IMMODERATE MODERATION: CHIEF JUSTICE ROBERTS'S CONCURRENCE IN *DOBBS*

Thomas J. Molony*

ABSTRACT

Chief Justice John Roberts attempted to chart a middle way in *Dobbs v. Jackson Women's Health Organization*. But there are times when you must choose a side. This was one of them.

The Chief Justice has been a consistent proponent of judicial restraint since he joined the United States Supreme Court in 2005. For him, one of the key characteristics of restraint is deciding no more than necessary to resolve a case. In *Dobbs*, he insisted that the Court did not need to overrule *Roe v. Wade* and *Planned Parenthood v. Casey* in full to uphold Mississippi's fifteen-week abortion ban, but merely could excise the *Roe* and *Casey* rule that viability is the critical dividing line in balancing a woman's putative right to choose abortion against a State's interests in curbing the procedure. According to the Chief Justice, the Court could have ruled in Mississippi's favor and yet preserved the basic right that the *Roe* Court found in the Constitution, a right he claimed that—at least for now—"should . . . extend far enough to ensure a reasonable opportunity to choose, but need not extend any further."

Chief Justice Roberts maintained that the Court could have disposed of viability "under a straightforward stare decisis analysis." Curiously, though, he did not refer at all to his missive on stare decisis in *Citizens United v. FEC*. There, he wrote in concurrence that "[s]tare decisis is a doctrine of preservation, not transformation." Ignoring this fundamental principle in pursuit of judicial restraint and moderation, the Chief Justice in *Dobbs* advocated for a decision that would have been neither restrained nor moderate.

Despite the Chief Justice's protestations to the contrary, to decide in Mississippi's favor, the Court would have had to have done more than just excise viability from *Roe* and *Casey*. Perhaps the Chief Justice did not recognize it, but even he was advocating for more, urging the Court to introduce a brand new "reasonable opportunity" rule into its abortion jurisprudence.

This Article critically examines Chief Justice Roberts's concurrence in *Dobbs*, focusing in particular on the effect of merely removing the gestational-based features the *Roe* and *Casey* Courts used in articulating their holdings and constitutional tests. The Article also describes the havoc the Court would have wrought if the Chief Justice had convinced just one of the Justices in the majority to join his concurrence.

* Professor of Law, Elon University School of Law.

And the Article concludes with a plea for judges to decide cases by applying principles of judicial restraint consistently and not artificially to manufacture a result.

INTRODUCTION

Ralph Waldo Emerson said that "[a] foolish consistency is the hobgoblin of little minds."[1] Chief Justice Roberts's concurrence in *Dobbs v. Jackson Women's Health Organization*[2] might suggest a corollary: An *engineered* consistency is the hobgoblin of *brilliant* minds. No doubt, the Chief Justice is brilliant, and on its face, his concurrence is consistent with how he conceives judicial restraint. But he had to twist himself in knots to reach his result,[3] and the consequences would have been disastrous had he convinced another Justice in the majority to follow his lead.

Nearly fifty years after *Roe v. Wade*[4] and almost thirty after *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[5] the *Dobbs* Court concluded that the *Roe* and *Casey* Courts had erred,[6] that there is no constitutional right to choose abortion,[7] and that stare decisis was no impediment to overruling the two decisions.[8] As a result, the Mississippi law at issue in the case—which prohibits abortion after fifteen weeks absent a "medical emergency" or "severe fetal abnormality"[9]—would stand.[10]

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[1] RALPH WALDO EMERSON, SELF-RELIANCE, *in* THE PROJECT GUTENBERG EBOOK OF ESSAYS, BY RALPH WALDO EMERSON 79, 89 (Edna H.L. Turpin ed., 2022) (ebook), https://www.gutenberg.org/files/16643/16643-h/16643-h.htm#SELF-RELIANCE [https://perma.cc/ZHJ2-ZMPE].

[2] *See generally* 597 U.S. 215, 347 (2022) (Roberts, C.J., concurring).

[3] *Cf.* Michael Stokes Paulsen, *The Magnificence of* Dobbs, PUB. DISCOURSE (June 26, 2022), https://www.thepublicdiscourse.com/2022/06/83022/ [https://perma.cc/KDC3-ZLVY] (praising Chief Justice Roberts for "great work" in the past but describing his *Dobbs* concurrence as "out to lunch").

[4] *See generally* 410 U.S. 113 (1973).

[5] *See generally* 505 U.S. 833 (1992), *overruled by Dobbs*, 597 U.S. 215.

[6] *See Dobbs*, 597 U.S. at 269 ("Together, *Roe* and *Casey* represent an error that cannot be allowed to stand.").

[7] *See id.* at 302 ("The Constitution does not prohibit the citizens of each State from regulating or prohibiting abortion.").

[8] *See id.* at 231 ("*Stare decisis*, the doctrine on which *Casey*'s controlling opinion was based, does not compel unending adherence to *Roe*'s abuse of judicial authority.").

[9] *Id.* at 232 (quoting MISS. CODE ANN. § 41-41-191 (2018)).

[10] *See id.* at 301 ("[The] constitutional challenge [to Mississippi's fifteen-week ban] must fail.").

The Chief Justice agreed with this result but contended that the Court did not need to overrule *Roe* and *Casey* to get there[11] and criticized both the majority and the dissent for being cocksure in their positions.[12] He insisted that "*Roe* adopted two distinct rules of constitutional law: one, that a woman has the right to choose to terminate a pregnancy; two, that such right may be overridden by the State's legitimate interests when the fetus is viable outside the womb."[13] The Chief Justice asserted that the Court could have ruled in Mississippi's favor by disposing of the second rule and leaving the first undisturbed.[14]

In concurrence, the Chief Justice claimed that the majority had "overrul[ed] *Roe* all the way down to the studs."[15] Really, though, the Court demolished *Roe*'s foundation, leaving nothing. Chief Justice Roberts, it seems, would have preferred a remodeling job.

At its essence, the *Roe* Court decided only that the United States Constitution would not abide an abortion ban that allowed the procedure only when necessary to save the life of the mother. That was the Texas law at issue in *Roe*.[16] Yet, the Chief Justice suggested that *Roe* stood for more—that the right *Roe* recognized "should . . . extend far enough to ensure a reasonable opportunity to choose, but need not extend any further."[17] But like the undue burden test that the *Casey* Court adopted to measure the constitutionality of pre-viability abortion restrictions,[18] the Chief Justice's "reasonable opportunity" standard has no basis in *Roe*.[19]

In his *Casey* dissent, Chief Justice William Rehnquist observed that "*Roe* continue[d] to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality."[20] The same could have been said about *Casey* if Chief Justice Roberts had had his way in *Dobbs*.

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[11] *See id.* at 359 (Roberts, C.J., concurring) ("I would decide the question . . . whether the previously recognized abortion right bars all abortion restrictions prior to viability, such that a ban on abortions after fifteen weeks of pregnancy is necessarily unlawful. . . . [T]here is no need to go further to decide this case.").

[12] *See id.* at 358 ("Both the Court's opinion and the dissent display a relentless freedom from doubt . . . .").

[13] *Id.* at 355.

[14] *See id.* ("I would abandon th[e] timing rule, but see no need in this case to consider the basic right.").

[15] *Id.* at 353.

[16] *See Roe*, 410 U.S. at 117–18 ("The Texas statutes that concern us here . . . make it a crime to 'procure an abortion,' . . . except . . . for the purpose of saving the life of the mother.").

[17] *Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring).

[18] *See Casey*, 505 U.S. at 876 ("In our view, the undue burden standard is the appropriate means of reconciling the State's interest with the woman's constitutionally protected liberty.").

[19] *Cf. id.* at 944 (Rehnquist, C.J., dissenting) ("The joint opinion, following its newly minted variation on *stare decisis*, retains the outer shell of *Roe* . . . , but beats a wholesale retreat from the substance of that case.").

[20] *Id.* at 954.

Indeed, using Chief Justice Roberts's approach to stare decisis in *Dobbs* would have spawned a bevy of unanswered questions, undermining what the Chief Justice had explained in *Citizens United v. FEC*: "Fidelity to precedent . . . promotes the evenhanded, predictable, and consistent development of legal principles . . . ."[21] Whatever merits the Chief Justice's approach in *Dobbs* might have had, predictability and consistency would not have been among them.

This Article explores Chief Justice Roberts's *Dobbs* concurrence, discussing his conception of judicial restraint and describing the confusion his superficial application of the underlying principles would have unleashed if a single Justice in the majority had joined him. Part I recounts the path to *Dobbs*, beginning with *Roe* and detailing where the Chief Justice trod along the way to the 2022 landmark decision. Part II examines the Chief Justice's concurrence in *Dobbs*. Part II first describes the principles of judicial restraint to which the Chief Justice adheres, with particular attention to his 2021 majority opinion in *Fulton v. City of Philadelphia*.[22] Then, Part II explains how the Chief Justice applied those principles in *Dobbs*, flaws in his analysis, why Justices Brett Kavanaugh and Amy Coney Barrett might have been unwilling to go along with the Chief Justice in *Dobbs* as they had in *Fulton*, and what it would have meant if one of them had joined him again. Finally, the Article concludes that Chief Justice Roberts's *Dobbs* concurrence serves as a warning against applying principles of judicial restraint selectively and mechanically, and the Article urges the judiciary to avoid bending rules to achieve what they may perceive as moderate and restrained results.

I. THE ROAD TO *DOBBS*

In 1973, the *Roe* Court declared that the Constitution grants women the right to choose abortion.[23] The Court added, though, that the right was not unlimited and had to be balanced against the State's prerogative to pursue its interests in protecting potential life, regulating the medical profession, and protecting women's health.[24] To achieve the balance, the Court constructed a demanding trimester framework. Under the Court's framework, a State appeared to have virtually no power to regulate abortion during the first trimester of pregnancy.[25] From the start of the second, the Court contended, a State could adopt measures designed to advance its interest in maternal health.[26] And according to the Court, only at the point of viability—which

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[21] 558 U.S. 310, 377 (2010) (Roberts, C.J., concurring).

[22] *See* 593 U.S. 522, 526, 534, 540–42 (2021).

[23] *See Roe*, 410 U.S. 113, 154 (1973) ("We, therefore, conclude that the right of personal privacy includes the abortion decision . . . .").

[24] *See id.* at 154, 155 (identifying State interest in regulating abortion).

[25] *See id.* at 164 (indicating that, in the first trimester, "the abortion decision . . . must be left to the medical judgment of the pregnant woman's attending physician.").

[26] *See id.* (describing the limits of a State's ability to regulate abortion in the second trimester).

in 1973 was approximately the start of the third trimester—could a State begin to restrict abortion so as to protect "the potentiality of human life," and even then, any restrictions had to include exceptions for when abortion is "necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[27]

Until 1992, the Court struck down regulation after regulation as inconsistent with *Roe*.[28] Then came *Casey*, which supposedly opened the door to greater government regulation. The *Casey* Court claimed to uphold *Roe*'s core, a critical aspect of which was "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."[29] But the trimester framework, the Court declared, was not essential, and its application in the years that followed *Roe* undervalued the interest in potential life that the *Roe* Court had acknowledged.[30]

To give the interest in potential life its due, the *Casey* Court replaced the trimester framework with an "undue burden" standard for pre-viability abortion restrictions, while affirming *Roe*'s test for post-viability measures.[31] Under the new undue burden test, "a provision of law [was] invalid[] if its purpose or effect [was] to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attain[ed] viability."[32] Otherwise, the Court stressed, pre-viability regulations designed to encourage childbirth over abortion or to protect maternal health would stand.[33] Applying the ostensibly more lenient undue burden standard, the *Casey* Court upheld Pennsylvania's informed consent, parental consent, reporting, and

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[27] *Id.* at 164–65.

[28] *See, e.g.*, Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 70, 75, 79, 82–83 (1976) (striking down spousal consent and parental consent requirements, the prohibition of an abortion method, and a mandated standard of care for the fetus when providing an abortion); City of Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 426 (1983) (finding unconstitutional informed consent and parental consent requirements, a twenty-four-hour waiting period, and a requirement that second trimester abortions be performed in a hospital), *overruled by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022); Planned Parenthood Ass'n of Kan. City, Mo., Inc., v. Ashcroft, 462 U.S. 476, 481–82 (1983) (invalidating Missouri statute requiring that abortions performed after twelve weeks of pregnancy be performed in a hospital); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 760, 767–68, 771 (1986) (striking down informed consent, second-physician, and reporting requirements, as well as imposition of standard of care for abortions performed when a fetus may be viable), *overruled by Casey*, 505 U.S. 833, *overruled by Dobbs*, 597 U.S. 215.

[29] *Casey*, 505 U.S. at 846.

[30] *See id.* at 872 (discussing the trimester framework).

[31] *See id.* at 878–79 (describing the scheme for testing the constitutionality of abortion regulations).

[32] *Id.* at 878.

[33] *See id.* (discussing the permissibility of regulations designed to protect potential life and maternal health).

recordkeeping requirements as well as the State's definition of "medical emergency" and a 24-hour waiting period.[34] According to the Court, only Pennsylvania's spousal notification requirement fell short.[35]

The *Casey* Court boldly proclaimed that it had resolved the nation's abortion wars through a "common mandate rooted in the Constitution,"[36] but the Court was wrong and judicial involvement persisted. In 1997, the Court upheld a Montana law precluding nonphysicians from performing abortions.[37] Three years later, it concluded that a Nebraska partial-birth abortion ban would not pass constitutional muster.[38]

Shortly after Chief Justice Roberts joined the Court, a five-Justice majority that included the new Chief Justice upheld the federal partial-birth abortion ban in *Gonzales v. Carhart*.[39] Then, in *Whole Woman's Health v. Hellerstedt*, the Court decided to strike down Texas admitting privileges and ambulatory surgery center requirements under the undue burden standard, which the Court contended was a balancing test that required a court to weigh an abortion regulation's benefits against its burdens.[40] Chief Justice Roberts joined Justice Samuel Alito in dissent.[41]

In 2020, however, the Chief Justice abandoned his conservative brethren and cast the deciding vote in *June Medical Services, L.L.C. v. Russo*, a case in which the Court found unconstitutional a Louisiana admitting privileges requirement that the Chief Justice described as "nearly identical" to the one that the Court invalidated in *Hellerstedt*.[42] Importantly, though, the Chief Justice concurred only in judgment based on stare decisis,[43] contending that the *Hellerstedt* majority was wrong about the need to balance benefits against burdens when applying *Casey*'s "undue burden" standard[44]

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[34] *See id.* at 880–87, 899, 900–01 (concluding that various aspects of Pennsylvania's abortion law withstood review under the undue burden standard).

[35] *See id.* at 898.

[36] *Id.* at 867.

[37] *See* Mazurek v. Armstrong, 520 U.S. 968, 971 (1997) ("[I]t is unlikely that [respondents] will prevail upon their suggestion that the requirement [that a licensed physician perform an abortion] constitutes an 'undue burden' within the meaning of *Casey*.").

[38] *See* Stenberg v. Carhart, 530 U.S. 914, 921–22 (2000) (explaining the undue burden standard and striking down the Nebraska partial-birth abortion ban), *abrogated by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022).

[39] *See* 550 U.S. 124, 146–68 (2007) (describing the contours of the undue burden test and upholding the federal partial-birth abortion ban).

[40] *See* 579 U.S. 582, 606–09 (2016) (Alito, J., dissenting) (interpreting *Casey*'s undue burden standard as a balancing test and concluding that Texas regulations fell short), *abrogated by Dobbs*, 597 U.S. 215.

[41] *See generally id.* at 644–84.

[42] 140 S. Ct. 2103, 2139 (2020) (Roberts, C.J., concurring), *abrogated by Dobbs*, 597 U.S. 215.

[43] *See 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.").

[44] *See id.* at 2136 ("Nothing about *Casey* suggested that a weighing of costs and benefits of an abortion regulation was a job for the courts.").

but crediting the *Hellerstedt* Court as having applied *Casey*'s standard properly understood.[45]

Less than a year after *June Medical*, the Court granted its writ of certiorari in *Dobbs*, and within days of the writ, Texas Governor Greg Abbot signed the Texas Heartbeat Act, which bars abortion once a fetal heartbeat is detected, effectively prohibiting abortion at six weeks gestation.[46] The law places enforcement exclusively in the hands of private citizens, who could earn a $10,000 bounty for each successful "prosecution,"[47] and though the ban undoubtedly ran afoul of *Roe* and *Casey*, its novel enforcement mechanism posed serious questions about the ability to challenge the ban in federal court.[48]

With the Heartbeat Act set to become effective on September 1, 2021, abortion providers and others sued the Texas attorney general, a State court judge, a State court clerk, the heads of four Texas agencies, and a private citizen, seeking an injunction.[49] The defendants could not convince the district court to dismiss the suits[50] and appealed to the United States Court of Appeals for the Fifth Circuit.[51] When the Fifth Circuit denied the plaintiffs' emergency motion for an injunction pending appeal, the plaintiffs looked to the Supreme Court for relief.[52]

The Court refused, explaining that "federal courts enjoy the power to enjoin individuals tasked with enforcing laws, not the laws themselves" and that the plaintiffs had not established a sufficient likelihood of success because there were significant questions as to whether the named defendants were subject to suit.[53] In dissent, Chief Justice Roberts commented that "[t]he desired consequence [of the Texas law] appear[ed] to be to insulate the State from responsibility for implementing and enforcing the [State's] regulatory regime" and that "the consequences of

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[45] *See id.* at 2138–39 ("We should respect the statement in [*Hellerstedt*] that it was applying the undue burden standard of *Casey*. . . . [*Hellerstedt*] held that Texas's admitting privileges requirement placed 'a substantial obstacle in the path of women seeking a previability abortion,' independent of its discussion of benefits.").

[46] *See* Texas Heartbeat Act, TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West 2021); *Dobbs*, 597 U.S. at 415–16; Whole Woman's Health v. Jackson, 556 F. Supp. 3d 595, 603 n.3 (W.D. Tex. 2021) ("[A]n ultrasound can typically detect cardiac activity beginning at approximately six weeks of pregnancy."), *aff'd in part and rev'd in part*, 595 U.S. 30 (2021).

[47] TEX. HEALTH & SAFETY CODE ANN. § 171.208 (West 2021).

[48] *See* Whole Woman's Health v. Jackson, 595 U.S. 30, 30 (2021) ("[I]t is unclear whether the named defendants in this lawsuit can or will seek to enforce the Texas law against the applicants in a manner that might permit our intervention.").

[49] *See Jackson*, 556 F. Supp. 3d at 602, 607–08 (indicating when the act was to take effect, noting when the plaintiffs brought their challenge, and describing the defendants).

[50] *See id.* at 602 (denying the defendants' motions to dismiss).

[51] Whole Woman's Health v. Jackson, No. 21-50792, 2021 WL 3919252, at *1 (5th Cir. Aug. 29, 2021).

[52] *Id.*

[53] *Jackson*, 595 U.S. at 30.

approving the state action . . . counsel at least preliminary judicial consideration before the program devised by the State takes effect."[54]

After the Supreme Court denied relief, the Fifth Circuit determined that the Act's exclusive civil enforcement mechanism meant that none of the Texas officials were proper defendants,[55] and the appeals court stayed lower court proceedings against the private defendant pending his appeal of the district court's decision to reject his motion to dismiss.[56] The plaintiffs returned to the Supreme Court and this time won the day. The Court concluded that the state agency defendants could enforce the Heartbeat Act, and therefore, the district court's consideration of the claims against those defendants could proceed.[57] In a separate opinion, Chief Justice Roberts emphasized:

> [The Heartbeat Act] is contrary to this Court's decisions in [*Roe* and *Casey*]. . . . Texas has employed an array of stratagems designed to shield its unconstitutional law from judicial review. . . . [Various] provisions . . . effectively chill the provision of abortions in Texas. Texas says that the law also blocks any pre-enforcement judicial review in federal court. On that latter contention, Texas is wrong. . . . Given the ongoing chilling effect of the state law, the District Court should resolve this litigation and enter appropriate relief without delay.[58]

The Fifth Circuit did not heed. Instead of remanding the case to the district court, it certified to the Texas Supreme Court the question whether any state agency defendants could enforce the Heartbeat Act.[59] Days later, the United States Supreme Court denied a request to order the Fifth Circuit to remand the case.[60] The Chief Justice remained silent.[61]

The Texas Supreme Court answered the certified question in the negative, deciding that Texas law did not allow the state agency officials to enforce the Texas

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[54] *Id.* at 2496 (Roberts, C.J., dissenting).

[55] *See* Whole Woman's Health v. Jackson, 13 F.4th 434, 438 (5th Cir. 2021) ("S.B. 8 emphatically precludes enforcement by any state, local, or agency officials. The defendant officials thus lack any 'enforcement connection' to S.B. 8 and are not amenable to suit . . . .").

[56] *See id.* at 439 (granting a stay of the district court proceedings).

[57] *See Jackson*, 142 S. Ct. at 539 ("[E]ight Justices hold this case may proceed past the motion to dismiss stage against [the] defendants with specific disciplinary authority over medical licensees . . . .").

[58] *Id.* at 543–44 (Roberts, C.J., concurring in judgment and dissenting in part).

[59] *See Jackson*, 23 F.4th 380, 389 (5th Cir. 2022) (certifying question to Texas Supreme Court).

[60] *See In re* Whole Woman's Health, 142 S. Ct. 701, 701 (2022) (denying the plaintiffs' motion for a writ of mandamus).

[61] The Chief Justice did not write a separate opinion; therefore, it is unknown whether he dissented or voted with the majority.

Heartbeat Act either directly or indirectly.[62] With that, the Fifth Circuit instructed the district court to dismiss the plaintiffs' challenges against the governmental defendants.[63] By the time the Supreme Court handed down its decision in *Dobbs*, Texas's six-week abortion ban had been in effect for nearly ten months.[64]

II. CHIEF JUSTICE ROBERTS'S CONCURRENCE— PRINCIPLED IN FORM, BUT NOT SUBSTANCE

In *Dobbs*, as in *Jackson*, Chief Justice Roberts's attempt to chart a moderate, middle course—a path he successfully navigated in *June Medical* with Justice Ginsburg still on the Court—failed. Determining that *Roe* and *Casey* were seriously wrong and that stare decisis could not save them, *Dobbs*'s five-Justice majority discarded the two precedents *in toto*[65] over a dissent that doggedly clung to them.[66]

In large measure, the Chief Justice aligned with his conservative colleagues. All six found that Mississippi's fifteen-week abortion ban does not violate the Constitution.[67] And they all agreed that the *Roe* and *Casey* Courts were wrong to set viability as the critical dividing line for balancing a woman's right to choose abortion against a State's right to prohibit the procedure.[68]

Unlike the majority, however, the Chief Justice contended that an up-or-down vote on *Roe* and *Casey* was not required to rule in Mississippi's favor. Rather, he indicated that doing away with the viability line alone was both possible and enough.[69] He insisted that one could understand *Roe* as deciding two separate and distinct issues—whether a woman has a right to choose abortion and, if so, how far that right extends.[70] According to Chief Justice Roberts, the *Roe* Court unnecessarily chose viability to delineate the right's scope, and the Court in *Dobbs* could have disposed of the viability line "under a straightforward *stare decisis* analysis."[71]

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[62] *See* Whole Woman's Health v. Jackson, 642 S.W.3d 569, 583 (Tex. 2022) (concluding that state agency defendants had no authority to enforce the Texas Heartbeat Act).

[63] *See* Whole Woman's Health v. Jackson, 31 F.4th 1004, 1006 (5th Cir. 2022) (remanding case to district court).

[64] *See generally* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 347–59 (2022).

[65] *Id.* at 269 (overruling *Roe* and *Casey*).

[66] *See id.* at 359–417 (Breyer, Sotomayor & Kagan, JJ., dissenting) (decrying the majority's decision to overrule *Roe* and *Casey*).

[67] *Id.* at 301 (majority opinion) (concluding that Mississippi's ban satisfies rational basis review); *id.* at 348 (Roberts, C.J., concurring) (concluding that Mississippi's ban gives women "a reasonable opportunity to choose").

[68] *See id.* ("I agree with the Court that the viability line established by *Roe* and *Casey* should be discarded . . . . That line never made any sense.").

[69] *Id.* at 355 ("The viability line is a separate rule . . . . I would excise that additional rule—and only that rule—from our jurisprudence.").

[70] *See id.* at 353–54 (discussing *Roe*).

[71] *Id.* at 348.

In deciding that stare decisis did not counsel in favor of retaining the viability line, the Chief Justice evaluated the seriousness of the *Roe* and *Casey* Courts' errors, the workability of the viability limit, the erosion of principles underlying the two decisions, and whether reliance interests weighed against overruling them as to the scope of the abortion right they recognized.[72] First, the Chief Justice decried the viability line as a serious error that "came out of thin air" and had no meaningful justification.[73] Second, he observed that the most that the *Casey* Court could say about viability was that it was workable:

> Although the [*Casey*] plurality attempted to add more content by opining that "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child," that mere suggestion provides no basis for choosing viability as the critical tipping point. A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant.[74]

Third, the Chief Justice pointed out that, since *Casey*, the Court has recognized interests justifying abortion regulation to which viability is inapposite and that other potential State interests—such as protecting against fetal pain—likewise do not implicate viability.[75] Finally, the Chief Justice explained that, whatever might be said about reliance on the ability to choose abortion more broadly, "[i]t cannot reasonably be argued that women have shaped their lives in part on the assumption that they would be able to abort up to viability, as opposed to fifteen weeks."[76]

The Chief Justice, therefore, advocated for overruling *Roe* and *Casey* only in part, disposing of viability as a constitutionally significant point, but leaving in place the right to abortion that the *Roe* Court purported to find in the Constitution.[77] That right, he contended, "should . . . extend far enough to ensure a reasonable opportunity to choose, but need not extend any further."[78]

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[72] *Id.* at 349–57 (discussing factors the Court customarily considers in deciding whether to overrule precedent); *see also* Thomas J. Molony, *Taking Another Look at the Call on the Field:* Roe*, Chief Justice Roberts, and Stare Decisis*, 43 HARV. J.L. & PUB. POL'Y 790–91 (2020) (discussing the stare decisis factors).

[73] *Dobbs*, 597 U.S. at 349 (Roberts, C.J., concurring).

[74] *Id.* at 350.

[75] *Id.* (noting that the Court in *Gonzales v. Carhart* "recognized a broader array of interests, such as drawing 'a bright line that clearly distinguishes abortion and infanticide,' maintaining societal ethics, and preserving the integrity of the medical profession" and stressing that "[t]he viability line has nothing to do with advancing such permissible goals.").

[76] *Id.* at 357.

[77] *See id.* at 352 (indicating that the Court did not need to "take the dramatic step of altogether eliminating the abortion right").

[78] *Id.* at 348.

Chief Justice Roberts described his approach in *Dobbs* as a proper exercise of judicial restraint,[79] a key characteristic of his jurisprudence since his elevation to the Court. On its face, the Chief Justice's *Dobbs* concurrence showcases his vision of what restraint means. That vision has three important features: deferring to the political branches, ensuring that a dispute involves a case or controversy appropriate for judicial resolution, and reaching no further than necessary to decide a case.[80] And what he urged in *Dobbs* seemingly would have satisfied all three.

The quintessential (and controversial) example of the Chief Justice's deference to the political branches is his opinion for the Court in *National Federal of Independent Business v. Sebelius* (*NFIB*). In *NFIB*, he stretched to conclude that Congress could use its taxing power to require individuals to purchase health insurance or pay a penalty.[81] In part of his opinion that no other Justice joined, he stressed: "As we have explained, 'every reasonable construction must be resorted to, in order to save a statute from unconstitutionality.'"[82] Likewise, in his dissent to the Court's decision in *Obergefell v. Hodges* that the Constitution includes a right to same-sex marriage, the Chief Justice emphasized deference as a key component of judicial restraint: "The majority today neglects [a] restrained conception of the judicial role. It seizes for itself a question the Constitution leaves to the people . . . acting through their elected representatives."[83]

Chief Justice Roberts's vote in an earlier same-sex marriage decision demonstrates his view that restraint requires the Court to stay out of disputes that are not appropriate for judicial resolution. In 2013, the Court in *United States v. Windsor* struck down the federal Defense of Marriage Act notwithstanding the Government's decision to support the law's invalidation.[84] With the Chief Justice joining, Justice Antonin Scalia lambasted the majority for getting involved:

> The Court is eager—*hungry*—to tell everyone its view of the legal question at the heart of this case[,] . . . but the people of We the People . . . gave judges . . . only the "judicial Power," a power to decide not abstract questions but real, concrete "Cases"

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[79] *See id.* at 357 (insisting that ruling in Mississippi's favor without overruling *Roe* and *Casey* entirely would have been "firmly grounded in basic principles of *stare decisis* and judicial restraint.").

[80] *See* Molony, *supra* note 72, at 808–09 (describing Chief Justice Roberts's views about judicial restraint).

[81] NFIB v. Sebelius, 567 U.S. 519, 574 (2012) ("The Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax.").

[82] *Id.* at 563 (quoting Hooper v. California, 155 U.S. 648, 657 (1895)).

[83] 576 U.S. 644, 687–88 (2015) (Roberts, C.J., dissenting).

[84] *See* 570 U.S. 744, 753–54 (2013) (indicating that the Justice Department had decided to stop defending the Defense of Marriage Act and declaring the Act unconstitutional).

> and "Controversies." Yet the plaintiff and the Government agree entirely on what should happen in this lawsuit. . . . What, then, are we *doing* here?[85]

In addition, the Chief Justice himself explained in *Rucho v. Common Cause* that federal courts do not have the power to resolve claims of partisan gerrymandering because those claims present political questions, which are not "Cases" or "Controversies" within the meaning of the Constitution.[86]

The result Chief Justice Roberts sought in *Dobbs* easily would have satisfied the two principles of judicial restraint described above. He would have ruled in Mississippi's favor, thereby deferring to the judgment of the State's elected representatives, and there was no question that the plaintiffs and defendants were at odds in a "Case" or "Controversy" within the meaning of Article III, Section 2 of the Constitution.[87] The last feature of the Chief Justice's conception of judicial restraint is the one that apparently kept him from joining the majority:

> I would . . . adhere[] to a simple yet fundamental principle of judicial restraint: If it is not necessary to decide more to dispose of a case, then it is necessary *not* to decide more. Perhaps we are not always perfect in following that command, and certainly there are cases that warrant an exception. But this is not one of them.[88]

The Chief Justice's reticence to sign on to sweeping decisions is nothing new. In his 2010 concurrence in the Court's controversial *Citizens United v. FEC* decision, Chief Justice Roberts praised the majority for first seeking to decide the case on statutory grounds, then looking to narrow constitutional grounds, and only after exhausting those possibilities, taking the drastic step of overruling a twenty-year-old precedent and partially overruling a more youthful one.[89] Just three years earlier, the Chief Justice had rejected Justice Scalia's call to overrule the more recent decision in part.[90] Joined by Justice Alito, the Chief Justice concluded that the Court could resolve the case on narrower constitutional grounds and therefore needed to go no further.[91]

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[85] *Id.* at 778–79 (Scalia, J., dissenting); *see id.* at 775 (Roberts, C.J., dissenting) (agreeing with Justice Scalia that the Court lacked jurisdiction).

[86] *See* 588 U.S. 684, 720 (2019) (concluding that partisan gerrymandering claims are not justiciable in federal court).

[87] U.S. CONST. art. III, § 2.

[88] *See* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 348 (Roberts, C.J., concurring).

[89] *See* 558 U.S. 310, 374 (2010) (Roberts, C.J., concurring) (discussing the majority's approach to the case).

[90] *See* FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 504 (2007) (Scalia, J., concurring) ("I would overrule that part of the Court's decision in *McConnell* upholding § 203(a) of BCRA.").

[91] *See id.* at 481–82 (majority opinion) (concluding that a campaign finance law violated the First Amendment as applied to particular speech).

It was likewise with *Janus v. AFSCME, Council 31*, a decision in which the Court overruled a forty-one-year-old decision.[92] The Court in *Janus* noted that it had previously stayed its hand, finding ways to distinguish the earlier ruling.[93]

The Chief Justice's 2021 majority opinion in *Fulton v. City of Philadelphia* showcases his preference for narrow decisions. The Court granted certiorari in *Fulton* with respect to three questions, one of which was whether to overrule its 1990 decision in *Employment Division, Department of Human Resources of Oregon v. Smith*,[94] a case in which the Court held that State laws that discriminate against religion do not violate the First Amendment's Free Exercise Clause if the laws are neutral and generally applicable.[95] The Chief Justice deftly distinguished *Smith* and avoided the question.

The *Fulton* Court considered whether the City of Philadelphia could exclude Catholic Social Services from participating in the city's foster care program because of the agency's refusal to certify same-sex couples as foster parents due to its religious beliefs regarding same-sex relationships.[96] Philadelphia's standard foster care agreement prohibited discrimination based on sexual orientation but gave the city the discretion to grant exceptions.[97] As a result, the Court determined that the prohibition was not generally applicable and *Smith* was inapposite.[98] The Chief Justice also avoided revisiting *Smith* in relation to a city ordinance that prohibited discrimination based on sexual orientation in public accommodations.[99] The Court decided that certifying parents for foster care was not a public accommodation subject to the ordinance.[100]

In *Dobbs*, Chief Justice Roberts noted that the Court had not granted review to consider whether to overrule *Roe* and *Casey* but to answer just one question:

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[92] *See* 138 S. Ct. 2448, 2460 (2018) (overruling Abood v. Detroit Bd. of Educ., 431 U.S. 209 (1977)).

[93] *See id.* at 2463 ("We have . . . refused to extend *Abood* to situations where it does not squarely control, while leaving for another day the question whether *Abood* should be overruled." (citation omitted)).

[94] *See* Fulton v. City of Philadelphia, 140 S. Ct. 1104, 1104 (2020) (granting petition for certiorari); Petition for Writ of Certiorari, Fulton v. City of Philadelphia, 593 U.S. 522 (2021) (No. 19-123), 2019 WL 3380520, at *1 (including the question "[w]hether *Employment Division v. Smith* should be revisited").

[95] *See* Emp. Div. v. Smith, 494 U.S. 872, 878 (1990) ("[I]f prohibiting the exercise of religion . . . is not the object . . . but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended.").

[96] *See Fulton*, 593 U.S. 522 (describing the constitutional issue).

[97] *See id.* at 535 (reproducing the Philadelphia contractual provision prohibiting discrimination based on sexual orientation).

[98] *See id.* ("We conclude, however, that th[e] provision is not generally applicable as required by *Smith*.").

[99] *See id.* at 540.

[100] *See id.* at 538 (concluding that "foster care agencies do not act as public accommodations in performing certifications").

"Whether all pre-viability prohibitions on elective abortions are unconstitutional."[101] And the Chief Justice seemed troubled with what he perhaps perceived as a bait-and-switch.[102] Mississippi had asserted that the Court could rule in its favor without discarding *Roe* and *Casey* and then argued that the Court should do just that.[103] Given how the Chief Justice steered the *Fulton* Court away from deciding whether to overrule *Smith*—a question which the Court had certified—it would not be surprising to see him go to greater lengths to avoid a question for which the Court had not granted review.

Chief Justice Roberts garnered the support of five other justices for his position in *Fulton*. Justices Kavanaugh and Barrett were among them. But in *Dobbs*, the Chief Justice could not secure the vote of either. If just one of them had joined the Chief Justice, his opinion would have been the narrowest basis supporting the judgment and—as with the plurality opinion in *Casey*—the opinion of a minority of Justices (perhaps just two) would have controlled the constitutionality of abortion regulations going forward.[104]

Why were neither Justice Kavanaugh nor Justice Barrett willing to side with the Chief Justice? One cannot be certain, of course, but Justice Barrett's *Fulton* concurrence (which Justice Kavanaugh joined) and Justice Kavanaugh's concurrence in *Dobbs* may offer clues. In *Fulton*, Justice Barrett was concerned that overruling *Smith* would result in lots of open questions,[105] and in *Dobbs*, Justice Kavanaugh maintained that overruling *Roe* and *Casey* would have the exact opposite effect.[106] Justices Barrett and Kavanaugh thus may have decided to sign on with the Chief Justice in *Fulton* to avoid chaos and not to join him in *Dobbs* for the same reason.[107]

Whatever one might conclude about whether Justice Barrett's and Justice Kavanaugh's concerns in *Fulton* were warranted, they were right on target if they

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[101] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 347–48 (2022) (Roberts, C.J., concurring) (quoting Petition for Writ of Certiorari at i, Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022) (No. 19-1392)).

[102] *See id.* at 352.

[103] *See id.* (discussing how the case progressed).

[104] *See* Marks v. United States, 430 U.S. 188, 193 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'").

[105] *See Fulton*, 593 U.S. at 544–45 (Barrett, J., concurring) ("There would be a number of issues to work through if *Smith* were overruled.").

[106] *Dobbs*, 597 U.S. at 345–46 (Kavanaugh, J., concurring) ("[A]s I see it, some of the other abortion-related legal questions raised by today's decision are not especially difficult as a constitutional matter."). Justice Kavanaugh also might have considered it significant that *Fulton* involved an enumerated right and *Dobbs* a questionable one. *Id.* at 341 ("This Court . . . does not possess the authority either to declare a constitutional right to abortion *or* to declare a constitutional prohibition of abortion.").

[107] *See id.* at 300 (majority opinion) ("[T]he concurrence's quest for a middle way would . . .[prolong] [t]he turmoil wrought by *Roe* and *Casey*.").

had the same fears about following the Chief Justice in *Dobbs*. The Chief Justice asserted in *Dobbs* that the Court could have removed the viability line from *Roe* and *Casey* but otherwise left the decisions intact "under a straightforward *stare decisis* analysis."[108] In reality, though, removing the viability line alone would have been anything but straightforward, as one can see when editing out the gestational-based features of what the *Roe* and *Casey* Courts said about their holdings.[109] *Roe*'s summary, so edited, would read:

> A state criminal abortion statute of the current Texas type, that excepts from criminality only a *life-saving* procedure on behalf of the mother, ~~without regard to pregnancy stage and~~ without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.
>
> ~~(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.~~
>
> ~~(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.~~
>
> ~~(c) For the stage subsequent to viability,~~ the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.[110]

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[108] *Id.* at 348 (Roberts, C.J., concurring). In describing the Court's error, the Chief Justice pointed out that neither the Texas statute in *Roe* nor the Georgia statute at issue in *Doe v. Bolton*, *Roe*'s companion case, contained any limits based on gestation. *See id.* at 349 (discussing both *Doe v. Bolton*, 410 U.S. 179 (1973), *abrogated by Dobbs*, 597 U.S. 215, and *Roe v. Wade*, 410 U.S. 113 (1973), *overturned by Dobbs*, 597 U.S. 215). Thus, it seems that Chief Justice Roberts did not need to engage in any stare decisis analysis but could have concluded that *Roe*'s viability rule was dicta and therefore the Court did not need to follow it. *See* Randy Beck, *Self-Conscious Dicta: The Origins of* Roe v. Wade*'s Trimester Framework*, 51 AM. J. LEGAL HIST. 505, 526 (2011) ("Our review of the *Roe* Court's internal correspondence shows that the Justices knew they were creating *dicta* when they purported to draw lines governing the duration of abortion rights.").

[109] *Cf. United States v. Windsor*, 570 U.S. 744, 799–800 (Scalia, J., dissenting) (making a point by modifying text from the majority opinion).

[110] *See Roe*, 410 U.S. at 164–65.

With these edits, it would appear that the absence of a health exception was fatal to the Texas statute—that the Court determined that the State's interest in preserving potential life never is sufficient for a ban on health-motivated abortions.[111]

The Georgia statute at issue in *Doe v. Bolton*, *Roe*'s companion case, however,[112] contained a health exception,[113] so the Court had to grasp for something more. Georgia's law required a doctor performing an abortion to do so in an accredited hospital, only when a hospital committee had approved the procedure, and only when two other physicians agreed on the abortion's necessity.[114] The health exception must not have been enough to save these requirements, for the *Doe* Court invalidated all of them.[115] As edited above to remove its gestational limits, then, *Roe* will not explain *Doe*.[116]

And removing the gestational features from how the *Casey* Court summarized its own holding presents similar problems:

> (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis . . . . An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion ~~before the fetus attains viability~~. . . .
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade,* and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy ~~before viability~~.
>
> (e) We also reaffirm *Roe*'s holding that "~~subsequent to viability,~~ the State in promoting its interest in the potentiality of human

[111] The Court in *Stenberg v. Carhart* concluded that the health exception requirement applies throughout pregnancy. *See* 530 U.S. 914, 930 (2000), *abrogated by Dobbs*, 597 U.S. 215 ("The State's interest in regulating abortion previability is considerably weaker than postviability . . . Since the law requires a health exception in order to validate even a postviability abortion regulation, it at a minimum requires the same in respect to previability regulation.").

[112] *See Roe*, 410 U.S. at 165 (indicating that the Court's opinions in *Roe* and *Doe* "[we]re to be read together").

[113] *See Doe*, 410 U.S. at 183 (describing the Georgia statute).

[114] *Id.* at 192–200 (evaluating the Georgia statute).

[115] *See id.* at 201 (striking down the Georgia statute in part).

[116] Notably, in striking down the accredited hospital requirement, the *Doe* Court observed that it applied during the first trimester. *See id.* at 194–95 (concluding that the accreditation requirement was invalid because it applied during the first trimester).

> life may, if it chooses, regulate, and even proscribe abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[117]

So edited, clauses (d) and (e) contradict each other. And to reconcile clauses (a) and (e), one must conclude that adding life and health exceptions to an abortion restriction would be sufficient to avoid imposing a substantial obstacle. But such a construction effectively would have overruled *Doe* and would have been inconsistent with the *Casey* Court's treatment of a Pennsylvania spousal notification requirement at issue in the case.

Similar to the *Doe* Court, the Court in *Casey* struck down the spousal notification requirement notwithstanding its medical emergency exception, which permitted abortions when a woman's life or health was endangered.[118] Consequently, for *Roe*, *Doe*, and *Casey* to make sense without viability, one would need to excise (or at least modify) what *Roe* and *Casey* said about a State's ability to prohibit or regulate abortions not aimed at preserving a woman's life or health. Before *Casey*, removing the statement about a State's power likely would have left *all* abortion regulations subject to strict scrutiny and thus valid "only if drawn in narrow terms to further a compelling state interest."[119] After *Casey*, *all* abortion bans arguably would have been verboten and the ostensibly more lenient undue burden standard broadly would have applied to lesser restrictions.[120]

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[117] Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 879 (1992), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215 (2022). Eliminating the viability line from the *Casey* Court's description of *Roe*'s holding has like effect:

> *Roe*'s essential holding . . . 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. Second is a confirmation of the State's power to restrict abortions ~~after~~ ~~fetal viability~~, if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.

Id. at 846.

[118] *See id.* at 902, 908–09 (reproducing the definition of "medical emergency" and the spousal notification requirement in the Pennsylvania abortion statute).

[119] *Id.* at 871.

[120] In her *Akron v. Akron Center for Reproductive Health, Inc.* dissent, Justice Sandra Day O'Connor asserted that an undue burden standard should apply throughout pregnancy. *See* 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting) ("In my view, this 'unduly burdensome' standard should be applied to the challenged regulations throughout the entire pregnancy without reference to the particular 'stage' of pregnancy involved.").

The Chief Justice was right in *Dobbs* when he insisted that the *Casey* Court's previous declaration that the viability line is an essential part of *Roe*'s holding "does not make it so."[121] As the discussion above illustrates, however, viability played a larger role than the Chief Justice acknowledged.

To sustain the right to abortion that the *Roe* and *Casey* Courts claimed the Constitution protected and to uphold Mississippi's fifteen-week abortion ban, the *Dobbs* Court could not simply have tossed out viability. No, it would have had to transform *Roe* and *Casey*. And that is what the Chief Justice was advocating when he suggested a "reasonable opportunity" standard: "Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right should . . . extend far enough to ensure a reasonable opportunity to choose, but need not extend any further. . . ."[122]

Neither *Roe* nor *Casey* mentions the "reasonable opportunity" concept, leaving one to wonder whether the Chief Justice pulled it "out of thin air" as he claimed the *Roe* Court did with its trimester framework.[123] Perhaps the idea comes from a tiny wisp in *Casey* about consent, but if that is the origin, the Chief Justice did not admit it. In making his case against the viability line, he asserted that the best defense the *Casey* Court could find was that "it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child."[124] This consent-based justification fits neatly with the "reasonable opportunity" standard, a point the Chief Justice makes obliquely when he emphasizes that women usually know they are pregnant well before that fifteen weeks,[125] but it would have been a thin reed for propping up *Roe* and *Casey*.

Moreover, the Chief Justice's "reasonable opportunity" standard would have unleashed a torrent of uncertainty for lower courts trying to apply it. The "turmoil" the *Dobbs* majority cited—questions about how a court determines when a regulation leaves women a reasonable opportunity and when exceptions might be appropriate—would have been the tip of the iceberg.[126] The Chief Justice's new standard would have raised many questions in relation to *Casey*. Would one have just substituted "reasonable opportunity" for the gestational features that appear in *Casey*'s holding? If so, it might have transformed how *Casey* described *Roe*'s essential holding in the following ways:

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[121] *Dobbs*, 597 U.S. at 354–55 (Roberts, C.J., concurring).

[122] *Id.* at 348.

[123] *Id.* at 349.

[124] *Id.* at 350 (quoting *Casey*, 505 U.S. at 870).

[125] *Id.* ("A similar implied consent argument could be made with respect to a law banning abortions after fifteen weeks, well beyond the point at which nearly all women are aware that they are pregnant.").

[126] *Id.* at 298–99.

> *Roe*'s essential holding . . . has three parts. First is a recognition of the right of the woman [*to a reasonable opportunity*] to choose to have an abortion. . . ~~before viability~~ and to obtain it without undue interference from the State. Before ~~viability~~ [*a woman has had a reasonable opportunity to choose to have an abortion*], 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. Second is a confirmation of the State's power to restrict abortions after ~~fetal viability~~ [*a woman has had a reasonable opportunity to choose to have an abortion*], if the law contains exceptions for pregnancies which endanger the woman's life or health. And third is the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child.[127]

Then, perhaps *Casey*'s summary of its own holding would look like this:

> (a) To protect the central right recognized by *Roe v. Wade* while at the same time accommodating the State's profound interest in potential life, we will employ the undue burden analysis. . . . An undue burden exists, and therefore a provision of law is invalid, if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before ~~the fetus attains viability~~ [*she has had a reasonable opportunity to choose*]. . . .
>
> (d) Our adoption of the undue burden analysis does not disturb the central holding of *Roe v. Wade,* and we reaffirm that holding. Regardless of whether exceptions are made for particular circumstances, a State may not prohibit any woman from making the ultimate decision to terminate her pregnancy before ~~viability~~ [*she has had a reasonable opportunity to make that decision*].
>
> (e) We also reaffirm *Roe*'s holding that "subsequent to ~~viability~~ [*the time when a woman has had a reasonable opportunity to choose to have an abortion*], the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[128]

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[127] *See Casey*, 505 U.S. at 846.
[128] *Id.* at 878–79.

Treating the Chief Justice's "reasonable opportunity" standard in this way would minimize the risk of unsettling earlier decisions. The Court's conclusions about the admitting privileges requirements, the ambulatory surgery standards, and spousal notification in *June Medical*, *Hellerstedt*, and *Casey* would still stand because the regulations at issue in those cases applied throughout pregnancy, and the Court struck them down as imposing undue burdens.[129] In addition, the Court's ruling in *Stenberg v. Carhart* that a Nebraska partial-birth abortion ban was unconstitutional would not have been affected because the decision was based in part on the absence of a health exception.[130]

Alternatively, though, one might understand the Chief Justice's "reasonable opportunity" standard not as a modification to *Casey*'s scheme, but as a brand-new test such that a regulation would have unconstitutionally infringed upon a woman's putative right to have an abortion only if it denied her a reasonable opportunity to choose. What this would have meant for *June Medical*, *Hellerstedt*, *Stenberg*, *Casey*, past lower court decisions, and even *Doe*, is hard to say. Moreover, how to apply the requirement that abortion regulations contain health exceptions in relation to a woman's "reasonable opportunity" would have been uncertain.

Finally, had the Chief Justice persuaded Justice Kavanaugh or Justice Barrett to join in the Chief Justice's middle way, questions may have arisen regarding how State interests that the Court had not previously considered might come into play. In *Dobbs*, the Chief Justice pointed out that since *Roe* and *Casey*, the Court had "recognized a broader array of interests [having nothing to do with viability], such as drawing 'a bright line that clearly distinguishes abortion and infanticide,' maintaining societal ethics, and preserving the integrity of the medical profession."[131] Likewise, he suggested that there might be other legitimate interests, like preventing fetal pain, that could be relevant.[132] How would those have fit into his "reasonable opportunity" standard? Given that the Court in *Roe* did not evaluate a state's interest in protecting *actual* human life but only an interest in *potential* human life,[133] might

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[129] *See* June Med. Servs., LLC v. Russo, 591 U.S. 299, 341–42 (2020) (describing a Louisiana admitting privileges requirement and agreeing with the district court that the requirement imposed an undue burden), *abrogated by Dobbs*, 597 U.S. 215 (majority opinion); *id.* at 358 (Roberts, C.J., concurring) ("The result in this case is controlled by our decision [in *Hellerstedt*] 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 . . . ."); Whole Woman's Health v. Hellerstedt, 597 U.S. 582, 599 (2016) (describing Texas admitting privilege and ambulatory surgery center requirements and finding that they constituted an undue burden); *Casey*, 505 U.S. at 895 (explaining the Pennsylvania spousal notification requirement and deciding that it represented an undue burden).

[130] *See* Stenberg v. Carhart, 530 U.S. 914, 930 (2000) (concluding that the Nebraska ban violated the Constitution "for at least two independent reasons [one of which was that] the law lack[ed] any exception 'for the preservation of the health of the mother.'").

[131] *Dobbs*, 597 U.S. at 350 (Roberts, C.J., concurring).

[132] *See id.* (discussing other possible interests).

[133] *See* Scott W. Gaylord, Roe *as Potemkin Village: Fallacies, Façades, and* Stare Decisis,

its interest in safeguarding actual life support a ban on abortion like the Texas ban *Roe* struck down? Could a court then determine that *Roe* correctly decided that the Constitution protects "a right to choose to terminate [a] pregnancy,"[134] but was wrong about its scope—that a State need only allow the procedure when a woman's life is at risk, as Chief Justice Rehnquist intimated in his *Roe* dissent?[135]

In short, Chief Justice Roberts's approach in *Dobbs* would have been completely unsettling, leaving many open questions, breeding significant uncertainty, and possibly disrupting a host of earlier decisions. That the Chief Justice would have been willing to cause such upheaval in the name of restraint is surprising given his votes in *Kisor v. Wilkie* and *Ramos v. Louisiana*, cases in which he seemed worried that overruling earlier decisions would cause far-reaching disruption in the courts.[136]

The course the Chief Justice proposed in *Dobbs* also is inconsistent with what he previously emphasized regarding stare decisis. Curiously, although the Chief Justice insisted that the *Dobbs* Court could dispose of viability "under a straightforward *stare decisis* analysis,"[137] he made no mention of his lengthy instruction on stare decisis in *Citizens United*.[138] There, he stressed, "[O]ur practice of avoiding unnecessary (and unnecessarily broad) constitutional holdings [does not] trump[] our obligation faithfully to interpret the law. It should go without saying . . . that we cannot embrace a narrow ground of decision simply because it is narrow; it must also be right."[139]

Addressing stare decisis in *Dobbs*, Chief Justice Roberts explained that "[w]hether a precedent should be overruled is a question 'entirely within the discretion

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83 U. PITT. L. REV. 229, 256 (2021) ("To properly weigh the competing interests . . . , the [*Roe*] Court [needed to] determine whether there is an actual human life and then value that life . . . , something the Court never [did]. . . . [W]hen human life begins is no longer a 'difficult question.'").

[134] *Dobbs*, 597 U.S. at 355 (Roberts, C.J., concurring).

[135] *See* Roe v. Wade, 410 U.S. 113, 173 (1973) (Rehnquist, J., dissenting) ("If the Texas statute were to prohibit an abortion even where the mother's life is in jeopardy, I have little doubt that such a statute would lack a rational relation to a valid state objective."), *overruled by Dobbs*, 597 U.S. 215.

[136] *See* Ramos v. Louisiana, 140 S. Ct. 1390, 1436 (2020) (Alito, J., joined by Roberts, C.J., dissenting) ("For 48 years, Louisiana and Oregon, trusting that *Apodaca* [*v. Oregon*] is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury-unanimity issue."); Kisor v. Wilkie, 139 S. Ct. 2400, 2422 (2019) (stating in Section III.B that the "Court alone has applied *Auer* [*v. Robbins*] or [*Bowles v.*] *Seminole Rock* [*& Sand Co.*] in dozens of cases," that "lower courts have done so thousands of times," and that "a decision in [the petitioner's] favor would allow relitigation of any decision based on *Auer*"); *id.* at 2424 (Roberts, C.J., concurring) (joining Section III.B of the principal opinion).

[137] *Dobbs*, 597 U.S. at 348.

[138] *See generally* Citizens United v. FEC, 558 U.S. 310, 372–85 (2010) (Robert, C.J., concurring) (discussing stare decisis in detail).

[139] *Id.* at 375.

of the court.'"[140] Fair enough, but his *Citizens United* concurrence indicated that the Court's discretion is not unfettered, a point that was not lost on the *Dobbs* majority.[141] The Chief Justice's 2010 concurrence emphasized that "[*s*]*tare decisis* is a doctrine of preservation, not transformation."[142] Yet, as the discussion above demonstrates, he proposed that the Court mint a "reasonable opportunity" standard of unclear origin and application.

Ironically, the Chief Justice's pursuit of one aspect of restraint—trying to decide no more than necessary—led him to espouse an "exercise of raw judicial power."[143] In *Obergefell*, the Chief Justice stressed that, "[u]nder the Constitution, judges have power to say what the law is, *not what it should be*."[144] But in *Dobbs*, he advocated for what he maintained judges are powerless to do: "Our abortion precedents describe the right at issue as a woman's right to choose to terminate her pregnancy. That right *should* therefore extend far enough to ensure a reasonable opportunity to choose."[145] In *Dobbs*, it seems, the Chief Justice would have given into the temptation to confuse his own preference for incremental change over what stare decisis demands.[146]

CONCLUSION

Chief Justice Roberts's concurrence in *Dobbs* is a cautionary tale of the perils associated with selectively applying principles of judicial restraint. Restraint is laudable, but straining too hard for a moderate result can yield a decision that is neither restrained nor moderate.

In his confirmation hearing in 2005, then Judge Roberts testified: "An overruling of a prior precedent is a jolt to the legal system. It is inconsistent with principles of stability and yet . . . the principles of *stare decisis* recognize that there are situations when that's a price that has to be paid."[147] Perhaps he had this testimony in mind when he wrote his concurrence in *Dobbs*: "The Court's decision to overrule *Roe* and *Casey* is a serious jolt to the legal system . . . . A narrower decision rejecting the misguided viability line would be markedly less unsettling."[148] That's doubtful. The

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[140] *Dobbs*, 597 U.S. at 357 (Roberts, C.J., concurring).

[141] *Id.* at 297 (quoting *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring)).

[142] *Citizens United*, 558 U.S. at 384 (Roberts, C.J., concurring).

[143] Roe v. Wade, 410 U.S. 113, 179 (1973) (White, J., dissenting), *overruled by Dobbs*, 597 U.S. 215 (2022).

[144] Obergefell v. Hodges, 576 U.S. 644, 686 (2015) (Roberts, C.J., dissenting) (emphasis added).

[145] *Dobbs*, 597 U.S. at 348 (Roberts, C.J., concurring) (emphasis added).

[146] *See Obergefell*, 576 U.S. at 687 (Roberts, C.J., dissenting) ("It can be tempting for judges to confuse our own preferences with the requirements of the law.").

[147] *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. 144 (2005) (testimony of Judge John G. Roberts, Jr.).

[148] *Dobbs*, 597 U.S. at 357 (Roberts, C.J., concurring).

"narrower" approach the Chief Justice sought would have ushered in a brand-new era of uncertainty and unpredictability. The Court would have gone from the trimester framework in 1973, to the undue burden standard in 1992, and then to the Chief Justice's reasonable opportunity test in 2022. With all the changes, one would have had good reason to "fear [that] the Court [would have been] compounding its past error by trying to fix it in a totally different era."[149]

Judge Roberts had explained to the Senate Judiciary Committee that he viewed the judge's role as akin to that of an umpire who calls balls and strikes.[150] But in *Dobbs*, the Chief Justice wanted to change the strike zone. If an umpire does this, it is bad for baseball; when a judge does it, it is "dangerous for the rule of law."[151] Please, Mr. Chief Justice—and other esteemed members of the judiciary—just call the pitch.

[149] South Dakota v. Wayfair, Inc., 585 U.S. 162, 197 (2018) (Roberts, C.J., dissenting).

[150] *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*, *supra* note 147, at 55–56 and accompanying parenthetical.

[151] *Obergefell*, 576 U.S. at 706 (Roberts, C.J., dissenting).