THE ESSENTIAL HOLDING OF *CASEY*: RETHINKING VIABILITY

Randy Beck*

> *"[L]egislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw."*
>
> *-Opinion of Justices O'Connor, Kennedy & Souter (1992)* [1]

> *"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."*
>
> *-Justice Blackmun, Internal Supreme Court Memo (1972)*[2]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, a three-Justice plurality of the Supreme Court sought to achieve a lasting resolution of the abortion controversy.[3] Justices O'Connor, Kennedy and Souter authored a joint opinion that recognized a broader scope for state regulatory authority, while reaffirming a right to abortion in the "early stages" of pregnancy.[4] As the Court's next significant abortion decision demonstrated, however, the three Justices who formed the *Casey* plurality had not successfully resolved the abortion issue even among themselves. In *Stenberg v. Carhart*, the proper interpretation of *Casey* became a matter of controversy, leading Justice Kennedy to dissent, while Justices O'Connor and Souter joined in striking down Nebraska's ban on partial-birth abortions.[5]

---

* Associate Professor, University of Georgia School of Law.

[1] *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 870 (1992) (plurality opinion).

[2] Cover Memorandum Accompanying Draft of *Roe v. Wade*, *quoted in* DAVID GARROW, LIBERTY AND SEXUALITY 580 (2005).

[3] 505 U.S. 833 (1992).

[4] *Id*. at 844, 871-79.

[5] 530 U.S. 914 (2000); *compare id*. at 920-46 (opinion of the Court, joined by Justices O'Connor and Souter), *and id*. at 947-51 (O'Connor, J., concurring), *with id*. at 956-79 (Kennedy, J., dissenting).

Perhaps it is not surprising that the plurality opinion in *Casey*, which has been understood to express the holding of the case,[6] would be interpreted in different ways by its joint authors. It is common for people to agree on language with legal significance, but to later disagree over its application in particular circumstances. Parties to a contract litigate its interpretation. Legislators who vote for the same statute dispute its implications. James Madison and Alexander Hamilton both participated in the Constitutional Convention and collaborated in writing the *Federalist Papers*, but afterwards became leaders of competing schools of constitutional interpretation.[7] The authors of the joint opinion in *Casey* join a long tradition of reaching consensus on a legal formula while understanding the formula in different ways.

This paper proposes a reading of the plurality opinion in *Casey*. The suggested interpretation turns on a recognition that the core holding of *Casey* was its reaffirmation of a right to an abortion early in pregnancy.[8] Statements in *Casey* indicating that the abortion right extends to the point of fetal viability were dicta, irrelevant to the Court's resolution of the issues presented.[9] This article contends that the Court's identification of viability as the earliest point at which states can proscribe abortion has never been adequately justified, is not supported by *Casey*'s *stare decisis* analysis, and interferes with the pursuit of legitimate state interests.

In the interest of full disclosure, let me confess that I have not been a fan of the Supreme Court's abortion jurisprudence. On both constitutional and moral grounds, my preference would be for the Court to return the abortion issue to the political process, where it can be resolved based on the convictions of the American people. But this article is written for those who do not agree with me on that point. It addresses those who believe the Constitution should be interpreted to safeguard a right to an abortion, but

---

[6] *See id*. at 921 (drawing applicable legal principles from the *Casey* joint opinion); *id*, at 947 (O'Connor, J., concurring) (treating the *Casey* plurality opinion as providing the controlling legal standards); *id*. at 960-61 (Kennedy, J., dissenting) (drawing from the plurality in describing what *Casey* "held").

[7] J. Randy Beck, *The New Jurisprudence of the Necessary and Proper Clause*, 2002 ILL. L. REV. 581, 586-98 (2002).

[8] *Casey*, 505 U.S. at 844 (describing *Roe* as "holding that the Constitution protects a woman's right to terminate her pregnancy in its early stages"); *id*. at 850 (recognizing disagreement over moral implications of terminating pregnancy "even in its earliest stage"); *id*. at 923 (Blackmun, J., concurring) ("In brief, five Members of this Court today recognize that 'the Constitution protects a woman's right to terminate her pregnancy in its early stages.'").

[9] *See id*. at 860, 870-71, 878-79.

who are open to the possibility that the Court has been overzealous in protecting abortion rights, particularly in cases like *Stenberg*.

Section I of the article will discuss the joint opinion in *Casey*, contending that the plurality's statements of adherence to the viability standard constituted non-binding dicta, unnecessary to a decision on the questions raised.[10] The regulations at issue in *Casey* applied to all abortions, without regard to the stage of pregnancy. Section II contends that *Casey*'s *stare decisis* analysis does not support retention of the viability rule.[11] Assuming that some women have relied on the availability of abortion in organizing their personal and professional lives, as the *Casey* plurality believed, that reliance cannot reasonably encompass the viability line. The sorts of career and family planning decisions the *Casey* joint opinion emphasized do not depend on a right to abortion that continues well over halfway through pregnancy.

Together, sections I and II of the article suggest that the Court should feel free to rethink the significance of fetal viability, even if it chooses to retain *Casey*'s "undue burden" formulation. Excising the dicta about viability, one can understand *Casey* to protect a right to terminate a pregnancy in the "early stages."[12] Fetal viability need play no role in such an analysis.

The sections that follow make a case for rejecting viability as a legally significant line. Section III of the article contends that the Court has never adequately justified extension of abortion rights to the point of fetal viability, a remarkably late stage in pregnancy when compared to abortion laws in other countries.[13] As Professor John Hart Ely noted in discussing *Roe v. Wade*'s[14] initial adoption of the viability standard: "Exactly why that is the magic moment is not made clear. . . . [T]he Court's defense seems to mistake a definition for a syllogism."[15] The theoretical ability of the fetus to live outside the mother's womb turns on factors irrelevant to the strength of the state's interest in preserving life. Moreover, the viability standard rests the constitutional status of the fetus on characteristics that vary with race and gender. While the Court sometimes employs rules that produce unintentional racial and gender disparities, there seems no reason to constitutionalize such disparate impacts in the absence of a principled justification.

---

[10] *See infra* notes 17-41 and accompanying text.

[11] *See infra* notes 42-52 and accompanying text.

[12] *See supra* note 8.

[13] *See infra* notes 53-118 and accompanying text.

[14] 410 U.S. 113 (1973).

[15] John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L. J. 920, 924 (1973).

The Court's inability to offer a reasoned defense of the viability standard, the moral and constitutional irrelevance of the characteristics it measures and the disparate racial and gender impacts that result provide reason enough for abandoning the viability rule. Section IV offers an additional ground for eliminating the viability standard from the Court's abortion jurisprudence or limiting its application. Specifically, the viability rule interferes with the pursuit of the legitimate state interests supporting regulation of late-term methods of abortion that even the Justices most supportive of abortion rights describe as "gruesome."[16]

I. The *Casey* Joint Opinion and Its Dicta on Viability

Many observers expected the Supreme Court's decision in *Casey* to significantly erode or even end the regime of constitutional abortion rights first recognized in *Roe v. Wade*.[17] At the time *Casey* was decided, at least five of the Justices had authored or joined opinions criticizing the Court's abortion jurisprudence.[18] Justice Clarence Thomas, the Court's newest member, was not expected to be a strong supporter of abortion rights.[19] It came as somewhat of a surprise, therefore, when two Justices previously

---

[16] *See infra* notes 119-43 and accompanying text.

[17] *See*, *e.g.*, Joseph Kobylka, *Will Court Play Politics With Next Abortion Decision?*, DALLAS MORNING NEWS, at 25A, 1992 WLNR 4785871 (May 28, 1992) ("Among legal scholars and other 'court watchers,' the consensus has emerged that the court will uphold the state's regulations, but not formally overturn the Roe decision. The death of Roe, they say, will occur sometime next year in a case from Guam or Louisiana."); Mary Deibel, *Legislatures to Become Front in Abortion War*, CINCINNATI POST, at 4K, 1992 WLNR 581543 (May 21, 1992) ("[T]he nine justices are expected to announce this summer their decision in a Pennsylvania case that could further erode the right to abortion. The court might not use this case to allow states to ban abortion, but more challenges are on the way."); Nat Hentoff, *Pro-Choicers Pin Hopes on Clinton*, ROCKY MTN. NEWS 89, 1992 WLNR 454804 (May 14, 1992) ("It is very likely that in the Pennsylvania case - which will be decided in late June or early July - a majority of the court will make clear that there is a new standard for judging the right to an abortion. The fundamental constitutional right of privacy will be gone. Instead, there will be a lesser standard. What the court calls the "rational basis" standard.").

[18] *See Webster v. Reproductive Health Services*, 492 U.S. 490, 513-521 (1989) (Rehnquist, C.J., joined by White and Kennedy, JJ.); *id*. at 532-37 (Scalia, J., concurring); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 786-97 (1986) (White, J., joined by Rehnquist, J., dissenting); *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453-59 (1983) (O'Connor, J., joined by White and Rehnquist, JJ., dissenting).

[19] Justice Souter had also joined the Court since the Court's *Webster* decision, and his views on a constitutional right to abortion were as yet unknown. *See* Bruce Fein, *Onset of the Crumbling?*, WASHINGTON TIMES, at F1, 1991 WLNR 140397 (Oct. 29, 1991) ("Justices David Souter and Clarence Thomas are officially agnostics on Roe, but their philosophical instincts and the conservative intellectual gravity of the court's committed anti-Roe quartet make them likely coadjutors in a Roe overruling.").

skeptical of *Roe* helped author the plurality opinion that reaffirmed "the essential holding" of that case on *stare decisis* grounds.[20]

While reaffirming what the plurality saw as the core of *Roe*, the joint opinion in *Casey* altered the Court's approach to abortion rights in various respects. The plurality explicitly abandoned *Roe*'s "trimester framework," described as "a rigid prohibition on all previability regulation aimed at the protection of fetal life."[21] On the contrary, the joint opinion recognized "a substantial state interest in potential life throughout pregnancy."[22] From the outset of the pregnancy, states could "take measures to ensure that the woman's choice is informed," so long as those measures were designed to "persuade the woman to choose childbirth over abortion," and did not represent an "undue burden on the right."[23] One aspect of *Roe* that the *Casey* plurality purported to retain, however, was the Court's identification of viability as the earliest point at which abortion could be proscribed: "We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy."[24]

The *Casey* plurality reviewed a number of provisions of Pennsylvania law, striking down one and upholding the rest. The joint opinion rejected challenges directed at Pennsylvania's definition of medical emergencies justifying an immediate abortion,[25] its informed consent and waiting period provisions requiring the abortionist to furnish certain information to the woman at least 24 hours before the abortion,[26] its parental consent provision,[27] and its recordkeeping and reporting requirements.[28] At the same time, the Court invalidated a provision requiring a married woman to notify her husband in most circumstances before obtaining an abortion, concluding that the provision created an undue burden for women with abusive husbands.[29]

---

[20] *Casey*, 505 U.S. at 845-46.

[21] *Id*. at 873. The trimester framework did not constitute "part of the essential holding of *Roe*." *Id*.

[22] *Id*. at 876.

[23] *Id*. at 878.

[24] *Id*. at 870.

[25] *Id*. at 879-80.

[26] *Id*. at 881-87.

[27] *Id*. at 899-900.

[28] *Id*. at 900-01.

[29] *Id*. at 887-98.

Reflection on the Pennsylvania regulations challenged in *Casey* leads to the conclusion that the plurality's statements concerning viability were dicta, irrelevant to the issues the Court was called upon to decide. Comments in an opinion constitute dicta if they are "not essential to [the Court's] disposition of any of the issues contested" in the case.[30] The provisions of Pennsylvania law at issue in *Casey* applied throughout pregnancy, governing abortions even in the very earliest stages. Consequently, nothing in the case required the Court to determine how late in pregnancy the right to an abortion continued. Recognition of any right to abortion, no matter how long it persisted, would trigger the same scrutiny of the Pennsylvania statutory provisions. The question of viability *vel non* did not alter the Court's analysis of the provisions that were upheld, nor of the provision struck down.[31]

"Dictum settles nothing, even in the court that utters it."[32] Language that constitutes dicta is not binding in subsequent litigation.[33] Though an earlier Court's dicta "may be followed if sufficiently persuasive," they "are not controlling."[34] Thus, where the Court articulates a test of constitutionality, one element of which constitutes dicta, it may nevertheless "correct course" in a subsequent case involving application of the test.[35]

---

[30] *Central Green Co. v. United States*, 531 U.S. 425, 431 (2001).

[31] In my view, one may reasonably argue that the viability line constituted dicta even in its original context in *Roe v. Wade*, since it was unnecessary to the Court's invalidation of the Texas abortion statute. *See* Webster v. Reproductive Health Services, 492 U.S. 490, 521 (1989) (plurality) ("In *Roe* . . . the Texas statute criminalized the performance of *all* abortions, except when the mother's life was at stake. . . . This case therefore affords us no occasion to revisit the holding of *Roe*, which was that the Texas statute unconstitutionally infringed the right to an abortion derived from the Due Process Clause . . . and we leave it undisturbed. To the extent indicated in our opinion, we would modify and narrow *Roe* and succeeding cases."); Michael Dorf, *Dicta and Article III*, 142 U. PA. L. REV. 1997, 2007-09 (1994) (explaining the *Webster* plurality's analysis of the holding in *Roe*); *but see id*. at 2030-2040 (discussing *Roe* in concluding that the holding of a case includes the rationale for the decision, not just the facts and outcome); Michael Abramowicz & Maxwell Stearns, *Defining Dicta*, 57 STAN. L. REV. 953, 1078-84 (2005) (arguing that *Roe*'s discussion of permissible abortion regulations in the first two trimesters should be deemed holding).

[32] *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 351 n.12 (2005).

[33] *Glus v. Brooklyn Eastern Dist. Terminal*, 359 U.S. 231, 235 (1959) ("But that language is in dicta and is neither binding nor persuasive."); *see also Hudson v. Michigan*, 126 S. Ct. 2159, 2163-64 (2006) (Court "had long since rejected" approach to exclusionary rule suggested by "[e]xpansive dicta" in earlier opinion); *Hiibel v. Sixth Judicial Dist. Court of Nevada, Humboldt*, 542 U.S. 177, 186-87 (2004) (prior dicta did not resolve question whether state could compel suspect to disclose name during *Terry* stop).

[34] *Humphrey's Executor v. United States*, 295 U.S. 602, 627 (1935).

[35] *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546, 548 (2005).

In *Cohens v. Virginia*, Chief Justice Marshall offered a now-classic rationale for denying controlling weight to dicta in a prior case:

> The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.[36]

In other words, the distinction between holding and dicta recognizes the limits of judicial foresight. Judges tend to be bright people, but their decisions inevitably produce consequences in subsequent cases that they did not fully anticipate. This is true in part because parties have little incentive to brief issues tangential to the case under consideration. Judicial statements regarding issues actually raised in litigation, by contrast, are more reliable because they are more likely to be informed by extensive adversarial briefing.[37]

These considerations support treating *Casey*'s discussion of viability as dicta. It seems doubtful that the Justices in the *Casey* plurality were fully cognizant of future cases like *Stenberg* when they drafted the joint opinion. Moreover, since viability was not relevant to the constitutionality of the challenged Pennsylvania regulations, potential justifications for the viability rule played no more than a *de minimis* role in the parties' briefs.[38] This may explain why, as we will see below, *Casey*'s joint opinion offered no substantive rationale for adhering to viability as the point at which states may proscribe abortions.[39] Nor, apart from a single footnote dropped

---

[36] *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821). *See* Dorf, *supra* note 30, at 2000 ("Chief Justice Marshall provides an instrumental justification for the maxim that dicta need not be followed. Dicta are less carefully considered than holding, and, therefore, less likely to be accurate statements of law."); Abramowicz & Stearns, *supra* note 30, at 1022-23 ("The holding-dicta distinction, properly conceived, helps to enforce an appropriate level of consideration, one that delves into reconciling the immediate case with the larger body of precedent, but that does not necessarily look for, or attempt to resolve, fissures within larger bodies of case law, at least at one time. Judicial minimalism leaves important issues open for resolution after further democratic deliberation.").

[37] *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 572 (1993) (Souter, J., concurring in part and concurring in the judgment) ("Sound judicial decisionmaking requires 'both a vigorous prosecution and a vigorous defense' of the issues in dispute, . . . and a constitutional rule announced *sua sponte* is entitled to less deference than one addressed on full briefing and argument.") (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 419 (1978)); Dorf, *supra* note 30, at 2002.

[38] *See* Brief for Petitioners and Cross-Respondents, at 28, 1992 WL 12006398 (Mar. 6, 1992); Brief for Respondents 1992 WL 551421, at 111-12 (Mar. 6, 1992); Brief for the United States as Amicus Curiae Supporting Respondents, at 16-17, 1992 WL 12006421 (Apr. 6, 1992).

[39] *See infra* notes 66-69 and 114 and accompanying text.

by Justice Scalia, did the dissenters engage the plurality on this aspect of the joint opinion.[40] The *Casey* plurality's purported reaffirmation of the viability line presents an appropriate instance for the principle that the Court is "not bound to follow . . . dicta in a prior case in which the point . . . at issue was not fully debated."[41]

II. *Casey*'s *Stare Decisis* Analysis and the Viability Rule

The *Casey* joint opinion premised its partial reaffirmation of *Roe* on the principle of *stare decisis*.[42] In the course of its *stare decisis* analysis, the Court focused on two harms it believed would flow from overruling *Roe*. First, the plurality thought that many women had come to rely on a right to abortion as the basis for significant personal decisions, and that these reliance interests would be undermined by abandonment of the Court's abortion jurisprudence.[43] Second, the authors of the joint opinion feared that the Court's legitimacy in the eyes of the public would be adversely affected if it overruled *Roe* in the face of persistent opposition.[44] Both points were strongly contested in the dissenting opinions.[45] For present purposes, however, it is enough to show that neither argument supports continued adherence to the viability line.

The *Casey* plurality discussed the reliance engendered by *Roe* in the following passage:

---

[40] Justice Scalia's principal point was that adherence to the viability standard was inconsistent with Justice O'Connor's previous critique of that standard as "arbitrary." *See Casey*, 505 U.S. at 989 (Scalia, J., concurring in part and dissenting in part) (citing *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461 (1983) (O'Connor, J., dissenting)). In a footnote, Justice Scalia commented as follows:

> Of course, Justice O'Connor was correct in her former view. The arbitrariness of the viability line is confirmed by the Court's inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child's life "can in reason and all fairness" be thought to override the interests of the mother. Precisely why is it that, at the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother, the creature is suddenly able (under our Constitution) to be protected by law, whereas before that magical second it was not? That make no more sense than according infants legal protection only after the point when they can feed themselves.

Id. at 989 n.5.

[41] *See Central Virginia Community College v. Katz*, 126 S. Ct. 990, 996 (2006).

[42] *Casey*, 505 U.S. at 854-69.

[43] *Id*. at 855-56.

[44] *Id*. at 861-69.

[45] *Casey*, 505 U.S. at 956-64 (Rehnquist, C.J., concurring in part and dissenting in part); *id*. at 996-1001 (Scalia, J., concurring in the judgment in part and dissenting in part).

> [F]or two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.[46]

Assuming the validity of the plurality's analysis here, the argument does not support retention of viability as the terminal point for a constitutional right to abortion. While some women may make career and relationship decisions on the assumption that they can obtain an abortion, it would be difficult to make the case that women have "relied reasonably on the . . . continued application" of the viability rule.[47] It is implausible that such personal and professional decisions rest on the assumption that the opportunity to obtain an abortion will remain available for more than five months after pregnancy begins. Whatever reasonable reliance interests exist in this context can be fully vindicated through an abortion right that ends well before the point of viability. The ability of women to "control their reproductive lives" can co-exist comfortably with a state's insistence that the woman exercise that control early in the process of gestation, long before fetal viability.

As to the question of legitimacy, the joint opinion in *Casey* suggests that this concern would be implicated only if the Court overruled *Roe* outright, not if it merely adjusted the subsidiary rules through which the abortion right has been administered.[48] The plurality itself rejected *Roe*'s trimester framework, adopting instead an undue burden test, and overruled two post-*Roe* decisions that had placed excessive impediments in the way of legitimate state regulations, all without any apparent concern for institutional legitimacy.[49] Taken as a whole, then, the joint opinion shows

---

[46] 505 U.S. at 856.

[47] *Id*. at 855.

[48] This has never seemed to me a strong argument in favor of the plurality's *stare decisis* analysis. While there were no doubt segments of the public who saw the Court as more legitimate because it resisted the pressure to overrule *Roe*, I suspect there were groups of equal size whose respect for the Court diminished because of its unwillingness to reconsider a decision so difficult to justify in terms of constitutional text, history and tradition. Stubbornly clinging to a bad precedent can adversely impact the Court's perceived legitimacy as much as overruling under political pressure. *Cf. Casey*, 505 U.S. at 963-64 (Rehnquist, C.J., concurring in part and dissenting in part); *id*. at 999 (Scalia, J., concurring in the judgment in part and dissenting in part).

[49] *Id*. at 872-79 (rejecting trimester framework and explaining undue burden test); *id*. at 882 (partially overruling *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S.

that the plurality's concern for the Court's perceived legitimacy does not play a decisive role in *stare decisis* analysis so long as the Court leaves in place a basic right to abortion derived from *Roe*.[50]

Section I argued that *Casey*'s discussion of viability constituted dicta on an issue that was not raised in the case and had not been the subject of plenary briefing.[51] This section contends that reconsideration of the constitutional significance of fetal viability would comport with the *Casey* plurality's *stare decisis* analysis. Rethinking the viability line would be analogous to reexamining the trimester framework, which once included viability as a constituent part.[52] The Court should therefore feel free to revisit the viability standard in an appropriate case. The next section will argue that the Court has never offered an adequate explanation for the viability rule first adopted in *Roe*.

III. The Persistent Failure to Justify the Viability Rule

Recent decisions of the Supreme Court have generated much discussion of whether a judge may appropriately take foreign law into account in resolving questions under the United States Constitution.[53] In *Roper v.*

---

416 (1983) and *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747 (1986)).

[50] In any event, there seem to me reasons to question the premise that *stare decisis* rules apply the same here as in other contexts. Such a position ignores the weightiness of the interests at stake in the abortion controversy. If anything, perhaps the Court should be less wedded to its prior precedents when human lives may be on the line. In the context of capital punishment, the Court has sometimes said that "death is different," suggesting that courts should take greater care to ensure the legality of their judgments and the fairness of their procedures when human lives are at issue. *See Ring v. Arizona*, 536 U.S. 584, 605-06 (2002); *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). With respect to its abortion jurisprudence, the Court has professed agnosticism in the face of claims that the unborn fetus is a human life prior to the point of viability. *Roe*, 410 U.S. at 159. Consequently, *Roe* and its progeny have erected a set of constitutional rules authorizing the death of beings that, for all the Court knows, may have a moral entitlement to continue living as great as that of any adult human being. Given that adherence to the viability rule may result in the unjustified deaths of thousands of human persons annually, it would seem reasonable for the Court to show greater willingness to reexamine the premises underlying its constitutional analysis in this context than when it is asked to revisit some decision affecting less significant interests.

[51] *See supra* notes 17-41 and accompanying text.

[52] *See Casey*, 505 U.S. at 872 (under *Roe*'s trimester framework, "during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake").

[53] *See*, *e.g.*, Diane Marie Amann, *International Law and Rehnquist-Era Reversals*, 94 GEO. L.J. 1319 (2006); Michael D. Ramsey, *International Materials and Domestic Rights: Reflections on* Atkins *and* Lawrence, 98 AM. J. INT'L L. 69 (2004); Daniel Bodansky, *The Use of International Sources in Constitutional Opinion*, 32 GA. J. INT'L & COMP. L. 421 (2004).

Simmons, for instance, in concluding that the death penalty may not be applied to a person below the age of 18 at the time of the murder, the Court observed that only a small number of countries permit capital sentences in those circumstances.[54] In his *Roper* dissent, Justice Scalia accused the Court of being selective in its invocation of foreign law, pointing to the Court's abortion jurisprudence as an example. The United States, he argued, is "one of only six countries that allow abortion on demand until the point of viability."[55] An article cited by Justice Scalia provides additional data on abortion laws worldwide:

> The vast majority of the world's countries (187 of 195) forbid abortion after 12 weeks gestation, and require, at a minimum, that the pregnant woman make some showing of "good reason" to terminate a pregnancy (141 of 195). Indeed, half the countries of the world (98 of 195) either forbid abortion altogether or allow abortions only to save the woman's life or physical health, or in cases of rape or incest. World opinion on abortion thus appears much more restrictive of abortion rights than domestic constitutional law.[56]

Professor Mary Ann Glendon notes that "no Continental [European] country permits abortion on demand as far into pregnancy as does the United States."[57]

---

[54] 543 U.S. 551, 575-79 (2005); *see also Lawrence v. Texas*, 539 U.S. 558, 572-73 (2003) (discussing European precedent in concluding United States Constitution prohibits criminalization of consensual homosexual conduct); *Atkins v. Virginia*, 536 U.S. 304, 316 n.21 (2002) ("within the world community, the imposition of the death penalty for crimes committed by mentally retarded offenders is overwhelmingly disapproved").

[55] *Roper v. Simmons*, 543 U.S. 551, 625 (2005) (Scalia, J., dissenting). Justice Scalia has repeatedly criticized the practice of relying on foreign precedent in resolving constitutional issues. *See The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT'L J. CONST. L. 519, 521-22 (2005).

[56] Joan L. Larson, *Importing Constitutional Norms from a 'Wider Civilization':* Lawrence *and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1320 (2004).

[57] Mary Ann Glendon, *A Beau Mentir Qui Vient de Loin: The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U.L. REV. 569, 582 (1989) ("[N]o Continental [European] country has a total ban on abortion; but no Continental country permits abortion on demand as far into pregnancy as does the United States."); *see also* Mary Ann Glendon, *Foundations of Human Rights: The Unfinished Business*, 44 AM. J. JURIS. 1, 10 (1999) ("few countries, if any, go as far as the United States and China in permitting abortions of healthy, viable unborn children"); Kenneth Anderson, *Squaring the Circle? Reconciling Sovereignty and Global Governance Through Global Government Networks*, 118 HARV. L. REV. 1255, 1287 n.51 (2005) ("[W]hen measured against secular Western European legal norms—let alone those of the rest of the world, including the Muslim and Latin American worlds—the standard of *Roe v. Wade* is just as

In highlighting these differences between U.S. abortion law and that of other countries, I do not intend to weigh in on the debate about the Court's reliance on foreign law. Rather, I do so simply as a way of framing the question addressed in this section of the article: What is the justification for rejecting any significant regulatory constraint on taking the life of a fetus prior to the point that the fetus could survive outside the womb? If other nations generally conclude that abortion rights should not extend so far into pregnancy, what explains the Supreme Court's insistence on such a permissive line?

A. The Court's "Explanations" of the Viability Line

A draft of the opinion in *Roe*, circulated by Justice Blackmun following reargument of the case in 1972, would have protected abortion on demand only until the end of the first trimester, permitting states to require a therapeutic justification for any abortion thereafter.[58] In a memorandum accompanying that draft, Justice Blackmun made the observations quoted at the outset of this article. He noted that selection of the end of the first trimester as the legally relevant point "is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary."[59] Following further internal deliberations, the majority switched to viability as the point at which states could regulate to protect the life of the fetus, adopting a position previously suggested by then-District Court Judge Jon O. Newman.[60]

The *Roe* opinion discussed the significance of viability in the following passage:

---

much an 'outlier'; Western Europe, while permitting abortion, has imposed many intermediate requirements that have been struck down in the United States.") (citing MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES 15-24 (1987)).

[58] GARROW, *supra* note 1, at 580-81 ("During the first three months, Blackmun's opinion held, a state 'must do no more than to leave the abortion decision to the best medical judgment of the pregnant woman's attending physician.' However, 'For the stage subsequent to the first trimester, the State may, if it chooses, determine a point beyond which it restricts legal abortions to stated reasonable therapeutic categores that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the stated classifications.'"); *see also* David Garrow, Roe v. Wade *Revisited*, 9 GREEN BAG 71, 79 (2005) (reviewing JACK M. BALKIN, ED., ET AL, WHAT *ROE V. WADE* SHOULD HAVE SAID (2005)).

[59] Cover Memorandum Accompanying Draft of *Roe v. Wade*, *quoted in* DAVID GARROW, LIBERTY AND SEXUALITY 580 (2005).

[60] *See Abele v. Markle*, 351 F. Supp. 224, 232 (D. Conn. 1972); GARROW, *supra* note 1, at 580-86.

> 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.[61]

It was this discussion that gave rise to Professor Ely's comment that the Court "seems to mistake a definition for a syllogism."[62] While the word "because" leads the reader to expect a rationale for selecting viability as the controlling line, the remainder of the sentence disappoints that expectation, simply rephrasing the Court's earlier explanation of what viability means.[63] The Court alludes to "logical and biological justifications" in the sentence that follows, but these are nowhere spelled out in the opinion.

A standard critique of the viability rule has been that it attributes constitutional significance to a line that can change over time, depending on the current state of medical technology.[64] Others, however, have offered a more profound critique. While the Court has treated viability as a tipping point, at which the state interest in protecting fetal life becomes sufficiently compelling to outweigh the mother's interest in ending the pregnancy, there is no obvious sense in which the fact of fetal viability

---

[61] *Roe v. Wade*, 410 U.S. 113, 163 (1973). The opinion subjected postviability abortion restrictions to a substantial qualification: "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*." *Id*. (emphasis added). In *Doe v. Bolton*, 410 U.S. 179 (1973), the companion case to *Roe*, the Court treated the idea of maternal "health" expansively, noting that "the medical judgment may be exercised in light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health" *Id*. at 192. This broad understanding of the factors an abortion provider can take into consideration in concluding that a third-trimester abortion will benefit the mother's "health" has led some to conclude that the Court's exception effectively swallows the rule allowing states to ban abortions after viability. *See* RAMESH PONNURU, PARTY OF DEATH 9-10 (2006).

[62] John Hart Ely, *The Wages of Crying Wolf*, 82 YALE L. J. 920, 924 (1973).

[63] *Compare Roe*, 410 U.S. at 160 ("Physicians and their scientific colleagues have regarded [quickening] with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid. Viability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks.").

[64] *See City of Akron*, 462 U.S. at 456 (O'Connor, J., dissenting) ("Just as improvements in medical technology inevitably will move *forward* the point at which the State may regulate for reasons of maternal health, different technological improvements will move *backward* the point of viability at which the State may proscribe abortions except when necessary to preserve the life and health of the mother.").

causes the state's interest in the life of the unborn to weigh more than it did before.[65]

The *Casey* plurality had an opportunity to supply *Roe*'s omitted justification for the viability standard, but the joint opinion did not rise to the challenge. The plurality offered two reasons for retaining the viability rule. The first was the principle of *stare decisis*. The plurality noted that "[a]ny judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care."[66] This description of *Roe* completely overlooked Professor Ely's still unanswered critique. Whatever the merits of *Roe* in other respects, its adoption of viability as the controlling line *was not* "a reasoned statement, elaborated with great care."

The second rationale offered by the *Casey* joint opinion effectively compounded the problem, succumbing to the same definition/syllogism confusion that afflicted the opinion in *Roe*:

> [T]he 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.[67]

While acknowledging the Court's obligation to justify the viability line, the plurality failed to do so. References to "reason" and "fairness" are just rhetorical flourishes in the absence of a principled explanation of why the "possibility of maintaining and nourishing a life outside the womb" changes the strength of the state interest in a way that causes it to outweigh the interest of the mother. The conclusion that no other line "is more workable" does nothing to show that the viability line satisfies the call for principled justification.

---

[65] *See Thornburgh*, 476 U.S. at 795 (White, J., dissenting); Mark J. Beutler, Comment, *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, 360 (1991) ("The point of viability says much about medical technology, little about fetuses, and has no apparent logical connection to the two interests which compete in the abortion equation—the woman's autonomy interest and the intrinsic worth of the fetus.").

[66] *Casey*, 505 U.S. at 870.

[67] *Id*. (citation omitted).

The real problem, in my view, is that Justice Blackmun was correct in his initial assessment, when he candidly conceded the possibility that it would be "equally arbitrary" to terminate the abortion right at the end of the first trimester or at viability.[68] Justice White challenged the justification for the viability standard in a subsequent dissent, arguing that "the Court's choice of viability as the point at which the State's interest becomes compelling is entirely arbitrary."[69] The subsections that follow consider and reject three possible explanations for the viability standard, drawn from *Roe*, *Casey* and Judge Newman's opinion first suggesting the viability standard. The inadequacy of these three rationales shows that the Supreme Court has failed to offer a principled defense of viability as the controlling line.

B. Dependent Beings as Unworthy of Protection

The point of viability marks a theoretical transition from dependence to autonomy.[70] Before viability, the fetus cannot survive without the support of the mother. After viability, the fetus potentially can survive apart from the mother, at least with appropriate technological assistance. Thus, after viability, the fetus can be described as possessing a form of autonomy or independence it did not possess beforehand.[71] So long as the fetus remains in the mother's womb, of course, this autonomy is hypothetical, rather than actual.[72] The conclusion that a fetus is viable is not a description of an existing state of affairs, so much as a medical prediction of what might happen in circumstances that do not then exist.[73]

The *Roe* Court concluded that the form of theoretical autonomy denoted by the term "viability" plays a decisive role in transforming the character of a state's interest in preserving the life of the unborn. At this point, *Roe* indicated, the state's interest in what the Court called "potential life"

---

[68] *See supra* text accompanying note 59.

[69] *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting).

[70] Donald Hope, *The Hand as Emblem of Human Identity: A Solution to the Abortion Controversy Based on Science and Reason*, 32 U. TOL. L. REV. 205, 212 (2001) ("[A]s long as the fetus is dependent and vulnerable, it can be destroyed and only earns the right to legal protection when it passes the point of a hypothetical independence.").

[71] *Casey*, 505 U.S. at 870 (viability "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 receive state protection) (emphasis added).

[72] Hope, *supra* note 70, at 208 ("The viability standard stands for the curious notion that all those who need the life support of gestation may be terminated at will, while for those who can survive without gestation, gestation can be mandated.").

[73] *Id*. at 211 ("Viability is a prediction about survivability, based on assessment of fetal lung maturity. As such, it must be estimated from other developmental features and is not directly observable.").

suddenly becomes strong enough to count as "compelling."[74] The implication is that some significant change occurs in the fetus at the time when *ex utero* survival becomes possible, a change that suddenly shifts the balance in the state's favor.

In a dissenting opinion authored thirteen years after *Roe*, Justice White questioned the justification for the viability standard, offering a critique that the Court has not successfully answered to this day. Justice White began with facts about fetal development that cannot reasonably be denied: "the fetus is an entity that bears in its cells all the genetic information that characterizes a member of the species *homo sapiens* and distinguishes an individual member of that species from all others."[75] He could see no morally or constitutionally significant change in the fetus at viability that would affect the strength of the relevant state interest:

> 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 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.[76]

To answer Justice White's argument and satisfy its obligation of reasoned decisionmaking, the Court must show that the conditions leading to a finding of viability bear in some significant respect, legally or morally, on the strength of the state's interest in unborn life.

The Court could try to meet Justice White's challenge by reference to some legal or philosophical understanding of personhood. One might argue that the theoretical autonomy associated with viability serves as a trigger point—a sort of moral on-off switch—changing what was

---

[74] *Roe*, 410 U.S. at 163. The phrase "potential life" is a euphemism. No one really denies that the unborn human is alive as a biological matter before an abortion. *See* PONNURU, *supra* note 61, at 78 (an embryo "is alive rather than dead or inanimate. It is human rather than a member of some other species."). The question is the strength of the state's interest in preserving the actual life of the fetus, not its "potential" life.

[75] *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).

[76] *Id*. at 795.

previously just a developing mass of cells into a "person" or "human life" entitled to government protection. Professor Michael Anthony Lewis appears to embrace such an argument in an article discussing "freedom of autonomy," a concept he deems morally fundamental: "For freedom of autonomy purposes the fetus is a person at the point of viability, and the state is justified in prohibiting abortion to protect that person's right to be left alone to live, subject to the usual exceptions for mother's health and other extenuating circumstances."[77]

A claim of this sort about viability, however, seems impossible to reconcile with an earlier portion of the *Roe* opinion. The Court denied that judges have the capacity to determine the point at which "life" begins from a moral standpoint:

> Texas urges that, apart from the Fourteenth Amendment, life begins at conception and is present throughout pregnancy, and that, therefore, the State has a compelling interest in protecting that life from and after conception. We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer.[78]

The Court displays a commendable humility in this passage. The members of the Supreme Court are generalists. They possess no particular expertise in addressing moral questions such as those that underlie a case like *Roe*.

In addition to taking the Court beyond its competence, denying that a previable fetus counts as a human life would also create tension with the *Casey* Court's recognition of a legitimate state interest in preserving the life of the fetus from the beginning of pregnancy. The plurality acknowledged "that the State has [a] legitimate interest[] from the outset of the pregnancy in protecting . . . the life of the fetus," albeit an interest that before viability is "not strong enough to support a prohibition of

---

[77] Michael Anthony Lewis, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123, 159 (2006). Note that the term "person" is used in different senses, depending on context. The *Roe* Court denied that a fetus constitutes a "person" as that term is used in the Fourteenth Amendment. The Framers, in the Court's view, used the term "person" to refer to those who had already been born. In Professor Lewis' argument, by contrast, the term "person" denotes a moral category, not a constitutional one. Even if the Framers for constitutional purposes used the term "person" to refer to postnatal humans, that does not foreclose the possibility that some or all prenatal humans might be "persons" for moral purposes.

[78] *Roe*, 410 U.S. at 159.

abortion or the imposition of a substantial obstacle to the woman's effective right to elect the procedure."[79]

While the Court cannot take up the argument that viability represents the *sine qua non* of human personhood, perhaps it could offer a somewhat different moral argument. One might view the moral entitlement of the fetus as something that increases over time as a consequence of various capacities that emerge in the process of fetal development. This would be consistent with the Court's statement in *Roe* that the state's legitimate interest in fetal life "grows in substantiality as the woman approaches term and, at a point during pregnancy, . . . becomes 'compelling.'"[80] It would also be consistent with the *Casey* plurality's recognition of a state interest in fetal life that comes into existence at the beginning of pregnancy, but only becomes sufficiently powerful to warrant a prohibition of abortion after viability. In this framework, the theoretical autonomy denoted by the term "viability" is a morally significant fact about the fetus—not the only morally significant fact, perhaps, but one without which the fetus lacks an entitlement to life that the state can protect. Thus, the authors of the *Casey* joint opinion contended that the "realistic possibility of maintaining and nourishing a life outside the womb" after viability corresponds to "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."[81]

While one can more easily reconcile this sliding scale theory of fetal entitlement with the language of *Roe* and *Casey*, it is not clear why the contested moral questions in this context would be any less difficult than the question of "when life begins," which the *Roe* Court thought itself incapable of resolving.[82] The theory that moral entitlements are connected to our emerging capacities presents a highly controversial claim as a philosophical matter.[83] And even if the theory enjoyed broad support at some high level of generality, one nevertheless suspects that "those trained in the respective disciplines of medicine, philosophy, and theology" would reach divergent conclusions regarding the moral weight that should attach to the emergence of any particular capacity.[84]

---

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

[80] *Roe*, 410 U.S. at 162-63.

[81] *Casey*, 505 U.S. at 870.

[82] *Roe*, 410 U.S. at 159.

[83] *See*, *e.g.*, PONNURU, *supra* note 61, at 127, 175-79; Robert P. George, *Terri Schiavo: A Right to Life Denied or a Right to Die Honored?*, 22 CONST. COMMENT. 419, 419-22 (2006).

[84] *Roe*, 410 U.S. at 159.

More particularly, the Court needs to show that the moral entitlement of the fetus (and hence the state interest in protecting the fetus) becomes significantly stronger once the fetus crosses the threshold of viability. But here the Court must deal with Justice White's contention that the viability of a particular fetus turns on "factors that are in essence morally and constitutionally irrelevant."[85] There is no difference in kind between the pre-viable and post-viable fetus, merely a difference in the degree of development. While the fetus can be said to possess (at least theoretically) a new form of autonomy or independence at viability, it is not clear why this attribute carries the decisive moral weight attributed to it by the Court.

The law does not generally require autonomy or independence as a condition for the existence of enforceable legal rights and interests. In many contexts, we deem physical dependence compatible with legal independence. In cases concerning medical treatment, for instance, our laws often recognize comatose or otherwise incompetent patients as continuing to possess rights or interests that may be asserted in litigation and protected by the state.[86] As Justice Kennedy noted in *Stenberg*, a state is properly concerned with "the dignity and value of human life, even life which cannot survive without the assistance of others."[87]

In some contexts, indeed, it is the very fact of dependence—the absence of autonomy—that brings legal rights into existence. The prisoner or institutionalized person has claims against the state that could not be asserted if the individual could provide for himself; it is only his dependence that gives him a cause of action.[88] A young child has a right to support and maintenance from her parents precisely because the law

---

[85] *Id*. at 795.

[86] *See*, *e.g.*, David M. English, *The Uniform Health-Care Decisions Act and Its Progress in the States*, PROBATE AND PROPERTY 19 (May/June 2001) ("Most states recognize living wills, powers of attorneys for health care and a decision making role for the families of those who have failed to make advance directives."); *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, 664, *cert. denied sub nom. Garger v. New Jersey*, 429 U.S. 922 (1976).

[87] *Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting).

[88] *See Estelle v. Gamble*, 429 U.S. 97, 103-04 (1976) ("An inmate must rely on prison authorities to treat his medical needs; if the authorities fail to do so, those needs will not be met."); *DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 199-200 (1989) ("when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety and general well-being"); *Youngberg v. Romeo*, 457 U.S. 307, 317 (1982) ("When a person is institutionalized—and wholly dependent on the State—it is conceded by petitioners that a duty to provide certain services and care does exist, although even then a State necessarily has considerable discretion in determining the nature and scope of its responsibilities.").

recognizes her dependence on them as an attribute calling for state protection.[89]

Even if we deemed some form of autonomy relevant to the status of the fetus, however, the Court has nowhere explained why the particular form associated with viability is legally or morally controlling. "Autonomy" or "independence" is not a single, unvariable condition. It is a continuum, a matter of degree. We all depend on others for the fulfillment of various needs. Every time we walk into a grocery store, check into a hospital, fill a prescription, or call the electric company to report an interruption of service, we implicitly recognize various forms of dependence on others, some of which may be critical to survival.

An important form of autonomy comes into existence very early in development, with the creation of an embryo genetically independent of its mother.[90] A different form of autonomy commences when the heartbeat begins, another when the embryo becomes a fetus with a functioning brain and the capacity for independent movement,[91] another at the point of birth, another when the child can walk, another when it can fix its own meals and still another when it gets a driver's license. The autonomy associated with the medical concept of viability seems less significant, as a practical matter, than many of these other forms because it is merely theoretical.[92] Viability is just a probability, a prediction of what doctors think could

---

[89] *See* 67A CORPUS JURIS SECUNDUM, *Parent and Child* § 156 (2006) ("The duty of parents to provide necessary support and maintenance may be said to rest on the inability of children to care for themselves. . . ."); *Liability of Parent for Necessaries Furnished to Adult Child*, 42 A.L.R. 150 (1926) ("The general rules of the law of parent and child, being based on the child's incapacity, both natural and legal, and its consequent need of protection and care, apply only while the child is under the age of majority, and the father's legal duty to support his child ceases when the child comes of age, although it continues to reside in his family.").

[90] *Thornburgh*, 476 U.S. at 792 (White, J., dissenting).

[91] About eight weeks after conception, at the transition from embryo to fetus, "the brain first begins to show electrical activity that is measurable by EEG." Hope, *supra* note 70, at 216. "It is at this stage of development that movement, first reflexive and then spontaneous, appears." *Id*. at 217.

[92] Here lies the problem with the *Casey* plurality's description of viability as the point when "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." *Casey*, 505 U.S. at 870. The Court cannot mean that there was no "independent existence" of a "second life" before the point of viability. It is indisputable that there was a second life before viability that was independent genetically, that had its own heartbeat and brainwaves and that could move independently of the mother. The Court does nothing to enlighten us as to why it believes that only the emergence of the particular form of independence associated with viability tips the balance in favor of the state.

happen under a set of conditions different than those that in fact exist.[93] It brings about no real alteration in the life of either the fetus or the mother.[94]

Justice White found viability "morally and constitutionally irrelevant" because it "is contingent on the state of medical practice and technology."[95] As a consequence of this technological dependence, the constitutional status of a fetus can depend on the year in which it was conceived, rather than any characteristic of the fetus itself. The *Casey* plurality was untroubled by the question "whether viability occurs at approximately 28 weeks, as was usual at the time of *Roe*, at 23 to 24 weeks, as it sometimes does today, or at some moment even slightly earlier in pregnancy, as it may if fetal respiratory capacity can somehow be enhanced in the future."[96] But the result of this malleable standard is that a state in 1973 probably lacked authority to protect, say, a 26-week-old fetus, while the very same fetus could be afforded legal protection today. By the same token, it seems a logical consequence of the Court's reasoning that fetuses in rural areas enjoy less potential for legal protection than those in cities with state-of-the-art neonatal facilities.[97]

The long-noted moral randomness of the viability standard ultimately shades into moral perversity. The medical evidence shows that viability tends to occur at different points in development, depending on the race, ethnicity and gender of the fetus.[98] A recently published study of extremely low birth weight (ELBW) infants, for instance, shows significantly greater prospects for survival among female and African-American fetuses:

> Female survival rates were higher than male survival rates in all 3 gestational age curves and across the entire range of birth weights. Black survival rates were always higher than white survival rates. In addition, the effect of female gender on survival rates seemed larger than the effect of black

---

[93] *See supra* note 73 and accompanying text.

[94] *See supra* note 72 and accompanying text.

[95] *Thornburgh*, 476 U.S. at 795 (White, J., dissenting).

[96] *Casey*, 505 U.S. at 860; *see also Roe*, 410 U.S. at 160 (viability "is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks").

[97] *See* Hope, *supra* note 70, at 211 ("Viability actually becomes a vague marker if we ask whether we mean viability in an advanced neonatal ICU or viability in a remote rural county with limited medical resources.").

[98] *Racial/Ethnic Disparities in Neonatal Mortality—United States, 1989-2001*, 292 J. AMER. MED. ASS'N 2461 (2004); Greg R. Alexander et al., *US Birth Weight/Gestational Age-Specific Neonatal Mortality: 1995-1997 Rates for Whites, Hispanics, and Blacks*, 111 PEDIATRICS 61 (2003).

> race. Both race and gender effects became more distinct at lower weights and gestational ages.[99]

The Supreme Court, in other words, has constitutionalized a standard with disparate impacts based on race and gender. As a corollary, since it takes longer for a white fetus to reach viability, the right to an abortion under the *Roe/Casey* framework tends to last longer for white women than for African-Americans.

I certainly do not believe the Supreme Court was aware of these racial and gender disparities when it adopted the viability standard. But I do believe these disparate impacts underscore the Court's obligation to either justify or abandon the viability rule. When faced with a practice that produces disparate impacts for a protected class, a common judicial response has been to examine the adequacy of the reasons offered for the practice in question.[100] We sometimes tolerate racial and gender disparities when they are the unintentional consequence of a rule justified on other grounds, but there is no reason for tolerance when the rule itself lacks a principled justification.

Neither *Roe* nor the cases that followed have offered a theory of human rights or fetal entitlements that would explain the decisive role attributed to viability in the context of abortion regulation. Such a theory seems an indispensable element for the Court to satisfy its admitted obligation to "justify the lines we draw."[101] For the sake of completeness, however, we will consider below two other judicial arguments in support of the viability standard that are not necessarily premised on the idea that a morally or constitutionally significant change occurs in the fetus as it crosses the viability threshold.

C. Presumed Societal Consensus at Viability

The idea of treating viability as the controlling constitutional line did not originate with the Supreme Court in *Roe*. The Court borrowed the concept from dicta in Judge Newman's opinion for the majority of a three-judge district court in *Abele v. Markle*, which struck down Connecticut's abortion law a few months before *Roe* was released.[102] Judge Newman's

---

[99] Steven B. Morse et al., *Racial and Gender Differences in the Viability of Extremely Low Birth Weight Infants: A Population-Based Study*, 117 PEDIATRICS 106, 110 (2006).

[100] *See Raytheon Co. v. Hernandez*, 540 U.S. 44, (discussing disparate impact claims targeting employment practices that "fall more harshly on one group than another and cannot be justified by business necessity") (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); *United States v. Fordice*, 505 U.S. 717, 735-36 (1992) (questioning educational justifications for admissions policies with racially disparate impact).

[101] *Id*. (citation omitted).

[102] 351 F. Supp. 224 (D. Conn. 1972).

argument for the viability standard proceeded in two steps, both of which are highly contestable.

Judge Newman began by suggesting that a high level of societal consensus must exist before a state interest can count as "compelling":

> The state interest advanced by this statute is critically different in nature than state interests that have been claimed, in other cases, to be sufficiently compelling to justify impairment of constitutional rights. A compelling state interest has generally been one where the nature of the interest was broadly accepted, with dispute remaining only as to whether the state could constitutionally advance that interest by the specific means being challenged. When Americans of Japanese descent were placed in relocation camps as a protection in the event of invasion, it was widely accepted that there was an important governmental interest in military security, even though it was a matter of sharp dispute whether that interest could justify an abridgement of constitutional rights based on a racial classification.[103]

Judge Clarie's dissent rejected the notion that societal consensus is necessary for a state interest to count as compelling: "diversity of viewpoint does not diminish state interest but often intensifies it. It is precisely for this reason that the weighing of conflicting values and viewpoints is a legislative, not a judicial, task."[104]

Even granting Judge Newman's consensus test for the sake of argument, one can still maintain that Connecticut demonstrated a compelling state interest in support of its abortion law. Judge Newman's principle called for societal consensus only at a high level of generality. In discussing the Japanese internment case, for instance, he recognized a broad consensus as to the general goal of "military security," notwithstanding a vigorous debate over the "specific means" of placing Japanese-Americans in relocation camps. If the regulation at issue in *Korematsu* satisfies Judge Newman's consensus test, then abortion regulations would seem to follow rather easily. No one would question the existence of a broad societal consensus in favor of state protection for innocent human life. The debate concerns only whether the state should pursue that interest through the "specific means" of regulating abortions.

---

[103] *Id*. at 15-16 (citing *Korematsu v. United States*, 323 U.S. 214 (1944)).

[104] *Id*. at 33 (Clarie, J., dissenting).

In any event, Judge Newman's consensus requirement seems difficult to reconcile with a case like *Grutter v. Bollinger*, which concerned affirmative action in law school admissions.[105] In upholding the affirmative action program in that case, the Court accepted the state's argument that it has a compelling interest in maintaining diversity in the law school's student body.[106] Clearly, this was a highly controversial proposition before the case was decided.[107] Large segments of the public would deny that the government has any legitimate interest in maintaining diversity, much less that this interest counts as compelling.

The second step in Judge Newman's analysis was to suggest that a societal consensus in favor of protecting fetal life might not emerge until viability:

> Like the present statute, [a statute designed to prevent the destruction of fetuses after viability has been reached] would be conferring statutory rights on a fetus which does not have constitutional rights. However, the state interest in protecting the life of a fetus capable of living outside the uterus could be shown to be more generally accepted and, therefore, of more weight in the constitutional sense than the interest in preventing the abortion of a fetus that is not viable.[108]

Judge Newman did not really claim—and certainly made no attempt to document—the proposition that a consensus in favor of protecting fetal life would form only at the point of viability. This is not surprising, given that this portion of the opinion was dicta, irrelevant to consideration of the Connecticut abortion statute before the court. In the absence of evidentiary support, however, Judge Newman's suggestion of viability as the legally significant line represents little more than a judicial hunch, a guess about what Americans might think from someone with little basis to know. Unlike legislators, who have a stake in discerning the views of their constituents, we purposely shelter federal judges from the influence of public opinion.[109]

---

[105] 539 U.S. 306 (2003).

[106] *Id*. at 328-29.

[107] *See*, *e.g.*, Douglass C. Lawrence, *Challenging Affirmative Action: Does Diversity Justify Race-Conscious Admissions Programs?*, 36 SUFFOLK U. L. REV. 83 (2002); Martin D. Carcieri, *The Sixth Circuit and Grutter v. Bollinger: Diversity and Distortion*, 7 TEX. REV. L. & POL'Y 127 (2002); *see also* Brian T. Fitzpatrick, *The Diversity Lie*, 27 HARV. J. L. PUB. POL'Y 385 (2003).

[108] *Abele*, 351 F. Supp. at 23.

[109] For this reason, the Constitution grants federal judges tenure during "good Behaviour" and protects their compensation against political manipulation. U.S. Const., art. III, § 1.

In applying its Eighth Amendment jurisprudence, the Supreme Court has thought the best evidence of public consensus was provided by state legislative enactments. Thus, the Court has examined the laws of the states to discern whether a national consensus exists as to the propriety of executing certain categories of capital defendants.[110] By that measure, Judge Newman's hunch about the American consensus on fetal life seems clearly inaccurate. Employing viability as the controlling standard, the Supreme Court's opinions in *Roe* and its companion case resulted in the invalidation of the abortion laws of nearly every state in the union.[111] Using the test employed in the capital punishment context, then, the pre-*Roe* consensus favored protection of fetal life at a point prior to viability.[112] Moreover, if one looks to international consensus, as the Supreme Court has sometimes done under the Eighth Amendment, it is telling that only a handful of countries permit abortion as late in pregnancy as viability.[113] The viability standard was so aberrant at the time of *Roe*, and remains so aberrant by international standards today, that, were it a rule governing executions, it would be in danger of invalidation as "cruel and unusual punishment" under the Court's Eighth Amendment case law.

D. The Woman's Presumed Consent at Viability

The joint opinion in *Casey* offered one other argument in favor of viability as the point at which states may seek to protect the life of the fetus. The plurality argued that the viability line has "an element of fairness," because "[i]n 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."[114] This dovetails with an argument made by Judge Newman in *Abele*, who wrote that a statute banning abortion after viability "would not be a direct abridgement of the woman's constitutional right, but at most a limitation on the time when her right could be exercised."[115]

---

[110] *See Roper v. Simmons*, 543 U.S. 551, 564-67 (2005) (finding "national consensus" against execution of juveniles); *Atkins v. Virginia*, 536 U.S. 304, 316 (2002) (finding "national consensus" against execution of the mentally retarded).

[111] *See* PONNURU, *supra* note 61, at 11-13 (status of state abortion legislation prior to *Roe*) (quoting Russell Hittinger, *Abortion Before Roe*, FIRST THINGS, at 14-15 (Oct. 1994)); *id*. at 17 (newspaper reports *Roe* will impact laws of 46 states) (quoting Warren Weaver, Jr., *National Guidelines Set by 7-to-2 Vote*, NEW YORK TIMES (Jan. 23, 1973)); *see also id*. at 13 n.7 ("A Harris poll asking whether abortion should be legal in the first four months of pregnancy came back 46 percent no, 42 percent yes in August 1972").

[112] Because of *Roe*, state legislation on abortion no longer provides a reliable indication of public opinion. However, a recent analysis of the polling data finds it "undeniable that the public supports a legal regime that is far more protective of unborn life than we have now," and "possible that [the public] narrowly supports a ban on most abortions." PONNURU, *supra* note 61, at 205.

[113] *See supra* notes 54-57 and accompanying text.

[114] *Casey*, 505 U.S. at 870.

[115] *Abele*, 351 F. Supp. at 24.

These arguments explain why a constitutional right to abortion should not extend farther than the point of viability. The *Casey* plurality recognized that when someone makes a decision as consequential as the decision to terminate a pregnancy, states have a legitimate interest in structuring the decisionmaking process to express respect for the life of the unborn.[116] States can adopt informed consent provisions, ensuring that the woman has been provided information relevant to the decision.[117] They can also adopt waiting periods to promote careful consideration.[118] By the same token, states have a legitimate interest in ensuring that the decision to terminate a pregnancy be made in a timely fashion.

However, while the arguments in *Casey* and *Abele* show why a right to abortion should not extend farther than viability, they offer no explanation for extending the abortion right to such a late point in pregnancy. It could just as easily be said that a woman implicitly "consent[s] to state intervention on behalf of the developing child" if she fails to act within some shorter period that affords an opportunity to learn of the pregnancy. This too would be "at most a limitation on the time when her right could be exercised." Thus, the argument from implied consent fails as a principled justification for selection of viability as the controlling legal standard.

IV. Viability and Legitimate State Interests

When the Supreme Court in *Roe* established a constitutional right to an abortion that extends to the point of fetal viability, it erected what remains one of the most permissive regimes of abortion on demand in the entire world.[119] Just how permissive became apparent when the Supreme Court released *Stenberg v. Carhart*, a case that gave many people their first glimpse into the disturbing world of late-term abortions. Justice Kennedy, a member of the *Casey* plurality, dissented in *Stenberg*, believing *Casey* had done more to rein in the excesses of *Roe* and its progeny than the majority was willing to acknowledge.[120] This article contends that, even if one believes in a constitutional right to an abortion, one need not support the extreme version of that right found in decisions like *Stenberg*. The

[116] *Casey*, 505 U.S. at 877 ("Regulations which do no more than create a structural mechanism by which the State, or the parent or guardian of a minor, may express profound respect for the life of the unborn are permitted, if they are not a substantial obstacle to the woman's exercise of the right to choose.").

[117] *Id*. at 881-85.

[118] *Id*. at 885-87.

[119] *See supra* notes 54-57; *see also supra* note 63.

[120] 530 U.S. at 956-57 (Kennedy, J., dissenting).

Court could instead protect a right to abortion only in the "early stages" of pregnancy, as the *Casey* plurality suggested it was doing.[121]

In my view, the arbitrariness of the viability standard provides a sufficient reason for its abandonment. In the subsections that follow, however, I offer additional grounds for ignoring *Casey*'s dicta about viability and instead reading the decision to permit state regulation of late-term abortions. Subsection A will discuss several of the opinions in *Stenberg*, including Justice Kennedy's somewhat graphic descriptions of late-term abortion procedures. Subsection B will argue that the Court should discard viability as the earliest point at which states can regulate to protect the life of the unborn. Alternatively, I will argue that the viability standard should be limited to the state interest in fetal life, and should not apply when the state regulates to promote the distinct state interests identified in Justice Kennedy's *Stenberg* dissent, including interests in erecting a barrier against infanticide and maintaining public respect for the medical profession.

A. *Stenberg v. Carhart* and Late-Term Abortions

In *Stenberg v. Carhart*, a narrow 5-4 majority of the Supreme Court struck down Nebraska's ban on partial birth abortions, also known as dilation and extraction (D&X) abortions. The Court offered two reasons for the decision. First, rejecting evidence that the D&X procedure is never medically indicated, the majority found the ban on D&X abortions impermissible because it failed to include an exception for the "health" of the mother.[122] Second, the Court concluded that, notwithstanding the construction of the statute by Nebraska's attorney general, the legislation could be read to also prohibit a different procedure, the dilation and evacuation (D&E) abortion, which is more commonly used to terminate second trimester pregnancies.[123]

Some of the more intriguing opinions in *Stenberg* were the concurrences and dissents. Of particular interest was Justice Kennedy's dissenting opinion, given that he was a member of the plurality that reaffirmed a constitutional right to abortion in *Casey*. Justice Kennedy concluded that the majority had failed to properly apply *Casey* in invalidating the Nebraska statute.[124]

---

[121] Id. at 844; cf. id. at 850 ("Men and women of good conscience can disagree, and we suppose some always shall disagree, about the profound moral and spiritual implications of terminating a pregnancy, even in its earliest stage.").

[122] *Stenberg*, 530 U.S. at 930-38.

[123] *Id*. at 938-46.

[124] Id. at 956-57 (Kennedy, J., dissenting) ("a central premise [of Casey] was that the States retain a critical and legitimate role in legislating on the subject of abortion, as limited by the woman's right"); id. at 964 ("Demonstrating a further and basic

Reviewing the trial transcript, Justice Kennedy described the two abortion methods at issue in the case. He began with the D&E abortion, which Nebraska claimed it was not seeking to ban:

> As described by Dr. Carhart, the D&E procedure requires the abortionist to use instruments to grasp a portion (such as a foot or hand) of a developed and living fetus and drag the grasped portion out of the uterus into the vagina. Dr. Carhart uses the traction created by the opening between the uterus and vagina to dismember the fetus, tearing the grasped portion away from the remainder of the body. . . . The fetus, in many cases, dies just as a human adult or child would: It bleeds to death as it is torn limb from limb. The fetus can be alive at the beginning of the dismemberment process and can survive for a time while its limbs are being torn off. . . . . Dr. Carhart has observed fetal heartbeat via ultrasound with "extensive parts of the fetus removed," and testified that mere dismemberment of a limb does not always cause death because he knows of a physician who removed the arm of a fetus only to have the fetus go on to be born "as a living child with one arm." At the conclusion of a D&E abortion no intact fetus remains. In Dr. Carhart's words, the abortionist is left with "a tray full of pieces."[125]

The second form of abortion at issue in *Stenberg*, the D&X procedure, was the one Nebraska claimed to prohibit by its statute:

> The other procedure implicated today is called "partial birth abortion" or the D&X. . . . In the D&X, the abortionist initiates the woman's natural delivery process by causing the cervix of the woman to be dilated, sometimes over a sequence of days. The fetus' arms and legs are delivered outside the uterus while the fetus is alive; witnesses to the procedure report seeing the body of the fetus moving outside the woman's body. At this point, the abortion procedure has the appearance of a live birth. . . . With only the head of the fetus remaining in utero, the abortionist tears open the skull. According to Dr. Martin Haskell, a leading proponent of the procedure, the appropriate instrument to be used at this stage of the abortion is a pair

---

misunderstanding of *Casey*, the Court holds the ban on the D & X procedure fails because it does not include an exception permitting an abortionist to perform a D & X whenever he believes it will best preserve the health of the woman.").

[125] 530 U.S. at 958-59 (Kennedy, J., dissenting).

> of scissors. Witnesses report observing the portion of the fetus outside the woman react to the skull penetration. The abortionist then inserts a suction tube and vacuums out the developing brain and other matter found within the skull. . . . Brain death does not occur until after the skull invasion, and, according to Dr. Carhart, the heart of the fetus may continue to beat for minutes after the contents of the skull are vacuumed out. The abortionist next completes the delivery of a dead fetus, intact except for the damage to the head and the missing contents of the skull.[126]

Justice Kennedy recognized that both procedures would be objectionable to those who recognize the humanity of the fetus.[127] Nevertheless, he contended that "D&X's stronger resemblance to infanticide means Nebraska could conclude the procedure presents a greater risk of disrespect for life and a consequent greater risk to the profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect."[128]

Explicitly rejecting the distinction Justice Kennedy and the other dissenters found between the two methods of late-term abortion, Justices Stevens and Ginsburg could see no valid reason to ban one and not the other. According to Justice Stevens:

> Although much ink is spilled today describing the gruesome nature of late-term abortion procedures, that rhetoric does not provide me a *reason* to believe that the procedure Nebraska here claims it seeks to ban is more brutal, more gruesome, or less respectful of 'potential life' than the equally gruesome procedure Nebraska claims it still allows.[129]

Justice Ginsburg agreed: "[A]s Justice Stevens points out, the most common method of performing previability second trimester abortions is no less distressing or susceptible to gruesome description."[130] The position of Justices Stevens and Ginsburg effectively puts states disturbed by partial birth abortions into a sort of Catch 22. An attempt to ban both

---

[126] *Id*. at 959 (Kennedy, J., dissenting).

[127] *Id*. at 963 (Kennedy, J., dissenting) ("Those who oppose abortion would agree, indeed would insist, that both procedures are subject to the most severe moral condemnation, condemnation reserved for the most repulsive human conduct.").

[128] *Id*. at 963 (Kennedy, J., dissenting).

[129] *Id*. at 946 (Stevens, J., concurring).

[130] *Id*. at 951 (Ginsburg, J., concurring).

D&X and D&E abortions at any point prior to viability would run afoul of *Roe*'s insistence that the right to abortion continues until the fetus is viable. On the other hand, an attempt to ban just one procedure, and leave the other in place, would be invalid because both are equally repulsive.

B. Viability and Late-Term Abortion Regulations

I have no strong opinion as to whether one can sensibly distinguish between D&E and D&X abortions. As I see it, Justices Stevens and Ginsburg were right to describe both procedures as "gruesome."[131] However, the conclusion I draw from that observation differs from theirs. In my view, the fact that it is difficult to read about late-term methods of abortion without a shudder shows that the Supreme Court was wrong to conclude that the Constitution protects a right to abortion extending to the point of viability. If the Court is going to recognize a constitutional right to abortion, the states should at least have authority to ask that the decision be made early in pregnancy, before D&E and D&X become the only available options. To my mind, this provides an additional reason for the Court to discard the viability standard, just as it threw out the equally arbitrary trimester framework in *Casey*.[132]

Alternatively, the Court should limit application of the viability standard to the context in which it was developed. The Court in *Roe* recognized only two state interests that might justify regulation of abortion—preserving the health of the mother and protecting the life of the fetus.[133] The Court adopted the viability rule as a limitation on the latter interest, which the State of Texas had sought to protect from the point of conception onward.[134] Justice Kennedy in *Stenberg* advocated a broader recognition of permissible state interests, finding it "inappropriate for the Judicial Branch to provide an exhaustive list of state interests implicated by abortion."[135] He thought *Casey* "premised on the States having an important constitutional role in defining their interests in the abortion debate."[136]

---

[131] *Id*. at 946 (Stevens, J., concurring); *id*. at 951 (Ginsburg, J., concurring).

[132] Indeed, the two are closely related. The viability rule provided the rationale for distinguishing between second and third trimester abortions. *See supra* note 52.

[133] *See* Roe, 410 U.S. at 162 ("the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another important and legitimate interest in protecting the potentiality of human life").

[134] *Id*. at 159, 163.

[135] *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 877).

[136] *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting).

Nebraska asserted that its ban on partial birth abortion was supported by a state interest in "erecting a barrier to infanticide."[137] Justice Kennedy described this interest in the following terms:

> States also have an interest in forbidding medical procedures which, in the State's reasonable determination, might cause the medical profession or society as a whole to become insensitive, even disdainful, to life, including life in the human fetus.[138]

He also thought Nebraska asserted a legitimate interest in "preserving the integrity of the medical profession"[139]:

> A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.[140]

In Justice Kennedy's view, these interests supported Nebraska's ban on D&X abortions.[141] But those same state interests would also support regulation of D&E abortions. Whether or not one may rationally distinguish between the procedures, both have the capacity to desensitize people to the taking of human life and to undermine public confidence in the medical profession.

Fetal viability bears only a tangential relationship to the strength of these distinct state interests, which concern the impact of certain abortion procedures on attitudes held by the public and by medical personnel. Undoubtedly, some people believe that a fetus becomes a human being only at the point of viability or afterwards. Abortion of pre-viable fetuses may have no impact on views held by such people regarding the value of human life or their respect for members of the medical profession. But as the Court has recognized, much of the public believes a fetus is a human being well before the point of viability.[142] The widespread availability of

---

[137] *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) (citing Brief for Petitioners 48-49).

[138] *Stenberg*, 530 U.S. at 961-62 (Kennedy, J., dissenting) (citing *Casey*, 505 U.S. at 852).

[139] *Stenberg*, 530 U.S. at 961 (Kennedy, J., dissenting) (citing Brief for Petitioners 48-49).

[140] *Stenberg*, 530 U.S. at 962 (Kennedy, J., dissenting).

[141] *Id*. at 960-64 (Kennedy, J., dissenting).

[142] Stenberg, 530 U.S. at 920 ("Millions of Americans believe that life begins at conception and consequently that an abortion is akin to causing the death of an innocent child.").

sonograms, through which millions of people see pre-viable fetuses with heads, eyes, fingers and other features characteristic of adult humans, will no doubt contribute to this phenomenon.[143]

For someone who recognizes humanity in the fetus, knowledge that tens of thousands of pre-viable fetuses are destroyed by D&E and D&X abortions could lead to a loss of confidence in the medical profession which carries out these procedures. Alternatively, since the law is a teacher, some who see the pre-viable fetus as human (including some doctors and nurses) may become gradually more accepting of the destruction of innocent humans as an unpleasant but "necessary" evil. The viability standard was developed to measure the strength of a different state interest, the interest in preserving the lives of individual fetuses subject to abortion. It should not be applied as a barrier to the pursuit of the legitimate state interests in dealing with the adverse societal impacts of late-term abortions.

V. Conclusion

At the outset of the article, I quoted the acknowledgement by the *Casey* plurality of an obligation to "justify the lines we draw."[144] The corollary would seem to be an obligation to eschew lines that defy principled justification. In the decades since *Roe*, the Court has offered no adequate rationale for the viability standard, notwithstanding persistent judicial and academic critiques. Exacerbating this country's divisions over abortion and placing us out of step with the world community, the viability rule seems a strong candidate for abandonment as the Court continues to rethink its abortion jurisprudence in the aftermath of *Casey*.

[143] *See* PONNURU, *supra* note 61, at 207-08. *See also* Hope, *supra* note 70, at 208 ("At twenty weeks of development the fetus is outwardly indistinguishable from a premature human infant. It has well developed facial features, arms and legs, hands and feet, fingers and toes, fingernails and fingerprints.").

[144] *Casey*, 505 U.S. at 870.