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Does *Stare Decisis* Preclude Reconsideration of *Roe v. Wade*? A Critique of *Planned Parenthood v. Casey*

Paul Benjamin Linton

Maura K. Quinlan

DOES *STARE DECISIS* PRECLUDE RECONSIDERATION OF *ROE V. WADE*? A CRITIQUE OF *PLANNED PARENTHOOD V. CASEY*

Paul Benjamin Linton† *and Maura K. Quinlan*††

ABSTRACT

Will the Supreme Court overrule its landmark decision in *Roe v. Wade*? Recent judicial confirmation battles, political campaigns, and state legislation seem to be driven by this question. In *Planned Parenthood v. Casey*, however, a majority of the Court held that the doctrine of *stare decisis*—the legal principle that courts should adhere to their prior precedents—precludes any reexamination of *Roe*. Based on *stare decisis*, *Casey* reaffirmed what it described as the central holding of *Roe*—that abortion could not be prohibited prior to viability, the stage in pregnancy when the unborn child could survive if born prematurely.

This Article examines the *stare decisis* analysis set forth in *Casey* and concludes that the Court's analysis does not withstand scrutiny. *Casey* asserted that *Roe*'s selection of viability was well reasoned and "elaborated with great care," but nothing in the *Roe* opinion itself supports that assertion. Indeed, Justice Blackmun's own papers show that the choice of viability was completely arbitrary, an apparent after–thought. *Casey* also claimed that the viability rule must be followed because four *stare decisis* factors had been met: the rule was "work–

† Paul Benjamin Linton is an attorney in private practice in Illinois who specializes in state and federal constitutional appellate litigation and legislative consulting. Mr. Linton, the former General Counsel for Americans United for Life, has submitted amicus curiae briefs in several Supreme Court abortion cases, including *Planned Parenthood of Southeastern Pennsylvania v. Casey*. Mr. Linton has published more than twenty law review articles on a variety of topics, as well as the only comprehensive analysis of abortion as a state constitutional right, ABORTION UNDER STATE CONSTITUTIONS (3d ed. 2020) (Carolina Academic Press). Mr. Linton received his law degree from Loyola University of Chicago.

†† Maura K. Quinlan is an attorney in private practice in Pennsylvania who has had extensive experience in drafting abortion legislation and has assisted several Attorneys General in defending such legislation, including the 1989 amendments to the Pennsylvania Abortion Control Act which were challenged in *Planned Parenthood of Southeastern Pennsylvania v. Casey*. She was the former Chief Counsel for Americans United for Life and has filed numerous briefs in abortion cases before the Supreme Court. Ms. Quinlan received her law degree from the University of Notre Dame.

able," people had come to "rely" on the availability of abortion, and no "changes in law" or "change of facts" undermined the choice of viability.

As this Article demonstrates, *Casey*'s *stare decisis* analysis is deficient on all four grounds. First, it is quite difficult to make an accurate determination of viability and there is no current medical consensus even as to what constitutes viability. Thus, the viability rule is unworkable because it is incapable of being applied and enforced in a principled, consistent fashion. Second, given the widespread availability of many highly effective forms of contraception, there is no plausible reliance interest in unrestricted abortion up until viability. Moreover, the social and economic progress that women have achieved cannot fairly be attributed to the availability of abortion on demand. Third, there have been substantial changes in criminal, tort, and health-care law that now protect unborn children throughout pregnancy; changes that have discarded viability as an outmoded relic of legal analysis. This undermines *Roe*'s suggestion that the unborn need not be protected until after viability because they are not protected in other areas of law. Finally, many scientific and medical developments—most significantly ultrasound and fetal surgery—vividly demonstrate that unborn children are *actually* alive, thereby undermining *Roe*'s claim that the unborn represent only "potential" life.

Another case requesting that *Roe* be overruled is virtually certain to reach the Supreme Court. When that happens, the doctrine of *stare decisis* should not prevent the Court from reconsidering and overruling *Roe*.

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INTRODUCTION

Will the Supreme Court overrule *Roe v. Wade*, the 1973 decision that legalized abortion throughout the United States?[1] The election of Donald Trump as president on November 8, 2016, has fueled speculation that he would have the opportunity to appoint enough justices to create a majority on the Court that would reconsider and overrule *Roe*.[2] Whether President Trump's appointments, along with the other justices on the Court who are (or who are believed to be) opposed to the landmark decision, would actually vote to overrule *Roe* remains to be seen. But even if a majority of Supreme Court justices were convinced that *Roe v. Wade* was wrongly decided as an original matter, should the Court overrule *Roe*? Or, as in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[3] should the justices feel bound to reaffirm *Roe* on the basis of *stare decisis*, the legal principle that courts should not disturb their own precedents? That is the subject of this Article.

I. THE DOCTRINE OF *STARE DECISIS*

The term *stare decisis* is part of a longer Latin phrase, *stare decisis et non quieta movere*, which means "to adhere to precedents, and not to unsettle things that are established."[4] As a general principle, *stare decisis* "is the preferred course because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and per–

1. 410 U.S. 113 (1973).

2. This speculation is not unreasonable, given the vacancy created by the death of Justice Scalia earlier in 2016, which had not been filled before the election, the ages of several of the justices at the time of the election, and President Trump's well-known views regarding abortion.

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

4. *Stare decisis*, BLACK'S LAW DICTIONARY 1220 (10th ed. 2014).

ceived integrity of the judicial process."[5] The Court will not overturn a past decision unless there are strong reasons for doing so.[6] But, as the Court has frequently recognized, *stare decisis* is "not an inexorable command."[7] Rather, it "is a principle of policy and not a mechanical formula of adherence to the latest decision."[8] And *stare decisis* "is at its weakest when [the Court] interpret[s] the Constitution because [its] interpretation can be altered only by constitutional amendment or by overruling [its] prior decisions."[9]

The Supreme Court considers different factors in deciding whether to overrule a past precedent.[10] Obviously, the Court does not need to consider those factors unless it has come to the conclusion that the precedent under review was wrongly decided. For purposes of this Article, we shall assume that a majority of the Supreme Court (the present Court or a future Court) *has* concluded that *Roe v. Wade* was wrongly decided as an original matter of constitutional interpretation.

Before examining *Casey's* analysis of the factors that need to be considered in deciding whether a precedent should be overruled,

5. Payne v. Tennessee, 501 U.S. 808, 827 (1991).

6. *See, e.g.*, United States v. IBM Corp., 517 U.S. 843, 856 (1996).

7. *Payne*, 501 U.S. at 828.

8. Helvering v. Hallock, 309 U.S. 106, 119 (1940).

9. Agostini v. Felton, 521 U.S. 203, 235 (1997). As Professor Paulsen has persuasively argued:

> [T]he doctrine of stare decisis is not constitutionally required, in any sense, and has never been so understood. Nothing in Article III of the Constitution (or in any other provision of the Constitution) mandates a practice of adherence to precedent; nothing in Article III specifies any rule or set of criteria for when a court should, must, or may follow a prior decision.

Michael Stokes Paulsen, *Does the Supreme Court's Current Doctrine of Stare Decisis Require Adherence to the Supreme Court's Current Doctrine of Stare Decisis?*, 86 N.C. L. REV. 1165, 1169 (2008). Professor Paulsen's article provides a thought provoking critique of *Casey*'s analysis of *stare decisis* in general terms, not as applied to the specific issue of abortion, which is the subject of this Article.

10. For example, when overruling *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977), the Court in *Janus v. Am. Fed'n of State, County, & Mun. Employees*, 138 S. Ct. 2448 (2018) considered "the quality of *Abood*'s reasoning, the workability of the rule it established, its consistency with other related decisions, developments since the decision was handed down, and reliance on the decision." *Id.* at 2478–79. The "quality" of *Roe*'s reasoning, in recognizing a right to abortion, largely lies outside the scope of this Article, which focuses on *Casey*'s *stare decisis* analysis. Nevertheless, it must be noted that *Roe* has been subjected to severe and sustained scholarly attack since it was decided in 1973. *See infra* note 199 and accompanying text.

however, it is important to note the significant respects in which *Casey*'s joint opinion (hereinafter Joint Opinion) departed from the reasoning and holdings of *Roe.* And there are many. That, in turn, suggests that the Court's resort to *stare decisis* as the critical justification for "reaffirming" *Roe* was, at best, pretextual.[11]

II. WHAT THE JOINT OPINION IN *CASEY* LEFT BEHIND ON THE SIDE OF THE ROAD

While purporting to rely on the doctrine of *stare decisis* to reaffirm *Roe*, the Joint Opinion abandoned major aspects of *Roe* and *Roe*'s progeny. Very briefly, the most significant discarded aspects of *Roe* are as follows.

First, *Roe* divided pregnancy into trimesters and determined to what extent the State may regulate or prohibit abortion at each stage.[12] The Joint Opinion rejected *Roe's* trimester framework and divided pregnancy into two stages for purposes of its analysis—pre- and post-viability.[13]

Second, *Roe* effectively employed the "strict scrutiny" standard of judicial review, under which only the least restrictive means of pro–moting a compelling state interest would support interference with a woman's right to choose abortion.[14] The Joint Opinion rejected this standard, and substituted an "undue burden" standard of review in place of *Roe's* strict-scrutiny standard.[15] Under the new *Casey* standard, regulations that do not prohibit abortion or impose an "undue burden" on a woman's ability to obtain an abortion before viability need only be "reasonably related" to the State's legitimate interests in

11. As Chief Justice Rehnquist stated in his partial dissent, the Court's discussion of the principle of *stare decisis* "appears to be almost entirely dicta, because the joint opinion does not apply that principle in dealing with *Roe*." Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 954 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

12. Roe v. Wade, 410 U.S. 113, 162–65 (1973).

13. *Casey*, 505 U.S. at 872–79.

14. *Roe*, 410 U.S. at 155. *Roe* described the right to choose abortion as "fundamental," *id.* at 152–53, and identified state interests in preserving maternal health and protecting the "potentiality of human life," as becoming "compelling" (and therefore weighty enough to support regulation and even prohibition of abortion) at different stages of pregnancy, *id.* at 162–64. Finally, *Roe* held that regulations limiting the exercise of the abortion liberty had to be "narrowly drawn to express only the legitimate state interests at stake." *Id.* at 155.

15. *Casey*, 505 U.S. at 874–79.

protecting maternal health or prenatal life.[16] And a regulation would not be considered to impose an undue burden unless it had the "purpose" or "effect" of placing a "substantial obstacle" in the path of a woman seeking an abortion before viability.[17]

Third, the Joint Opinion expressly overruled, in part, two of the Court's prior decisions that had applied the *Roe* standard of review to state regulations governing all abortions, regardless of the stage of pregnancy.[18] In those decisions, the Court had found the regulations invalid under *Roe*'s trimester framework. According to the Joint Opinion, portions of those two decisions needed to be overruled because the trimester framework was no longer applicable and they were incompatible with the Court's newly minted undue-burden standard of review.[19]

Given the Joint Opinion's wholesale abandonment of major aspects of *Roe*, it is difficult to take seriously its pronouncements on the importance of adhering to precedent.[20] The authors of the Joint Opinion, however, tried to finesse this difficulty by repeatedly referring to the viability rule as the "central"[21] or "essential"[22] holding of *Roe,* and "reject[ing] the trimester framework, which we do not consider to be part of the essential holding of *Roe*."[23] By characterizing the viability rule as "central" and "essential," the Joint Opinion in effect dismissed the rest of the trimester structure as "peripheral" and "superfluous." But the centrality of the trimester framework to *Roe*'s analysis cannot be so easily dismissed.

16. *See id.* at 877–78. Unlike *Roe*, the Joint Opinion in *Casey* never characterized the nature of the right at all and merely described the state interests as "legitimate" and "substantial." *See id.* at 846, 853, 871–73, 876. Nor did the Joint Opinion adopt the narrowly drawn (least-restrictive means) language of *Roe*. *See id.*

17. *See id.* at 877.

18. *Id.* at 870, 881–87 (overruling, in part, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 444–45 (1983), and *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759–64 (1986)).

19. *Id.* at 883, 885–87 (holding that neither the informed-consent requirement nor the twenty-four-hour waiting period imposed an "undue burden" on a woman's ability to obtain an abortion).

20. "The end result of the joint opinion's paeans of praise for legitimacy is the enunciation of a brand-new standard for evaluating state regulation of a woman's right to abortion—the 'undue burden' standard." *Id.* at 964 (Rehnquist, C.J., concurring in part and dissenting in part).

21. The Joint Opinion referred to the viability rule as the "central" holding of *Roe* almost two dozen times. *Id.* at 845–46, 853, 855, 857–58, 860–61, 864–65, 870–71, 873, 878–79.

22. *Id.* at 845–46, 869–71, 873, 880.

23. *Id.* at 873.

In summarizing its holdings in *Roe*, the Court specifically reiterated the trimester framework,[24] thereby reinforcing its importance. There is no reason, then, to believe that the *Roe* Court regarded any one element of that trimester framework as more important than any other.[25] Moreover, to the extent that an undue-burden standard of review previously had been suggested to replace the *Roe* strict scrutiny standard, it was the undue-burden standard that Justice O'Connor first articulated in her dissent in *City of Akron v. Akron Center for Reproductive Health, Inc.*,[26] and then favorably cited in her concurring opinion in *Webster v. Reproductive Health Services.*[27] The Joint Opinion, however, did not retain the undue-burden standard in the same form as Justice O'Connor had explained it in her earlier opinions. Instead, the Joint Opinion (which Justice O'Connor co-authored), adopted a much narrower and more unwieldy version.[28]

24. Roe v. Wade, 410 U.S. 113, 164–65 (1973).

25. As Justice Scalia said in his partial dissent, "I must . . . confess 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." *Casey*, 505 U.S. at 993 (Scalia, J., concurring in part and dissenting in part).

26. 462 U.S. 416, 461–65 (1983) (O'Connor, J., dissenting).

27. 492 U.S. 490, 529–31 (1989) (O'Connor, J., concurring).

28. There are two critical differences between Justice O'Connor's earlier formulation of the undue-burden standard and the Joint Opinion's formulation. First, in Justice O'Connor's earlier opinions, she strongly implied that a statute creates an undue burden only if it imposes "*absolute* obstacles or *severe* limitations on the abortion decision." *Akron Ctr.*, 462 U.S. at 464 (O'Connor, J., dissenting) (emphasis added). Under the Joint Opinion's reformulation of this standard, an undue burden exists even if the statute imposes only a "substantial" obstacle to the effectuation of the abortion decision. *Casey*, 505 U.S. at 846, 877–95, 901. Second, in her earlier opinions, Justice O'Connor expressed the view that a regulation of abortion that *does* impose an undue burden may be upheld if it either "reasonably relate[s] to the preservation and protection of maternal health," Planned Parenthood Ass'n of Kansas City, Mo., Inc. v. Ashcroft, 462 U.S. 476, 505 (1983) (O'Connor, J., concurring in part and dissenting in part) (quoting *Roe*, 410 U.S. at 163), or "reasonably relates" to "the State's compelling interests in maternal physical and mental health and protection of fetal life," *Akron Ctr.*, 462 U.S. at 473–74 (O'Connor, J., dissenting). *See also* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting). Under the Joint Opinion's reformulation, however, undue burdens imposed before viability are never constitutional. *Casey*, 505 U.S. at 877.

In light of the Joint Opinion's "selective disdain for precedent,"[29] it is hard to disagree with Chief Justice Rehnquist's critique of the Joint Opinion's treatment of the principle of *stare decisis*:

> Whatever the "central holding" of *Roe* that is left after the joint opinion finishes dissecting it is surely not the result of that principle. While purporting to adhere to precedent, the joint opinion instead revises it. *Roe* continues to exist, but only in the way a storefront on a western movie set exists: a mere facade to give the illusion of reality.[30]

And, as Part III of this Article demonstrates, the Joint Opinion's attempt to explain why the doctrine of *stare decisis* precludes reconsideration of *Roe*'s central holding—that the states may not prohibit abortion before viability or place a substantial obstacle in the path of a woman seeking a pre-viability abortion—fares no better. It, too, is "a mere facade to give the illusion of reality."[31]

III. CRITIQUE OF THE *STARE DECISIS* FACTORS IDENTIFIED IN *CASEY*

At the outset of its *stare decisis* discussion, the Joint Opinion states that *Roe*'s selection of viability as the stage in pregnancy when the State may prohibit abortion was "a reasoned statement, elaborated with great care," and "twice reaffirmed."[32] However, *Roe*'s explication of its selection of viability as the critical point upon which to balance the competing interests of a pregnant woman's right to abortion and the State's right to protect prenatal life was superficial and conclusory. In fact, the Court's entire "elaboration" of its reasoning consists of three bald assertions—not one of which is supported by any explanation.

First, the Court asserted that the State's interest in protecting prenatal life "grows in substantiality as the woman approaches term and, at a point during pregnancy, . . . becomes 'compelling.'"[33] The Court provided no explanation as to *why* the State's interest in protecting human life should grow substantially as the unborn child

29. Michael P. Gerhardt, *The Pressure of Precedent, A Critique of the Conservative Approaches to Stare Decisis in Abortion Cases*, 10 CONST. COMMENTARY 67, 77 (1993).

30. *Casey*, 505 U.S. at 954 (Rehnquist, C.J., concurring in part and dissenting in part).

31. *See id.*

32. *Id.* at 870 (referring to *Akron Ctr.*, 462 U.S. at 419–20, and *Thornburgh*, 476 U.S. at 759).

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

grows and develops during the pregnancy.[34] Certainly, a state's interest in protecting the life of a newborn baby is no less than its interest in protecting the life of a toddler, a teenager or an adult. An unborn child, like a newborn, is on a continuum toward adulthood. The State's interest in protecting both is the same.

The next assertion made in *Roe* was that "the 'compelling' point is at viability," "because the fetus then presumably has the capability of meaningful life outside the mother's womb."[35] Again, there is no explanation of why the capability of "meaningful life" (whatever that may mean) outside the womb should mark the time at which a state may protect prenatal life.[36]

Finally, the Court asserted that "State regulation protective of fetal life after viability thus has both logical and biological justifications,"[37] but did not attempt to explain these justifications. Indeed, there is a certain *illogic* in the notion that the State should be able to protect prenatal life by prohibiting abortion only *after* viability (when the unborn child could live independently and is least in need of protection), but not *before* viability (when the unborn child is most vulnerable). Likewise, there is little, if any, *biological* justification for choosing viability as the point when the State's interest in protecting fetal life becomes compelling. A twenty-three-week-old unborn child who would be viable today is no different than a twenty-three-week-old unborn child who would not have been viable in 1973.[38] There is simply no intrinsic biological difference between these two children.

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34. To the extent that the Court was suggesting that an unborn child is only "potential" life and not actually alive within the womb, its acknowledg–ment of the fact that the child is growing and developing as the woman progresses toward term would seem to belie that suggestion. *See infra* Part III.D.2.

35. *Roe*, 410 U.S. at 163. As Dean Ely noted at the time, the Court's explanation for choosing viability "mistakes a definition for a syllogism." John Hart Ely, *The Wages of Crying Wolf: A Commentary on* Roe v. Wade, 82 YALE L.J. 920, 924 (1973).

36. Justice Stevens, in his concurring opinion in *Thornburgh*, tried to provide a justification for why the State would have a greater interest in protecting unborn human life later in pregnancy than earlier, saying that it is "obvious that the State's interest . . . 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." *Id.* at 778 (Stevens, J., concurring). This is not at all "obvious," however, for it suggests that the State's interest in protecting the life of the newborn or the mentally disabled would be *less* than its interest in protecting the life of competent adults, a notion that is clearly contrary to our existing laws and principles of equality under the law.

37. *Roe*, 410 U.S. at 163.

38. Although, at the time *Roe* was decided, a twenty-three-week-old unborn child would not have been considered to be viable, now that child could

It is not surprising that *Roe* is so devoid of any relevant discussion or explanation of its choice of viability for balancing the competing interests of the parties. None of the statutes challenged in *Roe* or its companion case, *Doe v. Bolton*,[39] made any distinction based upon viability, and the concept of viability was not briefed or argued by any of the parties (or their amici) in either case. Appellants argued that a woman has an "absolute right" to abortion throughout her pregnancy, while appellees argued that the State could "protect prenatal life from and after conception."[40] None of the justices raised the issue of viability at oral argument.[41]

The second draft of Justice Blackmun's opinion in *Roe* was circulated six weeks after *Roe* and *Doe* had been reargued. That draft stated that the State's "important and legitimate interest in the potentiality of human life . . . becomes 'compelling,'" and therefore strong enough to support a restriction of abortion, "at, or at any time after the end of the *first trimester*, as the State may determine."[42] That draft did *not* say *after viability*. In his cover letter accompanying that draft, Justice Blackmun said, "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.*"[43]

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be considered to be viable. *See, e.g.*, Carl H. Backes et al., *Outcomes Following a Comprehensive Versus a Selective Approach for Infants Born at 22 Weeks of Gestation*, 39 J. PERINATOLOGY 39, 45 (2019).

39. 410 U.S. 179 (1973).

40. *See Roe*, 410 U.S. at 156.

41. The audio recordings and transcripts of the oral arguments in *Roe v. Wade* and *Doe v. Bolton* may be found at https//www.oyez.org/cases/1971/70-18 (last visited Feb. 1, 2020) and https/www.oyez.org/cases/1971/70-40 (last visited Feb. 1, 2020), respectively.

42. Justice Harry A. Blackmun, Unpublished Second Draft Opinion in *Roe v. Wade*, No. 70-18, at 47-48 (Nov. 22, 1972) (on file with Library of Congress, Manuscript Division, Box 151, Folder 6, Harry A. Blackmun Papers) (emphasis added). "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 categories that are articulated with sufficient clarity so that a physician is able to predict what conditions fall within the stated classification." *Id.* at 48.

43. Justice Harry A. Blackmun, Memorandum to the Conference, Re: No. 70-18—*Roe v. Wade* (Nov. 21, 1972) (emphasis added) (on file at Library of Congress, Manuscript Division, Box 151, Folder 6, Harry A. Blackmun Papers), *available at Blackmun Memorandum on* Roe v. Wade, JUST FACTS, https://www.justfacts.com/abortion.blackmun.asp [https://perma.cc/3PTB-L2L8] (last visited Oct. 9, 2019). "Quickening" is that stage of fetal development when the mother first detects fetal movement, usually beginning around the sixteenth week of pregnancy. *See Quickening*, DORLAND'S ILLUSTRATED MEDICAL DICTIONARY 1567 (32nd ed. 2012).

It is not entirely clear what influenced Justice Blackmun's thinking in subsequently abandoning the end of the first trimester as the critical period of time in favor of viability.[44] However, it is clear that the authors of the Joint Opinion in *Casey* were seriously mistaken in asserting that, with respect to the selection of viability, the opinion in *Roe* "was a reasoned statement, elaborated with great care."[45] Although the majority opinions in *Akron Center* and *Thornburgh v. American College of Obstetricians and Gynecologists*[46] did reaffirm *Roe* (on the basis of *stare decisis*), neither opinion defended or even mentioned the rationale upon which the choice of viability had been made.[47]

The Four Stare Decisis *Factors*

The Joint Opinion in *Casey* identified four factors that need to be evaluated in determining whether the doctrine of *stare decisis* bars reconsideration of a rule of law adopted in an earlier precedent. Those factors were:

> [(1)] whether the rule has proven to be intolerable simply in defying practical workability, [(2)] whether the rule is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation, [(3)] whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine, [and (4)] whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification.[48]

We shall refer to these four factors as "workability," "reliance," "change in law," and "changes of fact."

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44. After a meticulous examination of the Court's internal papers, one scholar has concluded that the only reason Justice Blackmun "expanded abortion to fetal viability" was a "pragmatic" one, specifically, "a broader 'right' to abortion would mean more access for more abortions." Clarke D. Forsythe, ABUSE OF DISCRETION: THE INSIDE STORY OF *ROE V. WADE* 153 (2013).

45. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870 (1992).

46. 476 U.S. 747 (1986).

47. *See* City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 419–20 (1983); *Thornburgh*, 476 U.S. at 759.

48. *Casey*, 505 U.S. at 854–55 (citations omitted).

A. Workability

The first *stare decisis* factor identified in *Casey* is whether the viability rule has proven to be "unworkable" in practice.[49] The Joint Opinion dismissed any concerns over this factor in a single sentence, merely remarking that *Roe* represents "a simple limitation beyond which a state law is unenforceable."[50] It also stated that although the need for continued judicial assessment of state abortion laws would remain, "the required determinations fall within judicial competence."[51] The Court did not explain the underlying basis for either statement.

The Joint Opinion's failure to develop those points is astonishing, given the prior opinions of two of its three authors. In her dissent in *Thornburgh*, Justice O'Connor stated that the "Court's abortion decisions have already worked a major distortion in the Court's constitutional jurisprudence."[52] She continued: "That the Court's unworkable scheme for constitutionalizing the regulation of abortion has had this institutionally debilitating effect should not be surprising, however, since the Court is not suited to the expansive role it has claimed for itself in the series of cases that began with *Roe v. Wade*."[53] In *Akron Center*, Justice O'Connor's dissent provided a lengthy criticism of *Roe*'s requirement that States continuously update their statutes to assure that they do not "depart from accepted medical practice."[54] While noting that this was a difficult and "exacting task" for legislatures, she stated that legislatures are far more competent "to make the necessary judgments than are courts."[55] Finally, Justice O'Connor correctly described *Roe*'s framework as it relates to maternal health and fetal viability, as "on a collision course with itself."[56]

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49. *Id.* at 855.

50. *Id.*

51. *Id.*

52. *Thornburgh*, 476 U.S. at 814 (O'Connor, J., dissenting).

53. *Id.* at 814–15; *see also* City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416, 453–54 (O'Connor, J., dissenting) (citation omitted) (describing *Roe*'s entire trimester framework, including viability, as "completely unworkable" and urging that it be scrapped).

54. *Akron Ctr.*, 462 U.S. at 454 (O'Connor, J., dissenting) (quoting *id.* at 431 (majority opinion)).

55. *Id.* at 456 & n.4.

56. *See id.* at 458. Justice O'Connor argued that as abortion becomes safer later in pregnancy and viability is achieved earlier in pregnancy a woman's absolute right to obtain an abortion whenever it is safer than childbirth would collide with the State's right to protect prenatal life when viable. *Id.* at 456–58. Some medical sources currently claim that abortion is safer than childbirth throughout pregnancy. *See, e.g.*, Elizabeth G. Raymond & David A. Grimes, *The Comparative Safety of Legal Induced Abortion*

Justice Kennedy, for his part, joined Chief Justice Rehnquist's plurality opinion in *Webster v. Reproductive Health Services*,[57] stating that principles of *stare decisis* should not prevent reconsideration of *Roe* because *Roe* "has proved 'unsound in principle and unworkable in practice.'"[58] The Joint Opinion failed to acknowledge these pronouncements that *Roe* is unworkable, much less explain what supposedly changed the justices' minds. Instead, without any explanation or elaboration, the Joint Opinion cited *Garcia v. San Antonio Metropolitan Transit Authority,*[59] as though simply citing *Garcia* was self-explanatory. It is not.[60]

In *Garcia,* the Supreme Court determined that its prior holding in *National League of Cities v. Usery*[61] *should* be overturned because the Court's attempt in *Usery* to distinguish between "proprietary" and "traditional" functions of state and local government was "unsound in principle and unworkable in practice."[62] As *Garcia* explained, it is not sufficient to simply state "that a 'line [must] be drawn,' and proceed[] to draw that line."[63] For *stare decisis* to apply, the Court must give a "reasoned explanation" for drawing that line.[64] The *Casey* Joint Opinion conspicuously failed to give that explanation. The Joint Opinion determined that a line must be drawn and "conclude[d] the line should be drawn at viability."[65] But it offered no reasoned explan–

and Childbirth in the United States, 119 OBSTETRICS & GYNECOLOGY 215, 215–19 (2012).

57. 492 U.S. 490 (1989).

58. *Id.* at 518 (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

59. 469 U.S. 528 (1985).

60. Ironically, *Webster* and *Casey* cited the exact same page of *Garcia* for *opposite* propositions. In *Webster*, the plurality opinion cited *Garcia* in support of a finding that *stare decisis* would *not* preclude overturning *Roe*, while in *Casey* the Joint Opinion cited *Garcia* in support of a finding that *stare decisis would* preclude overturning *Roe*. *Compare Webster*, 492 U.S. at 518, *with* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992).

61. 426 U.S. 833 (1976). In *Usery*, the Supreme Court held that, under the Tenth Amendment, the minimum wage and overtime regulations of the federal Fair Labor Standards Act could be applied only to "proprietary," but not "traditional," functions of state and local government. *Id.* at 852. This test was unworkable because it was difficult to determine which functions were proprietary and which were traditional.

62. *Garcia*, 469 U.S. at 546–47.

63. *Id.* at 543 (first alteration in original) (citation omitted) (quoting South Carolina v. United States, 199 U.S. 437, 456 (1905)).

64. *Id.*

65. *Casey*, 505 U.S. at 870.

ation for drawing that line.[66] It simply stated, *ipse dixit*, that "there is no line other than viability which is more workable."[67] Thus we are told, in effect, that although the choice of viability may "appear arbitrary" and is not actually workable, the "viability line" must be reaffirmed because of *stare decisis*.[68]

As set forth below, making a judgment with respect to viability is neither "simple" nor "within judicial competence" to determine. Nor is viability "more workable" than any other line.

1. Viability is Not a "Simple Limitation"

The *Casey* Court referred to viability as though it is a well-defined line (or point in time) that can be determined with some precision—a "simple limitation beyond which a state law is unenforceable."[69] There are many problems with the Court's approach, not the least of which is that viability is not really a defined line at all. Rather, it is a *prediction*—an educated guess—about the statistical probability that a baby (given certain characteristics) has of surviving if born prematurely. This is a complex estimation made on the basis of assessing multiple factors. It usually is done in the context of managing a pregnancy at risk of premature birth or in the context of determining the type and amount of care to be provided to a baby that has already been born prematurely.[70] And there is no predetermined degree of statistical probability that is generally accepted within the medical community regarding what constitutes viability. Different medical specialties, as well as individual physicians within those specialties, often have very different views about whether a baby with a statistical probability of

66. It is clear that the *Roe* Court's choice of viability (as the point when sufficient value could be assigned to the unborn child to allow limitations on the woman's ability to obtain an abortion) was completely arbitrary. *See supra* notes 40–44 and accompanying text. As such, it simply represents a value judgment made by the members of the Court based upon their own personal predilections.

67. *See Casey*, 505 U.S. at 870.

68. *See id.*

69. *Id.* at 855.

70. All of the medical journal articles discussed herein assess viability in these two contexts. We were unable to find any medical journal articles or abortion industry standards discussing viability predictions in the context of abortion. This is not surprising given that, in the context of abortion, the Court has held that the viability determination must be left solely to the judgment of the physician performing the abortion on a case-by-case basis. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 63–65 (1976); Colautti v. Franklin, 439 U.S. 379, 395–97 (1979).

survival of, say 20 percent, is viable.[71] Thus, the "viability line,"[72] as the Court refers to it, is no line at all. It is an illusion.

2. Factors Affecting Viability

Viability is currently predicted by examining a variety of factors, which are of varying difficulty to determine. Some factors are intrinsic to the baby—his or her gestational age,[73] weight, sex (females fare better than males),[74] and whether there is a singleton or multiple birth (singletons do better).[75] But each of these factors has significant limitations with respect to accuracy of determination, especially during pregnancy. Take, for example, gestational age. There are three basic methods that have been relied upon since *Roe* and *Coluatti* for determining an unborn child's gestational age. The two primary methods used at the time of *Roe* were determinations based on a physical examination of the pregnant woman and/or her recollection of the first day of her last menstrual period ("LMP"). Both of these methods are notoriously inaccurate means of determining gestational age.[76]

71. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS & SOC'Y FOR MATERNAL-FETAL MED., *Obstetric Care Consensus: Periviable Birth*, 130 OBSTETRICS & GYNECOLOGY e187, e195 (Oct. 2017) (suggesting that individual institutions should develop consensus guidelines because various providers may "have divergent opinions and practices based on personal beliefs or professional experiences"). Periviable birth is defined as a "delivery occurring from 20 0/7 weeks to 25 6/7 weeks of gestation." *Id.* at e188.

72. *Casey*, 505 U.S. at 870.

73. Gestational age is determined from the first day of the woman's last menstrual period, *see Gestation*, BLACK'S MEDICAL DICTIONARY 529 (43rd ed. 2012), and is commonly used by both obstetricians and neonatologists. Accordingly, we use that term throughout this Article.

74. The National Institute of Child Health & Human Development's (NICHD) preterm-birth-outcome calculator provides predicted survival rates for babies between twenty-two and twenty-five weeks. *NICHD Neonatal Research Network (NRN): Extremely Preterm Birth Outcome Data*, NAT'L INST. OF HEALTH, https://www1.nichd.nih.gov/epbo-calculator/Pages/epbo_case.aspx [https://perma.cc/79RM-J9C7] [hereinafter NICHD] (last reviewed Dec. 12, 2019). Inputting identical data into that calculator results in roughly a 10 percent reduction in survival rates between twenty-three and twenty-five weeks for males when the sex is changed from female to male. *See id.* Though males still fare worse than females at twenty-two weeks, the differences in survival rates are less dramatic. *See id.*

75. *See* Backes et al., *supra* note 38, at 45.

76. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS COMMITTEE ON OBSTETRIC PRACTICE ET AL., METHODS FOR ESTIMATING THE DUE DATE 2 (2017) (LMP is often inaccurate due to "inaccurate recall of the LMP, irregularities in cycle length, or variability in the timing of ovulation").

By far the most accurate method for determining gestational age currently relied upon by obstetricians is fetal ultrasound, which is based on crown-rump length during the first trimester.[77] However, even at this stage of pregnancy, the margin of error is plus-or-minus five to seven days.[78] Moreover, the accuracy of ultrasound assessments of gestational age *decreases* as the pregnancy progresses. So, for example, between the beginning of the twenty-second week and the end of the twenty-seventh week of gestation, the accuracy is plus-or-minus ten to fourteen days, and in the third trimester (the beginning of the twenty-eighth week and beyond), the accuracy is plus-or-minus twenty-one to thirty days.[79]

The remaining intrinsic factors also have problems with accuracy. For example, determining fetal weight is (obviously) more difficult and less accurate when the baby is still *in utero*, than it is when the baby already has been born prematurely.[80] And extrapolations of fetal weight based on ultrasound may have a margin of error between 10 and 15 percent.[81] Determining the sex of the baby through ultrasound cannot be made with a high degree of accuracy until thirteen or fourteen weeks,[82] and it is not uncommon for an early ultrasound to detect a multiple pregnancy, which is not supported by a later ultrasound.[83]

In addition to the above intrinsic factors that are considered in assessing viability, there are a number of other factors that relate to extrinsic conditions (which may or may not be present). The most important of these factors that affect a newborn's survivability is the type of prenatal and postnatal care administered. There are currently several different types of prenatal care that can greatly increase a newborn's chance of survival and reduce the incidence and severity of

77. *Id.* (stating that the first trimester ends after thirteen weeks, six days of gestation).

78. *Id.*

79. *Id.* at 3.

80. "[B]efore delivery, newborn birth weight can only be estimated. The inherent inaccuracy of ultrasound-estimated fetal weight introduces a degree of uncertainty to the prediction of newborn outcomes." AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 71, at e191.

81. Jun Zhang et al., *Defining Normal and Abnormal Fetal Growth: Promises and Challenges*, 202 AM. J. OBSTETRICS & GYNECOLOGY 522, 525 (2010) ("The percentage of birth weight predictions within ±10% and ±15% of actual birthweight were, on average, 69.2% and 86.5%, respectively.").

82. Manette Kearin et al., *Accuracy of Sonographic Fetal Gender Determination: Predictions Made by Sonographers During Routine Obstetric Ultrasound Scans*, 17 AUSTRALASIAN J. ULTRASOUND MED. 125, 129 (2014).

83. Ann L. Anderson-Berry & Terence Zach, *Vanishing Twin Syndrome*, MEDSCAPE (May 10, 2016), https://emedicine.medscape.com/article/271818-overview [https://perma.cc/6QNE-FGFR].

long-term disability. The administration of corticosteroids to the mother in advance of her anticipated premature birth greatly assists in the baby's lung maturation, and is one of the most important therapies available to improve newborn outcomes.[84] Administration of magnesium sulfate also has been shown to improve neurologic outcomes when given to the mother before she gives birth.[85] And, there are a number of other medications that can be administered to the mother (depending on the cause of the anticipated premature birth) that improve newborn outcomes.[86]

With respect to postnatal care, the most important factors are providing immediate resuscitation to the newborn at delivery and the provision of intensive care thereafter. Optimally, the delivery should take place in a hospital with an advanced neonatal intensive care unit ("NICU").[87] During the periviable period, both immediate resuscitation and intensive care are critical to survival.[88] Thus, the location of the anticipated delivery and the provision of prenatal and postnatal care significantly impact survival rates of newborns at the limits of viability—currently about twenty-two weeks gestational age.

3. Probabilities of Survival Vary Greatly

Numerous medical studies report wide ranges of survival rates at various gestational ages during periviable birth.[89] Significant disparities in survival rates can arise due to a variety of factors, including whether

84. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, *supra* note 71, at e194.

85. *Id.*

86. *See id.* at e195.

87. *Id.* at e191–92. Many of the medical conditions causing premature birth also require advanced care hospitals for favorable maternal outcome as well. So, it is more likely that a hospital capable of providing adequate care to the mother will also be able to meet the needs of the newborn.

88. Extremely premature infants do not usually survive "without life-sustaining interventions immediately after delivery." *Id.* at e191. As previously noted, "periviable birth" means a "delivery occurring from 20 0/7 weeks to 25 6/7 weeks of gestation." *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS & SOC'Y FOR MATERNAL-FETAL MED., *supra* note 71.

89. *See id.* at e188 and studies cited therein. Survival to discharge rates were reported as 5–6% at less than twenty-three weeks; 23–27% at twenty-three weeks; 42–59% at twenty-four weeks; and 67–76% at twenty-five weeks. *Id.* at e188–89; *see also* Backes et al., *supra* note 38, at 39 and studies cited therein; Matthew A. Rysavy et al., *Between-Hospital Variation in Treatment and Outcomes in Extremely Preterm Infants*, 372 NEW ENG. J. MED. 1801 (2015) and studies cited therein; Katrin Mehler et al., *Survival Among Infants Born at 22 or 23 Weeks' Gestation Following Active Prenatal and Postnatal Care*, 170 JAMA PEDIATRICS 671 (2016).

newborn infants are provided only palliative care[90] and die soon after birth, and whether reported survival rates are based on data that is older or more recent. Even where there are controls for these factors, though, wide ranges of survival rates have been reported. A recent study comparing infants born at twenty-two weeks gestation at two different hospitals—one in the United States, the other in Sweden—reported survival-to-discharge rates of between 8 and 53 percent.[91] Both hospitals had large NICUs, but each took a different approach to the provision of care. The hospital that routinely provided prenatal corticosteroid administration, neonatal resuscitation, and intensive care had substantially higher survival rates (53 percent) than the hospital that only selectively provided such care (8 percent).[92]

4. There is No Consensus Regarding What Statistical Probability Determines Viability

It also should be noted that there is no single source upon which a consensus rests for predicting when viability is reached. And, although there exists a widely available resource for estimating the likelihood of survival during the periviable period, the data upon which its calculations are based is quite old, given rapid advances in medical technology.[93] Thus, such predictive calculators cannot provide estimates of statistical probabilities of survival with "an accuracy equivalent to that initially reported" in the sources relied upon.[94]

Moreover, even if a uniform and accurate source were available to establish the survival rates at various ages, there is no consensus within

90. Extremely premature infants who are provided only palliative care and are not given any life-sustaining medical intervention should not be included in any viability prediction in the context of abortion because the Court's definition of viability refers to the potential ability to survive "with artificial aid." *See* Roe v. Wade, 410 U.S. 113, 160 (1973).

91. Backes et al., *supra* note 38 at 39.

92. *Id.* at 39, 43. "[C]enter variability in the provision of treatment at 22 weeks of gestation accounts for 78% of the variation in survival." *Id.* at 39. This study also cited other studies reporting that the provision of prenatal corticosteroids and neonatal intensive care were associated with reductions in the risk of death similar to those associated with a one-week increase in gestational age. *See id.*

93. NICHD, *supra* note 74 (data covers infants born between 1998 and 2003). The Obstetric Care Consensus on periviable birth notes that these prediction models exist but cautions against their use because they were developed based on populations of neonates born during a given period and are not regularly updated as medical care advances to reflect the most current data available. AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS & SOC'Y FOR MATERNAL-FETAL MED., *supra* note 71, at e190–91.

94. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS & SOC'Y FOR MATERNAL-FETAL MED., *supra* note 71, at e191.

the medical community with respect to how great the chance of survival at a particular age must be in order for a baby to be deemed "viable." Some doctors or medical facilities may deem a baby to be viable when there is, say, a 10 percent chance of survival, while others may not do so unless there is a 25 percent (or even a much greater) chance of survival.[95]

From the foregoing discussion, it should be clear that there is, of necessity, a great deal of inaccuracy involved in attempting to determine gestational age and fetal weight. Even under optimal circumstances, these factors have margins of error that can cause the determination to be off by about a week. And errors of this magnitude are amplified when dealing with periviable babies because those babies' chances of surviving increase dramatically with each week of gestational age and corresponding increases in fetal weight.[96] In addition, the knowledge and skill of the physician making the viability prediction is critical. Likewise, the type of pre- and post-natal care that the hospital where the birth takes place (and its policies toward treating or not treating periviable newborns at various ages), significantly affects the statistical probabilities for survival outcomes. All of these factors combined contribute to the fact that there is no current consensus regarding what statistical probability constitutes viability; and they make it unlikely that any consensus will be forthcoming in the near future.

5. Evaluating Predictions of Viability Does Not Fall Within Judicial Competence

From its inception, *Roe*'s reliance on viability as the critical point in time to assign value to an unborn child's life has proven to be uncertain and unworkable. *Roe* held that the State's interest in protecting prenatal life does not become sufficiently compelling until viability, that is, when the fetus is "potentially able to live outside the mother's womb, albeit with artificial aid."[97] After this point, the Court said, the State may regulate abortion and go so far as to proscribe abortion.[98] In addition, *Roe* seemingly set upper and lower limits for

95. *See supra* note 71 and accompanying text.

96. Once a gestational age is reached when the lungs have matured sufficiently to allow for independent living without neonatal intensive care, incremental increases in survival taper off. *Id.* at e188.

97. Roe v. Wade, 410 U.S. 113, 160 (1973).

98. *Id.* at 162–63. Per the Court's holding, the State may not prohibit those post-viability abortions that are necessary to save the life or health of the mother. *Id.* at 163. *See infra* Part IV (discussing whether the State's purported authority to prohibit post-viability abortions (given the broad exceptions for maternal "health") is real or illusory).

determining when viability was met—referring specifically to the time between twenty-four and twenty-eight weeks.[99]

There was widespread agreement at the time of *Roe* that a baby over twenty-eight weeks was generally viable, while one under twenty-four weeks could rarely survive.[100] There was no consensus, however, regarding the period between twenty-four and twenty-eight weeks, and *Roe* gave no guidance with respect to how the State could permissibly protect an unborn child during this gray period.[101] This was particularly vexing because *Roe* spoke, confusingly, of viability as being a "point," as though it were a particular point in time, while at the same time it referred to viability as occurring somewhere between twenty-four and twenty-eight weeks of gestation, over a span of time. So, it was not clear how the State could define viability and what criteria it could require to be considered in making the assessment of viability.

Immediately following *Roe,* numerous states set out to craft new abortion statutes that would comply with *Roe*'s dictates.[102] Given the paucity of guidance in *Roe* itself, however, there were many differing approaches and numerous court challenges.[103] The district courts evaluating the constitutionality of these definitions often reached diametrically opposed conclusions. For example, the Missouri and Pennsylvania statutes both defined viability in a manner similar to the definition contained in *Roe*.[104] Both definitions were challenged, with the plaintiffs in each case arguing that the definitions could only withstand a constitutional challenge if they contained a specific gestational age cut-off, which neither did.

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99. *See Roe*, 410 U.S. at 160.

100. *See* LOUIS HELLMAN & JACK PRITCHARD, WILLIAMS OBSTETRICS 493 (14th ed. 1971) ("Attainment of a weight of 1,000 g [about twenty-eight weeks] is therefore widely used as the criterion of viability."). The text also stated: "Interpretations of the word 'viability' have varied between fetal weights of 400g (about twenty weeks' gestation) and 1,000 g (about 28 weeks)." *Id.* The lower twenty-week limit, however, was based on the report of a single case of a baby surviving at that age. *See id.*

101. *See* Mary Anne Wood & Lisa Bolin Hawkins, *State Regulation of Late Abortion and the Physician's Duty of Care to the Viable Fetus,* 45 MO. L. REV. 394, 401 (1980) (surveying state abortion laws that attempt to regulate or prohibit abortion after viability).

102. *Id.*

103. *See id.*

104. The Pennsylvania statute defined *viable* as the "capability of a fetus to live outside the mother's womb albeit with artificial aid." *See* Planned Parenthood Ass'n v. Fitzpatrick, 401 F. Supp. 554, 569 (E.D. Pa. 1975). The Missouri statute had minor variations, but was essentially the same. *See* Planned Parenthood of Central Missouri v. Danforth (*Danforth I*), 392 F. Supp. 1362, 1368 (E.D. Mo. 1975).

In *Planned Parenthood of Central Missouri v. Danforth*, the district court upheld Missouri's definition and rejected plaintiffs' suggestion that a statutory definition of viability must "establish a specific point in gestation when the fetus is considered to be viable" to be constitutional.[105] In *Planned Parenthood Association v. Fitzpatrick*,[106] however, the district court struck down Pennsylvania's definition.[107] Unlike the *Danforth* court, the *Fitzpatrick* court had obtained extensive trial testimony from expert witnesses explaining the difficulties and uncertainties involved in making a prediction of viability—especially without any reference to gestational age.[108] In holding that the statutory definition of viability was unconstitutionally vague, the district court stated:

> The ability of a fetus to live outside the mother's womb cannot be determined directly. To reach such a judgment physicians must correlate certain probability of survival factors with the gestational age to determine viability as defined by the Act. The evidence clearly demonstrates that the statistical data available to the physician concerning fetus survival is not precise; also other variables such as the mother's health and the quality of hospital facilities in the community must be taken into consideration. There is a lack of consensus within the medical community as to "the capability of a fetus to live outside the mother's womb albeit with artificial aid" when the gestational age of the fetus is determined to be between 20 and 28 weeks.[109]

The court concluded "that while not every physician who testified would reach exactly the same determination as to gestational age, there would be a consensus within reasonable and tolerable limits," with respect to the *method* for determining gestational age.[110] Thus, the court noted that "if the statute had even limited viability to 24 weeks gestation, it would be in conformity with the pronouncement of *Roe*, and not subject to a successful challenge."[111] In reaching this decision,

105. *Danforth I*, 392 F. Supp. at 1368. The plaintiffs suggested "the period subsequent to the twenty-fourth week, or approximately the end of the second trimester" as an appropriate cut-off. *Id.*

106. 401 F. Supp. 554 (E.D. Pa. 1975).

107. *Id.* at 561.

108. *Id.* at 569.

109. *Id.* at 570 (also noting that physicians had no uniform position on what probability (e.g., 10 percent or 30 percent) of survival would be sufficient to qualify for viability).

110. *Id.* at 569–70.

111. *Id.*

the *Fitzpatrick* court acknowledged the existence of the *Danforth* court's prior ruling, but rejected its reasoning.[112]

The first of these two cases to reach the Supreme Court was *Danforth*. With little discussion, the Court affirmed the district court's holding with respect to the definition of viability in the Missouri law[113]:

> [W]e agree with the District Court that it is not the proper function of the legislature or the courts to place viability, which essentially is a medical concept, at a specific point in the gestation period. The time when viability is achieved may vary with each pregnancy, and the determination of whether a particular fetus is viable is, and must be, a matter for the judgment of the responsible attending physician.[114]

There are two fundamental flaws with respect to the Court's conclusion. First, the Court's refusal to allow states to set *any* particular gestational age as a cut-off point suggests that the Court did not believe there is any consensus at all regarding viability. One would have thought, however, that it would have been perfectly permissible for a state to draw a line at, say, twenty-eight weeks, given the broad agreement that a baby at that stage of development is viable.[115]

Second, the Court's pronouncement—that a viability determination must be specific to a "particular fetus"—also suggests a fundamental misunderstanding of the concept of viability.[116] It simply is not possible to make any accurate viability prediction with respect to a *particular* baby. Statistical survival probabilities are based on studies of survival rates within general populations of neonates at various gestational ages and do not predict the outcome for a particular newborn.[117] "[W]hen a specific estimated probability for an outcome is offered, it should be

112. *Id.* at 572.

113. *See* Planned Parenthood of Central Missouri v. Danforth (*Danforth II*), 428 U.S. 52, 63–65 (1976). Following the Supreme Court's decision in *Danforth* (discussed below in the text), the first appeal in *Fitzpatrick* was remanded for reconsideration in light of, among other things, *Danforth*'s viability holding. *See* Beal v. Franklin, 428 U.S. 901 (1976). On remand, the district court upheld the definition of viability. *See* Colautti v. Franklin, 439 U.S. 379, 385 (reciting the case's history). The constitutionality of Pennsylvania's definition of "viability" was not before the Court in *Colautti*.

114. *Danforth II*, 428 U.S. at 64.

115. *See* HELLMAN & PRITCHARD, *supra* note 100.

116. *See Danforth II*, 428 U.S. at 64.

117. *See* AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS & SOC'Y FOR MATERNAL-FETAL MED., *supra* note 71, at e191. Prediction of outcome frequencies "provides only a point estimate reflecting a population average and cannot predict with certainty the outcome for an individual newborn." *Id.*

stated clearly that this is an estimate for a population and not a prediction of a certain outcome for a particular patient in a given institution."[118] Moreover, if viability marks the point in time when the *value* of the unborn child becomes sufficient to support protection by the State, then there is no reason why one particular baby should have greater value than another of the same gestational age and, thus, the same probability of survival.[119]

In *Colautti v. Franklin,*[120] the Court restated the definition of viability again and further limited the State's ability to provide any meaningful indicia for making viability assessments. It stated: "Via–bility 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 . . . ."[121] As Justice White noted in dissent, with this further refinement of the viability definition, *Colautti* withdrew from the states "a substantial measure of the power to protect fetal life that was reserved to them in *Roe v. Wade.*"[122]

118. *Id.*

119. The foregoing discussion highlights the incongruity of even discussing viability in the context of abortion. In the non-abortion context, a viability assessment is important when anticipating that a pregnancy will terminate prematurely, or when a pregnancy has terminated prematurely, due to circumstances largely *outside the control* of the pregnant woman and her physician. Thus, in the non-abortion context, assessing viability has an actual medical use: to inform medical judgments about appropriate treatment options for the unborn (or newborn) child.

    In contrast, in the context of elective abortion, the circumstances that give rise to the pregnancy's premature termination are *wholly within the control* of the woman and her physician. In the absence of an abortion, the pregnancy would continue to term and there would be no need for any assessment of viability. Thus, predicting viability has no actual medical use—it is not done for the benefit of the pregnant woman or her unborn child. Instead, it simply identifies that stage in pregnancy when *value* may be accorded to the unborn, i.e., when *the intentional premature termination* of the pregnancy may be prohibited.

    The Court ignores this essential difference when it tries to graft the concept of viability onto an abortion procedure involving the *purposeful termination* of the pregnancy. As a consequence, many of the usual factors that would be taken into consideration in making a viability prediction (e.g., pre- and post-natal care) are simply irrelevant in the context of abortion. This adds to the problems that make the viability rule unworkable in practice.

120. 439 U.S. 379 (1979). For *Colautti*'s litigation history, *see supra* note 113.

121. *Colautti*, 439 U.S. at 388.

122. *Id.* at 401 (White, J., dissenting) (citation omitted).

Roe spoke of viability in terms of the fetus being "potentially able to live" outside the mother's womb[123]—not in terms of having a "reasonable likelihood of sustained survival."[124] As in *Danforth*, the Court in *Colautti* did not see fit to give any explanation regarding what the new "reasonable likelihood of sustained survival" standard entails. Does a 20 percent probability of survival constitute a reasonable likelihood of survival? Or must it be more than a 50 percent (or perhaps 75 percent) probability to qualify? And what is "sustained survival"? Does ten days qualify? Does discharge from the NICU qualify? Or, does it mean some other undefined time beyond that? Lower courts can only guess at the answers to these questions, and legislatures have been forbidden to refine their viability definitions in any manner other than as allowed by *Colautti*.[125]

The *Colautti* Court clearly was aware of the serious difficulties that *Roe*'s definition of viability posed for physicians attempting to assess viability.[126] In attempting to rectify this situation, the Court could have allowed the states to adopt bright-line gestational age cut-offs that were reasonable approximations of viability, as the plaintiff-physicians had urged in both *Danforth* and *Fitzpatrick*. This would have been consistent with *Roe* and would have avoided many, but not all, of the inherent difficulties associated with requiring physicians to make viability determinations.[127]

Instead, the Court doubled down on its ambiguous and manipulable viability definition that placed the viability determination solely in the hands of the physician performing the abortion. And it further foreclosed the State's ability to establish any bright-line objective standard beyond which abortions could be prohibited.[128] Thus, *Colautti* severely crippled the State's ability to enact any laws prohibiting (or even regulating) abortions after viability in a manner that could be meaningfully enforced (except, perhaps, if the baby is well into the third

123. *See* Roe v. Wade, 410 U.S. 113, 160 (1973).

124. *See Colautti*, 439 U.S. at 393 (majority opinion).

125. In his partial dissent in *Casey*, Justice Rehnquist noted that the Court in *Colautti* determined that only one definition of viability would be tolerated—its own—and that States were prohibited from trying to impose any "objective indicator" that would govern the definition of viability. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 949 (1992) (Rehnquist, C.J., concurring in part and dissenting in part).

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

127. There still would have been problems with accurately determining gestational age, but this would have avoided all of the other problematic aspects involved in attempting to make an assessment of viability.

128. *See Colautti*, 439 U.S. at 388–89.

trimester when the abortion is performed and bad faith can be proven).[129]

All of these same difficulties and uncertainties as to determining gestational age late in pregnancy and assessing viability remain today. Not one of them has been clarified or removed by the Court's post-*Colautti* decisions, so the criteria for assessing viability remain both undefined and undefinable. And the Court has determined that the purely subjective decisions that these physicians make may not be questioned.

In effect, then, the Court has granted virtual immunity to abortion doctors in determining whether a baby they wish to abort is viable. In so doing, the Court has ceded to third-party physicians the ability to determine both the extent of a woman's constitutional right to abortion and the constitutional value to be accorded to the unborn child. By abandoning the field, the Court has tacitly admitted that there are simply no standards capable of being properly applied by the courts to evaluate viability. In short, the Court has imposed upon the states a "constitutional" mandate that it lacks judicial competence to rule upon in any consistent and workable manner.

The Court has done this not out of necessity, but based on a completely arbitrary decision to cling to its choice of the completely arbitrary line of viability. The Court has not explained—indeed, it *cannot* explain—why either a woman's right to terminate her pregnancy or the State's right to prohibit that action should hinge on a term so indeterminate as "viability."

A brief examination of a hypothetical situation demonstrates just how unworkable the Court's viability rule is. Under the Court's judgments, a woman's constitutional right to terminate her pregnancy is dependent on where she lives within a state and the skill (or lack thereof) of her physician. Take two women who are twenty-five weeks pregnant. One seeks an abortion from a board-certified obstetrician-gynecologist who practices at a tertiary care hospital with an advanced NICU where intensive care is routinely provided to newborns at this age and the survival rate is in excess of 75 percent. The other seeks to have an abortion performed at a rural outpatient clinic by a physician who is not knowledgeable about current survival rates for premature babies.[130] The first physician would likely judge the baby to be viable,

129. Having been given responsibility for performing an impossible task—determining viability for a *particular* baby—it is no wonder that physicians have argued that they must be given absolute immunity from prosecution for performing a post-viability abortion. *See* Brief for American Public Health Association et al. as Amici Curiae Supporting Respondents at 30–32, Beal v. Franklin, 428 U.S. 901 (1976) (No. 75-709).

130. A survey conducted by researchers from the University of Alabama found that obstetricians and pediatricians significantly underestimated premature infants' odds of survival and overestimated their chances of developing a

while the second may likely judge the baby to be not viable. Thus, one woman would be unable to secure an abortion while the other would be able to obtain an abortion. Indeed, if one of the women goes first to the skilled physician and is denied the abortion and then goes to the non-skilled physician later that day, her baby may be deemed both "viable" and "non-viable" on the same day!

There is simply no plausible reason for basing the woman's constitutional right to abortion on her location or the skill level of her physician. Nor is there any plausible reason for suggesting that the baby's life is valuable and capable of being protected in one instance and not in the other. Neither of these interests should be determined by such haphazard means.

From the foregoing discussion, it is clear that the viability rule does not represent a simple limitation beyond which a state law is unenforce–able, unless the Court means that it is simple because it is left solely in the hands of the abortion physician and, thus, is completely unenforce–able. In that case, it may be "workable" in the sense that the State always loses. But, surely that is not what the Court meant. For a rule to be "workable," it must accomplish its goal. Unless *Roe* intended to allow abortion on demand throughout pregnancy—a position it adamantly disavowed[131]—it cannot be said that a holding that so severely limits the ability of the State to protect prenatal life is "workable" in any meaningful sense.

6. There Are Other Lines That Would Be More Workable Than Viability

Despite the *Casey* Joint Opinion's bald assertion that the Court's arbitrary viability line is "more workable" than any other,[132] nothing could be further from the truth. Allowing states to draw a bright-line cut-off at a specific gestational age would certainly be more workable for both physicians and the states.[133] Indeed, a line drawn at the end of

serious handicap. Roxanne Nelson, *Premature Babies Do Better than Many Doctors Believe*, WEBMD (May 8, 2000), https://www.webmd.com/baby/news/20000508/better-survival-rates-for-premature-babies#1 [https://perma.cc/N345-TKA6].

131. *See* Roe v. Wade, 410 U.S. 113, 153 (1973) (rejecting the argument that "the woman's right is absolute and that she is entitled to terminate her pregnancy at whatever time, in whatever way, and for whatever reason she alone chooses"); *id.* at 154 ("The privacy right involved . . . cannot be said to be absolute.").

132. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 870 (1992).

133. A bright-line gestational cut-off at, say, twenty-two weeks, would be a reasonable approximation of viability. This would address most of the concerns of physicians and enhance the states' enforcement capabilities. *See supra* Part III.A.4 and notes 108–119, 125–129 and accompanying text.

the first trimester, as Justice Blackmun initially proposed in his draft opinion in *Roe*, would be far more workable than viability.[134] This is because gestational age determinations made within the first trimester are far more accurate than those made later in pregnancy.

Physicians would be required only to make a relatively simple determination of gestational age and not be burdened with trying to make predictions of viability. In addition, it would be much easier for states to enforce such a cut-off.

Given that the viability line was entirely arbitrary to begin with, it simply represented the judgment of seven members of the Court with respect to the proper *value* to be accorded to the unborn child's life. There is no constitutional principle upon which the Court—rather than the duly elected representatives of the states—should be allowed to make that value judgment.

Roe's viability rule is entirely arbitrary and is not supported by any "reasoned explanation." Moreover, contrary to the Joint Opinion, it is "unsound in principle and unworkable in practice."[135] The fact that the viability rule—the *essential* holding of *Roe*—defies practical workability provides a compelling reason to reconsider and overrule *Roe*.[136]

B. Reliance

The second *stare decisis* factor identified in *Casey* is:

> [W]hether the rule [that a pregnant woman has a right to obtain an abortion before her unborn child is viable, regardless of her reason for the abortion] is subject to a kind of reliance that would lend a special hardship to the consequences of overruling and add inequity to the cost of repudiation.[137]

134. The scope of this Article is limited to demonstrating that *Casey*'s reliance upon principles of *stare decisis* in support of its partial reaffirmation of *Roe* was entirely unwarranted. It is not our intent, by mentioning this (or any other) example of a more workable line than viability, to endorse that cut-off as the most workable alternative to viability. Rather, it is simply used to demonstrate that the Court's claim regarding viability was clearly wrong.

135. *See* Webster v. Reprod. Health Servs., 492 U.S. 490, 518 (1989) (Rehnquist, C.J) (quoting Garcia v. San Antonio Metro. Transit Auth., 469 U.S. 528, 546 (1985)).

136. *See* Paulsen, *supra* note 9, at 1177 ("[T]he more standardless, variable, and difficult-to-apply the holding of a particular case[,] the less it tends to yield predictable, principled results; the more unworkable that rule is; the greater the justification for discarding it.").

137. *Casey*, 505 U.S. at 854–55.

"The inquiry into reliance," the Joint Opinion stated, "counts the cost of a rule's repudiation as it would fall on those who have relied reasonably on the rule's continued application."[138]

The Joint Opinion tacitly conceded that, in sharp contrast to cases involving property or contract rights and duties, "where advance planning of great precision is most obviously a necessity,"[139] there could not be any *specific* reliance in the continuation of a right to abortion, as such.[140] That is because, as the Joint Opinion recognized, "repro–ductive planning could take virtually immediate account of any sudden restoration of state authority to ban abortions."[141] The Joint Opinion, however, refused to restrict the reliance interest "to specific instances of sexual activity,"[142] explaining:

> [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.[143]

The Joint Opinion concluded its analysis of the reliance factor by asserting that "while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain cost of overruling *Roe*[,]for people who have ordered their thinking and living around that case[,] be dismissed."[144]

There are several significant problems with the Court's analysis of the reliance factor. First, the alleged reliance interest the Court identifies in the availability of legal abortion has no necessary relation–ship to *Roe*'s choice of *viability* to protect that interest. The Court just as easily could have chosen the end of the first trimester, or even an earlier time (soon after unprotected sex) if "failed contraception" were of concern.

Second, the Joint Opinion's attempt to attribute "two decades of economic and social developments" to *Roe* is, as Chief Justice

138. *Id.* at 855.

139. *Id.* at 856.

140. *See id.*

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

Rehnquist said in his partial dissent, "undeveloped and totally conclusory."[145]

> Surely it is dubious to suggest that women have reached their "places in society" in reliance upon *Roe*, rather than as a result of their determination to obtain higher education and compete with men in the job market, and of society's increasing recognition of their ability to fill positions that were previously thought to be reserved only for men.[146]

Most of the economic and social developments to which the Joint Opinion alluded (but never described or identified) have resulted from a nationwide commitment to establishing equal rights for women that has had little or nothing to do with the availability of legal abortion. As two commentators have observed:

> *Roe* is rarely cited as a precedent for women's rights in any area other than abortion. Virtually all progress in women's legal, social and employment rights over the past 30 years has come about through federal or state legislation and judicial interpretation wholly unrelated to and not derived from *Roe v. Wade*.[147]

That observation, made in the same year *Casey* was decided, remains true today, almost thirty years later. Whatever progress has been made in the law in combating sex discrimination and promoting women's rights is attributable primarily to Congressional and state legislative action, and, to a lesser extent, judicial doctrines entirely independent of *Roe*.[148]

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145. *Id.* at 956 (Rehnquist, C.J., concurring in part and dissenting in part).

146. *Id.* at 956–57.

147. Paige Comstock Cunningham & Clarke D. Forsythe, *Is Abortion the "First Right" for Women?*, *in* ABORTION, MEDICINE, AND THE LAW 100, 154 (J. Douglas Butler & David F. Walbert eds., 4th ed. 1992) (footnote omitted).

148. The Supreme Court has invalidated state laws giving a preference to men in issuing letters of administration in probate cases, *e.g.*, *Reed v. Reed*, 404 U.S. 71 (1971); limiting admission to public institutions of higher learning to members of only one sex, *United States v. Virginia*, 518 U.S. 515 (1996); and allowing a husband, as "head and master" of property jointly owned with his wife, the unilateral right to dispose of such property without his spouse's consent, *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). The Court has also prohibited the use of peremptory challenges of potential jurors solely on the basis of gender. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). And the Court has invalidated federal laws requiring dependents of servicewomen, but not servicemen, to prove their dependence in order to receive quarters' allowances and medical and dental benefits, *Frontiero v. Richardson*, 411 U.S. 677 (1973), and a public school board policy mandating that every teacher in an advanced stage of

Congress has enacted statutes prohibiting sex and pregnancy discrimination in public and private employment,[149] and in unemployment compensation.[150] It has also prohibited sex discrimination in federally funded public works projects and aid to highways,[151] personnel policies,[152] equal pay,[153] the sale or rental of housing,[154] credit transactions[155] and education.[156] Almost all of the states have enacted similar legislation.[157] And eighteen states have adopted provisions to their state constitutions mandating equal rights or otherwise prohibiting discrimination on account of sex.[158]

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pregnancy be placed on leave, *Cleveland Bd. of Educ. v. Le Fleur*, 414 U.S. 632 (1974).

149. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e(k), 2000e-2(a) (2012).

150. Federal Unemployment Tax Act, 26 U.S.C. § 3304(a)(12) (2012).

151. Public Works and Economic Development Act Amendments of 1971, 42 U.S.C. § 3123 (2012) (public works); 23 U.S.C. § 324 (2012) (highways).

152. 5 U.S.C. § 2302(b)(1)(A), (C) (2012).

153. Fair Labor Standards Act of 1938, 29 U.S.C. § 206(d) (2012).

154. Fair Housing Act of 1968, 42 U.S.C. § 3604 (2012).

155. Equal Credit Opportunity Act, 15 U.S.C. § 1691(a)(1) (2012).

156. 20 U.S.C. § 1681(a) (2012).

157. According to the National Council of State Legislatures, forty-five out of fifty States prohibit sex discrimination in public accommodations, forty-nine prohibit sex discrimination in employment and thirty-nine prohibit pregnancy discrimination in employment. *See State Public Accommodation Laws*, NAT'L CONF. ST. LEGISLATURES (Apr. 8, 2019), http://www.ncsl.org/research/civil-and-criminal-justice/state-public-accommodation-laws.aspx [https://perma.cc/BZ9Y-ZRLB]; *Discrimination—Employment Laws*, NAT'L CONF. ST. LEGISLATURES (July 27, 2015), http://www.ncsl.org/research/labor-and-employment/discrimination-employment.aspx [https://perma.cc/SBW7-7GL5]; NAT'L CONF. ST. LEGISLATURES, STATE EMPLOYMENT-RELATED DISCRIMINATION STATUTES (July 2015), http://www.ncsl.org/documents/employ/Discrimination-Chart-2015.pdf [https://perma.cc/B8W3-LB29]. All states but one (Mississippi) prohibit sex discrimination in credit transactions. *See* NAT'L CONSUMER LAW CTR., CREDIT DISCRIMINATION app. F, at 407–29 (7th ed. 2018) (additionally citing many state statutes prohibiting sex discrimination in housing).

158. ALASKA CONST. art. I, § 3 (2014); CAL. CONST. art. I, § 8 (Deering 2018); COLO. CONST. art II, § 29 (West 2010); CONN. CONST. art. I, § 20 (2014); HAW. CONST. art. I, §§ 3, 5 (2009); ILL. CONST. art. I, §§ 17, 18 (West 2018); LA. CONST. art. I, § 12 (2006); MD. CONST. DECL. OF RIGHTS, art. XLVI (LexisNexis 2003); MASS. CONST. pt. 1, art. I (West 2007); MONT. CONST. art. II, § 4 (2015); N.H. CONST. pt. 1, art. II (West 2017); N.M. CONST. art. II, § 18 (2014); PA. CONST. art. I, § 28 (West 2011); TEX. CONST. art. I, § 3a (West 2018); UTAH CONST. art. IV, § 1 (LexisNexis 1991); VA. CONST. art. I, § 11 (2008); WASH. CONST. art. XXXI, § 1 (West 2011); WYO. CONST. art VI, § 1 (2015). The scope and

From the foregoing, it is clear that it is not permissible to discriminate against women for becoming pregnant or failing to abort their children. Because such discrimination is illegal, women do not need to resort to abortion in order to enjoy equal rights with men.

The Joint Opinion also suggested that women cannot achieve equality with men without legal abortion because "people have organized intimate relationships . . . in reliance on the availability of abortion in the event that contraception should fail," and that women need to be able "to control their reproductive lives."[159]

Whatever may be said of women's need to control their reproductive lives in order to participate equally in society, there are certainly numerous means (short of abortion) available to women to achieve that goal. First, it is highly doubtful that women need to rely upon abortion up until viability in the event of contraceptive failure, because actual contraceptive failure is exceedingly rare,[160] unless what the Court really meant by "contraceptive failure" is the failure to use

interpretation of these provisions differ from state to state. In addition to those eighteen states, in 1998 two states added gender-inclusive language to their inalienable rights guarantees. *See* FLA. CONST. art. I, § 2 (2016) ("All natural persons, *female and male alike*, are equal before the law and have inalienable rights, among which are the right to enjoy and defend life and liberty, to pursue happiness, to be rewarded for industry, and to acquire, possess and protect property.") (emphasis added); IOWA CONST. art. I, § 1 (2013) ("All men *and women* are, by nature, free and equal, and have certain inalienable rights—among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and pursuing and obtaining safety and happiness.") (emphasis added).

159. Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 856 (1992).

160. A wide range of contraceptive methods are currently readily available for both women and men. Typical-use failure rates are the rates in actual practice, and include "inconsistent or incorrect use, and even *outright nonuse* among individuals who report using." Aparna Sundaram et al., *Contraceptive Failure in the United States: Estimates from the 2006–2010 National Survey of Family Growth*, 49 PERSP. ON SEXUAL & REPRODUCTIVE HEALTH 7, 7 (2017) (emphasis added), *available at* https://www.guttmacher.org/sites/default/files/article_files/4900717.pdf [https://perma.cc/C5MJ-NG48]. These rates vary according to the type of method used. According to the Guttmacher Institute, typical-use failure rates for the most commonly used *reversible* contraceptives are as follows: 1% for the IUD and implants; 4% for injectables; 7% for the pill; 13% for the condom; and 20% for withdrawal. *Id.* If one uses any of these in combination with another method, the typical-use failure rate would be much lower. For example, using the pill and condom together results in a failure rate of less than one percent (0.0091 = 0.07 (7%) x 0.13 (13%)). In addition, there are more types of contraceptives available now than in 1973 or 1992, and they are significantly more effective than contraceptives were then. *See id.* The failure rates for all methods (except withdrawal) "decreased substantially" between 2002 and 2010. *Id.* at 13.

contraceptives responsibly. But the failure to use contraceptives is hardly consistent with the notion of women taking "control [of] their reproductive lives." Instead, the Court seemed to be claiming that abortion must remain legal—virtually on demand—because women (and men) *refuse* to take control of their reproductive lives by using contraception responsibly while engaging in conduct that can result in a pregnancy that they wish to avoid.

Failing to overrule *Roe* because of this has nothing to do with genuine equality between the sexes. Instead, it simply promotes the use of abortion as another method of birth control—one that is certainly not necessary given the many other options available.[161] In short, with or without *Roe*, women will continue to have numerous means available to prevent pregnancy and to control their reproductive lives if they so choose. Because there is no demonstrable personal or societal reliance interest in continued access to abortion on demand up until viability, overruling *Roe* would *not*, contrary to the Joint Opinion, cause "serious inequity to those who have relied upon it or significant damage to the stability of the society governed by it."[162]

C. Change in Law

The third *stare decisis* factor identified in *Casey* is "whether related principles of law have so far developed as to have left the old rule [that a pregnant woman has a right to obtain an abortion for any reason before viability] no more than a remnant of abandoned doctrine."[163] In its analysis of this factor, the Joint Opinion stated that "[n]o evolution of legal principle has left *Roe*'s doctrinal footings weaker than they were in 1973,"[164] and that "[n]o development of constitutional law since the case was decided has implicitly or explicitly left *Roe* behind as a mere survivor of obsolete constitutional thinking."[165]

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161. According to the Centers for Disease Control and Prevention, almost 43 percent of abortions are performed on women who have had at least one prior abortion. TARA C. JATLAOUI ET AL., CTRS. FOR DISEASE CONTROL & PREVENTION, MORBIDITY AND MORTALITY WEEKLY REPORT: ABORTION SURVEILLANCE—UNITED STATES, 2016, at 37 tbl.17 (2019), *available at* https://www.cdc.gov/mmwr/volumes/68/ss/pdfs/ss6811a1-H.pdf [https://perma.cc/3H95-A5ME].

162. *See Casey*, 505 U.S. at 855. In addition, a Supreme Court decision overruling *Roe* would have an extremely modest impact on the legality of abortion in the overwhelming majority of states. *See* Paul Benjamin Linton, *Overruling* Roe v. Wade*: The Implications for the Law*, 32 ISSUES L. & MED. 341, 346–48 (2017).

163. *Casey*, 505 U.S. at 855.

164. *Id.* at 857.

165. *Id.*

1. Constitutional Law

Given the reluctance of the authors of the Joint Opinion to state that *Roe* was correctly decided as an original matter of constitutional interpretation,[166] what possible difference could it make whether *Roe* has been undermined by later decisions? And the unstated assumption that only a decision that becomes *less* defensible over time may be reconsidered would lead to the anomalous result that "the most outlandish constitutional decision could survive forever, based simply on the fact that it was no more outlandish later than it was when originally rendered."[167] "That the flaws in an opinion were evident at the time it was handed down is hardly a reason for adhering to it."[168]

Indeed, the Joint Opinion's decision to hold on to the viability rule while letting go of other aspects of *Roe*, particularly the trimester framework, manifests a certain intellectual incoherence. As Chief Justice Rehnquist noted in his partial dissent:

> The [Joint O]pinion frankly concludes that *Roe* and its progeny were wrong in failing to recognize that the State's interests in maternal health and in the protection of unborn human life exist throughout pregnancy. But there is no indication that these components of *Roe* are any more incorrect at this juncture than they were at its inception.[169]

Putting the foregoing aside, the Court's rationale for invoking *stare decisis* in defense of *Roe*'s constitutional underpinnings does not withstand scrutiny.[170] The Joint Opinion asserted that a woman's constitutional right to abort her unborn child until viability need not be re-examined because "*Roe's* doctrinal footings" were not weaker

166. *See* Paul Benjamin Linton, Planned Parenthood v. Casey: *The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 18–19 (identifying multiple passages in the Joint Opinion expressing misgivings as to whether *Roe* was correctly decided).

167. *See Casey*, 505 U.S. at 955–56 (Rehnquist, C.J., concurring in part and dissenting in part); *see also* Thornburgh v. American Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 788 (1986) (White, J., dissenting) ("[I]f an argument that a constitutional decision is erroneous must be novel in order to justify overruling that precedent, the Court's decisions in *Lochner v. New York* and *Plessy v. Ferguson* would remain the law, for the doctrines announced in those decisions were nowhere more eloquently or incisively criticized than in the dissenting opinions of Justices Holmes (in *Lochner*) and Harlan (in both cases).") (citations omitted).

168. *Thornburgh*, 476 U.S. at 788 (White, J., dissenting).

169. *Casey*, 505 U.S. at 956 (Rehnquist, C.J., concurring in part and dissenting in part) (citation omitted).

170. *Id.* at 857–59 (majority opinion). In attempting to shore up *Roe*'s legitimacy and assert its stability, the Court actually does much to undermine both.

than they were in 1973.[171] The Joint Opinion then noted "that *Roe* stands at an intersection of two lines of decisions."[172] One strand involves liberty interests "relating to intimate relationships, the family, and decisions about whether or not to beget or bear a child."[173] The other relates to an interest grounded in "personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on govern–mental power to mandate medical treatment or to bar its rejection."[174] Finally, the Joint Opinion stated that "one could classify *Roe* as *sui generis*."[175]

With respect to the first line of decisions, it may be accurate to state that no subsequent cases have undermined that line of authority, but then those decisions did not support *Roe* at the time, as *Roe* itself acknowledged.[176] And the fact that they *still* do not support *Roe* obviously provides no basis for the Court to continue to adhere to *Roe*.

Although not relied upon in *Roe,* the *Casey* Court claimed that a second line of cases limiting the government's ability to mandate medical treatment may also support *Roe*.[177] The Joint Opinion stated, "our cases since *Roe* accord with *Roe*'s view that a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."[178] Remarkably, none of the five cases cited

171. *See id.* at 857.

172. *Id.*

173. *Id.* This was the line of decisions that *Roe* referred to as recognizing a right of personal privacy. *See* Roe v. Wade, 410 U.S. 113, 152–53 (1973). *Casey* described some of those same cases as affording "constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *See Casey*, 505 U.S. at 851. Of course, none of those cases involved a personal decision that would end the life of another individual, as happens in the case of a decision to obtain an abortion. So, none supports *Roe*.

174. *Casey*, 505 U.S. at 857.

175. *Id.* The Court's inability to identify which of the above lines of decisions actually controls, or whether *Roe* is *sui generis* and neither applies, suggests that the Court was at least uncertain of what *Roe*'s doctrinal footings actually are.

176. *See Roe*, 410 U.S. at 153 (whether a woman has a right to obtain an abortion "is *inherently different* from marital intimacy, or bedroom possession of obscene material, or marriage, or procreation, or education") (emphasis added). And the Court in *Casey* recognized that *Roe* was "an extension of those cases." *See Casey*, 505 U.S. at 853.

177. *Casey*, 505 U.S. at 857. The Court, however, made no attempt to explain how cases limiting a government's power to *mandate* medical treatment might relate to a woman's right to abortion. The woman seeking an abortion is *requesting* that a medical procedure be performed on her—she is not rejecting state-mandated medical treatment.

178. *Id.*

supports the Court's assertion.[179] If anything, they support the *opposite* conclusion.[180] Moreover, just five years after *Casey*, the Court, in *Washington v. Glucksberg*,[181] directly contradicted this premise by holding that a State's interest in protecting human life *is* sufficient to override an individual's liberty interest in obtaining assistance in committing suicide.[182]

The Court began its review in *Glucksberg* by carefully examining "our Nation's history, legal traditions, and practices" with respect to the asserted liberty interest.[183] The Court noted that suicide and assisted suicide had been crimes for hundreds of years at common law, and that the vast majority of the states continued to criminalize assisted suicide by statute.[184] Accordingly, it rejected the claim that "the 'liberty' specially protected by the Due Process Clause includes a right to commit suicide which itself includes a right to assistance in

179. Although the Court referred to cases decided "since" *Roe*, only three of the cited cases were decided *after Roe*. *See id.*; *infra* note 180. The other two—*Rochin v. California*, 342 U.S. 165 (1952), and *Jacobson v. Massachusetts*, 197 U.S. 11 (1905), were decided before *Roe*. In *Rochin*, the Court held that the State could not use illegally obtained evidence in a criminal trial. 342 U.S. at 174. Its relevance is unclear. In *Jacobson*, the Court held that the State's interest in preventing the spread of smallpox was sufficient to support a mandatory vaccination requirement. 197 U.S. at 39. This directly contradicts the proposition for which *Casey* cited it. *See Casey*, 505 U.S. at 857. The Court also overlooked *Arver v. United States* (*Selective Draft Law Cases*), 245 U.S. 366 (1918), which upheld the authority of Congress to impose conscription. *Id.* at 389–90.

180. In both *Washington v. Harper*, 494 U.S. 210 (1990), and *Riggins v. Nevada*, 504 U.S. 127 (1992), the Court held that the State *may* administer anti-psychotic drugs to a prison inmate against his will (even though the drug could have serious side effects, including death) if the State has demonstrated that the inmate is dangerous to himself or others and the treatment is in his medical interest. *Harper*, 494 U.S. at 225–26; *Riggins*, 504 U.S. at 135. And while *Cruzan v. Director, Missouri Dep't of Health*, 497 U.S. 261 (1990), did suggest that a competent adult may have a constitutional liberty interest in *refusing unwanted* medical treatment, *id.* at 278–79, it did so only after an extensive examination of the common law and state laws. *Id.* at 269–78. The Court noted that under common law, unconsented touching was long considered to be a battery and that the concept of informed consent had grown out of that common law principle. *Id.* at 269. The Court ultimately held, however, that the State's interest in protecting human life *was* sufficient to require clear and convincing evidence of an incompetent individual's desire to *refuse* life-sustaining treatment before such treatment could be removed. *Id.* at 284.

181. 521 U.S. 702 (1997).

182. *Id.* at 728–35.

183. *See Glucksberg*, 521 U.S. at 710–19.

184. *Id.*

doing so."[185] Therefore, the Court's most recent pronouncement on whether a State's interest in protecting vulnerable life may override an individual's asserted liberty interest holds that it may. *Glucksberg* certainly leaves *Roe*'s doctrinal footings weaker than they were when *Roe* and *Casey* were decided.

Not one of the cases that the *Casey* Court cited in support of *Roe*'s constitutional *bona fides* remotely supports a claim that a person has a recognizable liberty interest (whether based on a claim of bodily integrity or a right to bear a child) sufficient to end the life of another.[186] *Roe* stands alone in this respect. And it does so only by pretending that abortion does not do what it actually does—end the life of another individual human.[187]

The Court's utter inability to cite to any prior decision that holds that an individual's personal autonomy extends to ending another human life seriously undermines *Roe*'s constitutional foundation. Perhaps in recognition of that glaring deficiency, the Joint Opinion suggested that "one could classify *Roe* as *sui generis*."[188] It then stated

185. *Id.* at 723. That *Glucksberg*, like *Roe*, dealt with the State's interest in protecting human life, distinguishes both cases from *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015), which involved no such interest.

186. In summarizing the cases relied upon, the Court said, "Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education." *Casey*, 505 U.S. at 851. None of these cases involved the taking of a human life in the pursuit of individual liberty.

187. Although the Court in *Roe* professed not to decide "the difficult question of when life begins," *see Roe v. Wade*, 410 U.S. 113, 159 (1973), it clearly *did* decide this question by referring to the unborn child as only "potential life." *See id.* at 150. That the unborn child, biologically, is actually alive and not just "potential life" is undeniable. *See infra* Part III.D.2. In any event, there is nothing in the Constitution that suggests that a question of this nature and magnitude (when human life begins) should rest with nine unelected members of the Court rather than the elected representatives of the people. Moreover, to the extent that the question of when human life begins is a judgment with respect to the value that should be given to the unborn child's existing life, it is not a legal question. *See Casey*, 505 U.S. at 982 (Scalia, J., concurring in part and dissenting in part) (stating that there is no way to determine "as a legal matter" whether "the human fetus is in some critical sense merely potentially human" which "is in fact a value judgment"). And, the unelected members of the Court have no special knowledge or skills with which to make this value determination.

188. *See Casey*, 505 U.S. at 857. Of course, *Roe* is *sui generis*. It is the only circumstance in which the lives of two individuals are intertwined. Though rare, there are cases in which a pregnancy itself may jeopardize a pregnant woman's life. *See Casey*, 505 U.S. at 880 (referencing "preeclampsia, inevitable abortion, and premature ruptured membrane"). Because of this, delicate balancing of the State's interest in protecting human life (both the pregnant woman's life and that of her unborn child) may be necessary. As noted above, it is a balancing that the State is better

that when "so viewed, . . . there clearly has been no erosion of its central determination."[189] Oddly, the Court proceeded to demonstrate that there *has* been a significant and steady erosion in support for *Roe*. The Court began by noting that *Roe* was a 7–2 decision in 1973.[190] It continued by noting that *Roe* was affirmed by a 6–3 vote in 1983 (*Akron Center*), and by a 5–4 vote in 1986 (*Thornburgh*).[191] Finally, the Court acknowledged that in 1989, *Roe* was questioned by five members of the Court in *Webster*, but not expressly overruled.[192] Indeed, in *Webster*, only four justices would have expressly reaffirmed *Roe*. And, given the evisceration of *Roe* in *Casey* itself,[193] it appears that in 1992, only Justices Blackmun and Stevens would have reaffirmed *Roe* as it was originally decided. Far from demonstrating that *Roe* is stable, the Court's above recitation of the relevant history shows that *Roe* has not been stable for quite some time.[194]

Finally, the Joint Opinion said, "[e]ven on the assumption that the central holding of *Roe* was in error, that error would go only to the strength of the state interest in fetal protection, not to the recognition afforded by the Constitution to the woman's liberty."[195] Again, this attempt to justify *Roe* actually undercuts *Roe*'s validity. The Joint Opinion seems to be suggesting that the extent of a woman's liberty interest outlined in *Roe* is somehow independent of the State's interest in protecting fetal life—as though one can be affected without affecting the other. But, logically, that cannot be the case.

Roe stated that a woman's liberty interest is not absolute.[196] Thus, the extent of that liberty is limited by *something*. And what limits the woman's liberty interest in obtaining an abortion is the strength of the State's interest in protecting the life of the unborn child. So, if the central holding of *Roe* was in error regarding the strength of the State

equipped to undertake than the Court. And it should be noted that no state, prior to *Roe*, prohibited an abortion when the procedure was necessary to save the life of the pregnant woman.

189. *Casey*, 505 U.S. at 857.

190. *Id.* at 857–58.

191. *Id.* at 858 (citing City of Akron v. Akron Ctr. for Reproductive Health, Inc., 462 U.S. 416 (1983); Thornburgh v. American Coll. of Obstetricians & Gynecologists, 476 U.S. 747 (1986)).

192. *Casey*, 505 U.S. at 857–58.

193. *See supra* Part II (explaining how *Casey* abandoned major aspects of *Roe*).

194. Justice Rehnquist's dissent well described how the Court's opinions have become increasingly splintered as the Court has expanded upon the ruling in *Roe*. *See Casey*, 505 U.S. at 945–50 (Rehnquist, C.J., concurring in part and dissenting in part).

195. *Id.* at 858 (joint opinion).

196. Roe v. Wade, 410 U.S. 113, 153–54 (1973).

interest in protecting an unborn child's life, then it was also in error regarding the extent of a woman's liberty interest. If the State's interest was undervalued, it was only because the scope of a woman's liberty interest was overvalued.

The Court concluded its constitutional justification for *Roe* by suggesting that the State could *force* women to abort if abortion were not constitutionally protected.[197] As Justice Scalia noted, this contention reveals "the utter bankruptcy of constitutional analysis deprived of tradition as a validating factor."[198] It is clear that the right to bear and beget a child is deeply rooted in our nation's history, legal traditions, and practices and, therefore, is constitutionally protected. The right to abortion, however, is not.[199] Thus, the right to conceive and give birth to a child is protected wholly independent of any alleged right to end the life of a child through abortion.[200]

Nothing in the *Casey* Court's attempt to preserve and fortify *Roe*'s constitutional roots accomplishes that goal. *Roe* is as wrong today as it was in 1973, and there is no need for any further change in constitutional law to prevent *Roe* from being re-examined and over–ruled. By focusing narrowly on constitutional law, however, the Court managed to avoid viewing the broader legal landscape with regard to the protection of an unborn child. Nevertheless, that landscape has changed dramatically in a way that significantly undermines *Roe*.

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197. *See Casey*, 505 U.S. at 859.

198. *Id.* at 981 n.1 (Scalia, J., concurring in part and dissenting in part).

199. *See Roe*, 410 U.S. at 174–77 (Rehnquist, C.J., dissenting). The legal literature criticizing *Roe* is voluminous. The most detailed and thorough critique of Justice Blackmun's superficial and misleading account of the treatment of abortion under English and American law, which also criticizes subsequent efforts to shore-up support for Justice Blackmun's reading of the historical record, is JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY (2006). *See also* Joseph W. Dellapenna, *The History of Abortion: Technology, Morality, and Law*, 40 U. PITT. L. REV. 359 (1979). For an excellent overview of the early scholarly response to *Roe*, see JOHN T. NOONAN, JR., *Inquiry 5 "On the Constitutional Foundation of the Liberty"*, *in* A PRIVATE CHOICE ABORTION IN AMERICA IN THE SEVENTIES 20 (1979). The gradual replacement of the common law crime of abortion by statutory prohibitions in the nineteenth century is described in James S. Witherspoon, *Reexamining* Roe*: Nineteenth-Century Abortion Statutes and the Fourteenth Amendment*, 17 ST. MARY'S L.J. 29 (1985). Finally, both the statutory history and state-court explanations of the reasons for which abortion statutes were enacted in the nineteenth century are set forth in Linton, *supra* note 166, app. A, at 103–14.

200. As *Casey* noted, the right to use contraceptives is "protected independently under *Griswold* and later cases." 505 U.S. at 859. So, overruling *Roe* would not affect that right, either.

In *Roe*, the Court stated: "In areas other than criminal abortion, the law has been reluctant to endorse any theory that life, as we recognize it, begins before live birth or to accord legal rights to the unborn except in narrowly defined situations and except when the rights are contingent upon live birth."[201] Whatever the accuracy of that statement at the time *Roe* was decided almost fifty years ago—and that is debatable, to say the least[202]—it has long ceased to be an accurate summary of the state of the law.

Judicial and legislative developments in areas outside of abortion law have increasingly recognized that, with respect to an unborn child, neither live birth, viability, nor any other arbitrary stage of human development is a relevant factor in defining public wrongs (criminal law), redressing private injuries (tort law), or determining when life-sustaining medical treatment may be withdrawn or withheld from a pregnant woman who is unable to make such decisions for herself (health care law).[203] In light of these developments, the Court's clinging to viability as the critical benchmark for assigning value to an unborn child's life is outdated and insupportable.

2. Criminal Law

In a reform of the law that has largely taken place since *Roe* was decided, thirty-six states have enacted statutes defining the killing of an unborn child (outside the context of abortion) as a form of homicide.[204] The most common approach, the one that has been adopted in thirty of those thirty-six states, has been to make the killing of an unborn child a crime without regard to any arbitrary gestational age.[205] These statutes treat the unborn child as a member of the human

201. *Roe*, 410 U.S. at 161.

202. *See* Hamilton v. Scott, 97 So. 3d 728, 743–44 (Ala. 2012) (Parker, J., concurring) (summarizing scholarly critiques of *Roe*'s misreading of the state of the law regarding unborn children at the time *Roe* was decided).

203. *See infra* Part III.3.B–D.

204. Paul Benjamin Linton, *The Legal Status of the Unborn Child under State Law*, 6 U. ST. THOMAS J.L. & PUB. POL'Y 141, 143 (2011).

205. *See id.* at 144 n.21 (listing statutes from Alabama, Alaska, Arizona, Georgia, Idaho, Illinois, Kansas, Kentucky, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin); *see also* ARK. CODE § 5-1-102(13)(B)(i)(a), (b) (2019) (extending scope of homicide statutes); FLA. STAT. § 775.021(5) (2019) (defining *another* as used in homicide statutes); *id.* § 782.071 (vehicular homicide); *id.* § 782.09 (killing of an unborn child by injury to the mother); IND. CODE §§ 35-42-1-1(4), -3(a)(1), -4(a), -4(c) (2019) (murder, voluntary, and involuntary manslaughter); N.C. GEN. STAT. § 14-23.1–.8 (2019) (all forms of homicide); VA. CODE § 18.2-32.2 (2019) (killing a fetus). Many of the states that have enacted fetal-

family whose life is entitled to protection by the criminal law throughout the child's development *in utero*.[206] Of the remaining states that do set a gestational age limit, only one sets it at viability.[207] The others place it at "quickening"[208] or some other point before viability.[209]

Of the twenty-nine states that have retained capital punishment for the crime of murder, at least twenty-two of them prohibit by statute the execution of a woman while she is pregnant,[210] regardless of the stage of her pregnancy. Thus, these states recognize that innocent human life should not be taken in the course of inflicting the death penalty upon the guilty. In such cases, the death sentence is suspended until the woman is no longer pregnant.[211]

3. Tort Law

The courts of thirty states have expressly or impliedly rejected viability as a relevant factor in determining liability for causing non-fatal, prenatal injuries to an unborn child. They have held that a common law action to recover damages for such injuries may be brought

homicide statutes have also criminalized conduct that results in non-fatal injuries to unborn children.

206. Both state and federal courts have uniformly rejected state and federal constitutional challenges to these statutes, including the argument that they violate *Roe v. Wade*. *See* Linton, *supra* note 204, at 145 nn.22–24, 16 nn.25–26.

207. MD. CODE., CRIM. LAW § 2-103 (2019) (murder or manslaughter).

208. NEV. REV. STAT. § 200.210 (2019) (manslaughter); WASH. REV. CODE § 9A.32.060(1)(b) (2019) (manslaughter). "Quickening" refers to the stage of pregnancy when the woman first detects fetal movement. *See* DORLAND'S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 43.

209. People v. Davis, 872 P.2d 591, 599 (Cal. 1994) (construing the term *fetus*, as used in CAL. PENAL CODE § 187(a) (2019), to mean "post-embryonic," *i.e.*, seven to eight weeks gestation); MONT. CODE §§ 45-5-102(1)(c), -103(1) (2019) (homicide of the fetus, deliberate and mitigated); *id.* § 45-5-116(3) (defining *fetus* as "an organism of the species homo sapiens from 8 weeks of development until complete expulsion or extraction from a woman's body"); N.H. REV. STAT. §§ 630:1-a(IV)–(V), :1-b, :2–:3 (2019) (all forms of homicide and defining *fetus* to mean post-twenty weeks gestation).

210. Linton, *supra* note 204, at 146 n.27 (listing statutes from Alabama, Arizona, Arkansas, California, Florida, Georgia, Idaho, Indiana, Kansas, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, Nevada, Ohio, Oklahoma, South Carolina, South Dakota, Utah, and Wyoming). Since *Legal Status* was published, Maryland, which once prohibited the execution of a pregnant woman, repealed its death penalty. *See* MD. CODE, art. 27 §§ 71–79 (repealed 1999). Statutes prohibiting the execution of pregnant women merely codified the common law rule.

211. Linton, *supra* note 204, at 146.

without regard to the stage of pregnancy when they were inflicted.[212] Courts in seventeen other states recognize a cause of action for prenatal injuries sustained after viability,[213] but those courts have not yet had occasion to decide whether such an action will lie for injuries suffered before viability. Significantly, no state court has rejected a cause of action for prenatal injuries, regardless of the gestational age of the unborn child, in fifty years.[214]

A representative example of the judicial reasoning for rejecting a viability requirement as a condition of recovery for prenatal injuries is the New Jersey Supreme Court's pre-*Roe* decision in *Smith v. Brennan.*[215] There the court stated:

> [T]he viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore should be given the same opportunity for redress.[216]

Forty-three states, by court interpretation or by statute, now allow recovery under wrongful death statutes for prenatal injuries resulting in stillbirth.[217] Some states, out of a reluctance to expand by judicial

212. *Id.* at 147 n.29 (listing cases from Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Louisiana, Maryland, Massachusetts, Michigan, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Virginia, Washington, West Virginia, and Wisconsin). *See generally Roland F. Chase*, Annotation, *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222 (1971 & Supp. 2018) (collecting cases).

213. Linton, *supra* note 204, at 148 n.30 (listing cases from Arkansas, Delaware, Hawaii, Idaho, Iowa, Kentucky, Minnesota, Mississippi, Montana, Nebraska, New Mexico, Ohio, Oregon, Tennessee, South Carolina, Utah, and Vermont). There are no reported cases recognizing or denying a cause of action for prenatal injuries from Alaska, Maine, or Wyoming. *See id.* at 148.

214. The last two state courts to reject such a cause of action were Michigan, *see* Marlow v. Krapek, 174 N.W.2d 172 (Mich. Ct. App. 1969), and Virginia, *see* Lawrence v. Craven Tire Co., 169 S.E.2d 440 (Va. 1969).

215. 157 A.2d 497 (N.J. 1960).

216. *Id.* at 504; *see also* Sinkler v. Kneale, 164 A.2d 93, 96 (Pa. 1960) (whether an unborn child was viable when the injuries were sustained "[has] little to do with the basic right to recover, when the [fetus] is regarded as having existence as a separate creature from the moment of conception").

217. Linton, *supra* note 204, at 148 n.32 (listing cases and statutes from Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Georgia, Hawaii, Idaho, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana,

decision the scope of a cause of action unknown at common law, allow the action to be brought only if the unborn child was viable at the time of the injury causing the child's death (or at least by the time death occurred).[218] But the modern trend, supported by legislative reform, is toward abolishing *any* viability (or other gestational) requirement.[219]

Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, Vermont, Washington, West Virginia, and Wisconsin); *see also* ALASKA CODE §§ 09.55.585, 11.81.900(b)(64) (2019) (defining *unborn child*); IND. CODE § 34-23-2.1 (2019); VA. CODE §§ 8.01-50(B), 32.1-249 (2019) (defining *fetal death*). The Hawaii Court of Appeals has confirmed an earlier federal court opinion interpreting Hawaii's wrongful death statute to permit an action on behalf of a viable, stillborn child. *See* Castro v. Melchor, 366 P.3d 1058, 1065–70 (Haw. Ct. App. 2016). Six states do not recognize a cause of action for the wrongful death of a stillborn child. *See* Linton, *supra* note 204, at 150 n.37 (citing cases from California, Florida, Iowa, Maine, New Jersey, and New York). One state, Wyoming, has not yet decided whether a wrongful death action will lie for prenatal injuries resulting in stillbirth. *See id.* at 150 n.38. *See generally* Sheldon R. Shapiro, Annotation, *Right to Maintain or to Recover Damages for Death of Unborn Child*, 84 A.L.R.3d 411 (1978 & Supp. 2018) (collecting cases).

218. Thirteen states have, by court decision, denied recovery (for stillbirth) when both the injury and stillbirth occur before viability. *See* Linton, *supra* note 204, at 150 & n.36 (listing cases from Arizona, Idaho, Kentucky, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Oregon, Pennsylvania, Rhode Island, South Carolina, and Washington). One other state has adopted a viability rule by statute. *See* IND. CODE § 34-23-2.1 (2019). Two other states allow recovery when the injury causing stillbirth occurs after "quickening." *See* Porter v. Lassiter, 87 S.E.2d 100, 103 (Ga. Ct. App. 1955); Rainey v. Horn, 72 So. 2d 434, 439–40 (Miss. 1954) (since codified at MISS. CODE § 11-7-13 (2019)). It should be noted that allowing wrongful death actions to be brought on behalf of viable unborn children who were stillborn represented an initial, first step in extending liability from the previous rule that had denied all recovery in such cases. As this Article demonstrates, however, it was only a first step.

219. Fifteen states now allow recovery for the wrongful death of a stillborn child regardless of the stage of pregnancy when the injury and death occur. *See* Linton, *supra* note 204, at 149 n.34 (listing cases and statutes from Alabama, Illinois, Louisiana, Michigan, Missouri, Nebraska, Oklahoma, South Dakota, Utah, Texas, and West Virginia); *see also* ALASKA CODE §§ 09.55.585, 11.81.900(b)(64) (2019) (defining *unborn child*); ARK. CODE §§ 16-62-102, 5-1-102(13)(B)(i) (b) (2019) (same); KAN. STAT. § 60-1901 (2019); VA. CODE §§ 8.01-50(B), 32.1-249 (2019) (collectively defining *fetal death*). Twelve other states have not had occasion to decide whether a wrongful death action will lie for the death of an unborn child where both the injury and the subsequent stillbirth occur before viability. *See* Linton, *supra* note 204, at 148 n.32 (listing cases from Colorado, Connecticut, Delaware, Hawaii, Minnesota, Nevada, North Carolina, North Dakota, Ohio, Tennessee, Vermont, and Wisconsin).

For example, in explaining its decision to abandon viability as a requirement that must be met in the case of wrongful death actions brought on behalf of stillborn children, the Alabama Supreme Court stated:

> [I]t is an unfair and arbitrary endeavor to draw a line that allows recovery on behalf of a fetus injured before viability that dies after achieving viability but that prevents recovery on behalf of an injured fetus that, as a result of those injuries, does not survive to viability. Moreover, it is an endeavor that unfairly distracts from the well established fundamental concerns of the State's wrongful-death jurisprudence, i.e., whether there exists a duty of care and the punishment of the wrongdoer who breaches that duty. We cannot conclude that "logic, fairness, and justice" compel the drawing of such a line; instead, "logic, fairness, and justice" compel the application of the Wrongful Death Act to circumstances where prenatal injuries have caused death to a fetus before the fetus has achieved the ability to live outside the womb.[220]

And when prenatal injuries result in death after live birth, the weight of modern authority rejects any requirement that an injury occur after viability (or any other stage of development) as a condition of recovery under wrongful death statutes.[221] Thus, both with respect to wrongful death actions based upon an injury that causes stillbirth, as well as wrongful death actions based upon an injury that causes death after live birth, state legislatures and state courts have increasingly rejected viability as an appropriate benchmark for determining liability.

4. Health Care Law

At the time *Roe* was decided, there were few, if any, statutes authorizing competent adults to execute advance directives setting forth what health care they wished to receive in the event that they are no longer able to make those decisions for themselves. Presently, all states have such statutes. Almost two-thirds of them prohibit the withholding or withdrawal of life-sustaining treatment from a pregnant woman patient under the authority of an advance directive.[222] And with

220. Mack v. Carmack, 79 So. 3d 597, 611 (Ala. 2011).

221. *See* Linton, *supra* note 204, at 149 n.35 (citing cases from Connecticut, Kansas, Maryland, Massachusetts, Michigan, New Hampshire, Pennsylvania, Rhode Island, and Virginia).

222. *Id.* at 152 n.42 (citing statutes from Alabama, Alaska, Arkansas, Connecticut, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Michigan, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Texas, Utah, Washington, and

the exceptions of Colorado and Louisiana, whether a woman's unborn child is viable has no bearing on whether such treatment may be withheld or withdrawn.[223] Thus, in yet another area of law, the lives of unborn children are generally protected throughout pregnancy.

5. Summary

Whatever may have been the state of the law at the time *Roe* was decided with respect to the status of the unborn child in areas other than abortion, it is abundantly clear that drastic changes in broad areas of the law have taken place since then. The overwhelming majority of states now recognize the unborn child as a human being whose rights are protected without regard to whether the child has attained some arbitrary stage of development such as quickening or viability.[224] Indeed, outside the context of abortion, the concept of viability has little or no relevance in determining whether an unborn child is protected in criminal law, tort law, or health care law.

The Court has continued to rely on viability as the critical component of its abortion jurisprudence to justify its continued adherence to *Roe*. That reliance, however, ignores how increasingly *irrelevant* the concept of viability has become with respect to the legal status of unborn children in areas of law outside of abortion. In light of these developments, contrary to the Joint Opinion, "the law's growth in the intervening years *has* left *Roe*'s central [viability] rule a doctrinal anachronism discounted by society."[225]

Wisconsin); *see also* COLO. REV. STAT. § 15-18-104(2) (2019); LA. REV. STAT. § 40.1151.9(E) (2019). The restrictions in Idaho, Nevada, and South Carolina's laws now appear, respectively, at IDAHO CODE § 39-4510(1) (2019), NEV. REV. STAT. § 449A.451 (2019), and S.C. CODE § 62-5-507 (2019) (with respect to durable powers of attorney for health care). The Florida, Georgia, and Oklahoma statutes allow life-sustaining care to be withdrawn or withheld from pregnant patients only if expressly authorized in the patient's advance directive.

223. In Colorado, life-sustaining treatment may not be withheld or withdrawn from a pregnant woman if her unborn child is determined to be viable. *See* COLO. REV. STAT. § 15-18-104(2) (2019). In Louisiana, it may not be withheld or withdrawn if the child has attained a post-fertilization age of twenty or more weeks. *See* LA. REV. STAT. § 40.1151.9(E) (2019).

224. *See Ex parte* Phillips, No. 1160403, 2018 WL 5095002, at *61 (Ala. Oct. 19, 2018) (Parker, J., concurring) ("[I]t is apparent that the laws of this nation increasingly recognize unborn children as persons entitled to the protections of the law, except where prohibited by the *Roe* exception.").

225. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 855 (1992) (emphasis added).

D. Changes of Fact

The fourth *stare decisis* factor identified in *Casey* is "whether facts have so changed, or come to be seen so differently, as to have robbed the old rule [that a pregnant woman has a right to obtain an abortion for any reason before viability] of significant application or justifi–cation."[226] In its analysis of this factor, the Joint Opinion stated:

> [V]iability marks the earliest point at which the State's interest in fetal life is constitutionally adequate to justify a legislative ban on nontherapeutic abortions[, regardless of 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.[227]

Accordingly, "the attainment of viability may continue to serve as the critical fact, . . . which is to say that no change in *Roe*'s factual underpinning has left its central holding obsolete, and none supports an argument for overruling it."[228]

In his partial dissent in *Casey*, Chief Justice Rehnquist dismissed this factor as of no consequence, commenting that "what might be called the basic facts which gave rise to *Roe* have remained the same—women become pregnant, there is a point somewhere, depending upon medical technology, where a fetus becomes viable, and women give birth to children."[229] That "the same facts which gave rise to *Roe* will continue to give rise to similar cases . . . . is not a reason, in and of itself, why those cases must be decided in the same incorrect manner as was the first case to deal with the question."[230]

But Chief Justice Rehnquist's comment overlooks the real reason the Court even mentioned changes of fact as a factor in its *stare decisis* analysis. The one-paragraph discussion of changes of fact in Part III(A)(4) of the Joint Opinion is key to the development of the theme in III(B) that suggests that only changes of fact (or perceived fact) justify overruling an earlier precedent in cases of great national controversies.[231] According to the Court, there have been no changes of relevant fact since 1973 (other than viability occurring somewhat earlier

226. *Id.*

227. *Id.* at 860.

228. *Id.*

229. *Id.* at 955 (Rehnquist, C.J., concurring in part and dissenting in part).

230. *Id.*

231. *See id.* at 861–64 (joint opinion).

in pregnancy and abortion becoming safer later in pregnancy). Therefore, overruling *Roe* would be inappropriate.[232]

1. Evidence of "Changes of Fact" is Not a Prerequisite to Reconsidering a Precedent

In support of its conclusion that *Roe* should not be overruled because the underlying facts relating to viability have not changed, the Court, oddly, cited two landmark decisions of the Supreme Court in which it *overruled* prior precedents.[233] *West Coast Hotel Co. v. Parrish*[234] overruled (by implication) *Lochner v. New York*,[235] and *Brown v. Board of Education*[236] overruled (expressly) *Plessy v. Ferguson*.[237] The thrust of the Joint Opinion is that the Court overruled *Lochner* and *Plessy* only because of the discovery of new "facts" in the interim. In the case of *Lochner*, the "new facts" were that *laissez-faire* economics does not work, and, in the case of *Plessy*, that racial segregation adversely affects the mental health of school children who are subjected to discrimination.[238] As Chief Justice Rehnquist said in his partial dissent, "[t]his is at best a feebly supported, *post hoc* rationalization for those decisions."[239]

It is true that in *West Coast Hotel* the Court referred to "recent economic experience" and the Great Depression,[240] but this was only in the last paragraph of the majority opinion.[241] Most decidedly, *West Coast Hotel* "did *not* state that *Lochne*r had been based on an economic view that had fallen into disfavor, and that it therefore should be overruled."[242] Rather, as Chief Justice Rehnquist observed in *Casey*, Chief Justice Hughes's *West Coast Hotel* opinion "simply recognized what Justice Holmes had previously recognized in his *Lochner* dissent, that '[t]he Constitution does not speak of freedom of contract.'"[243]

232. *Id.* at 864.

233. *See id.* at 861–63.

234. 300 U.S. 379 (1937).

235. 198 U.S. 45 (1905).

236. 347 U.S. 483 (1954).

237. 163 U.S. 537 (1896).

238. *Casey*, 505 U.S. at 862–63.

239. *Id.* at 960 (Rehnquist, C.J., concurring in part and dissenting in part).

240. West Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937).

241. For the Court's analysis of the "freedom of contract" issue, *see id.* at 391–99.

242. *See Casey*, 505 U.S. at 961 (Rehnquist, C.J., concurring in part and dissenting in part) (emphasis added).

243. *Id.* (quoting *West Coast Hotel*, 300 U.S. at 391) (alteration in original).

It is also true that in *Brown* the Court discussed the psychological impact of racial segregation upon minorities,[244] but so did Justice Harlan in his *Plessy* dissent.[245] The Court's actual *holding* in *Brown* was that the Equal Protection Clause forbids racial segregation, regardless of the public's view of segregation or integration.[246] The Court cited and relied upon cases decided shortly after the Reconstruction Amendments were ratified, interpreting the Fourteenth Amendment "as proscribing all state imposed discrimination against the Negro race."[247] And cases decided subsequent to *Brown* left little doubt that *Brown* was based on the perfectly straightforward proposition that racial segregation is unconstitutional per se, not due to any newly discovered insight into the psychological impact of racial discrimination on school-age children.[248] As Robert Bork noted: "Racial segregation by order of the state was unconstitutional under all circumstances and had nothing to do with the context of education or the psychological vulnerability of a particular age group."[249]

In light of the foregoing, it is not accurate to state, as the Joint Opinion did, that "*West Coast Hotel* and *Brown* each rested on facts,

244. Brown v. Bd. of Educ., 347 U.S. 483, 492–94, 494 nn.10–11 (1954).

245. *See* Plessy v. Ferguson, 163 U.S. 573, 562 (1896) (Harlan, J., dissenting) (describing the "brand of servitude and degradation" placed upon African Americans as a result of segregation).

246. *Brown*, 347 U.S. at 495.

247. *Id.* at 490 n.5.

248. That *Brown* did not ultimately turn on the emotional effect of "separate but equal" educational facilities upon impressionable school-age children is evidenced by the Court's post-*Brown* decisions invalidating segregated public beaches, golf courses, public parks, and courtrooms. Mayor & City Council of Balt. v. Dawson, 350 U.S. 877 (1955) (per curiam) (beaches); Holmes v. Atlanta, 350 U.S. 879 (1955) (per curiam) (golf courses); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (per curiam) (parks), *aff'g* 252 F.2d 122, 123 (5th Cir. 1958) (rejecting the city's request to remand the case "to determine whether such psychological considerations [that were present in *Brown*] are present in the denial of access" to public parks); Johnson v. Virginia, 383 U.S. 61, 62 (1973) (per curiam) (courtrooms; stating that "it is no longer open to question that a State may not constitutionally require segregation of public facilities").

249. ROBERT BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 76 (1990); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 962–63 (1992) (Rehnquist, C.J., concurring in part and dissenting in part) ("The rule of *Brown* is not tied to popular opinion about the evils of segregation; it is a judgment that the Equal Protection Clause does not permit racial segregation, no matter whether the public might come to believe that it is beneficial. On that ground it stands, and on that ground alone the Court was justified in properly concluding that the *Plessy* Court had erred.").

or an understanding of facts, changed from those which furnished the claimed justifications for the earlier constitutional resolutions."[250] The errors of both *Lochner* and *Plessy* were thoroughly identified in the dissents in both cases.[251] Although changes of fact may be cited *in support of* a departure from precedent,[252] there is no legal principle that *requires* proof of such a change before an earlier precedent may be reconsidered (and the Joint Opinion cited none). Accordingly, in evaluating whether *Roe* should be overruled, it is *not* necessary to demonstrate that "*Roe*'s premises of fact have so far changed . . . as to render its central holding somehow irrelevant or unjustifiable in dealing with the issue it addressed."[253]

2. Significant Changes in Medical Technology Have Greatly Enhanced Our Understanding of Unborn Human Life

Although changes of fact are not *necessary* in determining whether a case involving a "national controversy" may be overruled, changes of fact that undermine the very foundations upon which the prior decision was based *do* support overruling such a decision. As set forth below, there have been many changes of fact surrounding the medical treatment of unborn children. These changes demonstrate that the *Roe* Court seriously misperceived the true nature of the unborn child and, based on this misperception, grossly undervalued the State's interest in protecting prenatal life.

In *Roe*, the Court repeatedly referred to the State's interest as an interest in protecting "potential life," as though there were no *actual* life in the womb.[254] Given the state of obstetrical practice at the time, it is perhaps conceivable that the Court did not understand that the unborn child is actually alive—in a biological sense—prior to viability. Significant changes in medical technology since *Roe* was decided, however, clearly demonstrate that the unborn child within the womb is *actually* and, not just potentially, alive.

At the time of *Roe*, obstetrical practice focused primarily on the pregnant woman, not on the unborn child. As one medical text described this past practice: "The mother was the patient to be cared

250. *See Casey*, 505 U.S. at 863.

251. *See* Plessy v. Ferguson, 163 U.S. 537, 557, 562 (1896) (Harlan, J., dissenting); Lochner v. New York, 198 U.S. 45, 73 (1905) (Harlan, J., dissenting); *id.* at 75–76 (Holmes, J., dissenting).

252. *See*, *e.g.*, South Dakota v. Wayfair, Inc., 138 S.Ct. 2080, 2096–97, 2099 (2018) (overruling *National Bellas Hess, Inc. v. Department of Revenue of Illinois*, 386 U.S. 753 (1967), and *Quill Corp. v. North Dakota*, 504 U.S. 298 (1992), and rejecting the "physical presence rule" as a condition of imposing state sales taxes).

253. *See Casey*, 505 U.S. at 855.

254. *See* Roe v. Wade, 410 U.S. 113, 150, 159, 162, 163, 165 (1973).

for; the fetus was but another, albeit transient, maternal organ."[255] But modern obstetrical medicine has rejected this outmoded view of unborn children. Indeed, an unborn child is now recognized as a "second patient, a patient who usually faces much greater risks of serious morbidity and mortality than does the mother."[256] And the unborn child can be treated surgically and medically while still *in utero*—both before and after viability.[257]

Although ubiquitous now, basic ultrasound technology was in its infancy at the time of *Roe* and was not widely used in the United States until well into the 1970s.[258] And the clarity of sonogram pictures is greatly enhanced today. Mothers regularly see and share photos taken of their unborn children during the first trimester of pregnancy and beyond.

The advent of the prenatal obstetric ultrasound has given rise to whole new fields of medicine. Fetal surgery was unavailable at the time of *Roe*, but now top pediatric hospitals across the country regularly perform such surgeries.[259] This can be done by partially extracting the

255. F. GARY CUNNINGHAM ET AL., WILLIAMS OBSTETRICS 277 (18th ed. 1989). An earlier version of this text also stated:

> Fetal diagnosis and therapy have now emerged as legitimate tools the obstetrician must possess. Moreover, the number of tools the obstetrician can employ to address the needs of the fetus increases each year . . . Who would have dreamed—even a few years ago—that we could serve the fetus as physician? Or, that the well-being and growth of the fetus could be monitored accurately and that the status of fetal health could be addressed?

JACK A. PRITCHARD & PAUL C. MACDONALD, WILLIAMS OBSTETRICS vii (16th ed. 1980).

256. *See* CUNNINGHAM ET AL., *supra* note 255.

257. *See infra* notes 259–262 and accompanying text.

258. MALCOLM NICOLSON & JOHN E.E. FLEMING, IMAGING AND IMAGINING THE FETUS 233 (2013) ("By . . . 1976, diagnostic ultrasound was established as a component of modern clinical routine."); *see also id.* at 201 ("[B]y the mid-1970s . . . the fetus had become a clinical presence in its own right, for the first time in its history.").

259. The website of Children's Hospital of Philadelphia describes this emerging field as follows:

> Fetal surgery is a highly complex surgical intervention to repair birth defects in the womb that requires the most expert care for both mother and unborn baby. Improved fetal imaging and diagnostic tools have allowed us to identify more precisely when conditions worsen during fetal development. This knowledge has helped us develop new ways to help babies sooner while *in utero*. Today, fetal therapy is recognized as one of the most promising fields in pediatric medicine, and prenatal surgery is becoming an option for a growing number of babies with birth defects.

baby from the womb, performing surgery on it and then returning the baby to the womb to continue its development. And some fetal maladies are now remediable through less-invasive laparoscopy surgical procedures.[260] Likewise, other conditions that are potentially life-threatening to an unborn child may be diagnosed *in utero* and treated by providing the mother with medicines to resolve these problems.[261] And newly emerging treatments for babies *in utero* include trans–plantation of the mother's stem cells to the baby to cure a variety of diseases.[262] Moreover, obstetrical textbooks note that the failure to treat an unborn child as a second patient in modern obstetrical practice can result in significant legal liability for injuries to that child.[263]

From the foregoing, it is clear that the prevailing view of unborn children has changed dramatically since *Roe*. They are now viewed as individual patients deserving of, and regularly provided with, medical care. This is due, in large measure, to advances in prenatal medicine, which were developed through the use of ultrasound technology that became available after *Roe*.

Thus, even though changes of fact are not *necessary* in order to overrule a case involving a national controversy, when such changes do come about and make the "old facts" relied upon obsolete, they do support a reexamination of the prior case. This is especially true where, as here, the many breakthroughs in prenatal treatments since *Roe* can understandably cause significant cognitive dissonance in the public mind. It is now possible for two women at the same stage of pregnancy

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Fetal Surgery, CHILDREN'S HOSPITAL OF PHILA., https://www.chop.edu/treatments/fetal-surgery [https://perma.cc/B2VT-GW8Q] (last visited Oct. 29, 2019).

260. Kathryn M. Maselli & Andrea Badillo, *Advances in Fetal Surgery*, 4 ANNALS TRANSLATIONAL MED. 394, 396–97 (2016), *available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5107396/.

261. *See, e.g.*, John T. Harrigan et al., *Successful Treatment of Fetal Congestive Heart Failure Secondary to Tachycardia*, 304 NEW ENG. J. MED. 1527, 1528 (1981) (describing the administration of digoxin to a mother to remedy cardiac arrhythmias in her unborn baby); *see also supra* notes 84–86 and accompanying text.

262. A recent article described a baby diagnosed with a fatal disease *in utero* who received some of his mother's stem cells at about eighteen weeks gestational age and was later born at thirty-seven weeks. Suzanne Leigh, *Baby Born in World's First* in utero *Stem Cell Transplant Trial*, U. CAL. S.F. (May 25, 2018), https://www.universityofcalifornia.edu/news/baby-born-world-s-first-utero-stem-cell-transplant-trial [https://perma.cc/P6W8-SWNF].

263. CUNNINGHAM ET AL., *supra* note 255.

to enter the same hospital—one to deliver prematurely or undergo prenatal surgery, while the other procures an elective abortion.[264]

It is not clear whether the Justices in the *Roe* majority actually believed that the unborn have only "potential," and not actual, life. However, that was their stated justification for devaluing the unborn and limiting the State's ability to protect the actual lives of the unborn. With the ever-expanding ability to treat the unborn child *in utero*, even before viability, and the legal liability now available for causing prenatal injuries, this justification for refusing to allow states to protect these actual children throughout pregnancy cannot be supported. Thus, contrary to the Joint Opinion, the "decision to reexamine [*Roe*] on this ground alone [is] not only justified, but required."[265]

IV. DOES VIABILITY MATTER?

Apart from the foregoing analysis of the *stare decisis* factors considered in *Casey*, it may be asked: Does viability even matter? That is, does the unborn child's attainment of viability, however difficult that may be to determine, make any actual difference in the State's authority to prohibit a pregnant woman from obtaining an abortion? The answer would appear to be "no," which suggests that the viability rule reaffirmed in *Casey* is an illusory distinction without legal or practical significance.

In *Roe*, the Court held that after viability, "the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion *except* where it is necessary, in appropriate medical judgment, for the preservation of the life or *health of the mother.*"[266] In the companion case of *Doe v. Bolton*,[267] the Court, relying upon its earlier opinion in *United States v. Vuitch*,[268] defined the scope of the mandated health exception: "[T]he medical judgment [as to the necessity of an abortion] may be exercised in the 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

264. A graphic description of the dilation-and-evacuation abortion method ("D & E"), which is the most commonly used method during the second trimester, may be found in *Gonzales v. Carhart*, 550 U.S. 124, 135–36 (2007).

265. *See* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 863 (1992).

266. Roe v. Wade, 410 U.S. 113, 164–65 (1973) (emphases added).

267. 410 U.S. 179 (1973).

268. 402 U.S. 62 (1971).

health."[269] Given this expansive definition of health, it is doubtful that *any* statute attempting to limit post-viability abortions would be constitutional. And the post-*Roe* case law does nothing to dispel this doubt.

In *Doe v. Rampton*,[270] a three-judge federal district court struck down a Utah statute that prohibited post-viability abortions unless the procedure was "necessary to save the life of the pregnant woman or to prevent serious and permanent damage to her physical health."[271] It did so, in part, because "it prohibit[ed] abortions performed to preserve the mental health of the mother."[272] In *Margaret S. v. Edwards*,[273] a federal district court struck down a Louisiana statute prohibiting abortion after viability unless the procedure was necessary "to prevent *permanent impairment* to [the woman's] health."[274] The court reasoned:

> Preserving maternal health means more than preventing permanent incapacity. A rape or incest victim may not be able to prove that her mental health will be *permanently* impaired if she is forced to bear her attacker's child, but she might be able to show that it is necessary to preserve her immediate mental health.[275]

In *Schulte v. Douglas*,[276] a federal district court considered the constitutionality of a Nebraska statute that prohibited abortion after viability unless the procedure was "necessary to preserve the woman from *an imminent peril* that *substantially endangers* her life or health."[277] It held that the qualifying words "imminent" and "sub–stantial" impermissibly narrowed the scope of post-viability abortions that must be permitted under *Roe*.[278] In *Planned Parenthood of Central New Jersey v. Verniero*,[279] a federal district court reviewed the

269. *Bolton*, 410 U.S. at 192 (emphasis added). In *Roe*, the Court emphasized that *Roe* and *Bolton* "are to be read together." *Roe*, 410 U.S. at 165.

270. 366 F. Supp. 189 (D. Utah 1973).

271. *Id.* app. at 194 (quoting UTAH CODE ANN. § 76-7-302(3) (amended 1973)).

272. *Id.* at 192–93.

273. 488 F. Supp. 181 (E.D. La. 1980).

274. *Id.* at 196 (quoting LA. REV. STAT. ANN. § 40:1299.35.4 (1979).

275. *Id.* It should be noted that *no* plaintiff in *Edwards* was a victim of rape or incest.

276. 567 F. Supp. 522 (D. Neb. 1981), *aff'd per curiam sub nom.* Women's Services, P.C. v. Douglas, 710 F.2d 465 (8th Cir. 1983).

277. *Id.* at 525 (quoting NEB. REV. STAT. §§ 28-329, -330 (1979)).

278. *Id.*

279. 41 F. Supp. 2d 478 (D. N.J. 1998), *aff'd*, 220 F.3d 127 (3d Cir. 2000).

constitutionality of a prohibition on partial-birth abortions that contained an exception only for a woman's life. The court held that "states may not proscribe an abortion procedure, before or after viability, without providing an exception for when such procedure is necessary, in a physician's medical judgment, to preserve the physical or mental health of the woman."[280]

In *Women's Medical Professional Corp. v. Voinovich*,[281] the Sixth Circuit affirmed a district court judgment striking down an Ohio statute that prohibited post-viability abortions except when the procedure was necessary to avert the death of the pregnant woman or to avoid serious risk of substantial and irreversible impairment of a major bodily function.[282] The court of appeals noted that the statute "appear[ed] to be limited to physical health risks, as opposed to mental health risks."[283] This understanding was confirmed by the State in oral argument and the legislative intent set forth in the statute.[284] So construed, the Sixth Circuit held the statute unconstitutional. The court explained that "if the State chooses to proscribe post-viability abortions, it must provide a health exception that includes situations where a woman is faced with the risk of severe psychological or emotional injury which may be irreversible."[285] In *American College of Obstetricians and Gynecologists v. Thornburgh*,[286] the Third Circuit noted that "no Supreme Court case has upheld a criminal statute prohibiting abortion of a viable fetus."[287] The court stated, in dicta, that had Pennsylvania attempted to prohibit post-viability abortions performed for psychological or emotional reasons, such a limitation would have been unconstitutional under *Doe v. Bolton*.[288] In *Jane L. v.*

280. *Id.* at 502.

281. 130 F.3d 187 (6th Cir. 1997).

282. *Id.* at 190.

283. *Id.* at 206.

284. *Id.* at 206–07.

285. *Id.* at 210.

286. 737 F.2d 283 (3d Cir. 1984).

287. *Id.* at 298.

288. *Id.* at 299. The inherent manipulability of a mental health exception is evident from the pre-*Roe* experience with California's Therapeutic Abortion Act of 1967. According to data referenced by the California Supreme Court, more than 60,000 abortions were authorized and performed in 1970 for alleged "mental health" reasons, even though the standard for invoking the exception was the same as the standard for civil commitment, to wit, the pregnant woman had to pose a danger to herself or to others or to the property of others. *See* People v. Barksdale, 503 P.2d 257, 264–65 (Cal. 1972). The court went on to express "serious doubt" that more than

Bangerter,[289] the Tenth Circuit, also in dicta, opined that a restriction of post-viability abortions to those necessary to prevent "grave damage to the woman's health" would violate *Roe* and *Casey*.[290]

In light of the unanimity of the foregoing authorities, it is apparent that the states may not restrict post-viability abortions to those necessary to preserve the physical health of the woman. It is even doubtful that they could impose any enforceable limitations on abortions sought for reasons of the woman's mental health.[291] And the Supreme Court has repeatedly refused to grant review in cases in which it could have clarified the scope of the post-viability health exception mandated by *Roe*.[292] If, as these lower court decisions suggest, the states have little or no authority to impose meaningful limitations on post-viability abortions, then the viability rule adopted in *Roe* and re–affirmed in *Casey* would appear to be meaningless.

CONCLUSION

Roe and its progeny have been subjected to severe and sustained scholarly criticism, which has not abated since *Roe* was decided almost fifty years ago. Those critiques have shown that *Roe* was so fundamentally flawed that the decision provides almost limitless targets for scholarly attack.

One wonders whether the authors of *Casey*'s Joint Opinion (none of whom was on the Court when *Roe* was decided) knew what was contained in Justice Blackmun's private papers concerning *Roe* and the choice of viability. Regardless, those papers laid bare the vacuity of it all. There was no careful examination of what the Joint Opinion repeatedly called the "essential" holding of *Roe*—the viability rule. Nor was there any reasoned explanation for that choice. Rather, the choice of viability was purely arbitrary and unnecessary, no more than an

60,000 women met the standard for civil commitment merely because they were pregnant. *Id.* at 265.

289. 102 F.3d 1112 (10th Cir. 1996).

290. *Id.* at 1118 n.7. In *Jane L.*, the court of appeals held that the post-viability applications of a twenty-week abortion ban could not be severed from the pre-viability applications of the ban and struck down the ban *in toto*. *Id.* at 1117.

291. The authors are unaware of any case in which a physician has been successfully prosecuted for performing a post-viability abortion in violation of a state law prohibiting such abortions.

292. *See, e.g.*, Guam Soc'y of Obstetricians & Gynecologists v. Ada, 962 F.2d 1366 (9th Cir. 1992), *cert. denied*, 506 U.S. 1011 (1992); *Jane L.*, 102 F.3d 1112, *cert. denied sub nom.* Leavitt v. Jane L., 520 U.S. 1274 (1997); Women's Med. Prof'l Corp. v. Voinovich, 130 F.3d 187 (6th Cir. 1997), *cert. denied* 523 U.S. 1036 (1998).

afterthought. It was, as Justice White said at the time, the "exercise of raw judicial power."[293]

Not one of the *stare decisis* factors identified in *Casey* purporting to require adherence to the viability rule precludes reconsideration of *Roe*. Indeed, all of them strongly favor a decision overruling *Roe*. The viability rule is unworkable because it is incapable of being applied and enforced in a principled, consistent fashion; there is no plausible personal or societal reliance that can be placed on continued access to legal abortion through viability; the law has increasingly discarded viability as an outmoded relic of legal analysis; and medical and scientific developments since *Roe* have dramatically changed society's perception of the unborn child, both before and after viability.

It is almost certain that another case will reach the Supreme Court in which a state will argue that *Roe* should be overruled. When that happens, the Court should not hesitate to re-examine and overrule *Roe*. As Justice White remarked in his *Thornburgh* dissent, "history has been far kinder to those who departed from precedent[, as in *Brown*,] than to those who would have blindly followed the rule of *stare decisis*."[294] *Roe* has distorted "the Court's constitutional jurisprudence"[295] long enough, and the Court should restore to the states their rightful authority to protect the lives of unborn children.

293. Doe v. Bolton, 410 U.S. 179, 222 (1973) (White, J., dissenting).

294. Thornburg v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 788 (1986) (White, J., dissenting) (referring to *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

295. *Id.* at 814 (O'Connor, J., dissenting).