Twenty-Week Abortion Statutes: Four Arguments

by RANDY BECK*

Introduction

Over a third of the states have enacted legislation in recent decades restricting elective abortions after twenty weeks of pregnancy.[1] Both houses of the majority-Democrat West Virginia

* Justice Thomas O. Marshall Chair of Constitutional Law, University of Georgia School of Law. The author would like to thank Stuart Derbyshire, Chuck Donovan, Clarke Forsythe, Stephen Gilles, and Tom Messner, who commented on a draft of this paper, and Lee Deneen, who provided excellent research assistance.

1. At least seventeen states have adopted twenty-week statutes since 1991. The first statute counted here, adopted by Utah, restricted abortions "after" twenty weeks from conception, which was interpreted to mean twenty-one weeks after conception or twenty-three weeks following the woman's last menstrual period ("LMP"). *See* Jane L. v. Bangerter, 809 F. Supp. 865, 869 (D. Utah 1992). The Utah statute may have been inspired by the Supreme Court's decision in Webster v. Reprod. Health Servs., 492 U.S. 490 (1989), which upheld a state law requiring viability testing at twenty weeks' gestation. The Tenth Circuit declared the Utah statute invalid. *See* Jane L. v. Bangerter, 102 F.3d 1112, 1118 (10th Cir. 1996). Other state twenty-week statutes are of more recent origin. The statutes vary with respect to the precise terms for calculating when their restrictions apply. *See* ALA. CODE § 26-23B-5 (1975) ("postfertilization age of the unborn child of the woman is 20 or more weeks"); ARIZ. REV. STAT. § 36-2159(B) (2012) ("probable gestational age of her unborn child has been determined to be at least twenty weeks"); *id*. § 36-2151(4) (calculate gestational age from woman's last menstrual period); ARK. CODE § 20-16-1405(a)(1) (2013) ("post-fertilization age of the unborn child of the woman is twenty (20) or more weeks"); GA. CODE ANN., § 16-12-141(c)(1) (2012) ("probable gestational age of the unborn child has been determined . . . to be twenty weeks or more"); *id*. § 31-9B-1(5) (probable gestational age based on time from fertilization); IDAHO CODE ANN. § 18-505 (2013) ("probable postfertilization age of the woman's unborn child is twenty (20) or more weeks"); IND. Code § 16-34-2-1(a)(2) (2013) ("twenty (20) weeks of postfertilization age"); KAN. STAT. ANN. § 65-6724(a) (2011) (prohibiting abortion of "pain capable unborn child"); *id*. § 65-6723(d) (measuring "gestational age" from last menstrual period), *id*. § 65-6723(f) (defining "pain capable unborn child" as "gestational age of 22 weeks or more"); *cf*. *id*. § 65-6722(j) (finding unborn child capable of experiencing pain "20 weeks after fertilization"); LA REV. STAT. 40:1299.30.1(E)(1) (2012) ("probable postfertilization age of the woman's unborn child is twenty or more weeks"); MISS. CODE ANN. § 41-41-137 (2013) ("probable gestational age of the unborn child is twenty (20) or more weeks"); *id*. § 41-41-133(b) (measuring gestational age from the first day of the woman's last menstrual period); NEB. REV. STAT. § 28-3,106 (2010)

legislature voted for such a bill by wide margins, but the governor vetoed the legislation.[2] Republicans then took control of the state legislature and passed their own twenty-week statute, overriding the governor's veto.[3] The U.S. House of Representatives passed a federal twenty-week bill during the 113th Congress,[4] and another during the 114th Congress, though the President has promised a veto.[5] Most of the Republican presidential candidates have endorsed the House bill, while the Democratic frontrunner opposes the legislation.[6]

Twenty-week abortion statutes come in two major varieties based on different ways of measuring pregnancy. Doctors often measure gestation by counting from the first day of a woman's last menstrual period ("LMP"), even though fertilization likely occurred a couple of weeks later.[7] Some statutes rely on this LMP convention

("probable postfertilization age of the woman's unborn child is twenty or more weeks"); N.C. GEN. STAT. ANN. § 14-45.1(a) (2015) (abortion not unlawful "during the first 20 weeks of a woman's pregnancy"); N.D. CENT. CODE §14-02.1-05.3(3) (2013) ("probable postfertilization age of the woman's unborn child is twenty or more weeks"); OKLA. STAT. ANN. tit. 63, § 1-745.5A (2011) ("probable postfertilization age of the woman's unborn child is twenty (20) or more weeks"); TEX. HEALTH & SAFETY CODe ANN. § 171.044 (2013) ("probable post-fertilization age of the unborn child is 20 or more weeks"); W. VA. CODE § 16-2M-4(a) (2015) (forbidding abortion after "pain capable gestational age"); *id*. § 16-2M-2(7) (pain capable gestational age set at twenty-two weeks from last menstrual period); *cf. id*. §16-2M-1(6) (equating twenty weeks after fertilization with twenty-two weeks following the woman's last menstrual period); WISC. STAT. § 253.107(3) (2015) ("probable postfertilization age of the unborn child is 20 or more weeks"). In addition to the Utah statute, the Arizona and Idaho statutes have been declared invalid by the federal courts, *see* Isaacson v. Horne, 716 F.3d 1213, 1225–27 (9th Cir. 2013) (Arizona); McCormack v. Herzog, 788 F.3d 1017, 1029–30 (9th Cir. 2015) (Idaho). The Georgia statute was blocked by a state court on state constitutional grounds. *See* Associated Press, *Georgia Abortion Law Blocked*, POLITICO (Dec. 24, 2012), http://www.politico.com/story/2012/12/georgia-abortion-law-blocked-85469.html.

2. *West Virginia Governor Vetoes 20-Week Abortion Ban Bill*, ASSOCIATED PRESS (Mar. 28, 2014, 12:58 AM), http://bigstory.ap.org/article/wva-gov-vetoes-20-week-abortion-ban-bill.

3. Jonathan Mattise, *20 Week Abortion Ban in West Virginia Becomes Law Despite Governor's Veto 2 Years in a Row*, STAR TRIB. (May 26, 2015, 1:00 PM), http://www.startribune.com/20-week-abortion-ban-in-west-virginia-becomes-law/305043061/.

4. *See* Pain-Capable Unborn Child Protection Act, H.R. 1797, 113th Cong. (1st Sess. 2013).

5. Sandhya Somashekhar, *House Approves 20-Week Abortion Ban*, WASH. POST (May 13, 2015), http://www.washingtonpost.com/politics/house-approves-20-week-abortion-ban/2015/05/13/e25f4748-f97b-11e4-a13c-193b1241d51a_story.html; *see* Pain-Capable Unborn Child Protection Act, H.R. 36, 114th Cong. (1st Sess. 2015).

6. Sabrina Siddiqui, *Republican Candidates Line Up Behind House's 20-Week Abortion Ban*, THE GUARDIAN (May 15, 2015), http://www.theguardian.com/us-news/2015/may/15/house-passes-gop-abortion-bill.

7. GUTTMACHER INST., *State Policies in Brief: State Policies on Later Abortions* 1 (Feb. 1, 2015), http://www.guttmacher.org/statecenter/spibs/spib_PLTA.pdf.

when calculating the time period referenced in a twenty-week statute.[8] Most of the state statutes and the House bill, however, count the twenty-week time period from "fertilization," meaning that they really permit abortion until approximately twenty-two weeks LMP.[9]

Twenty-week legislation enjoys extremely broad support in public opinion polls, with even higher support among women than men.[10] Such statutes are *legally* controversial, however, because of the Supreme Court's *dicta* in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey* indicating that before viability, when the fetus could survive outside the womb, "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."[11] A recent study in the *New England Journal of Medicine* found that overall survival rates among infants who received active treatment reached 23.1% for infants born at twenty-two weeks LMP, 33.3% for infants born at twenty-three weeks, and 56.6% for those born at twenty-four weeks.[12] Thus, while a significant percentage of fetuses protected by a "twenty-week" abortion statute (twenty-two-weeks LMP) are already viable under the Court's definition, others would receive protection a week or two before they could survive outside the womb.

The constitutional objection to a twenty-week statute turns on the vitality and proper application of the Supreme Court's viability rule. The Ninth Circuit in *Isaacson v. Horne* struck down Arizona's twenty-week statute, for instance, offering essentially only one

8. *See supra* note 1 (*e.g.*, Arizona, Mississippi).

9. *See supra* note 1; GUTTMACHER INST., *supra* note 7, at 3 ("20 weeks postfertilization is equivalent to 22 weeks LMP").

10. *See* Aaron Blake, *The Most Surprising Part About the GOP's Failed 20-Week Abortion Ban Push: It Was Popular*, WASH. POST (Jan. 22, 2015), http://www.washingtonpost.com/news/the-fix/wp/2015/01/22/the-most-surprising-part-about-the-gops-failed-20-week-abortion -ban-push-it-was-popular/ (noting results of three polls that showed restricting abortion at twenty weeks is roughly twice as popular as restricting at twenty-four weeks); Aaron Blake, *Guess Who Likes the GOP's 20-Week Abortion Ban? Women*, WASH. POST (Aug. 2, 2013), http://www.washingtonpost.com/news/the-fix/wp/ 2013/08/02/guess-who-likes-the-gops-20-week-abortion-ban-women/ (analyzing poll results showing significantly higher support for twenty week abortion statutes among women than men).

11. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992); Roe v. Wade, 410 U.S. 113, 163–64 (1973); *see infra* notes 81–86, 238 & 277–78 and accompanying text (explaining that adoption of the viability rule in *Roe* and reaffirmation in *Casey* constituted *dicta* because the duration of abortion rights was not at issue in either case).

12. Matthew A. Rysavy *et al.*, *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801, 1807 (2015). The survival rates rose to 72.3% for infants born at twenty-five weeks who received active treatment and 81.6% for infants born at twenty-six weeks. *Id*.

ground for its decision: the statute was unconstitutional because it "deprives the women to whom it applies of the ultimate decision to terminate their pregnancies prior to fetal viability."[13] Judge Kleinfeld wrote separately to explain that though "substantial medical evidence" supported legislative findings "that the risk [of abortion] to pregnant women is considerably greater after 20 weeks gestation, and that fetuses feel pain at least by 20 weeks," he felt compelled to concur because, as he read the case law, fetal viability constituted "the 'critical fact' that controls constitutionality."[14] The *Isaacson* decision echoed an earlier Tenth Circuit ruling in *Jane L. v. Bangerter*, striking down a Utah twenty-week statute because it had "the purpose and effect of placing a substantial obstacle in the path of a woman seeking to abort a nonviable fetus."[15]

In the absence of the *Roe/Casey* viability rule, twenty-week statutes would presumptively lie within the authority of the states, at least if they included adequate exceptions for abortions justified on medical or other constitutionally required grounds.[16] This article contends that the viability rule provides too weak of a constitutional foundation to justify striking down all substantial abortion regulations twenty weeks after fertilization, when the risks of abortion outweigh the risks of childbirth.[17] The Court has never offered a plausible justification for the conclusion that a state may not protect a fetus in the days immediately before it can survive outside the womb.[18] Decisions like *Isaacson v. Horne* and *Jane L v. Bangerter* therefore represent the triumph of "raw judicial power"[19] over the "reasoned judgment" that is supposed to characterize constitutional decision making.[20]

13. Isaacson v. Horne, 716 F.3d 1213, 1217 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014). The Arizona statute differed from many of the other recent twenty-week statutes because it measured the statutory time period from the first day of the woman's LMP, rather than from fertilization. *Id*. at 1218 n.2. *See supra* note 1.

14. *Isaacson*, 716 F.3d at 1231, 1233 (Kleinfeld, J., concurring).

15. Jane L. v. Bangerter, 102 F.3d 1112, 1118 (10th Cir. 1996).

16. *See, e.g.*, Ayotte v. Planned Parenthood of New Eng., 546 U.S. 320, 327–28 (2006) (ruling that states may not restrict access to abortions medically necessary for life or health of the mother).

17. *See infra* notes 192–95 and accompanying text.

18. *See infra* Part II.

19. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting) ("As an exercise of raw judicial power, the Court perhaps has authority to do what it does today; but in my view its judgment is an improvident and extravagant exercise of the power of judicial review that the Constitution extends to this Court.").

20. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992) (plurality opinion) ("The inescapable fact is that adjudication of substantive due process claims may

Rulings like *Isaacson* and *Bangerter* are certainly not inevitable interpretations of the Constitution, nor are they inevitable interpretations of the Supreme Court's current case law on abortion. Several arguments based in existing abortion jurisprudence would support state efforts to presumptively limit elective abortions twenty weeks after fertilization (twenty-two weeks LMP).[21] In any event, the almost complete failure of the Supreme Court to defend the viability rule makes it a prime candidate for reconsideration under applicable principles of *stare decisis*.[22] By giving viability a less prominent role in constitutional adjudication and allowing greater regulation of elective second-trimester abortions, the Court would enable more legislatures to adopt laws satisfactory to a majority of state residents, thereby diminishing the political salience of the abortion issue.[23]

Part I of the article notes the extreme nature of the viability rule, highlighting public opinion polls and abortion laws in other countries.[24] Part II considers the rationale for selecting viability as the line controlling the duration of abortion rights.[25] Scholars of diverse views agree that *Roe* failed to provide *any* argument in favor of drawing the line at viability.[26] The rule entered our case law as *ipse dixit* and remains so today. The Court has never offered any justification for the viability rule in a majority opinion, and the weak rationalizations articulated in nonmajority opinions—e.g., that the line is "workable" or that it gives a woman time to make the abortion decision—do not offer a principled rationale to distinguish viability from earlier lines that might be drawn.[27] Meanwhile, the most coherent academic attempt to justify the viability rule—Professor Laurence Tribe's argument that at viability the pregnant woman can "transfer nurture of the fetus to other hands"[28]—misunderstands the practical significance of a viability determination. A medical prediction that a fetus could theoretically survive on life support if removed from the mother's womb does not mean a pregnant woman

call upon the Court in interpreting the Constitution to exercise that same capacity which by tradition courts always have exercised: reasoned judgment.").

21. *See infra* Part III(A)–(C).

22. *See infra* Part III(D).

23. *See* Beck, *Fueling Controversy*, 95 MARQ. L. REV. 735, 748–49 (2011–12).

24. *See infra* notes 42–70 and accompanying text.

25. *See infra* notes 71–186 and accompanying text.

26. *See infra* notes 92–97 and accompanying text.

27. *See infra* notes 87–107, 133–76 and accompanying text.

28. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1357–58 (2d ed. 1988).

can simply schedule a premature delivery once the fetus crosses the viability threshold.[29]

At least seven Supreme Court Justices have at some point described the viability line as arbitrary or joined opinions critiquing the rule, including, ironically, the author of *Roe* and two of the three joint authors of the *Casey* plurality opinion.[30] Ultimately, viability seems insurmountably arbitrary as a line to measure the duration of abortion rights because the presence or absence of fetal viability tells us nothing about the value of the fetus from the perspective of the state or the burden of continued pregnancy for the mother, the two factors the rule purports to balance.[31] The moral and constitutional irrelevance of fetal viability is underscored by evidence that viability varies based on fetal race and gender, as well as irrelevant environmental and behavioral factors.[32]

Part III of the article outlines four arguments for sustaining regulation of elective abortions after twenty weeks of pregnancy.[33] First, the risks attending late-term abortion rise rapidly as pregnancy progresses, with the result that a substantial majority of abortion

29. *See infra* notes 113–19 and accompanying text.

30. The seven Justices are Blackmun, Kennedy, O'Connor, Rehnquist, Scalia, Thomas, and White. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 993 (1992) (Scalia, J., joined by Rehnquist, C.J., and White and Thomas, JJ.) ("I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains."); Webster v. Reprod. Health Servs., Inc., 492 U.S. 490, 519 (1989) (Rehnquist, C.J., joined by White and Kennedy, JJ.) ("[W]e do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 795 (1986) (White, J., joined by Rehnquist, J.) ("The substantiality of [the state's] interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant."); Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 461 (1982) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting) ("The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward."); Randy Beck, *Self-Conscious Dicta: The Origins of Roe v. Wade's Trimester Framework*, 51 AM. J. LEGAL HIST. 506, 520 (2011) (Blackmun, J., internal Supreme Court memorandum acknowledging proposed first-trimester cutoff is arbitrary, "but perhaps any other selected point, such as quickening or viability, is equally arbitrary").

31. *See infra* notes 177–81 and accompanying text.

32. *See infra* notes 182–86 and accompanying text.

33. *See infra* notes 187–319 and accompanying text.

providers will not perform abortions after twenty weeks.[34] A state may reasonably conclude that elective abortions should be unavailable at such a late stage in pregnancy as a health measure designed to channel women toward less risky alternatives, including childbirth and earlier abortion. *Roe* permitted second-trimester abortion regulations designed to protect the health of the mother. The state interest in protecting maternal health justifies a twenty-week abortion law so long as it contains an appropriate exception for abortions justified on medical grounds.[35]

Second, even if one agrees with the *Roe* Court that fetal life becomes significantly more valuable after the fetus crosses the viability threshold, states should be able to prohibit elective abortions after twenty weeks in order to further the state interest in protecting viable fetuses. Fetal viability is a debatable medical prediction that varies with the particular circumstances of each pregnancy, making it a difficult line for the legal system to enforce. Drawing the line precisely at viability, as the Court has done, and requiring deference to the abortion provider's viability determination, makes it virtually certain that some viable fetuses will be aborted based on erroneous or dishonest findings of nonviability. A twenty-week law draws a line easier to enforce than viability and leaves room for a margin of error, improving the odds that the state will be able to protect viable fetuses from elective abortions.[36]

Third, the Supreme Court's decision in *Gonzales v. Carhart* authorized states to regulate abortion based on new state interests beyond the two (maternal health and fetal life) recognized in *Roe*. While *Gonzales* "assumed" these new state interests would continue to be governed by the viability rule, this was not a holding, a point highlighted in Justice Ginsburg's dissent. There is no reason viability should be the controlling line for new state interests that support regulation at twenty weeks, such as the interest in drawing a clearer distinction between abortion and infanticide or the interest in preventing fetal pain.[37]

Fourth, even if the Court finds a twenty-week statute incompatible with current case law, rules of precedent warrant reconsideration of the viability rule. An Eighth Circuit panel has urged the Supreme Court to rethink the viability rule because it

34. *See infra* notes 187–99*;* Randy Beck, *Prioritizing Abortion Access Over Abortion Safety in Pennsylvania*, 8 U. ST. THOMAS J.L. & PUB. POL'Y 33, 35 n.20 (2013).

35. *See infra* notes 187–211 and accompanying text.

36. *See infra* notes 212–35 and accompanying text.

37. *See infra* notes 236–65 and accompanying text.

undermines legitimate state interests and because circumstances have changed since the rule's adoption.[38] The doctrine of *stare decisis* does not protect a rule the Court has never justified, especially where the issue has never been considered in detail, based on plenary briefing and argument, in a case where it mattered to the outcome.[39] The uncertainty of predictions about fetal survival makes viability an unworkable line to regulate medical practice, and it is doubtful that any woman has made significant decisions in reliance on abortion rights extending to twenty-four weeks LMP rather than twenty-two weeks LMP.[40] The doctrinal significance of fetal viability has been gradually weakened in a series of decisions over time, and there are significant factual changes over the past four decades that warrant a fresh look at the duration of abortion rights.[41]

I. Viability as an Extreme Line to Measure Abortion Rights

The fortieth anniversary of *Roe v. Wade* generated several academic symposia centered on constitutional protection of abortion rights.[42] Papers from a range of perspectives demonstrated that the constitutional status of abortion remains a source of contention, continuing to agitate our shared political life. The recent symposia provide ongoing support for classifying *Roe* as the most controversial Supreme Court decision of the modern era.[43]

It was not supposed to be this way. The *Roe* Justices knew they were stepping into a sensitive debate, but they "anticipated that their

38. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 786, 773–76 (8th Cir. 2015); *see also* Edwards v. Beck, 786 F.3d 1113, 1117–19 (8th Cir. 2015). Four of the nine Justices of the Alabama Supreme Court likewise critiqued the viability rule in the course of refusing to apply it for purposes of state tort law. *See, e.g.*, Hamilton v. Scott, 97 So. 3d 728, 742–47 (Ala. 2012) (Parker, J., joined by Stuart, Bolin & Wise, JJ., specially concurring).

39. *See infra* notes 293–95 and accompanying text.

40. *See infra* notes 298–301 and accompanying text.

41. *See infra* notes 302–19 and accompanying text.

42. *See* Symposium, *Roe v. Wade at 40*, 24 STAN. L. & POL'Y REV. Issue No. 1 (2013); Symposium, *Roe at 40: The Controversy Continues*, 71 WASH. & LEE L. REV., Issue No. 2 (2014); Ryan T. Anderson, *On the 40th Anniversary of Roe v. Wade: A Public Discourse Symposium*, PUB. DISCOURSE (Jan. 21, 2013); *Three-Day Symposium Examines 40 Years Later*, U.F. NEWS (Sept. 27, 2013), http://news.ufl.edu/2013/09/27/roe-v-wade-40-years-later/.

43. *See* JACK M. BALKIN, WHAT ROE V. WADE SHOULD HAVE SAID 3 (Jack M. Balkin ed., 2005). Justice Harry A. Blackmun, author of the opinions in *Roe* and its companion case, Doe v. Bolton, 410 U.S. 179 (1973), recalled that mail to the Court concerning the opinions "proved to be the greatest in its history," exceeding even the mail received following the initial school prayer decision. *See* HARRY A. BLACKMUN, THE JUSTICE HARRY A. BLACKMUN ORAL HISTORY PROJECT (1994–95), 492 (Supreme Court Historical Soc'y 2003).

decision would settle, rather than inflame, the abortion issue."[44] In drafting the *Roe* opinion, Justice Blackmun hoped to head off future abortion litigation through *dicta* spelling out "just what aspects are controllable by the State and to what extent."[45] The day after *Roe* came down, the *New York Times* editorialized that "[t]he Court's verdict on abortions provides a sound foundation for final and reasonable resolution of a debate that has divided America too long."[46]

Two decades after *Roe*, recognizing that the Court's initial attempt to resolve the abortion controversy had failed, the controlling plurality in *Casey* again sought to negotiate a civil peace on the issue.[47] The plurality reaffirmed a somewhat relaxed abortion right and urged "the contending sides . . . to end their national division by accepting a common mandate rooted in the Constitution."[48] Following the *Casey* decision, Justice Blackmun optimistically suggested that perhaps "the issue of *Roe* itself is receding into the background."[49] But the subsequent litigation over "partial-birth abortion"—in which the Court first struck down a Nebraska statute[50] and then upheld a federal statute[51]—showed that litigation over the scope of abortion rights remains an area "live with business."[52]

Why does the Supreme Court's protection of abortion rights remain such a source of contention in this country forty-three years and twenty-four years after successive attempts to settle the issue? The normal pattern after a contested constitutional decision has been

44. Neal Devins, *The D'Oh! of Popular Constitutionalism*, 105 MICH. L. REV. 1333, 1338 (2007).

45. Beck, *supra* note 30, at 526–27.

46. *Respect for Privacy*, N.Y. TIMES, Jan. 24, 1973, at 40. To be fair, the editorial recognized that the Court's success in resolving the abortion controversy depended on how abortion opponents responded to the decision. *See id*.

47. *See* Randy Beck, *Gonzales, Casey and the Viability Rule*, 103 NW. U. L. REV. 249, 256–57 (2009).

48. 505 U.S. 833, 867 (1992) (plurality opinion of O'Connor, Kennedy and Souter, JJ.).

49. BLACKMUN, *supra* note 43, at 206. Justice Blackmun expressed the opinion at that point that *Casey* had "done a lot to silence the turmoil and the like." *Id*. at 210. Elsewhere in the oral history, on the other hand, Justice Blackmun wondered whether his *Roe* opinion "ever will cease to be under scrutiny." *Id*. at 485.

50. Stenberg v. Carhart, 530 U.S. 914 (2000).

51. Gonzales v. Carhart, 550 U.S. 124 (2007).

52. *See* Confirmation Hearing on the Nomination of John G. Roberts, Jr. to be Chief Justice of the United States, S. Hrg. 109-158, at 208 (Sept. 13, 2005) (Judge Roberts quoting Justice Ruth Bader Ginsburg).

a period of debate followed by eventual public acquiescence.[53] Why hasn't the decision in *Roe*, or its reaffirmation in *Casey*, produced the sort of gradual public acceptance that generally follows a controversial opinion?[54]

Various factors could be cited to explain the continuing controversy over abortion, all of which undoubtedly play a role. The ongoing debate owes a great deal to the importance of the interests at stake on either side of the issue—profound beliefs concerning the value and sanctity of human life weighed against profound beliefs concerning the autonomy and equality of women.[55] The controversy persists, likewise, because leading figures in both major political parties discern electoral and fundraising advantages from keeping their bases stirred up about the abortion issue.[56] The slim textual and historical support for a constitutional right to abortion no doubt also hinders the Court's ability to impose a stable political resolution through the vehicle of constitutional interpretation.[57] It is difficult to

53. Justice Blackmun observed that "[u]sually when a case is decided, there will be a furor for a few years, and then it will die down and the case will be accepted and *stare decisis* will move in." BLACKMUN, *supra* note 43, at 291.

54. Justice Blackmun acknowledged that *Roe* had not followed the normal pattern, though he hoped the *Casey* decision might have "turned the corner" on the abortion issue. *Id*. Richard Myers contrasts *Roe* with the roughly contemporaneous Supreme Court decisions applying heightened equal protection scrutiny for classifications based on sex. Richard S. Myers, *Re-Reading* Roe v. Wade, 71 WASH. & LEE L. REV. 1025, 1040–41 (2014). Cases such as *Craig v. Boren*, 429 U.S. 190 (1976), profoundly reshaped American social life and were criticized at the time as activist judicial decisions with inadequate support in constitutional text, history, and precedent but, unlike *Roe*, they generate very little controversy today. *Id.* Similarly, John Jeffries notes that, though once controversial, *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954), is now "universally celebrated, while *Roe* remains durably controversial." John C. Jeffries, *The Liability Rule for Constitutional Torts*, 99 VA. L. REV. 207, 247 n.141 (2013).

55. In seeking to explain the unusual persistence of conflict over *Roe*, Justice Blackmun observed that "[t]he emotions are deep, and the convictions on both sides are solid." BLACKMUN, *supra* note 43, at 291. *See also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 772 (1986) ("[A]bortion raises moral and spiritual questions over which honorable persons can disagree sincerely and profoundly."), *overruled on other grounds by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

56. Mary Ziegler, *Beyond Backlash: Legal History, Polarization, and* Roe v. Wade, 71 WASH. & LEE L. REV. 969, 1007 (2014) ("The abortion conflict also intensified as both political parties cemented their positions on abortion."); Chris Tomlinson, *GOP, Democrats Seek to Capitalize on Texas Abortion Debate with Fundraising, More Votes*, WIS. GAZETTE, (July 5, 2013) http://www.wisconsingazette.com/national-gaze/gop-democrats-seek-to-capitalize-on-texas-abortion-debate-with-fundraising-more-votes.html ("In Texas, there is nothing like a fight over abortion laws to mobilize hardcore Republican and Democratic voters.").

57. *See* Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995, 1007 (2003) ("The result in *Roe v. Wade* was, to put the matter

persuade pro-life citizens that a "mandate rooted in the Constitution" requires abandonment of their deepest notions of political justice when many find those constitutional roots obscure to nonexistent.

One major factor contributing to the persistence of controversy over abortion in the United States deserves the Supreme Court's attention, however, because it concerns the Court's own unique role in exacerbating the abortion conflict. The Court could help set the stage for a more sustainable political compromise on abortion while continuing to protect "a woman's right to terminate her pregnancy in its early stages."[58] The country's continuing conflict over abortion is aggravated by the most extreme element of the *Roe* decision: the Court's opinion concerning the duration of abortion rights.[59] The *Roe* Court asserted in *dicta*—without any explanation or defense—that states may not regulate to protect fetal life prior to "viability," when the fetus can survive outside the womb.[60] The *Casey* plurality, again in *dicta*, retained a weakened version of *Roe*'s viability rule, prohibiting any regulation creating a "substantial obstacle" to a pre-viability abortion.[61] Drawing the controlling line at viability has aggravated the abortion conflict by extending an unrestricted right to a purely elective abortion roughly two-thirds of the way through pregnancy, to a point when the fetus, apart from location, seems hard to distinguish from a premature infant.[62] While our political system

simply and directly, not warranted by any plausible argument from constitutional text, structure, or history."); John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L.J. 920, 935–36 (1973) ("What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure."); *Thornburgh*, 476 U.S. at 789 (White, J., dissenting) ("[T]he text [of the Constitution] obviously contains no references to abortion, nor, indeed, to pregnancy or reproduction generally; and, of course, it is highly doubtful that the authors of any of the provisions of the Constitution believed that they were giving protection to abortion").

58. *Casey*, 505 U.S. at 844.

59. Beck, *supra* note 23, at 737 ("By greatly restricting the range of permissible legislative action, the viability rule disabled legislative bodies from negotiating political compromises like those worked out in other countries. At the same time, the decision facilitated pro-life mobilization, putting abortion rights advocates in the position of defending methods of abortion 'susceptible to gruesome description,' as Justice Ginsburg once rather delicately framed the matter.").

60. *Roe*, 410 U.S. at 163–64.

61. *Casey*, 505 U.S. at 846.

62. *See* Alberto Giubilini & Francesca Minerva, *After-Birth Abortion: Why Should the Baby Live?* (2012) J. MED. ETHICS, http://jme.bmj.com/content/early/2012/03/01/medethics-2011-100411.full (arguing for the permissibility of "after-birth abortion" on the theory that a newborn infant has moral status "comparable with that of a fetus (on which abortions in the traditional sense are performed)"). A standard pregnancy lasts an

might have accommodated a right to abortion during the first trimester of pregnancy[63] the Court instead ensured enduring political conflict by purporting to discover a sweeping constitutional prohibition on any substantial regulation of most second-trimester abortions.[64]

By selecting fetal viability as the earliest point for significant abortion regulations, the *Roe* and *Casey* Courts created an abortion right lasting approximately double the time permitted in other parts of the world. Countries that recognize a right to elective abortion generally do so only during the first twelve weeks of pregnancy.[65] Since many doctors in this country now associate viability with twenty-three to twenty-four weeks' gestation,[66] the *Roe*/*Casey* viability rule protects abortion about twice as long as many other nations viewed as having relatively permissive abortion laws.

Drawing the line at fetal viability dictates a regime of abortion rights so extreme as to be incapable of winning majority support from the American public.[67] Polls stretching back for decades show that two-thirds or more of the public believe abortion should generally be illegal in the second trimester of pregnancy.[68] Even a majority of those who call themselves "pro-choice" have told pollsters that abortion should presumptively be restricted after the first trimester.[69] By extending abortion rights to the point of fetal viability, the Court has afforded constitutional protection to some of the most gruesome and least defensible second-trimester abortions, giving the pro-life

average of forty weeks from the first day of a woman's LMP, but the infant is considered "early term" at thirty-seven weeks. *See Definition of Term Pregnancy*, American College of Obstetricians & Gynecologists, Comm. Op. No. 579 (Nov. 2013). The parties in a recent Ninth Circuit case agreed "that a healthy fetus typically attains viability at twenty-three or twenty-four weeks, at the earliest." Isaacson v. Horne, 716 F.3d 1213, 1218 n.4 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 905 (2014).

63. The second draft of the *Roe* opinion would have recognized a right to abortion only during the first trimester of pregnancy. This line was abandoned in favor of viability in the third draft. *See* Beck, *supra* note 30, at 520–26.

64. Beck, *supra* note 23, at 744–49.

65. Beck, *supra* note 47, at 261–67. Countries permitting elective abortions within the first twelve weeks of pregnancy include Denmark, Greece, Norway, Russia, and Switzerland. *See* CTR. FOR REPROD. RIGHTS, *The World's Abortion Laws* 2 (2008). France sets a limit of fourteen weeks and Sweden at eighteen weeks. *Id*.

66. *See supra* note 62. As noted above, doctors may disagree as to whether a particular fetus has reached the point of viability based on factors particular to an individual pregnancy. *See infra* notes 216–22 and accompanying text.

67. Beck, *supra* note 23, at 746–47.

68. Beck, *State Interests and the Duration of Abortion Rights*, 44 MCGEORGE L. REV. 31, 41 (2013) (discussing Gallup polling); Beck, *supra* note 23, at 746–47 (same).

69. *See* Beck, *supra* note 68, at 41.

movement politically persuasive grounds to complain of judicial overreach.[70]

II. The Absence of Any Principled Justification for the Viability Rule

The Supreme Court has never offered any justification for the viability rule in a majority opinion.[71] The Court's failure to defend the rule has not been for lack of opportunity. Professor John Hart Ely highlighted *Roe*'s failure to justify the viability line in a widely cited law review article that quickly came to Justice Blackmun's attention.[72] Dissenting Justices underscored the arbitrariness of the viability rule in cases after *Roe*,[73] but the majority never responded with a principled defense of the decision to draw a controlling line at viability. The closest thing any Justice has offered to a justification for the viability rule consists of a few weak rationalizations articulated

70. *See* Beck, *supra* note 23, at 737; Stenberg v. Carhart, 530 U.S. 914, 957–60 (2000) (Kennedy, J., dissenting) (describing late term abortion procedures).

71. As explained below, the *Roe* Court offered no justification for the viability rule. *See infra* Part IIA. The *Casey* plurality made an inadequate attempt to justify the viability rule in Section IV of their opinion, but this part of the opinion was not joined by a majority of the Court. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 836–37 (1992).

72. Ely, *supra* note 57, at 924 ("[T]he Court's defense [of the viability rule] seems to mistake a definition for a syllogism"). Justice Blackmun complained that Professor Ely published his critique of the *Roe* opinion "before the ink was dry." BLACKMUN, *supra* note 43, at 201; *see also id*. at 493; Dennis J. Hutchinson, *Aspen and the Transformation of Harry Blackmun*, 2005 SUP. CT. REV. 307, 312 (2005) ("Ely's essay inflicted a deep wound on Blackmun that never healed.").

73. *See supra* note 30; Akron v. Akron Ctr. for Reprod. Health, Inc., 462 U.S. 416, 460–61 (1982) (O'Connor, J., dissenting) ("The state interest in potential human life is likewise extant throughout pregnancy. In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: potential life is no less potential in the first weeks of pregnancy than it is at viability or afterward. . . . The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward."); Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 794–95 (1986) (White, J., dissenting) ("As Justice O'Connor pointed out three years ago in her dissent in *Akron*, the Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary. The Court's 'explanation' for the line it has drawn is that the State's interest becomes compelling at viability 'because the fetus then presumably has the capacity of meaningful life outside the mother's womb.' As one critic of *Roe* has observed, this argument 'mistakes a definition for a syllogism.'") (citing Ely, *supra* note 57, at 924); *Casey*, 505 U.S. at 993 ("I must confess, however, that I have always thought, and I think a lot of other people have always thought, that the arbitrary trimester framework, which the Court today discards, was quite as central to *Roe* as the arbitrary viability test, which the Court today retains.").

in Justice Blackmun's separate opinion in *Webster v. Reproductive Health Services*,[74] and halfheartedly echoed by the *Casey* plurality.[75]

Section A notes the academic consensus that *Roe* failed to defend the viability rule,[76] and highlights *Casey*'s concession that a judicially drawn line is only legitimate if supported by a principled rationale. By the standards articulated in *Casey*, the *Roe* Court's unexplained decision to draw a controlling line at fetal viability was "no judicial act at all."[77] Section B focuses on the most coherent academic effort to justify the viability rule, offered by Professor Laurence Tribe of the Harvard Law School.[78] Professor Tribe's position ultimately fails because it rests on a mistaken view of the practical significance of fetal viability and assumes a broader scope for abortion rights than the Court has recognized in *Roe* and its progeny. Section C considers arguments for the viability rule presented in nonmajority Supreme Court opinions. The arguments fail because they are conclusory and do not distinguish viability from other lines the Court could have drawn.[79] Section D contends that the arbitrariness of the viability line is insurmountable because viability has nothing to do with either the value of the fetus to the state or the burden of pregnancy to the mother.[80] The rule's arbitrariness is underscored by evidence that viability varies based on race, gender, and irrelevant behavioral and environmental factors.

A. The *Roe* Court's Failure to Justify the Viability Rule

Justice Blackmun's initial draft opinions in *Roe v. Wade* and *Doe v. Bolton* did not take any position on the duration of abortion rights.[81] Though these first drafts attracted five votes in internal

74. *See infra* notes 153–64 and accompanying text. Justice Blackmun argued that a fetus does not have interests distinct from the mother prior to viability, that viability is an easy line to apply and that it gives the mother time to make the abortion decision. Webster v. Reprod. Health Servs., 492 U.S. 490, 553–54 (1989) (Blackmun, J., concurring in part and dissenting in part). I show below that each of these arguments is highly questionable in light of other Supreme Court case law or fails to distinguish viability from earlier lines that might be drawn. *See infra* notes 153–64 and accompanying text.

75. *See infra* notes 166–76 and accompanying text.

76. *See infra* notes 81–107 and accompanying text.

77. *Casey*, 505 U.S. at 865.

78. *See infra* notes 108–32 and accompanying text.

79. *See infra* notes 133–76 and accompanying text.

80. *See infra* notes 177–86 and accompanying text.

81. Beck, *supra* note 30, at 517–18. The first draft of *Roe* would have struck down Texas' abortion statute based on vagueness. *Id*. at 517. The first draft of *Doe* would have invalidated portions of the Georgia abortion statute based on a constitutional right to abortion of unspecified duration. *Id*. at 517–18.

deliberations, Justice Blackmun nevertheless recommended that *Roe* and *Doe* be reargued after Justices Powell and Rehnquist joined the bench.[82] In requesting reargument, Justice Blackmun suggested to his fellow Justices that the Court might want to go beyond the issues raised by the particular Texas and Georgia statutes in *Roe* and *Doe* and offer a fuller exposition of the scope of abortion rights: "Should we spell out—although it would then necessarily be largely dictum—just what aspects are controllable by the State and to what extent?"[83]

Following reargument of the abortion cases, Justice Blackmun circulated a second draft in *Roe* that would have recognized a right to abortion during the first trimester of pregnancy.[84] The cover memorandum accompanying this draft acknowledged that it contained *dicta*, including an arbitrary line governing the duration of abortion rights:

> In its present form [the opinion] contains dictum, but I suspect that in this area some dictum is indicated and not to be avoided.
>
> You will observe that I have concluded that the end of the first trimester is critical. This is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.[85]

Subsequent internal deliberations led to the final opinion in *Roe*, which shifted the controlling line from the end of the first trimester to fetal viability.[86]

Roe offered no explanation for drawing a line at viability. The Court's opinion acknowledged distinct state interests in protecting maternal health and "potential life," observing that "[e]ach grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'"[87] The state interest in maternal health became compelling after the first trimester, the Court

82. *Id.* at 518.

83. *Id.* (quoting Justice Harry A. Blackmun, Memorandum to the Conference Re: No. 70-18—Roe v. Wade, No. 70-40—Doe v. Bolton (May 31, 1972), http://law2.wlu.edu/deptimages/powell%20archives/70-18_RoeWade.pdf.).

84. Beck, *supra* note 30 at 520.

85. *Id.* (quoting Justice Harry A. Blackmun, Memorandum to the Conference Re: No. 70-18—Roe v. Wade (Nov. 21, 1972)).

86. Beck, *supra* note 30 at 521–25.

87. Roe v. Wade, 410 U.S. 113, 162–63 (1973).

explained, due to the relative risks of abortion and childbirth.[88] As to the state interest in fetal life, the Court wrote:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications. If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.[89]

Earlier in the opinion, the Court noted that a fetus becomes viable when it is "potentially able to live outside the mother's womb, albeit with artificial aid," and that this point "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks."[90]

"[B]efore the ink was dry" on the opinion, Justice Blackmun complained,[91] Professor John Hart Ely published an article critiquing *Roe*, including a passage that memorably pilloried the *Roe* Court's explanation for the viability rule:

> The Court's response here is simply not adequate. It agrees, indeed it holds, that after the point of viability (a concept it fails to note will become even less clear than it is now as the technology of birth continues to develop) the interest in protecting the fetus is compelling. Exactly why that is the magic moment is not made clear: Viability, as the Court defines it, is achieved some six to twelve weeks after quickening. (Quickening is the point at which the fetus begins discernibly to move independently of the mother and the point that has historically been deemed crucial—to the extent any point between conception and birth has been focused on.) But no, it

88. *Id*. at 163.

89. *Id*. at 163–64.

90. *Id*. at 160.

91. *See* BLACKMUN, *supra* note 43.

> is viability that is constitutionally critical: the Court's defense seems to mistake a definition for a syllogism.[92]

Numerous commentators from a variety of perspectives have seconded Ely's observation concerning *Roe*'s inadequate defense of the viability rule. Professor John A. Robertson noted that "the Court has never given a convincing account of why viability is key" and that the lack of justification for the viability rule provided "yet another reason why the Court's opinion struck so many as an *ipse dixit*, not founded in any valid conception of constitutional law."[93] Professor Christopher Eisgruber suggested that the Court offered "a blatantly circular justification for making viability the point at which the state acquired an interest in fetal life."[94] Professor Alexander Aleinikoff agreed that the Court provided "a definition of viability, not an explanation of value," offering *Roe* as an example of a case in which the Court "sends up smoke" to make it look like it is engaging in a balancing process when it in fact is doing "something quite different."[95] Professor Khiara M. Bridges observed that the *Roe* Court's selection of viability as the point at which the state interest in fetal life became compelling was "seemingly pulled from thin air."[96] Many other scholars could likewise be cited for their agreement with Ely's analysis.[97]

---

92. Ely, *supra* note 57, at 924.

93. John A. Robertson, *Abortion and Technology: Sonograms, Fetal Pain, Viability, and Early Prenatal Diagnosis*, 14 U. PA. J. CONST. L. 327, 359–60 (2011).

94. Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 95–96 (1995).

95. T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 976 (1987).

96. Khiara M. Bridges, *"Life" in the Balance: Judicial Review of Abortion Regulations*, 46 U.C. DAVIS L. REV. 1285, 1328 (2013).

97. *See, e.g.*, Michael F. Moses, *Institutional Integrity and Respect for Precedent: Do They Favor Continued Adherence to an Abortion Right?*, 27 NOTRE DAME J. OF L., ETHICS & PUB. POL'Y 541, 551 (2013) ("To date, the Court has given no reasoned explanation for why it selected viability as the crucial line for determining when an abortion must be allowed."); Justin Murray, *Exposing the Underground Establishment Clause in the Supreme Court's Abortion Cases*, 23 REGENT UNIV. L. REV. 1, 29 (2011) (Justice Blackmun "provided no justification for selecting viability as the crucial moment in fetal development, apart from a brief explanation that is nothing more than a tautology."); David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 137 (1995) (The *Roe* Court's conclusion that state interest becomes compelling only at viability "fail[s] to follow, in any logical manner, from the precedents, principles, and history which the Court recites at such length."); David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 575 (1991) (quoting with approval Prof. Ely's critique that *Roe* opinion mistook a definition for a syllogism); Harry H.

From one perspective, the *Roe* Court's failure to justify the viability rule is not particularly surprising. As noted above, Justice Blackmun conceded in an internal memorandum that the viability line was essentially arbitrary.[98] He acknowledged that language addressing the duration of abortion rights in the *Roe* opinion represented *dictum*,[99] an assessment shared by other Justices in the majority.[100] The parties' briefs did not address the duration of abortion rights, and the attorneys resisted answering questions on that topic in oral argument.[101] Without briefing or other assistance from the parties, and without any need to grapple with the duration of abortion rights to resolve the constitutional issues raised by the Texas and Georgia statutes, the *Roe*/*Doe* Court simply announced the viability rule, leaving the rationale (if any) unexplained.

If we are to believe a majority of the Justices in *Casey*, however, the *Roe* Court's failure to justify the viability rule makes the rule constitutionally illegitimate. According to the *Casey* majority, a ruling by the Court only counts as a "judicial act" to the extent it is supported by a principled rationale:

> The underlying substance of [judicial] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinions, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all.[102]

The *Casey* majority insisted that the principled justification underlying a judicial ruling must be explained in a plausible and transparent opinion, so the public can "accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures."[103] The three-Justice

Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 306 (1973) ("As Professor Ely has said: '[T]he Court's defense seems to mistake a definition for a syllogism.'").

98. *See supra* note 30 and accompanying text.

99. Beck, *supra* note 30, at 520.

100. *Id*. at 515–16.

101. *Id*. at 511–12.

102. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).

103. *Id*. at 865–66. *Casey* described the Court's obligation to offer transparent and principle opinions as follows: "[E]ven when justification is furnished by apposite legal

Casey plurality located this requirement of principled justification at the heart of the distinction between courts and legislatures: "Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."[104]

By the standards articulated in *Casey*, *Roe*'s viability rule lacks legitimacy. Drawing the controlling line at viability was "no judicial act at all,"[105] but rather an arbitrary compromise propelled by social and political pressures.[106] Even if we could imagine a principled rationale for the viability rule, *Roe* fell short of judicial standards when the Court failed to justify the rule in an opinion "sufficiently plausible to be accepted by the Nation."[107] Thus, one of the great ironies of the *Casey* opinion is that the Court's discussion of judicial legitimacy completely undermined the viability rule, while another portion of the opinion purported to retain the rule going forward.

B. Professor Laurence Tribe's Defense of the Viability Rule

One of those recognizing *Roe*'s inadequate defense of the viability rule was Professor Laurence Tribe, who acknowledged, "nothing in the Supreme Court's opinion provides a satisfactory explanation of why the fetal interest should not be deemed overriding prior to viability."[108] Professor Tribe sought to supply the Court's omission, offering his own justification for the viability rule. He began his argument with a quote from Professor Sylvia Law describing the unique relationship between a woman and her fetus:

principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation." *Id*. (majority opinion).

104. *Id*. at 870 (plurality opinion).

105. *Id*. at 865 (majority opinion).

106. *Id*. at 65–66 (majority opinion).

107. *Id*.

108. LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1349 (2d ed. 1988); *see also* Laurence H. Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 (1973) ("Clearly, this mistakes 'a definition for a syllogism,' and offers no reason at all for what the Court has held.").

> Fetal life is starkly different from all other forms of human life in that the fetus is completely dependent upon the body of the woman who conceived it. It cannot survive without her. Although all human infants, and many adults, are dependent upon others for survival, that support can be provided by many people. The fetus by contrast is dependent upon a particular woman.[109]

Professor Tribe contended that this unique relationship between a woman and fetus justified the Court's decision to draw the line at viability:

> This unique characteristic of fetal life justifies the line that the Supreme Court has drawn between a woman's freedom to abort and the state's authority to protect a fetus. Until the fetus is viable, *only* the pregnant woman can respond to and support her fetus' "right" to life; during this period, the state cannot abridge the woman's autonomy. But once the fetus "has the capability of meaningful life outside the mother's womb"—that is, once the responsibility for the nurture that is essential to life can be assumed by others with the aid of medical technology—the state may limit abortions so long as it poses no danger to the woman's life or health.[110]

Professor Tribe revisited the argument in addressing Justice O'Connor's concern that *Roe*'s trimester framework was "on a collision course with itself" because technological advances were moving viability to an earlier point in pregnancy:[111] "That is precisely the point: as technology enhances the ability to relieve the pregnant woman of the burden of her pregnancy and transfer nurture of the fetus to other hands, the state's power to protect fetal life expands—*as it should*."[112]

---

109. TRIBE, *supra* note 108, at 1357 (quoting Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1023 (1984)).

110. *Id.* (quoting Roe v. Wade, 410 U.S. 113, 163 (1973)).

111. *Id.* (quoting Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 458 (1983) (O'Connor, J., dissenting)).

112. *Id.* at 1357–58 (emphasis in original).

In short, Professor Tribe suggests that the right to abortion should last so long as abortion represents the only way to relieve the woman of the responsibility to care for her fetus. The state may restrict abortion rights at viability, because then someone other than the mother can assume care of the fetus.

The central problem with Professor Tribe's argument is the assumption that once a fetus reaches the viability threshold, the pregnant woman can "transfer nurture of the fetus to other hands."[113] A finding of viability is the doctor's prognosis concerning what might happen in a hypothetical set of circumstances that are radically different from those that exist at the time.[114] When a doctor predicts that medical personnel could keep the fetus alive independent of the mother, that does not mean the woman may immediately insist on premature delivery. As Professor Nancy Rhoden has noted, "it would be irresponsible and even cruel to advocate simply allowing viable fetuses to be removed, especially since the removal process itself can harm the fragile, premature fetus."[115]

Furthermore, voluntarily delivering a barely viable fetus without a medical rationale would violate standards of care in the medical profession. The American College of Obstetricians and Gynecologists ("ACOG") considers full term gestation to be thirty-nine or forty weeks from the first day of a woman's last menstrual period, when "[t]he frequency of adverse neonatal outcomes is lowest."[116] ACOG has historically advocated delaying deliveries "until 39 completed weeks of gestation or beyond,"[117] noting that "pulmonary development continues well into early childhood" and that "respiratory morbidity is relatively common in neonates delivered" in the thirty-seven to thirty-eight week period.[118] Given that ACOG disapproves of elective deliveries at thirty-eight weeks of

113. *Id.*

114. Beck, *supra* note 68, at 37.

115. Nancy K. Rhoden, *Trimesters and Technology: Revamping* Roe v. Wade, 95 YALE L.J. 639, 664–65 (1986).

116. *Definition of Term Pregnancy*, American College of Obstetrics and Gynecology Committee on Obstetric Practice, Opinion No. 579, at 1 (Nov. 2013), https://www.acog.org/~/media/Committee%20Opinions/Committee%20on%20Obstetric%20Practice/co579.pdf.

117. *Nonmedically Indicated Early-Term Deliveries*, American College of Obstetrics and Gynecology Committee on Obstetric Practice, Opinion No. 561, at 1 (Apr. 2013), http://www.acog.org/-/media/Committee-Opinions/Committee-on-Obstetric-Practice/co561.pdf?dmc=1&ts=20141112T0547574941.

118. *Id.*

gestation,[119] it is hard to imagine a reputable obstetrician willing to deliver a barely viable twenty-three to twenty-four week fetus without some demonstration of medical necessity. It likewise seems unlikely that a neonatal intensive care unit would authorize purely elective use of its facilities.

Beyond Professor Tribe's misapprehension concerning the significance of a determination of fetal viability, his argument is difficult to reconcile with the Supreme Court's exposition of abortion rights in *Roe* and its progeny. Professor Tribe's argument implicitly conceives of the Constitution as protecting a right not to be pregnant at any given stage of gestational development.[120] Thus, the abortion right lasts so long as that is the only way to terminate the pregnancy, and may be restricted once another option for terminating the pregnancy arises.[121] However, from the very beginning of its abortion jurisprudence, the Court has emphasized that "a pregnant woman does not have an absolute constitutional right to an abortion on her demand."[122] It has described the right recognized in *Roe* as "a woman's right to terminate her pregnancy in its early stages[.]"[123] As the *Casey* plurality explained, the Court's decisions recognize a right to make a decision about pregnancy, but one that may be waived if not exercised early enough in the gestational process: "In some broad sense 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] Thus, Professor Tribe's implicit assumption that the Constitution affords a right not to be pregnant is difficult to square with the Court's descriptions of abortion rights over the years.

More recently, Professor Mark Osler has attempted to frame a defense of the viability rule that partially tracks the rationale offered by Professor Tribe:

> What is different after viability from the mother's perspective . . . is that with viability comes a third option regarding the pregnancy. Prior to that point, the woman could either continue carrying the baby or

119. *Id*. at 4 ("Even comparing neonates and infants delivered at 38 weeks of gestation with those delivered at 39 weeks of gestation there is still an increased (albeit clinically small) risk of adverse outcomes.").

120. *See supra* text accompanying note 110.

121. *See id*. and text accompanying note 112.

122. Doe v. Bolton, 410 U.S. 179, 189 (1973).

123. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992).

124. *Id*. at 870.

> have an abortion. After viability, though, she can continue to carry the baby, have an abortion, *or* give birth to the child, who is likely to live. To put this another way, after viability, there are two ways to terminate the pregnancy: through abortion or through a live birth.[125]

Unlike Professor Tribe, Professor Osler acknowledges practical obstacles that may make premature delivery a difficult option to pursue:

> Certainly, there are factors which could complicate that choice. For example, doctors may refuse to deliver the premature baby in the absence of a medical crisis. There is also an increased risk to the health of the child, often very significant, that goes with being born early. Moreover, there is the cost of caring for the premature infant, which can be very significant. In the end, though, it cannot be ignored that viability is significant to the mother because, at some level, she has the ability to give birth to a child who will live, and thus to terminate the pregnancy (the object of her liberty interest) by bringing into the world a child who could live and thrive, be adopted if she did not want to care for him, and represent a life in being graced by the choice of that mother.[126]

Professor Osler's admirably candid concessions undermine his conclusion. To argue that "at some level" a pregnant woman can choose to deliver a fetus any time after viability is a bit like arguing that Americans have the choice "at some level" to travel to the moon. The only problem is that various factors "complicate that choice," like the absence of companies with the equipment and resources to actually make the journey. An option that is not available, as a practical matter, to more than a tiny handful of women (those who could fund their own neonatal intensive care unit) does not provide a principled justification for a line the Supreme Court drew to regulate all pregnancies.

125. Mark Osler, Roe*'s Ragged Remnant: Viability*, 24 STAN. L. & POL'Y REV. 215, 235 (2013).

126. *Id*. at 235–36.

Professor Osler offers an alternative justification for the viability rule based on the argument that a viable fetus faces fewer risks than a previable fetus:

> It is easy to think of the fetus as "potential life" prior to viability in large part because of the many things that must occur between that point and the time we can hold that child in our arms: not only the passage of time, but the health of the mother and the child. Looking backward, it is easy to see other contingencies in the process—the successful conception, and even the parents meeting one another.
>
> From this view (which is easily assumed), these other contingencies are equivalent to abortion, because they are just as much but-for causes for the potential of life not being realized. In other words, if pre-viability fetuses are just "potential" life, there is a way in which an abortion has as much moral import as a sperm not reaching an egg, the man wearing a condom, or the parents never having quite connected in the first place—and this but-for universe makes moral arguments about abortion ring hollow. However, once the point of viability is reached, this all changes, and the myriad of equivalent "but-fors" evaporates with the myth of "potential" life, something that is more of an idea than a thing. At viability, a new truth emerges—there is only one contingency necessary to be fulfilled once viability is achieved, and that is the mere passage of the fetus into our larger, confusing world, an event that can happen immediately.[127]

Professor Osler rightly attaches the label "myth" to the idea that a previable fetus enjoys only "potential life." The Court in *Gonzales v. Carhart* acknowledged, "by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[128] Describing the previable fetus as "potential life" simply begs the question of why the

127. *Id.* at 236–37.

128. Gonzales v. Carhart, 550 U.S. 124, 147 (2007).

capacity to survive outside the womb should play such a critical role in the Court's abortion jurisprudence.

As for the argument that there are more contingencies that can end the life of a previable fetus than a viable fetus, that might depend on the circumstances of each pregnancy. Moreover, we generally do not view the number of risks an individual faces as a justification for intentionally ending the individual's life.[129] In any event, Professor Osler overlooks the real issue when he compares the risks faced by a viable fetus to those of a human sperm or egg prior to conception. The relevant comparison for purposes of evaluating the viability rule is between a previable fetus at twenty-three weeks LMP and the same fetus a week later after it crosses the viability threshold.[130] Under the Ninth Circuit's reading of the Supreme Court's case law in *Isaacson*, the mother will have an unqualified right to abort the twenty-three week fetus, but the state can intervene to protect the same fetus a few days later as a result of tiny, perhaps invisible developmental advances in the respiratory system.[131] That is the distinction the Supreme Court must justify to legitimize drawing a controlling line at viability,[132] and the contributions of Professors Tribe and Osler do not satisfy the Court's unfulfilled obligation.

C. Arguments for the Viability Rule in Nonmajority Opinions

While a majority of the Supreme Court has never offered a justification for the viability rule, particular Justices have advanced arguments in nonmajority opinions. As we will see, none of these arguments satisfies the objections raised by Professor Ely. Some are conclusory and others fail to distinguish viability from earlier potential lines the Court might have drawn. None of the arguments we examine will suffice to show that the fetus becomes more valuable to the state at viability or that the burden on the pregnant woman diminishes. Consequently, they do not establish grounds for viewing viability as a critical tipping point at which the balance of interests decisively shifts in favor of the state.

129. There are many ways someone rock climbing in the Himalayas could die, but that would not justify his climbing partner in releasing the rope he depends on for survival.

130. *See supra* note 18 and accompanying text.

131. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (noting that viability depends on fetal respiratory capacity).

132. *See* Beck, *supra* note 47, at 276–78 (discussing what would be required for the Court to justify the viability rule).

1. Akron v. Akron Center for Reproductive Health, Inc. *and* Thornburgh v. American College of Obstetricians and Gynecologists

In her first major opinion on the abortion issue, Justice O'Connor dissented in *Akron v. Akron Center for Reproductive Health, Inc.*,[133] raising foundational questions about the viability rule as one component of *Roe*'s "trimester framework." Justice O'Connor objected that both lines drawn by the *Roe* Court—permitting regulation in the second trimester to protect maternal health and permitting regulation after viability to protect fetal life—depended on advances in medical science.[134] The *Roe* trimester framework, Justice O'Connor argued, was "on a collision course with itself" because advances in abortion safety would push the line for health-related regulations later in pregnancy while advances in neonatal care would simultaneously move the viability line earlier in pregnancy.[135]

Particularly relevant to our inquiry, Justice O'Connor argued that the state interests in fetal life and maternal health "are present *throughout* pregnancy," and "the point at which these interests become compelling does not depend on the trimester of pregnancy."[136] She then applied the argument specifically to the state interest in fetal life:

> In *Roe*, the Court held that although the State had an important and legitimate interest in protecting potential life, that interest could not become compelling until the point at which the fetus was viable. The difficulty with this analysis is clear: *potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward. At any stage in pregnancy, there is the *potential* for human life. Although the Court refused to "resolve the difficult question of when life begins," the Court chose

133. Akron v. Akron Center for Reprod. Health, Inc., 462 U.S. 416 (1982).

134. *Id*. at 452 (O'Connor, J., dissenting) ("[N]either sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the 'stages' of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs.").

135. *Id*. at 458 (O'Connor, J., dissenting) ("The *Roe* framework, then, is clearly on a collision course with itself. As the medical risks of various abortion procedures decrease, the point at which the State may regulate for reasons of maternal health is moved further forward to actual childbirth. As medical science becomes better able to provide for the separate existence of the fetus, the point of viability is moved further back toward conception.").

136. *Id*. at 459 (O'Connor, J., dissenting).

> the point of viability—when the fetus is *capable* of life independent of its mother—to permit the complete proscription of abortion. The choice of viability as the point at which the state interest in *potential* life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.[137]

The majority opinion in *Akron* did not respond to Justice O'Connor's argument that viability is an arbitrary line to measure the value of human life and that the state interest in the developing fetus is the same whether or not the fetus can survive outside the womb. Indeed, the majority said very little about the dissent's arguments, contending principally that the dissent's analysis would be incompatible with *stare decisis*.[138]

Three terms later, Justice White, dissenting in *Thornburgh v. American College of Obstetricians and Gynecologists*,[139] amplified Justice O'Connor's *Akron* criticism that "the Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary"[140]:

> The governmental interest at issue is in protecting those who will be citizens if their lives are not ended in the womb. The substantiality of this interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability.[141]

---

137. *Id*. at 460–61 (O'Connor, J., dissenting) (citations omitted) (quoting Roe v. Wade, 410 U.S. 113, 159 (1973)).

138. *Id*. at 420 n.1.

139. Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 785 (1986) (White, J., dissenting).

140. *Id*. at 794 (White, J., dissenting). Though Justice O'Connor did not join Justice White's dissent in *Thornburgh*, she indicated that she adhered to her approach in *Akron*. *Id*. at 815 (O'Connor, J., dissenting).

141. *Id*. at 795 (White, J., dissenting).

Justice White highlighted the Court's failure to defend the viability rule, echoing Professor Ely's comment that the *Roe* Court's treatment of viability "mistakes a definition for a syllogism."[142]

As in *Akron*, the *Thornburgh* majority basically ignored the dissenters' critique of the viability rule. Justice Stevens, however, authored a concurring opinion that responded to some of the points made by Justice White. Relevant to our discussion, Justice Stevens wrote:

> Justice White is also surely wrong in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth. . . . I should think it obvious that the State's interest in the protection of an embryo—even if that interest is defined as "protecting those who will be citizens"—increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus—and pregnancy itself—are not static conditions, and the assertion that the government's interest is static simply ignores this reality.
>
> Nor is it an answer to argue that life itself is not a static condition, and that "there is no nonarbitrary line separating a fetus from a child, or indeed, an adult human being." For, unless the religious view that a fetus is a "person" is adopted—a view Justice White refuses to embrace—there is a fundamental and well-recognized difference between a fetus and a human being; indeed, if there is not such a difference, the permissibility of terminating the life of a fetus could scarcely be left to the will of the state legislatures. And if distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection—even though the fetus represents one of "those who will be citizens"—it seems to me quite odd to argue that distinctions may not also be drawn between the state interest in protecting the freshly

142. *Id.* at 794–95 (White, J., dissenting) (citing Ely, *supra* note 57, at 924).

> fertilized egg and the state interest in protecting the 9-month-gestated, fully sentient fetus on the eve of birth.[143]

While Justice Stevens may be correct that the government acquires additional reasons to protect the fetus as it develops—e.g., the government may have an interest in preventing pain to a fetus capable of experiencing pain that does not exist early in the pregnancy—he provides no reason for concluding that a state interest in fetal life early in pregnancy must necessarily rest on "theological" or "religious" grounds. Many have argued for protecting human life at all stages of development without resting their arguments on theological premises, and people who do not profess religious faith have embraced that position.[144] Moreover, just because "distinctions may be drawn between a fetus and a human being in terms of the state interest in their protection," that does not explain why such distinctions *must* be drawn, even by a state whose citizens see the world differently.

The key point for our purposes, however, is that Justice Stevens makes no attempt to defend the Court's decision to draw the controlling line at fetal viability. His argument responds to the contention that the state interest in human life exists throughout pregnancy, but does not try to explain why the capacity to survive *ex utero* is the critical tipping point that causes the state interest to outweigh the interests of the mother, rather than some other fetal capacity or characteristic.[145] As Mark Beutler has pointed out, "[r]ather than vindicate the viability standard," Justice Stevens' argument "does more to undermine its validity."[146] Of the four fetal capacities Justice Stevens identifies—"to feel pain, to experience pleasure, to survive, and to react to its surroundings"—Beutler notes that three "are wholly unrelated to viability."[147] Thus, even conceding every point made by Justice Stevens, *Thornburgh* represents the

143. *Id*. at 778–79 (Stevens, J., concurring) (citations omitted).

144. Kristine Kruszelnicki, *Yes, There Are Pro-Life Atheists Out There. Here's Why I'm One of Them*, PATHEOS, (Mar. 11, 2014), http://www.patheos.com/blogs/friendly atheist/2014/03/11/yes-there-are-pro-life-atheists-out-there-heres-why-im-one-of-them/ (collecting arguments from pro-life atheists and noting poll results showing 19 percent of atheists identify as pro-life).

145. *See Thornburgh*, 476 U.S. at 778–79 (Stevens, J., concurring).

146. Mark J. Beutler, *Abortion and the Viability Standard—Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life*, 21 SETON HALL L. REV. 347, 368 (1991).

147. *Id*. at 368–69.

second time the Justices in the majority simply failed to offer an argument for the viability rule despite a strong dissent critiquing the viability line as arbitrary.

2. Webster v. Reproductive Health Services, Inc.

In *Webster v. Reproductive Health Services, Inc.*, the Supreme Court addressed a challenge to a Missouri law that the plurality characterized as creating "a presumption of viability at 20 weeks, which the physician must rebut with tests indicating that the fetus is not viable prior to performing an abortion."[148] The statute directed the physician determining viability to consider gestational age, fetal weight, and lung capacity.[149] Justice O'Connor believed the statute could be sustained as consistent with prior cases.[150] The plurality, however—Chief Justice Rehnquist, joined by Justices White and Kennedy—believed the statute inconsistent with prior decisions applying the viability rule. In critiquing *Roe*'s "rigid trimester analysis," the plurality challenged the Court's focus on fetal viability: "we do not see why the State's interest in protecting potential human life should come into existence only at the point of viability, and that there should therefore be a rigid line allowing state regulation after viability but prohibiting it before viability."[151] Instead, the plurality embraced the position of the dissenting opinions in *Thornburgh* that the state's compelling interest in protecting human life exists "throughout pregnancy," both before and after viability.[152]

Justice Blackmun responded to the *Webster* plurality in his partially dissenting opinion. He began by seconding Justice Stevens' views in *Thornburgh*, arguing that the state's interest in protecting a fetus grows stronger over the course of pregnancy.[153] Ironically, given the *ipse dixit* character of *Roe*'s viability discussion, Justice Blackmun complained that "[t]he [plurality] opinion contains not one word of rationale for its view of the State's interest. This 'it-is-so-because-we-say-so' jurisprudence constitutes nothing other than an attempted exercise of brute force; reason, much less persuasion, has no place."[154]

148. Webster v. Reprod. Health Servs., 492 U.S. 490, 515 (1989) (plurality opinion).

149. *Id.*

150. *Id.* at 525–26 (O'Connor, J., concurring).

151. *Id.* at 519 (plurality opinion).

152. *Id.* The fifth vote to sustain the Missouri statute came from Justice Scalia. *Id.* at 532.

153. *Id.* at 552–53 (Blackmun, J., concurring in part and dissenting in part) (quoting Thornburgh v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 778–79 (Stevens, J., concurring)).

154. *Id.* at 552.

With respect to drawing the controlling line at viability, Justice Blackmun argued:

> The viability line reflects the biological facts and truths of fetal development; it marks that threshold moment prior to which a fetus cannot survive separate from the woman and cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman. At the same time, the viability standard takes account of the undeniable fact that as the fetus evolves into its postnatal form, and as it loses its dependence on the uterine environment, the State's interest in the fetus' potential human life, and in fostering a regard for human life in general, becomes compelling. As a practical matter, because viability follows "quickening"—the point at which a woman feels movement in her womb—and because viability occurs no earlier than 23 weeks gestational age, it establishes an easily applicable standard for regulating abortion while providing a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy.[155]

Apart from reiterating the meaning of the term "viability," Justice Blackmun's defense seems to offer three arguments in favor of drawing the controlling line at viability, none of which serves as an adequate justification. First, Justice Blackmun argues that before viability the fetus "cannot reasonably and objectively be regarded as a subject of rights or interests distinct from, or paramount to, those of the pregnant woman."[156] To the extent Justice Blackmun is arguing that one cannot distinguish the interests of the fetus and the mother before viability, the argument is inconsistent with the Court's recognition in *Gonzales* that a fetus is a living organism distinct from the mother "whether or not it is viable outside the womb."[157] The

155. *Id*. at 553–54 (quoting *Thornburgh*, 476 U.S. at 771). Contrary to Justice Blackmun's claim, the laws of many states regard the fetus prior to viability as the subject of legal rights and interests distinct from those of the mother in areas such as criminal law, tort law and property rights. *See* Paul Benjamin Linton, *The Legal Status of the Unborn Child Under State Law*, 6 ST. THOMAS J.L. & PUB. POL'Y 141 (2012).

156. Webster v. Reprod. Health Servs., 492 U.S. 490, 553 (1989).

157. Gonzales v. Carhart, 550 U.S. 124, 147 (2007).

argument is also inconsistent with the Court's subsequent conclusion in *Casey* that "the State has legitimate interests from the outset of the pregnancy in protecting . . . the life of the fetus that may become a child."[158] On the other hand, to the extent Justice Blackmun is claiming that before viability the state can never view the interests of the fetus as paramount to the mother's interest in obtaining an abortion, the argument is conclusory and begs the central question in the debate.[159]

Justice Blackmun's second argument is that viability "establishes an easily applicable standard for regulating abortion."[160] This is at best peripheral to the question of the appropriate constitutional duration for abortion rights. It gives no reason to believe that drawing a controlling line at viability constitutes the most principled way to balance the interests of the state in protecting fetal life and the interests of the woman in terminating a pregnancy. Moreover, the argument fails from a pragmatic standpoint because it ignores the "uncertainty of the viability determination," which Justice Blackmun acknowledged in an earlier opinion for the Court.[161] As I will argue more extensively below, a line based on gestational age, such as twenty weeks after fertilization, would be easier to enforce than the viability rule because gestational age is just one of several factors that must be considered in determining viability.[162]

Justice Blackmun's third argument is that the viability rule "provid[es] a pregnant woman ample time to exercise her fundamental right with her responsible physician to terminate her pregnancy."[163] Again, the argument does not explain why viability represents the constitutional tipping point at which the state's interest in protecting fetal life may for the first time be thought to outweigh a woman's interest in obtaining an abortion. Many countries have concluded that a right to abortion during the first trimester of pregnancy affords ample time for exercise of the right, and Justice Blackmun gave no reason to conclude otherwise.[164]

158. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).

159. Beutler, *supra* note 146, at 380 ("The third claim, that a fetus cannot be regarded as a subject of interest paramount to those of the pregnant woman, is no more than a restatement of the conclusion.").

160. *Webster*, 492 U.S. at 553.

161. Colautti v. Franklin, 439 U.S. 379, 395–96 (1979).

162. *See infra* notes 232–35 and accompanying text; Rhoden, *supra* note 115, at 680 ("gestational age is easier to estimate *in utero* than is viability").

163. *See Webster*, 492 U.S. at 553–54; CENT. FOR REPROD. RIGHTS, *The World's Abortion Laws*, *supra* note 65, at 2.

164. *See* Beck, *supra* note 47, at 261–67.

3. Planned Parenthood of Southeastern Pennsylvania v. Casey

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Supreme Court reaffirmed *Roe*'s constitutional right to an abortion.[165] The controlling plurality opinion, in *dicta*, purported to retain a weakened version of the viability rule. States could now regulate to protect fetal life from the outset of the pregnancy, but only if the regulation did not "plac[e] a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus."[166] The plurality opinion rested principally on *stare decisis*[167] but also offered some arguments for retaining the viability line:

> The second reason [for retaining the viability rule] is that the concept of viability, as we noted in *Roe*, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman. Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. And there is no line other than viability which is more workable. . . . The viability line also has, as a practical matter, an element of fairness. In some broad sense 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.[168]

The plurality Justices may have felt some need to offer a rationale for the viability rule, given that two of the three authors had previously joined opinions challenging the viability line.[169]

A few moments' consideration reveals that the plurality's three arguments are essentially the same arguments Justice Blackmun

165. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 845–46 (1992).

166. *Id.* at 877.

167. *Id.* at 870 (plurality opinion).

168. *Id.* (citations omitted).

169. *See supra* note 30; *see also Casey*, 505 U.S. at 989 (Scalia, J., concurring in the judgment in part and dissenting in part) (citing Akron v. Akron Center for Reproductive Health, 462 U.S. 416, 461 (O'Connor, J.)).

offered in his *Webster* dissent,[170] and that they fail to justify the viability rule for the same reasons. The contention that viability marks the "independent existence of [a] second life [that] can in reason and all fairness be the object of state protection that now overrides the rights of the woman" is little more than a conclusion unsupported by reasons.[171] The plurality failed to explain why independence is a necessary condition for state protection. In areas like parent-child relations or prisoners' rights, the law often views dependence on another as establishing legal rights and interests, not eliminating them.[172] The plurality also gave no reason to conclude that the *hypothetical* independence from the mother signified by the term "viability"—the expectation that the fetus could survive independently if removed from the womb—is the form of independence that should matter for constitutional purposes, rather than other possibilities like "genetic independence from the mother (conception) or the capacity for independent movement (quickening)."[173] Ultimately, the plurality failed to offer "any constitutional principle interrelating state power and fetal entitlement in a way that would justify the Court's continued adherence to the viability rule."[174]

The plurality's second claim—that "there is no line other than viability which is more workable"—is not true given the debatable nature of viability determinations, a point I will expand below.[175] In any event, it offers no reason to believe that only at viability does the state's interest in fetal life come to outweigh the woman's interest in an abortion. Finally, the plurality's third rationale—that "a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child"—offers no reason to view viability as the first point in pregnancy when such an argument for implied maternal consent might plausibly be made.[176]

D. The Insurmountable Arbitrariness of the Viability Rule

The failure of the Supreme Court to offer a principled constitutional justification for the viability rule ultimately seems insurmountable, which explains why so many members of the Court

170. *See supra* note 155 and accompanying text.
171. *See* Beck, *supra* note 47, at 273–76.
172. *Id.* at 275.
173. *Id.*
174. *Id.* at 276.
175. *See infra* notes 216–22 and accompanying text.
176. *See supra* notes 163–64 and accompanying text.

have described viability as an arbitrary line for measuring abortion rights.[177] The viability rule purports to balance the value a state may attribute to developing human life against the importance of a woman's interest in reproductive autonomy.[178] But there seems no principled rationale for viewing viability as the critical tipping point at which the former suddenly outweighs the latter. There is no persuasive reason a state should be constitutionally required to deem a fetus less valuable a few days before it attains the hypothetical capacity to survive outside the womb than after it crosses that murky threshold, nor is there any reason to believe that a viable fetus intrudes less on the pregnant woman's interests than the same fetus a week earlier.[179]

Justice White identified the central problem with the viability rule in his *Thornburgh* dissent:

> The substantiality of [the governmental] interest is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant. The State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom.[180]

Fetal viability was "morally and constitutionally irrelevant" at the time of *Roe* and it remains irrelevant today. The incremental development in respiratory capacity that typically explains the fetus' transition from previability to viability says nothing about the value of the fetus from the perspective of the state or the Constitution.[181]

The viability rule's arbitrary character becomes more apparent when we consider factors that may influence a doctor's viability determination. Research shows that African-American fetuses tend

177. *See supra* note 30 and accompanying text.

178. Roe v. Wade, 410 U.S. 113, 162–63 (1973).

179. *See* Beck, *supra* note 68, at 37–38.

180. Thornburg v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 795 (1986).

181. Beck, *supra* note 68, at 56; Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992) (focusing on possible future advances related to "fetal respiratory capacity").

to become viable earlier in pregnancy than Caucasian fetuses.[182] A Caucasian woman can therefore expect the right to abortion to last longer under the Court's precedents than a similarly situated African-American woman.[183] Male fetuses tend to become viable later in pregnancy,[184] putting them at risk for abortion longer than their female counterparts. Since smoking tends to slow fetal growth, the abortion rights of women who smoke will tend to last longer than for women who do not.[185] And since altitude influences fetal development, the right to abortion for women at high altitudes will tend to last longer than for similarly situated women at sea level.[186] These bizarre and inexplicable outcomes simply underscore Justice White's point in *Thornburgh*. The factors influencing fetal viability are irrelevant to the constitutional status of the fetus.

III. Four Arguments for the Constitutionality of Twenty-Week Statutes

To this point, we have examined the Supreme Court's failure to offer a constitutional justification for the viability rule, a failure that likely cannot be remedied in a coherent fashion. This part of the article outlines four arguments that would support a state or federal twenty-week statute challenged on due process grounds. The first three arguments rely on current Supreme Court case law or minor modifications to current case law, while the fourth presents an argument for reconsideration of the duration of abortion rights in the context of a twenty-week statute.

A. Twenty-Week Statutes Protect Maternal Health

The most common method of performing second trimester abortions in the United States is the dilation and evacuation ("D&E") procedure.[187] The D&E abortion is a surgical procedure that involves dilation of the cervix and use of instruments to remove fetal tissue from the uterus, often requiring numerous instrument passes to dismember the fetus.[188] Justice Breyer described some of the

182. Beck, *supra* note 47, at 260–61.
183. Beck, *supra* note 68, at 39.
184. *Id.*
185. *Id.*
186. *Id.* at 39–40.
187. Stenberg v. Carhart, 530 U.S. 914, 924 (2000).
188. *Id.* at 924–26.

risks of the D&E procedure in the Supreme Court's majority opinion in *Stenberg v. Carhart*:

> The D&E procedure carries certain risks. The use of instruments within the uterus creates a danger of accidental perforation and damage to neighboring organs. Sharp fetal bone fragments create similar dangers. And fetal tissue accidentally left behind can cause infection and various other complications.[189]

The *Gonzales* majority noted, "[a] doctor [performing a D&E abortion] may make 10 to 15 passes with the forceps to evacuate the fetus in its entirety, though sometimes removal is completed with fewer passes."[190] Abortions performed at twenty weeks "typically take 2 or more days to complete, and involve greater skill and resources" than those performed earlier in pregnancy.[191]

The risks of surgical abortion increase significantly as pregnancy progresses and the fetus becomes larger. One influential study by researchers with the pro-abortion rights Guttmacher Institute found a mortality rate of 8.9 deaths per 100,000 abortions performed at twenty-one weeks LMP or above (approximately nineteen weeks

189. *Id.* at 926. Dissenting in *Gonzales v. Carhart*, Justice Ginsburg highlighted risks of the standard D&E procedure that could arguably make the "intact D&E" (or "partial birth") procedure Congress had banned safer in some situations: "First, intact D&E minimizes the number of times a physician must insert instruments through the cervix and into the uterus, and thereby reduces the risk of trauma to, and perforation of, the cervix and uterus—the most serious complication associated with nonintact D&E. Second, removing the fetus intact, instead of dismembering it in utero, decreases the likelihood that fetal tissue will be retained in the uterus, a condition that can cause infection, hemorrhage, and infertility. Third, intact D&E diminishes the chances of exposing the patient's tissues to sharp bony fragments sometimes resulting from dismemberment of the fetus. Fourth, intact D&E takes less operating time than D&E by dismemberment, and thus may reduce bleeding, the risk of infection, and complications relating to anesthesia." Gonzales v. Carhart, 550 U.S. 124, 178 (2007) (Ginsburg, J., dissenting).

190. *Gonzales*, 550 U.S. at 136.

191. Jenna Jerman & Rachel K. Jones, *Secondary Measures of Access to Abortion Services in the United States, 2011 and 2012: Gestational Age Limits, Cost, and Harassment,* 24 WOMEN'S HEALTH ISSUES e422 (2014).

post-fertilization).[192] The authors noted, "the risk of death increased exponentially with increasing gestational age," projecting "a thirty-eight percent increase in risk of death for each additional week of gestation."[193] This compares with federal government statistics showing only 7.7 deaths per 100,000 live births for pregnancies carried to term.[194] The informed consent form used at one Albuquerque, New Mexico abortion clinic notifies patients that "pregnancy termination at 18 weeks and above involves a greater risk than carrying the pregnancy to term."[195]

Among abortion facilities, seventy-two percent will perform abortions at twelve weeks' gestation, but only thirty-four percent will perform an abortion at twenty weeks and only sixteen percent at twenty-four weeks.[196] In other words, roughly two-thirds of abortion facilities will not perform abortions at twenty weeks or later.[197] This can result in a situation where the least skilled providers perform some of the riskiest abortion procedures. That dynamic is illustrated by the case of Dr. Kermit Gosnell, convicted in 2013 of performing illegal late-term abortions, killing viable infants born alive in his abortion clinic and negligently causing the death of an adult patient.[198] The grand jury that investigated Dr. Gosnell reported that he "had

192. Linda A. Bartlett, et al., *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 733 (2004). Such studies could understate mortality risks because reporting of abortion-related deaths in this country is not systematic. AMERICAN ASS'N OF PRO-LIFE OBSTETRICIANS AND GYNECOLOGISTS, ABORTION IS SAFER THAN CHILDBIRTH? 1 (Feb. 2012), http://www.aaplog.org/wp-content/uploads/2012/11/ab-safer__003.pdf ("There is no mandatory reporting of abortion deaths or complications. And even the total number of abortions reported each year does not reflect reality because of the voluntary and haphazard nature of the CDC and Guttmacher data collection."); Bartlett, et al., *supra*, at 730 (noting that complete clinical records were not always available for suspected cases of abortion-related mortality). Termination of pregnancy also creates other longer term risks, such as an increased incidence of premature births in later pregnancies. *See* John M. Thorp, Jr., *Public Health Impact of Legal Termination of Pregnancy in the U.S.: 40 Years Later*, 2012 SCIENTIFICA 5 (2012).

193. Bartlett, *supra* note 192, at 731; Thorp, *supra* note 192, at 4 ("[T]he likelihood of harm [from termination of pregnancy] is dependent on gestational age with risk directly proportional to gestational age.").

194. Randy Beck, *Overcoming Barriers to the Protection of Viable Fetuses*, 71 WASH. & LEE L. REV. 1263, 1295 (2014) (citing Centers for Disease Control and Prevention statistics).

195. Beck, *supra* note 194, at 1294 n.176.

196. Jerman & Jones, *supra* note 191, at e421.

197. Randy Beck, *supra* note 34, at 35 n.20 (quoting Grand Jury Report: "Most doctors won't perform late second-trimester abortions, from approximately the 20th week of pregnancy, because of the risks involved").

198. *Id.* at 33.

many late-term Philadelphia patients because most other local clinics would not perform procedures past 20 weeks."[199]

In *Roe v. Wade*, the Supreme Court recognized two state interests that would justify abortion regulations at different stages in pregnancy. The viability rule applied when the state regulated to advance a state interest in protecting the "potential life" of the fetus.[200] However, the Court was also aware that "the risk to the woman" from abortion "increases as her pregnancy continues"[201] and acknowledged that "the State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy."[202] This interest in maternal health, the Court believed, could justify second-trimester abortion regulations prior to fetal viability.[203]

The state interest in protecting maternal health justifies a prohibition of purely elective abortions twenty weeks after fertilization or twenty-two weeks LMP. At least by that point, in the absence of medical indications, the elective decision to perform a surgical D&E abortion exposes the woman to risks greater than she would face in carrying the pregnancy to term. Moreover, the relative risks of abortion and childbirth diverge rapidly after that point in pregnancy, with the mortality risk from abortion increasing approximately thirty-eight percent with each additional week of fetal growth.[204] A prohibition on elective abortions after twenty weeks serves maternal health by reserving abortion at that late stage of pregnancy for situations where it is medically indicated and by encouraging those who desire an abortion to schedule the procedure earlier in gestation, when the risks to maternal health are lower.

The Ninth Circuit in *Isaacson v. Horne* rejected a maternal health justification for Arizona's twenty-week statute.[205] The court relied upon *Casey*'s statement that "'[b]efore viability, the State's

199. *Id.* at 35 (quoting Grand Jury Report).

200. Roe v. Wade, 410 U.S. 113, 163 (1973).

201. *Id.* at 150.

202. *Id.*

203. *Id.* at 163.

204. *See supra* note 193 and accompanying text. *See* Diedrich et al., *Complications of Surgical Abortion*, 52 CLINICAL OBSTETRICS AND GYNECOLOGY 205, 205 (2009) ("The risk of abortion-related complications increases exponentially for each week of gestation; that means a one-week delay in abortion at 17 weeks of gestation results in a much higher risk of complications than if a one-week delay occurs at 8 weeks of gestation."); *see also id.* at 211 (While D&E is safe, it is imperative "that women are referred for abortion as early as possible in their pregnancies to decrease morbidity.").

205. Isaacson v. Horne, 716 F.3d 1213, 1228–29 (9th Cir. 2013).

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.'"[206] The Ninth Circuit drew a distinction between "regulation" of abortion and "prohibition," concluding that the Supreme Court's case law would permit abortion regulations for maternal health prior to viability, but not a health related prohibition.[207]

The Supreme Court's normal practice is to decide "only the case before [the Court]."[208] The Ninth Circuit, however, read the *Casey* opinion as if it conclusively resolved issues completely different from those the *Casey* Court faced. The regulations reviewed in *Casey* did not regulate late-term abortions to protect maternal health. They were rules that applied to all abortions, including those performed very early in pregnancy.[209] In reading the *Casey* opinion, the Ninth Circuit ignored Chief Justice Marshall's "maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used" and "ought not to control the judgment in a subsequent suit when the very point is presented for decision."[210]

The Ninth Circuit's reading of *Casey* generates the bizarre conclusion that a state may not forbid a previability abortion even if the woman's medical condition makes it a near certainty that the abortion will result in her death. The court's categorical distinction between "regulation" and "prohibition" fails to recognize that almost any "regulation" of abortion can be recast as a "prohibition" of abortions that do not conform to the regulatory standards. "Regulations" requiring informed consent to an abortion or the presence of emergency resuscitation equipment are also "prohibitions" of abortion without informed consent and without the necessary equipment. While *Casey* did not concern health related regulation of late-term abortions, if we are to rely on *Casey* in this context, we should instead focus on the Court's distinction between "regulations to further the health or safety of a woman seeking an abortion" and "[u]nnecessary health regulations" that "impose an

206. *Id*. at 1222 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)). The *Isaacson* court also relied on language in *Gonzales v. Carhart* purporting to apply the *Casey* standards, *id*. at 1226, but *Gonzales* clearly indicated that its application of the *Casey* standards was an "assumption," not a holding. *See infra* note 257.

207. *See Isaacson*, 716 F.3d at 1228–29.

208. Upjohn Co. v. United States, 449 U.S. 383, 396 (1981).

209. Beck, *supra* note 68, at 45–46.

210. Cohens v. Virginia, 19 U.S. (6 Wheat) 264, 399 (1821).

undue burden on the right."[211] Given the significantly greater health risks of surgical abortions after twenty weeks, the courts should uphold twenty-week legislation so long as it contains an adequate exception to permit an abortion when medically necessary.

B. Protecting Viable Fetuses Erroneously Deemed Previable

The Supreme Court in *Roe* recognized a compelling state interest in protecting the lives of fetuses that had crossed the viability threshold.[212] Some of the Court's subsequent opinions, however, made it virtually impossible for a state to protect that interest in cases near the viability margin.[213] The problem lies partly in the inconclusive nature of a medical determination of viability and partly in the Court's insistence on deference to an abortion provider's potentially self-interested conclusion that a particular fetus is not yet viable.[214] The result has been a set of constitutional rules virtually guaranteeing that some viable fetuses will be aborted.[215]

"Viability" does not refer to a clear and easily discernible line in pregnancy.[216] It is instead a medical prediction about the consequences of removing a particular fetus from the safety of the womb and placing it on life support.[217] Such predictions require the doctor to factor in a large number of variables, including gestational age, fetal weight, the woman's "general health and nutrition," the "quality of the available medical facilities, and other factors."[218] Because of the multi-factored nature of the medical inquiry into fetal viability, the Supreme Court has acknowledged the "uncertainty of the viability determination"[219]:

> Because of the number and imprecision of these variables, the probability of any particular fetus' obtaining meaningful life outside the womb can be

211. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 878 (1992).

212. Roe v. Wade, 410 U.S. 113, 163–64 (1973).

213. *See, e.g.*, Colautti v. Franklin, 439 U.S. 379 (1979); Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52 (1976).

214. Beck, *supra* note 194, at 1266–76.

215. The difficulty becomes particularly acute in the case of abortion providers like Dr. Kermit Gosnell of Philadelphia, who routinely distorted and destroyed medical records to hide abortions of viable fetuses and infanticide of viable infants delivered in his clinic. *Id.* at 1277–82.

216. Beck, *supra* note 47, at 1268.

217. *Id*.; Beck, *supra* note 68, at 37.

218. *See Colautti*, 439 U.S at 395–96.

219. *Id*.

> determined only with difficulty. Moreover, the record indicates that even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all. In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.[220]

In other words, two physicians may reach different conclusions about the viability of a particular fetus "for reasons having nothing to do with the fetus itself, but arising instead from differences in medical skill or treatment philosophy."[221] Indeed, there is research indicating that a particular doctor's conclusion as to fetal viability is itself a variable significantly impacting the fetus's chances of survival.[222]

Notwithstanding the Court's recognition that viability determinations are uncertain and debatable, the Court in cases after *Roe* resisted state efforts to establish clearer benchmarks for regulating abortion rights. The Court concluded that "neither the legislature nor the courts may proclaim one of the elements entering into the ascertainment of viability—be it weeks of gestation or fetal weight or any other single factor—as the determinant of when the State has a compelling interest in the life or health of the fetus."[223] Instead, the Court indicated that states were required to accord an unspecified level of deference to "the judgment of the responsible attending physician."[224]

Deference to the abortion provider's conclusions about viability makes it virtually certain that abortions will be performed on some fetuses that are in fact viable. A major problem with such deference lies in the fact that not all abortion providers are "responsible attending physicians" like those Justice Blackmun no doubt represented at the Mayo Clinic. Some will be more like Dr. Kermit

220. *Id.*

221. Beck, *supra* note 68, at 37.

222. Beck, *supra* note 47, at 260 (quoting Jay D. Iams, *Preterm Births*, *in* STEVEN G. GABBE ET AL., OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES 755, 812 (4th ed. 2002)).

223. *Id.* at 388–89.

224. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 64 (1976); *see also Colautti*, 439 U.S. at 388–89 ("Viability is reached when, in the judgment of the attending physician on the particular facts of the case before him, there is a reasonable likelihood of the fetus' sustained survival outside the womb, with or without artificial support.").

Gosnell who, according to the grand jury investigating his Philadelphia clinic, made it a "standard business practice to slay viable babies," and who routinely put financial considerations above the safety of his patients.[225] Once one recognizes the problem presented by providers with little regard for law, it becomes clear that the Supreme Court has not afforded states the tools needed to protect fetuses that have in fact crossed the viability threshold. Under the Supreme Court's rules of engagement, a less-than-scrupulous abortion provider can make a healthy living by deeming fetuses that have crossed the viability threshold "nonviable."[226] The risks are heightened by the fact that those willing to perform late-term abortions can charge significantly higher rates than those who provide abortions early in pregnancy.[227] The chances of a successful law enforcement action in cases near the viability margin are reduced by the Supreme Court's insistence on a debatable medical judgment as the criterion for state protection and by the requirement of deference to the abortion provider's conclusion in close cases.[228]

Even assuming perfect good faith on the part of the abortion provider, however, the Court's rules make it likely that a fair number of viable fetuses will be aborted. The uncertainty of the viability determination means that doctors will sometimes reach erroneous conclusions and perform abortions on viable fetuses by mistake.[229] For instance, doctors may be overly pessimistic about the chances of fetal survival. Some doctors use twenty-four weeks LMP as the benchmark for viability,[230] even though the recent *New England Journal of Medicine* study showed survival by nearly a quarter of fetuses born and actively treated at twenty-two weeks, and approximately a third of fetuses actively treated at twenty-three weeks.[231]

The compelling state interest in protecting the lives of viable fetuses could be advanced more effectively were the Court to allow

225. Beck, *supra* note 34, at 34–37; Beck, *supra* note 194, at 1279–80.

226. Beck, *supra* note 194, at 1276.

227. *Id.* at 1275–76.

228. *Id.* at 1291–92.

229. *Id.* at 1269.

230. *See Pregnancy Viability – What Does It Mean?*, BABYMED, http://www.babymed.com/prematurity/pregnancy-viability-what-does-it-mean (last visited Aug. 12, 2015) ("At 24 weeks is the cutoff point for when many doctors will use intensive medical intervention to attempt to save the life of a baby born prematurely including doing a cesarean section.").

231. Rysavy et al., *supra* note 12, at 1807.

enforcement of a twenty-week abortion statute.[232] Since gestational age is one of many factors relevant to a viability determination, a durational line expressed in terms of gestational age would be easier to enforce than a line drawn at viability.[233] A "twenty-week" statute—one that really restricts abortion at approximately twenty-two weeks LMP[234]—would create a reasonable buffer zone, guarding against erroneous or deceptive findings of nonviability and allowing the state to more effectively protect fetuses that have crossed the viability threshold.[235]

C. *Gonzales* Allows States to Protect New State Interests

The Ninth Circuit opinion in *Isaacson v. Horne* assumed that the plurality opinion in *Casey* represented the last significant development in Supreme Court case law relevant to the duration of abortion rights. Since *Casey*, however, the Supreme Court upheld the federal partial birth abortion statute in *Gonzales v. Carhart*.[236] *Gonzales* is more relevant than *Casey* because *Gonzales* concerned a regulation directed at late-term abortions.[237] *Casey*, by contrast, concerned abortion regulations applicable from the outset of pregnancy.[238] Any comments in *Casey* concerning the duration of abortions therefore constituted *dicta*, irrelevant to the analysis of the Pennsylvania statute before the Court.[239]

The Ninth Circuit in *Isaacson* suggested that *Gonzales* made no significant change to the viability rule as articulated in *Casey*.[240] That

232. Beck, *supra* note 194, at 1292–93.

233. *Id.* at 1293. *See also* Rhoden, *supra* note 115, at 680 ("[G]estational age is easier to estimate in utero than is viability.").

234. *See supra* note 9 and accompanying text.

235. Beck, *supra* note 194, at 1292. A statute restricting abortion twenty weeks after fertilization, or twenty-two weeks LMP, would not completely eliminate the risk of erroneous postviability abortion. There has been at least one reported case of a baby delivered at twenty-one-weeks and five days who survived and was able to go home with her parents. *See* Claire Bates, *A Medical Miracle: World's Most Premature Baby, Born at 21 Weeks and Five Days, Goes Home to Her Delighted Parents*, DAILY MAIL (U.K.) (Apr. 25, 2011, 4:46 PM EST), http://www.dailymail.co.uk/health/article-1380282/Earliest-surviving-premature-baby-goes-home-parents.html. A statute restricting abortion at twenty-weeks LMP would increase the margin for error and make it less likely that a viable fetus would be aborted.

236. Gonzales v. Carhart, 550 U.S. 124, 168 (2007).

237. *Id.* at 135–40 (describing methods of abortion used in the second trimester).

238. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 844 (1992) (describing challenged Pennsylvania regulations).

239. Beck, *supra* note 68, at 45–46.

240. Isaacson v. Horne, 716 F.3d 1213, 1226 (2013) (quoting *Gonzales*, 550 U.S. at 146).

analysis views the *Gonzales* precedent differently than the dissenting Justices in the case did. The *Gonzales* majority upheld the federal partial-birth abortion statute even though it applied to previability abortions.[241] Justice Ginsburg's four-Justice dissent accused the majority of "blur[ring] the line, firmly drawn in *Casey*, between previability and postviability abortions."[242]

In at least one respect, *Gonzales* reflects a new analysis of state abortion regulations that is highly relevant to the duration of abortion rights. In *Roe*, the Court recognized only two state interests that could justify abortion regulations, with a different durational line linked to each interest. The state interest in protecting the health of the mother became compelling and justified regulation after the first trimester of pregnancy.[243] The state interest in protecting fetal life became compelling and justified regulation at the point of viability.[244] In *Stenberg v. Carhart*, a 5-4 majority of the Supreme Court struck down Nebraska's ban on partial-birth abortions,[245] noting that the act applied to previability, as well as postviability, abortions: "The fact that Nebraska's law applies both previability and postviability aggravates the constitutional problem presented. The State's interest in regulating abortion previability is considerably weaker than postviability."[246] The majority also argued that the statute did not further the state interest in "the potentiality of human life" because it only regulated one method of abortion and did not prevent abortions by other means.[247] Alternative interests articulated by the state—including showing concern for unborn life, preventing cruelty to the partially born, and preserving the integrity of the medical profession—did not, according to the *Stenberg* majority, suffice to sustain the statute in the absence of a health exception.[248]

Justice Kennedy wrote a dissenting opinion in *Stenberg* criticizing the majority for according too little weight to the state's interests in legislating concerning abortion.[249] He read the majority as "misunderstanding *Casey*" because it accepted the respondent's view that "the only two interests the State may advance through regulation

241. *Gonzales*, 550 U.S. at 147.
242. *Id.* at 171 (Ginsburg, J., dissenting).
243. Roe v. Wade, 410 U.S. 113, 163 (1973).
244. *Id.*
245. Stenberg v. Carhart, 530 U.S. 914, 922 (2000).
246. *Id.* at 930.
247. *Id.* at 930–31.
248. *Id.*
249. *Id.* at 956–57.

of abortion are in the health of the woman who is considering the procedure and in the life of the fetus she carries."[250] Justice Kennedy instead understood the *Casey* opinion as "premised on the States having an important constitutional role in defining their interests in the abortion debate."[251] In addition to the state interest in "concern for the life of the unborn and 'for the partially-born,'" Justice Kennedy believed the Nebraska statute was also supported by additional state interests, including "preserving the integrity of the medical profession" and "erecting a barrier to infanticide."[252]

In *Gonzales*, Justice Kennedy wrote the majority opinion rejecting a facial challenge to the federal partial-birth abortion statute.[253] Justice Kennedy in *Gonzales* won majority support for the position he took in his *Stenberg* dissent concerning the freedom of states to articulate and protect new interests in the abortion context. The majority upheld the federal statute based on Congress' view that failing to regulate such a brutal procedure would "further coarsen society to the humanity of . . . all vulnerable and innocent human life, making it increasingly difficult to protect such life."[254] In other words, rather than an interest in the value of fetal life per se, as in *Roe*, the *Gonzales* Court recognized a state interest in preventing the social and legal consequences of allowing a brutal method of abortion to continue. Other novel governmental interests cited in sustaining the federal statute included Congress' interest in regulating the ethics of the medical profession[255] and its desire to draw "a bright line that clearly distinguishes abortion and infanticide."[256]

The *Gonzales* majority opinion merely "assumed" the continued applicability of the viability rule,[257] drawing a protest from Justice Ginsburg.[258] The majority's recognition of new state interests justifying abortion regulations makes the assumption doubtful for future cases. If a state adopts a twenty-week statute based on a new state interest distinct from those recognized in *Roe*, there is no reason

250. *Id.* at 960.

251. *Id.* at 961.

252. *Id.*

253. Gonzales v. Carhart, 550 U.S. 124, 132 (2007).

254. *Id.* at 157.

255. *Id.*

256. *Id.* at 158.

257. *Id.* at 146 ("We assume the following principles for the purposes of this opinion."); *id.* at 161 ("under precedents we here assume to be controlling").

258. *Id.* at 187 (Ginsburg, J., dissenting) ("[M]ost troubling, *Casey*'s principles, confirming the continuing vitality of 'the essential holding of Roe,' are merely 'assume[d]' for the moment, rather than 'retained' or 'reaffirmed.'").

Roe's viability rule—adopted to govern the state interest in protecting fetal life—should remain the controlling durational benchmark.[259] For instance, twenty-week abortion statutes have often been premised on evidence that a fetus can feel pain at that stage of development.[260] Since fetal pain depends on neurological development rather than respiratory capacity, there is no reason fetal viability should be the controlling point in pregnancy at which a state may assert that interest.[261]

A twenty-week bill would also be an effective way for a state to further one of the state interests approved in *Gonzales*, the interest in drawing a clearer distinction between abortion and infanticide.[262] Two European philosophers recently published an article arguing that it should be permissible to kill a newborn infant "in all circumstances where abortion would be" permissible, including a situation where the mother feels she cannot care for the child.[263] They used the term "after-birth abortion" to describe infanticide committed in such circumstances, claiming that the newborn infant has a moral status "comparable with that of a fetus (on which abortions in the traditional sense are performed)."[264] The harder it is to distinguish between fetuses subject to abortion and newborn infants, the steeper and more dangerous the slippery slope from abortion to infanticide becomes. The viability rule exacerbates the risk of confusion for reasons discussed in the previous section: viability determinations are uncertain, and a rule that one may abort any fetus deemed nonviable by the abortion provider will almost certainly result in abortions of fetuses that could survive outside the womb if given the chance. Allowing a state to enact a twenty-week abortion bill would make it easier to prevent the abortion of viable fetuses and would draw a clearer distinction between abortion and infanticide.[265]

D. *Stare Decisis* and the Viability Rule

To this point, we've been considering arguments for the constitutionality of twenty-week abortion statutes based on the Court's current abortion jurisprudence or relatively minor

259. Beck, *supra* note 68, at 55.

260. The federal bill is titled the "Pain-Capable Unborn Child Protection Act." *See* H.R. REP. NO. 113–109 (2013).

261. Beck, *supra* note 68, at 56.

262. Gonzales v. Carhart, 550 U.S. 124, 158 (2007).

263. Giubilini & Minerva, *supra* note 62.

264. *Id.*

265. Beck, *supra* note 194, at 1291–95.

adjustments to that jurisprudence. Recently, however, an Eighth Circuit panel in *MKB Management Corp. v. Stenehjem* called on the Supreme Court to reconsider its case law on the duration of abortion rights.[266] The court noted that *Casey* had replaced *Roe*'s original trimester framework with an undue burden standard because *Roe* failed to give adequate weight to the state interest in protecting fetal life.[267] The panel also noted Justice Ginsburg's observation in her *Gonzales* dissent that the majority opinion merely "assumed" the continued application of the viability rule, rather than "retain[ing]" or "reaffirm[ing]" it.[268] The Eighth Circuit panel considered itself bound by the viability rule absent further action from the Supreme Court,[269] but argued that "good reasons exist for the Court to reevaluate its jurisprudence."[270]

The panel believed "the Court's viability standard ha[d] proven unsatisfactory because it g[ave] too little consideration to the 'substantial state interest in potential life throughout pregnancy.'"[271] The judges were troubled by the fact that viability shifts over time, with the result "that the same fetus would be deserving of state protection in one year but undeserving of state protection in another."[272] It thought the choice of a durational line was "better left to the states, which might find their interest in protecting unborn children better served by a more consistent and certain marker than viability."[273] The panel also thought the Court should reevaluate its jurisprudence because "the facts underlying *Roe* and *Casey* may have changed."[274] The panel noted a number of potentially relevant factual changes, including evidence that abortion decisions often do not involve close prior consultation with a treating physician, evidence that women were frequently coerced to terminate pregnancies, and state legislation allowing parents to relinquish custody of infants to the state without consequences.[275] "In short," the panel concluded,

266. MKB Mgmt. Corp. v. Stenehjem, 795 F.3d 768 (8th Cir. 2015).

267. *Id.* at 772. The panel upheld an injunction against a North Dakota statute that purported to restrict abortion once the fetus had a heartbeat. *Id.* at 771.

268. *Id.* at 772 (quoting Gonzales v. Carhart, 550 U.S. 124, 186–87 (2007) (Ginsburg, J., dissenting)).

269. *Id.* at 773.

270. *Id.* at 773.

271. *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 876 (1992) (plurality opinion)).

272. *Id.*

273. *Id.*

274. *Id.* at 775.

275. *Id.* at 775–76.

"continued application of the Supreme Court's viability standard discounts the legislative branch's recognized interest in protecting unborn children."[276]

The *MKB Management* opinion urges the Supreme Court to rethink the viability rule. Such reconsideration would provide an appropriate alternative ground for upholding a twenty-week abortion statute. The viability rule was announced in *dicta* in *Roe*, a case in which the duration of abortion rights did not matter to the outcome.[277] It was reaffirmed in *dicta* in *Casey*, another case in which the duration of abortion rights could not affect the disposition.[278] Consequently, in establishing the viability rule and in reaffirming the rule, the Court was acting in what Justice Stevens has described as "treacherous" conditions:

> When we follow our traditional practice of adjudicating difficult and novel constitutional questions only in concrete factual situations, the adjudications tend to be crafted with greater wisdom. Hypothetical rulings are inherently treacherous and prone to lead us into unforeseen errors; they are qualitatively less reliable than the products of case-by-case adjudication.[279]

Not only was the Court on treacherous ground when it established the viability rule, but it was walking blindfolded. Since the duration of abortion rights was not an issue relevant to the litigation in *Roe* or *Casey*, the parties did not offer the Court substantial briefing or argument on the question in either case.[280] In these circumstances, it can hardly be surprising that the Court has offered no justification for the viability rule.[281]

---

276. *Id.* at 776. The Eighth Circuit panel cited a concurring opinion in an Alabama Supreme Court case permitting a wrongful death action to proceed where an unborn child died before viability. *See id.* at 775 (citing Hamilton v. Scott, 97 So.3d 728, 742 (Ala. 2012) (Parker, J., concurring specially)). The author of *Hamilton* wrote the concurrence on behalf of four Justices to explain why *Roe*'s viability rule does not control for purposes of state tort law, and to critique the viability line as unpersuasive and incoherent. *Hamilton*, 97 So. 3d at 937–47.

277. Beck, *supra* note 68, at 34–36.

278. *Id.* at 45–46.

279. New York v. Ferber, 458 U.S. 747, 780–81 (1982) (Stevens, J., concurring) (explaining why he declined to engage in overbreadth analysis in free speech case).

280. Randy Beck, *Transtemporal Separation of Powers in the Law of Precedent*, 87 NOTRE DAME L. REV. 1405, 1462 (2012).

281. *See supra* notes 93–97; *supra* notes 168–76 and accompanying text.

The principal reason offered for *Casey*'s *dicta* adhering to the viability line was *stare decisis*.[282] The doctrine of *stare decisis* serves important values. It promotes stability in the law.[283] It preserves judicial resources, shielding courts from needless re-litigation of every issue that arises in a legal proceeding.[284] It safeguards reliance interests, allowing individuals to count on legal principles that underlie their personal and financial decisions.[285]

At the same time, the purpose of the doctrine of *stare decisis* is "to ensure that legal rules develop 'in a principled and intelligible fashion.'"[286] It was never designed as a substitute for the Supreme Court carefully doing its job of producing well-considered opinions. Notwithstanding the principle of *stare decisis*, the Court has readily revisited questions resolved hypothetically through *dicta*,[287] particularly when the *dicta* concerned an issue that "was not fully debated."[288] The Court has reconsidered issues when an earlier ruling did not benefit from plenary briefing and argument,[289] and when the earlier outcome was not adequately explained.[290] All of these circumstances call for reconsideration of the viability rule.[291] Invoking *stare decisis* to shield an inadequately supported ruling from full consideration by the Court would be a misuse of the doctrine. The Court has not done its job of explaining its conclusions concerning the duration of abortion rights, and *stare decisis* should not be invoked to excuse continuation of that failure.

---

282. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 870 (1992).

283. Beck, *supra* note 280, at 1408.

284. *Id.*

285. *Id.* at 1408 & n.18.

286. Mich. v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2036 (2014) (quoting Vasquez v. Hillery, 474 U.S. 254, 265 (1986)).

287. Beck, *supra* note 280, at 1429–34. *See* Kirtsaeng v. John Wiley & Sons, Inc., 133 S. Ct. 1351, 1368 (2013) ("Is the Court having once written *dicta* calling a tomato a vegetable bound to deny that it is a fruit forever after?").

288. Cent. Va. Cmty. Coll. v. Katz, 546 U.S. 356, 363 (2006).

289. Beck, *supra* note 280, at 1434–39; Teague v. Lane, 489 U.S. 288, 332 (1989).

290. Beck, *supra* note 280, at 1439–47; *Teague*, 489 U.S. at 332; Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009) (factors relevant to *stare decisis* include "whether the decision was well reasoned").

291. Beck, *supra* note 68, at 56–60. It is in fact a common occurrence for the Supreme Court to rethink prior decisions; indeed, it often happens several times in a single term. *See*, *e.g.*, Congressional Research Service, *Supreme Court Decisions Overruled by Subsequent Decision*, *in* THE CONSTITUTION OF THE UNITED STATES OF AMERICA: ANALYSIS AND INTERPRETATION, at 2571–85 (2013), http://www.gpo.gov/fdsys/pkg/GPO-CONAN-2013/pdf/GPO-CONAN-2013.pdf (listing overruled Supreme Court cases up to 2010).

One could respond that, even if *Roe* and *Casey* did establish and reaffirm the viability line in *dicta*, the Court has applied the rule in other cases. There appear to have been five Supreme Court cases in which the viability line was potentially relevant to the issues before the Court: *Collauti*, *Danforth*, *Webster*, *Stenberg*, and *Gonzales*.[292] In none of those cases, however, did a majority revisit the question of how long the right to abortion lasts. Consequently, the application of the viability rule in a few of these decisions does not rectify the Court's failure to address the duration of abortion rights in a case where it matters, on the basis of plenary briefing and argument, resulting in a principled decision explaining the outcome. *Stare decisis* does not bind the Court to a rule when the propriety of that rule has never been "squarely addressed"[293] or when the rule has "taken the form of assertion unaccompanied by detailed justification."[294] For instance, the Court in *Copperweld Corp. v. Independence Tube Corp*. felt free to reconsider the intra-enterprise conspiracy doctrine recognized in prior cases that "never explored or analyzed in detail the justifications for such a rule."[295] By the same token, the Court has never "explored or analyzed in detail the justifications" for the viability rule, so *stare decisis* presents no bar to reconsidering the duration of abortion rights in a case involving a twenty-week abortion statute.

A number of additional factors the Court looks to in applying *stare decisis*, including several considered in *Casey*, point in favor of revisiting the viability rule.[296] Claims of *stare decisis* "are at their weakest" when the Court interprets the Constitution, since "mistakes cannot be corrected by Congress."[297] Relevant considerations include the workability of the prior decision and the reliance interests at stake.[298] Given the "uncertainty of the viability determination,"[299] fetal viability is significantly less workable than gestational age (e.g.,

292. *See supra* notes 148–64, 212–24, 245–61 and accompanying text.

293. Brecht v. Abrahamson, 507 U.S. 619, 631 (1993).

294. *Teague*, 489 U.S. at 332.

295. Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752, 766 (1984).

296. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 855 (1992).

297. Vieth v. Jubelirer, 541 U.S. 267, 305 (2004) (plurality opinion).

298. Montejo v. Louisiana, 556 U.S. 778, 792–93 (2009) ("Beyond workability, the relevant factors in deciding whether to adhere to the principle of *stare decisis* include the antiquity of the precedent, the reliance interests at stake, and of course whether the decision was well reasoned.").

299. Colautti v. Franklin, 439 U.S. 379, 395–96 (1979).

twenty weeks) as a line to regulate medical practice.[300] Moreover, while it is plausible that women have relied on a right to abortion in making decisions about relationships and careers, it is highly unlikely that any woman has made significant decisions based on whether a state can restrict abortion at twenty-two weeks LMP (under a "twenty-week" post-fertilization statute) or twenty-four weeks LMP (under the viability rule).[301]

Notwithstanding the doctrine of *stare decisis*, the Court may rethink "a decision whose 'underpinnings' have been 'eroded' by subsequent developments of constitutional law."[302] The *Casey* Court concluded that the doctrinal underpinnings of *Roe*'s right to abortion had not been weakened in subsequent decisions.[303] On the other hand, the viability rule seems to be significantly weaker today than when it was first announced. In early cases after *Roe*, the Court would not allow state regulations aimed at guiding an abortion provider's viability determinations[304] and struck down previability regulations designed to further a state interest in fetal life.[305] In *Webster*, however, the Court upheld a statute regulating the viability determination for a fetus at twenty-weeks' gestation, even though several Justices thought the statute inconsistent with the post-*Roe* case law.[306] In *Casey*, the Court considerably downgraded the significance of fetal viability, permitting regulations to protect fetal life from the outset of pregnancy so long as they did not create a substantial obstacle to a previability abortion.[307] In *Gonzales*, the Court upheld a ban on one method of previability abortion, notwithstanding the dissent's complaint that doing so "blur[red] the line" between previability and postviability abortions.[308] The Court's

300. Beck, *supra* note 68, at 57; *see Casey*, 505 U.S. at 855; *Montejo*, 556 U.S. at 792 ("[T]he fact that a decision has proved 'unworkable' is a traditional ground for overruling it.").

301. *See supra* notes 9 and accompanying text; Beck, *supra* note 68, at 58; *Casey*, 505 U.S. at 855–56.

302. Alleyne v. United States, 133 S. Ct. 2151, 2164 (2013) (quoting United States v. Gaudin, 515 U.S. 506, 521 (1995)).

303. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992).

304. Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 65 (1976); *Colautti*, 439 U.S. at 388–89.

305. Thornburgh v. Am. Coll. Of Obstetricians & Gynecologists, 476 U.S. 747, 759–64 (1986) (striking down informed consent rules); *Akron*, 462 U.S. at 442–51 (striking down informed consent rules and 24-hour waiting period requirement).

306. *See supra* notes 148–51 and accompanying text.

307. *See supra* note 166 and accompanying text; *Casey*, 505 U.S. at 870 (overruling parts of *Akron* and *Thornburgh*).

308. Gonzales v. Carhart, 550 U.S. 124, 171 (2007) (Ginsburg, J., dissenting).

reasoning in *Gonzales* substantially undercut the assumptions about fetal value necessary for the viability rule to make sense.[309] After *Gonzales*, if the Court seeks to justify the viability rule, it must explain "why the state may ascribe sufficient value to the previable fetus to protect it against death by one means, but may not value it sufficiently to protect it against death by other means."[310]

Casey's *stare decisis* analysis also considered whether time had altered any of the factual assumptions underlying the *Roe* opinion.[311] For purposes of evaluating whether the viability rule should be applied to a state or federal twenty-week abortion statute, relevant facts could include those concerning the strength of the state's interests and the burden of pregnancy on the mother, since those are the competing interests the viability rule purports to balance. I have argued above that the viability rule should be irrelevant when a state seeks to regulate late-term abortions to advance an interest in maternal health.[312] However, assuming the Court's precedents are read to apply the viability rule to maternal health regulations, it seems significant that we now have much better information concerning the health risks associated with late-term abortions.[313] The Bartlett study projecting a thirty-eight percent increase in abortion related mortality for each week of gestation after twenty-one weeks LMP was not released until 2004, over a decade after *Casey* and three decades after *Roe*.[314]

On the other side of the balance, there have been developments in the past four decades relevant to the burdens of pregnancy and childrearing. The *Roe* Court's consideration of maternal interests focused on, among other factors, the difficulties of bearing and raising a child or an additional child.[315] It is of course true that the burdens of carrying a child to term and raising that child are significant. But there have been legal and social changes since 1973 that may diminish some of those burdens. Every state has now reportedly adopted a "Safe Haven" law,[316] which typically permits a mother to "legally surrender an uninjured newborn at a designated safe haven site with

309. Beck, *supra* note 47, at 276–79.

310. *Id.* at 279.

311. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 860 (1992).

312. *See supra* notes 187–211 and accompanying text.

313. *See supra* notes 187–99 and accompanying text.

314. *See supra* notes 192–93 and accompanying text.

315. Roe v. Wade, 410 U.S. 113, 153 (1973).

316. Lynne Marie Kohm, *Roe's Effects on Family Law*, 71 WASH. & LEE L. REV. 1339, 1354–55 & n.58 (2014).

anonymity and immunity from prosecution."[317] Government benefits of various sorts are available for low-income women and their children.[318] State and federal governments have increased child support enforcement efforts.[319] None of this means that bearing or raising children has become easy. However, to the extent additional support and new options are available today that were unavailable in 1973, those changed facts could affect the Court's thinking about how to balance the woman's interest in terminating a pregnancy against the various state interests involved, including those relating to maternal health.

Conclusion

For over four decades, the Supreme Court has enforced a rule concerning the duration of abortion rights that has never been justified in constitutional terms. By the standards of *Casey*, in the absence of a principled justification, the viability rule is "no judicial act at all."[320] The Court would do well to take the opportunity afforded by the new wave of twenty-week abortion statutes to revisit the duration of abortion rights. Validating a twenty-week statute would further legitimate state interests and begin to address the most extreme element of the Court's abortion jurisprudence.

317. Diane S. Kaplan, *Who Are the Mothers Who Need Safe Haven Laws? An Empirical Investigation of Mothers Who Kill, Abandon or Safely Surrender Their Newborns*, 29 WIS. J.L. GENDER & SOC'Y 213, 222 (2014).

318. *See*, *e.g.*, *Women, Infants and Children*, UNITED STATES DEPARTMENT OF AGRICULTURE (Feb. 27, 2015), http://www.fns.usda.gov/wic/about-wic-wic-glance; *The Children's Health Insurance Program (CHIP)*, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, https://www.healthcare.gov/medicaid-chip/childrens-health-insurance-program/; *Pregnant Women*, UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, http://www.medicaid.gov/medicaid-chip-program-information/by-population/pregnant-women/pregnant-women.html.

319. Angela Cai, *Insuring Children Against Parental Incarceration Risk*, 26 YALE J.L. & FEMINISM 91, 96 n.24 (2014).

320. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 865 (1992).