jackson Women’s Health Organization*¹⁶ presented the Justices with a familiar set of interpretive choices. Justice Alito’s majority opinion elected to rely on a narrow treatment of text and a partial, highly contested history to conclude that the core right recognized in *Roe* and *Casey* is not entitled to continued constitutional enforcement.¹⁷ The majority’s suggestion that *Roe* and *Casey* were merely the expression of individual Justices’ personal preferences, and that only adherence to rigorous text and history can constrain such judicial legislating,¹⁸ is a familiar refrain. But thoughtful members of the Court have over time understood that reasoned judgment is a superior alternative to such

13. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2345 (2022) (Breyer, Sotomayor & Kagan, JJ., dissenting) (citing *Casey*, 505 U.S. at 856).

14. As Mark Graber points out in his blog post, this obligation to maintain some continuity with past commitments exerts more force on the Court in times of relative regime stability. Mark A. Graber, *Justice Robert Jackson’s Catechisms*, MD. L. REV. ONLINE (July 20, 2022), <https://www.marylandlawreview.org/graber-blog>. The Court’s role in framing and organizing competing positions, which derives in part from its special institutional capacities, does not disappear, however, even when shared norms are in contest. Indeed, the Court’s obligation to help incumbents holding competing positions negotiate workable arrangements may be more crucial when fundamental norms are in contest.

15. Boldt & Friedman, *supra* note 12, at 331. Justice Frankfurter captured this set of ideas in his concurrence in *Adamson v. California*, 332 U.S. 46 (1947), by explaining:

We are called upon to apply to the difficult issues of our own day the wisdom afforded by the great opinions in this field This guidance bids us to be duly mindful of the heritage of the past As judges charged with the delicate task of subjecting the government of a continent to the Rule of Law we must be particularly mindful that it is “a *constitution* we are expounding,” so that it should not be imprisoned in what are merely legal forms even though they have the sanction of the Eighteenth Century.

Adamson, 332 U.S. at 65–66 (Frankfurter, J., concurring) (first citing *Davidson v. New Orleans*, 96 U.S. 97 (1877); then citing *Missouri v. Lewis*, 101 U.S. 22 (1879); then citing *Hurtado v. California*, 110 U.S. 516 (1884); then citing *Holden v. Hardy*, 169 U.S. 366 (1898); then citing *Twining v. New Jersey*, 211 U.S. 78 (1908); and then citing *Palko v. Connecticut*, 302 U.S. 319 (1937)).

16. 142 S. Ct. 2228 (2022).

17. *Id.* at 2247–48 (majority opinion).

18. *Id.*

a ham-handed form of constitutionalism. As Justice Frankfurter explained in *Adamson v. California*¹⁹:

[The due process] standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia. But neither does the application of the Due Process Clause imply that judges are wholly at large. The judicial judgment in applying the Due Process Clause must move within the accepted notions of justice and is not to be based upon the idiosyncrasies of a merely personal judgment.²⁰

Sadly, the *Dobbs* majority, failing to find a right to reproductive autonomy in their constitutional pharmacopoeia, concluded that such a right could only come into existence as the expression of idiosyncratic personal preference. That is wrong. The right was the product of careful judicial development, passing from *Meyer v. Nebraska*²¹ to *Pierce v. Society of Sisters*²² to *Griswold v. Connecticut*²³ to *Roe*,²⁴ constrained by precedent and organized by reasoned judgment. To be sure, the interpretation of broadly-worded, rights-generative provisions in the constitution is not the objective calling of balls and strikes, as Chief Justice Roberts has famously suggested,²⁵ but it also is not raw subjective politics. At least it need not be. But with the Court's opinion in *Dobbs*, reasoned judgment has been replaced with raw politics, and that is a loss of institutional integrity that may never be reclaimed.

19. 332 U.S. 46 (1947).

20. *Id.* at 68 (Frankfurter, J., concurring); cf. Charles Fried, Commentary, *Constitutional Doctrine*, 107 HARV. L. REV. 1140 (1994) (discussing how the need for continuity and stability in constitutional law is derived not simply by following precedent but by attending to “doctrine”).

21. 262 U.S. 390 (1923).

22. 268 U.S. 510 (1925).

23. 381 U.S. 479 (1965).

24. *Roe v. Wade*, 410 U.S. 113 (1973).

25. *Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. 55–56 (2005) (statement of John G. Roberts, Jr., Nominee to be Chief Justice of the United States).