

## ***A Profile in Courage***

Chief Justice Roberts is a profile in courage who would easily make it into John F. Kennedy's famous work on politicians who sometimes take the path less traveled. Roberts, was nominated by George W. Bush on September 29, 2005. He had formerly served on the District of Columbia Circuit Court. He was defined by President Bush's enemies as a man who would ruin the Court and return it to prehistoric days.

Instead, Roberts has stood out as a courageous and honorable justice. Much has already been written about *Dobbs vs. Jackson Women's Health*, decided by the Supreme Court in an Opinion published June 24, 2022. Much more will be written about the Court's determination that abortion in the United States is not a right protected by the Constitution adopted in 1789 and amended numerous times thereafter. Likewise, said *Dobbs*, the 1865 Civil War Amendments guaranteeing equal protection and due process on the part of the states, do not protect the right to abortion.

Chief Justice Roberts, in his Opinion concurring in the judgment, counseled a more narrow decision. Roberts' reasoning is well grounded in jurisprudence offered by America's greatest justices; men like Oliver Wendell Holmes, Hugo Black and Felix Frankfurter. Not everyone agreed with those Justices either. To some, they seemed overly restrictive in their legal reasoning because they did not view the United States Supreme Court as a super social legislature.

Roberts succinctly stated that the United States Supreme Court granted *certiorari* to decide one question: "Whether all pre-viability prohibitions on elective abortions are unconstitutional." As Roberts pointed out, the initial arguments made by the Mississippi Attorney General conceded that abortions were constitutionally protected in the United States but that the test as to when an abortion could be legally performed was not necessarily viability as defined by earlier Supreme Court decisions.

Roberts wrote that Mississippi's law allows a woman three months to obtain an abortion, well beyond the point at which it is considered "late" to discover a pregnancy. "I see no sound basis for questioning the adequacy of that opportunity," said the Chief.

Roberts would not have outlawed all abortions but rather would have chosen an incremental approach, much more logical in terms of the greatest power the court has; the power of persuasion. Courts do not have Armies or Navies or the ability to manipulate the media. Rather, a legitimate court operates through persuasion, and more importantly, reaching decisions that are frequently incremental and which can be accepted by the citizens without the use of force.

The Chief Justice agreed that the rule should be discarded holding that a woman's right to terminate her pregnancy extends up to the point that the fetus is regarded "viable" outside the womb. Roberts, along with a number of other Justices, thought that establishing viability "as the earliest point at which a state may legislate to advance the substantial interest in the area of abortion" was erroneous. The "original" three-part framework based upon viability was an invention of *Roe vs. Wade* and has no basis in the Constitution or any legislation which existed at the time.

Later decisions did not support *Roe vs. Wade*. Once *Roe vs. Wade* found abortion to be a protected liberty interest, the Court had to wrestle with the problem that it was permitting the termination of a human life. Viability, therefore, seemed to be the most logical point at which to hold that abortions were not simply birth control on demand. Once that magical day of viability arrived, it would be murder to kill a baby but, the day before, it was a woman's right to choose. That dichotomy never sat well, even with proponents of abortion rights.

With advance of medicine, especially prenatal medicine, the pillars of the viability construct only weakened with time. A number of statutes were passed in jurisdictions that forbid abortions after 20 weeks of pregnancy. They were premised on the theory that a fetus can feel pain at that stage of development. Who is to say that pain, the development of a heart or movement inside of the body was more or less important than the ability to breathe outside the womb at approximately 21 weeks?

In arguing that the viability rule was created outside the ordinary course of litigation, Chief Justice Roberts expressed an informed doubt, and unstated love for his country.

I am not sure, for example, that a ban on terminating a pregnancy from the moment of conception must be treated the same under the Constitution as a ban after 15 weeks.

Roberts admonished the reader to heed the words of the great Justice Felix Frankfurter to observe limitations on the function of the court and to decide only what is necessary to the disposition of the case. That philosophy protects the court from accusations of overreach and activism, whether the temptation to rewrite the Constitution comes from conservatives or liberals.

With the passage of time, we may come to realize that Chief Justice Roberts had the correct view from in terms of maintaining an orderly civil society on issues easily manipulated by aggressive factionalism.

*Clifford A. Rieders, Esquire*  
*Rieders, Travis, Dohrmann, Mowrey*  
*Humphrey & Waters*  
*161 West Third Street*  
*Williamsport, PA 17701*  
*(570) 323-8711 (telephone)*  
*(570) 323-4192 (facsimile)*

*Cliff Rieders is a Board-Certified Trial Advocate in Williamsport, is Past President of the Pennsylvania Trial Lawyers Association and a past member of the Pennsylvania Patient Safety Authority. None of the opinions expressed necessarily represent the views of these organizations.*