

Where's the Syllogism?: *Gonzales, Casey* and the Viability Rule

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The now-abandoned “trimester framework” of *Roe v. Wade* evaluated abortion regulations based on the stage of pregnancy to which they applied.¹ Central to this framework was the concept of fetal “viability,”² the point at which the fetus is “potentially able to live outside the mother's womb, albeit with artificial aid.”³ *Roe* concluded that the state interest in protecting fetal life becomes “compelling”—justifying substantial regulation or proscription of abortion—only at viability,⁴ a period then identified with the third trimester of pregnancy.⁵ This viability rule generated dissents in subsequent cases from Justices who considered the Court’s line “arbitrary.”⁶ Justice White, for example, maintained that “the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant.”⁷

Nearly two decades after *Roe*, the controlling opinion in *Planned Parenthood of Southeastern Pa. v. Casey* discarded the “rigid” trimester framework, substituting a more

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¹ *Roe v. Wade*, 410 U.S. 113, 164-65 (1973); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 872 (1992) (plurality opinion of O’Connor, Kennedy and Souter, JJ.).

² Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639, 640 (1986) (“[T]wo medically determined times—the time when the hazards of abortion surpassed those of childbirth, and the time of fetal viability—appeared to form the structural foundation of the *Roe* trimester framework.”)

³ *Roe*, 410 U.S. at 160.

⁴ *Id.* at 163-64 (“With respect to the State's important and legitimate interest in potential life, the ‘compelling’ point is at viability. . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”).

⁵ *Casey*, 505 U.S. at 872 (under *Roe*’s trimester framework, “during the third trimester, when the fetus is viable, prohibitions are permitted provided the life or health of the mother is not at stake”).

⁶ *Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 461 (1983) (O’Connor, J., dissenting) (“The choice of viability as the point at which the state interest in potential life becomes compelling is no less arbitrary than choosing any point before viability or any point afterward.”); *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 794 (1986) (White, J., dissenting) (“the Court’s choice of viability as the point at which the State’s interest becomes compelling is entirely arbitrary”). Actually, Justice Blackmun had already acknowledged the potential arbitrariness of treating viability as the controlling line in an internal memorandum circulated during the drafting of *Roe v. Wade*. See Cover Memorandum Accompanying Draft of *Roe v. Wade*, quoted in DAVID GARROW, *LIBERTY AND SEXUALITY* 580 (2005); Randy Beck, *The Essential Holding of Casey: Rethinking Viability*, 75 UMKC L. REV. 713, 722-23 (2007).

⁷ *Thornburgh*, 476 U.S. at 795 (White, J., dissenting).

accommodating “undue burden” standard.⁸ Nevertheless, the plurality retained the rule that a state may not prohibit abortion prior to fetal viability,⁹ though with the recognition that medical advances had pushed the viability threshold to an earlier point in pregnancy than at the time of *Roe*.¹⁰ In a partial dissent, Justice Scalia subscribed to Justice O’Connor’s earlier position that viability is an arbitrary line, labeling the plurality’s defense of the viability rule “conclusory.”¹¹

The viability rule once again emerged as a point of contention in *Gonzales v. Carhart*, the Court’s most recent decision addressing the scope of abortion rights.¹² A narrowly-divided Court in *Gonzales* rejected a facial challenge to the federal Partial-Birth Abortion Ban Act of 2003.¹³ While the majority assumed the applicability of the viability rule,¹⁴ it upheld a federal ban on the “intact dilation and evacuation” (intact D&E) procedure that applied without regard to the stage of fetal development.¹⁵ Justice Kennedy explained that “[t]he Act does apply both previability and postviability because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”¹⁶ In dissent, Justice Ginsburg twice

⁸ *Casey*, 505 U.S. at 872-79.

⁹ *Id.* at 879.

¹⁰ *Id.* at 860 (“We have seen how time has overtaken some of *Roe*’s factual assumptions: advances in maternal health care allow for abortions safe to the mother later in pregnancy than was true in 1973, and advances in neonatal care have advanced viability to a point somewhat earlier. . . . The soundness or unsoundness of [the constitutional judgment that viability is the earliest point at which states may ban nontherapeutic abortions] in no sense turns on 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.”) (citations omitted). The possibility that the point of viability would change over time was an anticipated consequence of selecting the viability line. *See Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 61 (1976) (*Roe*’s definition of viability was “purposefully left flexible for professional determination, and dependent upon developing medical skill and technical ability”).

¹¹ *Casey*, 505 U.S. at 989 n.5 (Scalia, J., concurring in the judgment in part and dissenting in part). (“Of course Justice O’Connor was correct in her former view. The arbitrariness of the viability line is confirmed by the Court’s inability to offer any justification for it beyond the conclusory assertion that it is only at that point that the unborn child’s life ‘can in reason and all fairness’ be thought to override the interests of the mother.”) (referencing *Akron*, 462 U.S. at 461 (O’Connor, J., dissenting)).

¹² 127 S. Ct. 1610 (2007).

¹³ *Id.* at 1639.

¹⁴ *See, e.g., id.* at 1626 (“We assume the following principles for the purposes of this opinion. Before viability, a State ‘may not prohibit any woman from making the ultimate decision to terminate her pregnancy.’”) (quoting *Casey*, 505 U.S. at 879 (plurality opinion)); *see also id.* at 1632 (“Under the principles accepted as controlling here, the Act, as we have interpreted it, would be unconstitutional ‘if its purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.’ *Casey*, 505 U.S., at 878, 112 S.Ct. 2791 (plurality opinion). The abortions affected by the Act’s regulations take place both previability and postviability; so the quoted language and the undue burden analysis it relies upon are applicable.”).

¹⁵ *Id.* at 1627. The majority did note that the intact D&E abortion method is used “in the later stages of pregnancy.” *Id.* at 1614.

¹⁶ *Id.*

accused the majority of “blur[ring] the line, firmly drawn in *Casey*, between previability and postviability abortions.”¹⁷

The continuing discord over viability reflected in the *Gonzales* opinions highlights an issue that remains unsettled 34 years after *Roe*. Why may a state protect the life of a fetus after it reaches viability, but not before? What makes viability the constitutionally significant line? Professor John Hart Ely famously criticized *Roe* for failing to explain “[e]xactly why that is the magic moment,” observing that “the Court’s defense seems to mistake a definition for a syllogism.”¹⁸ More than a third of a century after *Roe*, the problem highlighted by Professor Ely remains unresolved. The Court has yet to supply an adequate constitutional rationale for requiring the capacity to survive outside the womb as a necessary condition for state protection of fetal life.

This article suggests that the Supreme Court has a continuing obligation to account for the significance accorded to fetal viability in its abortion jurisprudence. Neither *Roe* nor *Casey* provided a constitutional justification for the viability rule, and *Gonzales* makes such a justification even harder to envision. Under the reasoning of *Casey*, if the Court cannot offer a principled constitutional rationale for requiring ability to survive *ex utero* as a condition for state protection, then the viability rule should be abandoned as illegitimate, an arbitrary line inappropriate for judicial imposition.

Before examining the Court’s defense of the viability rule, the analysis begins with the preliminary question of whether the rationale for the rule really matters. Why revisit a question the Court has largely avoided for over three decades? In Section I of the article, I offer three reasons to believe the Court has an obligation to either justify the viability rule or abandon it. First, I emphasize *Casey*’s acknowledgement that judicial decisions can only be considered legitimate to the extent the Court provides a non-arbitrary constitutional justification for the lines it draws.¹⁹ As a majority of the *Casey* Court recognized, “a decision without principled justification would be no judicial act at all.”²⁰ Second, I discuss some of the disquieting consequences of the viability rule, which causes fetal and maternal rights to vary based on seemingly irrelevant factors, such as the state of prenatal medicine during the period of gestation, the proximity of the mother to advanced medical facilities, the outlook of the doctor making the viability assessment and the race and gender of the fetus.²¹ If the Court wishes to tie constitutional status to a biological criterion that generates morally random outcomes, it should offer a principled basis for the rule that produces these results. Third, I sketch out the practical import of the viability rule, which prevents state regulation of late-term abortions that would be illegal

¹⁷ *Id.* at 1641 (Ginsburg, J., dissenting); *see also id.* at 1649-50.

¹⁸ John Hart Ely, *The Wages of Crying Wolf*, 82 *YALE L. J.* 920, 924 (1973).

¹⁹ *See infra* notes 31-46 and accompanying text.

²⁰ *Casey*, 505 U.S. at 865.

²¹ *See infra* notes 47-70 and accompanying text.

in all but a handful of other countries.²² The Court should justify the viability rule because it pushes U.S. abortion law far outside the international mainstream.

Section II of the article illuminates the weakness of the Supreme Court's defense of the viability line. The discussion begins with the broad academic consensus that *Roe* failed to offer any argument in favor of the viability rule.²³ Missing from the Court's "syllogism" in *Roe* was the major premise—a constitutional analysis of state power and fetal entitlement that, when combined with the Court's definition of viability, would lead to the conclusion that the state can only protect a viable fetus.

The discussion next moves to *Casey*, which improved matters only slightly.²⁴ The plurality opinion in *Casey* did describe viability as marking "the independent existence of [a] second life" that "can in reason and all fairness be the object of state protection," notwithstanding the competing claims of the mother.²⁵ The ambiguity of this passage aside, a generous reading might disclose the major premise for a syllogism supporting the viability rule. However, the plurality's premise is merely asserted rather than defended. Like the Court in *Roe*, the *Casey* plurality offered no theory of state power or fetal entitlement to explain why "independent existence"—or, more precisely, the particular form of hypothetical independence denoted by the term "viability"—constitutes a necessary condition for protection by the state. Significantly, nothing in *Casey* sought to link such an "independent existence" requirement to any principle drawn from the Constitution. The viability rule therefore fails the test of judicial legitimacy set forth in *Casey* itself.

Section II concludes by showing that last term's *Gonzales* decision tends to undermine the defense of the viability rule hinted at in *Casey*.²⁶ The Court in *Gonzales* clearly recognized that a pre-viable fetus represents a second life with an existence independent of the mother. The *Gonzales* opinion, moreover, affirmed the legitimacy of certain legal protections for the pre-viable fetus, based in part on its similarity to a newborn infant. The reasoning of *Gonzales* therefore makes it more difficult to articulate and support a constitutional justification for the viability rule along the lines intimated in *Casey*.

I. Why Expect a Rationale for the Viability Rule?

For more than a third of a century, the courts of the United States have vigorously applied a seemingly arbitrary rule, one never justified in either legal or moral terms. From 1973 to the present, courts have consistently struck down every law perceived to create a substantial obstacle to the abortion of any fetus that had not crossed the viability

²² See *infra* notes 71-85 and accompanying text.

²³ See *infra* notes 89-106 and accompanying text.

²⁴ See *infra* notes 107-26 and accompanying text.

²⁵ *Casey*, 505 U.S. at 870.

²⁶ See *infra* notes 127-47 and accompanying text.

threshold, regardless of the reasons for wanting an abortion.²⁷ In all that time, the Supreme Court has never explained how this viability rule can be derived from the Constitution. Even if one assumes that the Constitution protects some right to terminate a pregnancy, the Court has never offered a principled explanation for its conclusion that the right continues until the fetus can survive outside the womb.²⁸

One can imagine some readers questioning whether the Court's failure to justify the viability rule really matters. Given the longstanding application of the rule, why ask the Court to go back and address a gap in the reasoning of *Roe*? Before moving to the defense of the viability standard in *Roe* and *Casey*, therefore, this section of the article will maintain that the Court owes the public a principled justification for treating viability as the dispositive constitutional line. Subsection A discusses the test of legitimacy *Casey* invited the public to apply in evaluating the Court's decisions.²⁹ Subsections B and C consider ramifications of the viability rule that seem to call for explanation.³⁰

A. *Casey's Test of Legitimacy*

The most straightforward reason for thinking the Court should give a principled explanation for the viability rule is that the *Casey* opinion acknowledged the Court's obligation to do so. *Casey* placed great weight on judicial "legitimacy" as a necessary foundation for the beneficial exercise of judicial power.³¹ In a portion of the joint opinion joined by a majority of the Supreme Court, the Justices noted that judges cannot obtain support for their decisions through expenditure of funds and have only limited ability to coerce obedience.³² The Supreme Court's effectiveness in fulfilling its constitutional responsibilities therefore turns on the legitimacy of its decisions in the eyes of the public:

The Court's power lies . . . in its legitimacy, a product of substance and perception that shows itself in the people's acceptance of the Judiciary as fit to determine what the Nation's law means and to declare what it demands.³³

²⁷ See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 930 (2000) (striking down Nebraska partial birth abortion ban, which applied before and after viability); *Casey*, 505 U.S. at 893-94 (spousal notification requirement, which applied prior to viability, invalidated as substantial obstacle to abortion); *Planned Parenthood Ass'n of Kansas City v. Ashcroft*, 462 U.S. 476, 481-82 (1983) (requirement that second trimester abortions be performed in hospital unreasonably infringed on abortion rights); *Colautti v. Franklin*, 439 U.S. 379, 389-94 (1979) (striking down act imposing standard of care in performance of abortion where fetus "may be viable").

²⁸ See *infra* notes 89-126 and accompanying text.

²⁹ See *infra* notes 31-46 and accompanying text.

³⁰ See *infra* notes 47-85 and accompanying text.

³¹ *Casey*, 505 U.S. at 864-69.

³² *Id.* at 865.

³³ *Id.*

Failure to maintain the Court's legitimacy, the majority believed, would threaten our collective ability to view ourselves as a country committed to the rule of law.³⁴

Much of *Casey*'s discussion of legitimacy related to concerns about public perception of a decision overruling *Roe v. Wade*.³⁵ However, the majority also wrote at length about the Court's obligation to act on principled grounds so that its opinions *merit* recognition as legitimate. The Justices acknowledged that "[t]he underlying substance of this legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws."³⁶ Consequently, "a decision without principled justification would be no judicial act at all."³⁷

While acting on principled grounds constitutes an indispensable foundation, the *Casey* Court also suggested that judicial legitimacy requires something more.³⁸ *Casey* emphasized the Court's obligation to present the principles underlying its decisions for inspection by the public:

Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decisions on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principled choices that the Court is obliged to make. Thus, the Court's legitimacy depends on making legally principled decisions under circumstances in which their principled character is sufficiently plausible to be accepted by the Nation.³⁹

Understanding legitimacy as "a product of substance and perception," the Court affirmed its obligation to act transparently in order to maintain public confidence. To accept judicial decisions as legitimate, the public must be able to see how they derive from constitutional principles. If the Court fails to explain the principles justifying a decision,

³⁴ *Id.* at 868 ("Like the character of an individual, the legitimacy of the Court must be earned over time. So, indeed, must be the character of a Nation of people who aspire to live according to the rule of law. Their belief in themselves as such a people is not readily separable from their understanding of the Court invested with the authority to decide their constitutional cases and speak before all others for their constitutional ideals. If the Court's legitimacy should be undermined, then, so would the country be in its very ability to see itself through its constitutional ideals. The Court's concern with legitimacy is not for the sake of the Court, but for the sake of the Nation to which it is responsible.").

³⁵ Thus, the plurality expressed concern about the damage to its reputation if it was perceived to be overruling *Roe v. Wade* in response to political pressure. *See id.* at 867 ("So to overrule under fire in the absence of the most compelling reason to reexamine a watershed decision would subvert the Court's legitimacy beyond any serious question.").

³⁶ *Id.* at 865 (plurality opinion).

³⁷ *Id.*

³⁸ *Id.* ("But even when justification is furnished by apposite legal principle, something more is required.").

³⁹ *Id.* at 865-66.

the public may suppose that the outcome represents an unprincipled compromise produced by social or political pressures.

Casey subsequently addressed the viability rule in a portion of the opinion reflecting the views of Justices O'Connor, Kennedy and Souter.⁴⁰ In that context, the plurality reemphasized the Court's obligation to offer principled rationales for its decisions:

Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw.⁴¹

As understood by the *Casey* plurality, then, the Court's responsibility to provide transparent and principled justifications for its rulings applies, not just to the derivation of constitutional rights, but also to the selection of particular lines to implement those rights. Specifically, the obligation of principled justification applies to the viability rule, a line implementing the abortion right the Court recognized in *Roe*.

The *Casey* opinion thus offers a test of judicial legitimacy that we may use to evaluate the Court's defense of the viability rule. To demonstrate the rule's legitimacy, the Court must show that viability is not simply an arbitrary line reflecting some Justices' views of a reasonable social or political compromise in the area of abortion rights. The Court must instead provide a principled analysis demonstrating the warrant for the viability rule in the Constitution. This principled justification must be apparent to readers of the Court's opinions and "sufficiently plausible to be accepted by the Nation."⁴²

For many Americans, the legitimacy of the Court's jurisprudence is nowhere more in doubt than in the context of abortion rights.⁴³ The *Casey* plurality recognized the "intensely divisive" nature of the abortion controversy, and displayed a desire to foster some degree of consensus on the issue.⁴⁴ However, if the Court "calls the contending sides of a national controversy to end their national division by accepting a common mandate rooted in the Constitution,"⁴⁵ it seems crucial to demonstrate the constitutional mandate to which the Court appeals. Drawing a line as far-reaching and consequential as the viability rule without a convincing constitutional rationale appears more calculated to aggravate the national division over abortion than to quell it. After all, the viability rule carves out a large territory in which the normal processes for mediating political disputes

⁴⁰ *Id.* at 869-71.

⁴¹ *Id.* at 870.

⁴² *Id.* at 865-66.

⁴³ See, e.g., Michael Stokes Paulsen, *The Worst Constitutional Decision of All Time*, 78 NOTRE DAME L. REV. 995 (2003); Ely, *supra* note 18, at 947 (*Roe* is "a very bad decision. . . . It is bad because it is bad constitutional law, or rather because it is *not* constitutional law and gives almost no sense of an obligation to try to be."); *Casey*, 505 U.S. at 866 (recognizing that the Court's abortion jurisprudence implicates an "intensely divisive controversy").

⁴⁴ *Casey*, 505 U.S. at 866-67.

⁴⁵ *Id.* at 867.

are rendered inoperative.⁴⁶ In Section II below, we will consider the Court's attempts to explain the viability rule in light of the standards for judicial legitimacy articulated by the Court in *Casey*.

B. *The Moral Randomness of the Viability Standard*

The Court's obligation to articulate principled justifications for its decisions applies whenever the Court resolves constitutional issues. In some circumstances, however, the consequences of a particular ruling may provide additional reason to seek a convincing constitutional rationale. This subsection and the next highlight ramifications of the viability rule that seem to call for explanation.

Justice Blackmun borrowed *Roe*'s viability standard from the medical community.⁴⁷ Doctors making treatment decisions with respect to preterm fetuses must predict the likely consequences of premature delivery.⁴⁸ Medical researchers assist this predictive exercise by gathering information on survival of infants delivered prior to full term.⁴⁹ One standard medical text notes that survival rates for preterm infants have improved in recent decades:

As neonatal and perinatal care has improved, the lower limit of "viability" has been a progressively earlier gestational age. Regionalized perinatal care, broader use of antenatal corticosteroids, and advances in neonatal care (e.g., surfactant treatment) have led to steady improvements in perinatal, neonatal, and infant morbidity and mortality. As many as 15 percent of infants born at 23 weeks, 56 percent at 24 weeks, and 80 percent at 25 weeks may now survive to hospital discharge in the postsurfactant era.⁵⁰

⁴⁶ MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 25 (1987) ("In no other country have constitutional courts gone as far in removing abortion law from regulation by the democratic process as in the United States.").

⁴⁷ *Roe*, 410 U.S. at 160 ("As we have noted, the common law found greater significance in quickening. Physicians and their scientific colleagues have regarded that event with less interest and have tended to focus either upon conception, upon live birth, or upon the interim point at which the fetus becomes 'viable,' that is, potentially able to live outside the mother's womb, albeit with artificial aid.").

⁴⁸ E. GARY CUNNINGHAM, ET AL., *WILLIAMS OBSTETRICS* 857 (22nd ed. 2005) ("Approaches to preterm labor and delivery currently are guided in large part by expectations for survival of the neonate.").

⁴⁹ Rhoden, *supra* note 2, at 676 (noting that "medical statistics can show that 15, 30 or 50 percent of fetuses born at a particular gestational age survive").

⁵⁰ Jay D. Iams, *Preterm Birth*, in STEVEN G. GABBE, ET AL., *OBSTETRICS: NORMAL AND PROBLEM PREGNANCIES* 755, 812 (4th ed. 2002). The treatments mentioned in the text relate to respiratory capacity, a significant issue in premature deliveries:

Virtually all premature infants have respiratory problems. Treatment for such problems ideally begins before birth, with the mother being given an injection of corticosteroids, which are known to cross the placenta, and greatly accelerate lung development. After birth, respiratory problems are treated with artificial ventilation. The ventilators that are commonly used on adults have been shown to damage infant lungs, so special high frequency oscillation ventilators are commonly used. . . . Used in

Such data explains the *Casey* plurality's conclusion that the viability threshold has moved significantly in the years since *Roe*.⁵¹

The change in viability statistics over time highlights one of the odd consequences of using viability, a concept developed for medical purposes, as the basis for determining an individual's legal status under the Constitution. Compare a healthy 26-week-old fetus *in utero* in 1973 with an identical fetus similarly situated in 2007. Under the viability rule, a state likely could not adopt abortion regulations protecting the life of such a fetus at the time of *Roe*, but could protect an identical fetus today.⁵² “According to the logic of *Roe v. Wade*, then, a whole class of unborn human beings would now merit legal protection but would not have merited it then.”⁵³

This difference in legal status between the 1973 fetus and the 2007 fetus seems difficult to explain in a principled fashion. No distinction between the two fetuses justifies the disparate treatment.⁵⁴ Nor is there any difference in the burden the two fetuses place on

combination with the ventilator, is surfactant replacement therapy, which has been described as “the most exciting advance in neonatal medicine of the last decade.” Surfactant is a naturally occurring chemical, which helps the lungs absorb oxygen. In premature infants, there is usually insufficient surfactant in the lungs, which leads to problems in the absorption of oxygen. Surfactant replacement therapy treats this problem by supplying synthetic surfactant directly to the lung surfaces. It is believed that up to half of the decline in the US national infant mortality death rate reported between 1989 and 1990 can be attributed to the introduction of surfactant therapy.

STEPHEN COLEMAN, *THE ETHICS OF ARTIFICIAL UTERUSES: IMPLICATIONS FOR REPRODUCTION AND ABORTION* 8-9 (2004) (quoting V.Y.H. Yu, *Improving the Outcome of Preterm and Low Birthweight Infants*, unpublished manuscript, at 3 (1995)).

⁵¹ See *supra* note ___ and accompanying text; STEPHEN COLEMAN, *supra* note 50, at 7 (“When *Roe v. Wade* was handed down, 28 weeks was commonly used as the cut off point for treatment. . . . These days, things have changed so much that in the Neonatal Intensive Care Unit (NICU) of the Monash Medical Centre in Melbourne, 28 weeks is considered to be the 90-95 per cent survival point. At this NICU, the survival of babies born at only 24 weeks gestation was routine, and the survival of babies born at only 23 weeks was not unknown. Even more surprisingly, few of these babies have significant disabilities.”).

⁵² Beck, *supra* note 6, at 730 (“But the result of this malleable standard is that a state in 1973 probably lacked authority to protect, say, a 26-week-old fetus, while the very same fetus could be afforded legal protection today.”).

⁵³ Jeanne Heffernan Schindler, *Abortion*, in *MEDICINE, HEALTH CARE, & ETHICS: CATHOLIC VOICES* 117 (John P. Morris, ed.) (2007).

⁵⁴ See Rhoden, *supra* note 2, at 663 (“As this brief summary shows, viability does not mark a particular biological change in the fetus. The viable fetus has no more capability for self-awareness or feeling pain than a pre-viable fetus. This conclusion follows from the fact that viability advances with medical technology, while fetal development remains the same over time.”); Mark J. Beutler, Comment, *Abortion and the Viability Standard—Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life*, 21 SETON HALL L. REV. 347, 363 (1991) (“The idea that the state's interest in protecting the life of a fetus at twenty-seven weeks of gestation was in some way less compelling in 1939 than in 1989 makes one suspicious of this entire inquiry. If a twenty-seven week old fetus is worth protecting at a time when science could enable its extra-uterine survival, then it is worth protecting prior to obtaining such technological capabilities. The reverse, of course, is also true.”).

their respective mothers.⁵⁵ The only change between 1973 and 2007 concerns the likely effectiveness of medical providers in caring for the fetuses in a set of hypothetical circumstances (premature delivery) distinct from those that in fact exist (development *in utero*).⁵⁶

Nor is differential treatment based on the year of conception the only way in which the viability rule introduces irrelevant factors into the constitutional calculus. Australian commentator Stephen Coleman suggests that changes in a woman's location during pregnancy could cause a fetus to move in and out of viability. He illustrates the point with an example:

A woman is 25 weeks pregnant, and is visiting a doctor at the Monash Medical Centre in Melbourne. Since the Monash Medical Centre has one of the most advanced Neonatal Intensive Care Units in the world, the developing human inside her would be considered viable. Now suppose that the woman leaves Melbourne, and flies to Papua New Guinea. Once she arrives in Papua New Guinea, she walks up into the highlands, where she remains until the birth. Since sophisticated medical assistance is not available in the Papua New Guinea highlands, when she arrives in the highlands her developing human would *not* be considered viable, and in fact would not be considered viable for almost three months. In fact, if this woman was to continue to travel regularly between Papua New Guinea and a major centre in Australia, then her unborn developing human could reach the 'point' of viability several times, becoming viable whenever she was near sophisticated medical facilities, and not viable whenever she returned to the remote Papua New Guinea highlands.⁵⁷

The hypothetical "shows the problem of using viability as a moral dividing line, since viability, even more than birth, privileges location."⁵⁸

One response to Coleman could be that viability determinations should be based on the best neonatal technology currently in use, even if that technology would be unavailable for a particular fetus. Justice Scalia's partial dissent in *Casey* understood viability to refer to "the magical second when machines currently in use (though not necessarily available to the particular woman) are able to keep an unborn child alive apart from its mother."⁵⁹

⁵⁵ Paul Benjamin Linton, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, 13 ST. LOUIS U. PUB. L. REV. 15, 68 (1993) ("the viable unborn child is as physically dependent upon her mother for the same nourishment as is the unborn child who is not yet viable").

⁵⁶ *Id.* at 67 ("The child's capacity to survive outside the womb is undoubtedly relevant when one is contemplating removing the child from the womb and one is concerned about the safety of the child if this is done. That capacity seems entirely irrelevant, however, when the point of viability marks only the time at which the child can no longer be removed from the womb.").

⁵⁷ COLEMAN, *supra* note 50, at 87.

⁵⁸ *Id.*

⁵⁹ 505 U.S. at 989 n.5. *But see* Colautti v. Franklin, 439 U.S. 379, 395-96 (1979) (record disclosed that doctors evaluating viability consider *inter alia* the quality of "available" medical facilities); Linton, *supra*

If that is an accurate understanding of the viability rule, however, then the rule seems unprincipled for a different reason—it causes the constitutional status of a fetus to turn on potentially non-existent hypothetical circumstances, rather than real-world prospects for survival.

The constitutional relevance of viability appears even more suspect when one considers that doctors sometimes reach divergent results in evaluating the survival prospects of a particular fetus.⁶⁰ Since determining viability involves a prediction based on multiple factors, doctors operating in good faith may reach different conclusions.⁶¹ Divergent outcomes might flow from differences in medical skill or in the quality of equipment used in making the assessment.⁶² Or they could reflect nothing more than differing levels of risk-aversion or conflicting treatment philosophies.⁶³ Interestingly, predictions about viability tend to be self-fulfilling:

Several studies have reported that the expectation of the medical team of survival for the ELBW [extremely low birth weight] infant actually influences the likelihood of survival. A study of 66 infants with birth weights between 500 and 749 g found that after controlling for birth weight and gestational age, fetuses who were considered ‘viable’ (i.e., likely to survive) were 18 times more likely to survive than fetuses who were deemed pre-viable.⁶⁴

Under the Court’s precedents, then, the constitutional status of a particular fetus may depend on the optimism of the doctor performing the evaluation. Legal deference to disputable medical judgments becomes particularly problematic when the doctor has financial, legal or ideological interests at stake in the determination.⁶⁵

Further evidence of viability’s moral and legal irrelevance derives from the fact that the race and gender of a fetus significantly influence its likelihood of survival outside the

note 55, at 40 (“viability presumably depends on the availability of such technology within a particular community”).

⁶⁰ *Colautti*, 439 U.S. at 395-96 (“In the face of these uncertainties, it is not unlikely that experts will disagree over whether a particular fetus in the second trimester has advanced to the stage of viability.”).

⁶¹ *Id.* (“As the record in this case indicates, a physician determines whether or not a fetus is viable after considering a number of variables: the gestational age of the fetus, derived from the reported menstrual history of the woman; fetal weight, based on an inexact estimate of the size and condition of the uterus; the woman’s general health and nutrition; the quality of the available medical facilities; and other factors. Because of the number and the imprecision of these variables, the probability of any particular fetus’ obtaining meaningful life outside the womb can be determined only with difficulty.”).

⁶² Linton, *supra* note 55, at 41 (accuracy of “ultrasound determination of gestational age may depend on the quality of the machine, as well as the skill of the technician”).

⁶³ *See Colautti*, 439 U.S. at 395-96 (noting that “even if agreement may be reached on the probability of survival, different physicians equate viability with different probabilities of survival, and some physicians refuse to equate viability with any numerical probability at all”).

⁶⁴ Iams, *supra* note 50, at 812.

⁶⁵ *Cf. Moore v. Regents of Univ. of Cal.*, 793 P.2d 479, 485 (Cal. 1990) (informed consent case recognizing that doctor’s “personal interests . . . may affect his medical judgment”).

womb. Researchers have demonstrated that, gestational age and birth weight being equal, female and African-American fetuses are more likely to survive premature delivery than their male and Caucasian counterparts.⁶⁶ In other words, African-American and female fetuses reach the viability threshold sooner. Since viability marks the terminal point for constitutional abortion rights under *Roe* and *Casey*, one implication is that the right to abortion under the Court's precedents lasts longer for Caucasian women than for similarly-situated African-American women.⁶⁷

Would anyone drafting a Constitution make the status of an individual—her amenability to protection by the state—turn on the therapeutic techniques available to address an as-yet-unrealized medical contingency? Would anyone attach controlling significance to the proximity of cutting edge medical facilities or to an “imprecise medical judgment”⁶⁸ made by a potentially self-interested physician? How many today would make an individual's legal status dependent on her race and gender? Why should we accept these corollaries of the viability rule, which seem inexplicable from a moral perspective?

We sometimes tolerate unappealing results when they flow from constitutional principles justified on other grounds. A person who commits a murder in one state may be subject to the death penalty, while someone who commits a much more heinous murder in a state with different laws might not face capital punishment.⁶⁹ The differential treatment of the two murderers seems unfair in the abstract, but the legal system tolerates the disparity as a consequence of our system of federalism, which enjoys clear constitutional support. The viability rule, however, cannot claim a clear grounding in the constitutional text, structure and history, comparable to our regime of sovereign and independent states.⁷⁰ If the Court cannot explain the constitutional principles that justify the viability rule, we have no reason to accept the morally random results the rule produces.

C. *Viability in International Perspective*

Comparison with other countries provides a third reason to believe the Supreme Court should provide a principled account of the constitutional rationale for the viability rule. As Justice Scalia has noted, the Supreme Court's abortion jurisprudence “makes us one of only six countries that allow abortion on demand until the point of viability.”⁷¹ If the

⁶⁶ See Beck, *supra* note 6, at 731.

⁶⁷ *Id.*

⁶⁸ Linton, *supra* note 55, at 41.

⁶⁹ Maimon Schwarzschild, *Pluralism, Conversation, and Judicial Restraint*, 95 NW. U. L. REV. 961, 972 (2001) (“There is great variation in state and local laws, reflecting different interests and values, even on matters of life and death: some states have capital punishment, for example, and others do not.”).

⁷⁰ See *Printz v. United States*, 521 U.S. 898, 918-22 (1997) (reviewing textual and historical evidence concerning the Constitution's division of power among federal and state governments).

⁷¹ *Roper v. Simmons*, 543 U.S. 551, 625-26 (2005) (Scalia, J., dissenting) (citing Joan L. Larsen, *Importing Constitutional Norms from a “Wider Civilization”*: Lawrence and the Rehnquist Court's Use of Foreign and International Law in Domestic Constitutional Interpretation, 65 OHIO ST. L.J. 1283, 1320 (2004) and Center for Reproductive Rights, *The World's Abortion Laws* (June 2004)).

Court believes our Constitution requires not just a right to abortion, but an abortion law significantly less protective of fetal life than most of the nations of the world, it should explain the constitutional principles compelling that conclusion.

In a law review article cited by Justice Scalia, Joan Larsen points out that “the vast majority” of countries “forbid abortion after 12 weeks gestation.”⁷² Both Scalia and Larsen rely on information compiled by the Center for Reproductive Rights, an abortion-rights nonprofit that tracks abortion laws worldwide. The Center’s data shows that most nations, if they permit abortion at all, view it as an act requiring justification.⁷³ Permissible reasons for an abortion vary from nation to nation, ranging from protection of the mother’s life, to her physical or mental health, to socioeconomic factors like age, economic circumstances, marital status or number of children.⁷⁴ In this regard, *Roe* took a minority position by international standards. Only after viability could a state require a reason (protection of the mother’s life or health) as a condition for obtaining an abortion.⁷⁵

Among the minority of nations that require no particular reason for an abortion, the great majority limit the availability of the procedure to a time period much shorter than *Roe/Casey*. Of the 56 nations in this more permissive category, 40 require exercise of the abortion right within 12 weeks or some shorter time period.⁷⁶ Consistent with Justice Scalia’s observation, only six nations on the list allow unrestricted abortion to the point of viability or without any specific time limitation—Canada, China, Netherlands, North Korea, United States and Vietnam.⁷⁷ A seventh country, Singapore, sets a limit of 24 weeks, which approximates the current viability threshold in this country.⁷⁸

Considered in international perspective, then, the viability rule puts the United States in a small subset of nations that permit abortion to the point of viability or beyond. Most of the nations that join the United States in permitting late-term abortions seem like dubious company. Communist China’s efforts toward population control clash with the theory of reproductive rights underlying the Supreme Court’s abortion jurisprudence, and have led

⁷² Larsen, *supra* note 71, at 1320.

⁷³ See Center for Reproductive Rights, *The World’s Abortion Laws* (May 2007); Larsen, *supra* note 71, at 1320 (“the vast majority of the world’s countries . . . require, at a minimum, that the pregnant woman make some showing of ‘good reason’ to terminate a pregnancy (141 of 195)”).

⁷⁴ Center for Reproductive Rights, *supra* note 73, at 1-2.

⁷⁵ *Roe*, 410 U.S. at 163-64 (“If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period, except when it is necessary to preserve the life or health of the mother.”).

⁷⁶ Center for Reproductive Rights, *supra* note 73, at 2.

⁷⁷ While Puerto Rico is listed separately on the Center’s information sheet, its law on this point is controlled by U.S. standards. *Id.*

⁷⁸ *Id.*; see *Casey*, 505 U.S. at 860.

to coerced abortions in parts of that country.⁷⁹ With respect to the other two Communist regimes on the list, Vietnam also places legal limits on family size,⁸⁰ and North Korea does not spring to mind as a leader in the field of human rights.⁸¹ The medical culture of the Netherlands appears generally less protective of fetal life than other nations, quite apart from the abortion issue. For instance, doctors in that country are much less willing than their European neighbors to provide life sustaining treatment to premature but potentially viable infants.⁸² Canada might seem a more conventional companion for the United States on legal questions. However, the current absence of an abortion law in

⁷⁹ See United States Department of State, *State Department Background Note: China*, 2007 WLNR 15375414 (Aug. 8, 2007) (“China’s 2002 Population and Family Planning Law and policy permit one child per family, with allowance for a second child under certain circumstances, especially in rural areas, and with guidelines looser for ethnic minorities with small populations. Enforcement varies, and relies largely on ‘social compensation fees’ to discourage extra births. Official government policy opposes forced abortion or sterilization, but in some localities there are instances of forced abortion.”); *Zhu v. Gonzales*, ___ F.3d ___, 2007 WL 2083712 (5th Cir. July 23, 2007) (immigrant compelled to have abortion in China entitled to withholding of removal from U.S.); *Chinese Riot Over Steps to Control Population*, INT’L HERALD TRIB., at 4 (May 22, 2007) (“according to villagers and witness accounts posted on the Internet, officials in several parts of Guangxi mobilized their largest effort in years to roll back population growth by instituting mandatory health checks for women and forcing pregnant women who did not have approval to give birth to abort fetuses.”).

⁸⁰ *Why Baby Boys are More Sought After in Asian Societies*, STRAITS TIMES (SINGAPORE), 2007 WLNR 13400853 (July 14, 2007) (Vietnam pursues a two-child per family policy); Rep. Christopher Smith, *UNCertain Problem: United States Pays the U.N. Too Much*, WASH. TIMES, at A23, 1999 WLNR 395834 (Oct. 21, 1999) (criticizing UN support for “coercive population control systems in China and Vietnam”); David Lamb, *World Perspective: Asia*, L.A. TIMES, at 2, 1998 WLNR 6435093 (Apr. 11, 1998) (though abortion is officially discouraged in Vietnam, it is “the most common way to meet the Communist government’s goal of limiting each family to two children”).

⁸¹ Choe Sang-Hun, *Brutally Shaped by North Korean Gulag*, INT’L HERALD TRIB., at 2, 2007 WLNR 13047333 (July 10, 2007) (describing experiences of refugee who grew up in North Korean prison camp); *North Korea: Expect Worse*, THE ECONOMIST, at 11, 2007 WLNR 11682281 (June 23, 2007) (evidence of human rights abuses in North Korea; “over the years an estimated 500,000 to 1m have been executed or have died from ill-treatment in Mr. Kim’s gulag”).

⁸² INSTITUTE OF MEDICINE, *PRETERM BIRTH: CAUSES, CONSEQUENCES, AND PREVENTION* 668 (2007) (Richard E. Behrman & Adrienne Stith Butler, eds.) (“infants at the border of viability (those born at less than 26 weeks gestation) are resuscitated much less frequently in the Netherlands than in other European countries and the United States”); *id.* at 661 (European questionnaire concerning hypothetical fetus at 24-weeks gestation found that “82 to 98 percent of physicians would resuscitate an infant in all countries studied except the Netherlands, where only 39 percent of the physicians surveyed would resuscitate the infant”). European nations other than the Netherlands generally cap abortion rights at 12 weeks. Joan L. Larsen, *Importing Constitutional Norms From a ‘Wider Civilization’: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283, 1324 (2004) (“[A]ccording to the Center for Reproductive Rights, of the twenty-five members of the European Union, only one, the Netherlands, allows abortion until the point of viability, as in the United States. One, Sweden, allows abortion until eighteen weeks’ gestation. The rest impose a gestational limit of twelve weeks, with the exception of Ireland, Malta, and Poland, which generally ban abortion altogether. Thus, it would seem that the European nations have coalesced around a standard that is greatly more protective of fetal life, and greatly more restrictive of reproductive autonomy, than the standard constitutionalized in the United States.”).

Canada may be less a reflection of national sentiment than a result of Parliament's failure in attempts to enact a statute meeting standards imposed by the Canadian judiciary.⁸³

The United States Constitution no doubt requires some outcomes that diverge from the international mainstream.⁸⁴ But humility counsels a willingness to consider the legal practices of other countries and, when we do part ways, to do so on principled grounds.⁸⁵ Even for supporters of abortion rights, the fact that the viability rule permits abortion nearly twice as far into pregnancy as the most common international cutoff period should raise a question mark. The wide discrepancy between the viability rule and the standards applied in the vast majority of other countries calls for an explanation. What constitutional principles compel a rule so out of keeping with the standards applied in most nations of the world? In the next section, we will consider what the Supreme Court has offered to date by way of explanations for the viability rule.

II. The Supreme Court's Failure to Justify the Viability Rule

The authors of *Casey* presumably believed that the viability rule satisfies the requirements for judicial legitimacy set forth in their opinion. Attentive reading of the Court's opinions, however, demonstrates that the Court has never provided a principled justification for the viability rule. In seeking to explain adherence to the viability rule, the *Casey* authors rested in part on the opinion in *Roe*,⁸⁶ overlooking what scholars from a wide variety of backgrounds have recognized: *Roe* literally provided *no argument* in favor of treating viability as the controlling line, much less an argument grounded in constitutional principles.⁸⁷ The legitimacy of the viability rule therefore turns on *Casey*'s own account of the significance of fetal viability, an account properly described as "conclusory."⁸⁸ The discussion below shows that neither *Roe* nor *Casey* satisfied the Court's obligation to provide a principled justification for the viability rule, and that *Gonzales* further undermines any attempt at such a justification.

⁸³ Margaret Somerville, *Issues in the Public Square: Principles vs. Packages*, 32 J.L. MED. & ETHICS 731, 734-35 (2004) ("Parliament unsuccessfully attempted to enact an abortion law complying with the Supreme Court's ruling, leaving Canada in the unique position, among comparable countries, of having no legislation governing abortion. It is legal until immediately before a woman goes into labor - at that point, another Criminal Code provision, that is the successor to the longstanding prohibition of killing a child in the act of birth, kicks in."); *Most Canadians Want Restrictions on Abortion, but Liberals Unlikely to Introduce Legislation*, CATH. NEW TIMES, at 6, 2004 WLNR 16796669 (Nov. 21, 2004) (reporting poll results indicating 57 percent of Canadians want life protected after first three months of pregnancy).

⁸⁴ See Diarmuid F. O'Scannlain, *What Role Should Foreign Practice and Precedent Play in the Interpretation of Domestic Law?*, 80 NOTRE DAME L. REV. 1893, 1905-07 (2005) (advocating originalist theory of constitutional interpretation and noting ways in which U.S. is distinct from the rest of the world).

⁸⁵ See Austen L. Parrish, *Storm in a Teacup: The U.S. Supreme Court's Use of Foreign Law*, 2007 U. ILL. L. REV. 637, 678-80 (2007) (discussing pragmatic advantages of considering foreign precedent in constitutional adjudication).

⁸⁶ *Casey*, 505 U.S. at 870.

⁸⁷ See *infra* notes 89-106 and accompanying text.

⁸⁸ See *Casey*, 505 U.S. at 989 n.5 (Scalia, J., concurring in the judgment in part and dissenting in part) (describing plurality's defense of viability rule as "conclusory").

A. *The Missing Syllogism of Roe v. Wade*

Roe v. Wade recognized two distinct state interests that might justify regulation of abortion procedures: “[1] preserving and protecting the health of the pregnant woman . . . and . . . [2] protecting the potentiality of human life.”⁸⁹ The Court believed that “[e]ach [interest] grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes ‘compelling.’”⁹⁰ The state interest in maternal health becomes compelling at the end of the first trimester, the Court concluded, because “until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth.”⁹¹ The Court’s adoption of the viability rule appeared in its discussion of the second recognized state interest, the protection of “potential” life:

With respect to the State’s important and legitimate interest in potential life, the “compelling” point is at viability. This is so because the fetus then presumably has the capability of meaningful life outside the mother’s womb. State regulation protective of fetal life after viability thus has both logical and biological justifications.⁹²

The conclusion that the state interest in fetal life became compelling at viability meant that a state could proscribe abortion after viability “except when it is necessary to preserve the life or health of the mother.”⁹³

The Court’s abortion jurisprudence has no doubt provoked more debate within the academic community than any other issue in recent memory.⁹⁴ Notwithstanding the wide-ranging disagreement, though, a broad consensus has formed that *Roe*’s explanation for the viability rule was inadequate. Shortly after release of the opinion, John Hart Ely commented that “the Court’s defense seems to mistake a definition for a syllogism.”⁹⁵ His succinct critique “has come to summarize the scholarly consensus that the Court failed to offer a meaningful justification of its viability standard.”⁹⁶

⁸⁹ 410 U.S. at 162.

⁹⁰ *Id.* at 162-63.

⁹¹ *Id.* at 163.

⁹² *Id.*

⁹³ *Id.* at 163-64.

⁹⁴ See John Copeland Nagle, *Choosing the Judges Who Choose the President*, 30 CAP. U. L. REV. 499, 517 (2002) (“[a]bortion is probably the most controversial issue facing the Court”); Robin West, *Progressive and Conservative Constitutionalism*, 88 Mich. L. Rev. 641, 646 (1990) (describing *Roe* as “the Burger Court’s most controversial decision”).

⁹⁵ Ely, *supra* note 18, at 924.

⁹⁶ David M. Smolin, *The Religious Root and Branch of Anti-Abortion Lawlessness*, 47 BAYLOR L. REV. 119, 137 n.79 (1995).

Many have seconded Ely's criticism of *Roe*'s viability discussion.⁹⁷ Laurence Tribe observed that "[o]ne reads the Court's explanation several times before becoming convinced that nothing has inadvertently been omitted. . . . Clearly, this mistakes 'a definition for a syllogism,' and offers no reason at all for what the Court has held."⁹⁸ Christopher Eisgruber described *Roe*'s justification for the viability rule as "blatantly circular."⁹⁹ Nancy Rhoden agreed with Ely that the *Roe* Court provided "nothing more than the definition of viability."¹⁰⁰ Even Radhika Rao, one of Justice Blackmun's former clerks, in an article celebrating his abortion opinions, described *Roe*'s defense of the viability rule as "cryptic"¹⁰¹

Unpacking Ely's comment makes it possible to see more precisely the defect in *Roe*'s defense of viability. A "syllogism," the classical form of deductive argument,¹⁰² involves two propositions—a major premise and a minor premise—that logically necessitate the syllogism's conclusion.¹⁰³ One standard example purports to demonstrate the mortality of Socrates:

Major Premise: All men are mortal.

Minor Premise: Socrates is a man.

⁹⁷ See David L. Faigman, "Normative Constitutional Fact-Finding": *Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 575 (1991) (quoting Ely, *supra* note 18, at 924); Linton, *supra* note 55, at 39 n.108 (same); Gregory J. Roden, *Roe v. Wade and the Common Law: Denying the Blessings of Liberty to Our Posterity*, 35 UWLA L. REV. 212, 269 n.219 (2002-2003) (same); Tom Stacy, *Death, Privacy and the Free Exercise of Religion*, 77 CORNELL L. REV. 490, 510 n.68 (1992) (quoting Ely but defending viability rule on ground not offered by *Roe* Court); Lynn D. Wardle, "Time Enough": *Webster v. Reproductive Health Services and the Prudent Path of Justice*, 41 FLA. L. REV. 881, 911 n.178 (1989) (quoting Ely); Mark J. Beutler, Note, *Abortion and the Viability Standard—Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life*, 21 SETON HALL L. REV. 347, 359 n.71 (1991) (quoting Ely and noting that "[t]he Court's rationale for this distinction is simply inadequate").

⁹⁸ Laurence H. Tribe, *Foreward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1, 4 (1973) (quoting Ely, *supra* note 18, at 924).

⁹⁹ Christopher L. Eisgruber, *The Fourteenth Amendment's Constitution*, 69 S. CAL. L. REV. 47, 96 & n.171 (1995).

¹⁰⁰ Rhoden, *supra* note 2, at 664.

¹⁰¹ Radhika Rao, *The Author of Roe*, 26 HASTINGS CONST. L.Q. 21, 30 (1998). Professor Rao goes on to argue that Blackmun "struck a brilliant and ingenious compromise by drawing the line at viability, an intermediate stage in the course of pregnancy that correlates with a phase of fetal development thought to be critical from the standpoint of several different theories." *Id.* at 31-34.

¹⁰² Ruggero J. Aldisert, *Perspective from the Bench on the Value of Clinical Appellate Training of Law Students*, 75 MISS. L.J. 645, 665 (2006).

¹⁰³ ALBUREY CASTELL, *A COLLEGE LOGIC* 112 (1935); JOSEPH GERARD BRENNAN, *A HANDBOOK OF LOGIC* 49 (2nd ed. 1957); ANDREW H. BACHHUBER, S.J., *INTRODUCTION TO LOGIC* 87 (1957); F.C.S. SCHILLER, *FORMAL LOGIC: A SCIENTIFIC AND SOCIAL PROBLEM* 179 (1912).

Conclusion: Socrates is mortal.¹⁰⁴

The conclusion of a properly constructed syllogism may be either true or false, depending on whether the major and minor premises are both accurate. It could be, for instance, that the major premise in our example is false because not all men are mortal. Or, if the major premise is true, the minor premise might be subject to challenge on the ground that Socrates is not properly classified as a man. In either case, one might escape the conclusion that Socrates is mortal. However, assuming the major and minor premises to be true, the conclusion of the syllogism follows as a matter of logical necessity.¹⁰⁵

Applying this analytical framework to *Roe*'s discussion of the viability rule, the Court's definition of viability could supply the minor premise for a syllogism, and its ban on previability regulations protecting fetal life could constitute the conclusion:

Minor Premise: A viable fetus can survive outside the womb.

Conclusion: Only a viable fetus can be protected by the state.¹⁰⁶

What *Roe* omitted, from this perspective, was the major premise of the argument. The Court failed to offer any constitutional principle interrelating state regulatory power and the value of developing fetal life that—when combined with the Court's definition of viability—would entail the conclusion that the state can only prohibit abortion of a viable fetus. We consider next whether *Casey* supplied the constitutional premise missing from the argument in *Roe*.

B. The Ambiguous and Conclusory Syllogism of Planned Parenthood v. Casey

Though rejecting *Roe*'s "trimester framework," *Casey* retained the viability rule because the authors of the joint opinion felt the need for a "line that is clear" to govern abortion rights.¹⁰⁷ If one seeks a clear line in pregnancy, viability seems an unlikely choice. Viability provokes disagreement among medical professionals because it involves a prediction made case by case, after consideration of multiple factors, based on probabilities that shift over time.¹⁰⁸ *Casey* could have achieved much greater clarity with

¹⁰⁴ HARRY J. GENSLER, *LOGIC: ANALYZING AND APPRAISING ARGUMENTS* 3 (1989) (setting forth a form of these premises to see if the reader can identify the appropriate conclusion); CASTELL, *supra* note 103, at 112 (substituting "Greeks" for "Socrates").

¹⁰⁵ BRENNAN, *supra* note 103, at 49 ("A syllogism is a form of deductive argument in which, granting the truth of two propositions (called the premises), the truth of a third proposition (the conclusion) necessarily follows."); BACHHUBER, *supra* note 103, at 87 (in a syllogism "the conclusion . . . is so related to the premises taken jointly that if they are true, it must also be true").

¹⁰⁶ SCHILLER, *supra* note 103, at 180 ("The minor term is the subject in the conclusion, the major the predicate.").

¹⁰⁷ *Casey*, 505 U.S. at 869 (plurality opinion).

¹⁰⁸ See *supra* notes 60-64 and accompanying text; see also Linton, *supra* note 55, at 40-41 (noting factors that can influence assessments of viability).

a different rule.¹⁰⁹ The plurality, for instance, could have selected a line based on gestational age or some less debatable milestone in the process of fetal development.¹¹⁰

The decision to reaffirm the viability rule provided the authors of *Casey* a new opportunity to furnish the constitutional rationale neglected by *Roe*. Two paragraphs in the opinion explain the reasons for adherence to the viability line. Consideration of each in turn shows that the plurality opinion fell short of the goal it set for itself; nothing in either paragraph sets forth a non-arbitrary constitutional justification for the viability rule.

1. *Casey's Reliance on the Reasoning of Roe*

The *Casey* plurality's initial defense of the viability rule, based on *stare decisis*, rested on the Court's discussion in *Roe*:

We conclude the line should be drawn at viability, so that before that time the woman has a right to choose to terminate her pregnancy. We adhere to this principle for two reasons. First, as we have said, is the doctrine of *stare decisis*. Any judicial act of line-drawing may seem somewhat arbitrary, but *Roe* was a reasoned statement, elaborated with great care. We have twice reaffirmed it in the face of great opposition. Although we must overrule those parts of *Thornburgh* and *Akron I* which, in our view, are inconsistent with *Roe's* statement that the State has a legitimate interest in promoting the life or potential life of the unborn, the central premise of those cases represents an unbroken commitment by this Court to the essential holding of *Roe*. It is that premise which we reaffirm today.¹¹¹

However one evaluates the *Casey* plurality's application of *stare decisis*,¹¹² it is clear that this portion of the *Casey* opinion cannot supply the justification for the viability rule that *Roe* omitted. The plurality's description of *Roe* as "a reasoned statement, elaborated with great care" ignores the fact that the *Roe* Court *did not offer a reason* for treating viability as the controlling line for constitutional purposes.¹¹³ Therefore, if the *Casey* Court is to establish the legitimacy of the viability rule, the justification will need to be found in the paragraph that follows.

¹⁰⁹ See Wardle, *supra* note 97, at 912 n.182 (suggesting that viability may not be an easy standard to apply).

¹¹⁰ See Linton, *supra* note 55, at 41 (noting that the Court could have selected a more workable line than viability by simply choosing a particular gestational age).

¹¹¹ *Casey*, 505 U.S. at 870 (plurality opinion).

¹¹² It has never been apparent to me why one must understand the "essential holding" of *Roe* to include the viability rule, rather than *Roe's* more basic conclusion that the Constitution protects "a woman's decision whether or not to terminate her pregnancy." *Roe*, 410 U.S. at 153. Nor is it clear why *stare decisis* permits abandonment of *Roe's* trimester framework, but supports retention of the viability rule, one of the cornerstones of that framework.

¹¹³ See *supra* notes 89-106 and accompanying text.

2. *Casey's Contribution to the Defense of the Viability Rule*

Beyond reliance on *stare decisis*, the *Casey* plurality included an additional paragraph setting forth three arguments to explain the Court's continued focus on fetal viability. I number the arguments to facilitate discussion:

[1] The second reason [we adhere to the viability rule] is that the concept of *viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb, so that the independent existence of the second life can in reason and all fairness be the object of state protection that now overrides the rights of the woman.* Consistent with other constitutional norms, legislatures may draw lines which appear arbitrary without the necessity of offering a justification. But courts may not. We must justify the lines we draw. [2] And *there is no line other than viability which is more workable.* To be sure, as we have said, there may be some medical developments that affect the precise point of viability, but this is an imprecision within tolerable limits given that the medical community and all those who must apply its discoveries will continue to explore the matter. [3] The viability line also has, as a practical matter, an element of fairness. *In some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.*¹¹⁴

These three arguments represent the totality of *Casey's* contribution to *Roe's* defense of the viability rule.

Recalling *Casey's* criteria for judicial legitimacy, it becomes apparent that, of these three arguments, the latter two cannot count toward establishing the necessary principled constitutional justification for the viability rule. A majority of the Justices in *Casey* recognized the Court's obligation to "speak and act in ways that allow people to accept its decisions . . . as grounded truly in principle, not as compromises with social and political pressures."¹¹⁵ The Court's justification for a ruling must show the warrant for the ruling in the Constitution and must be "sufficiently plausible to be accepted by the Nation."¹¹⁶ In light of these standards, the plurality's assertion that no other line is "more workable" than viability, if it were true, might count as an argument for adopting viability as an arbitrary compromise.¹¹⁷ But it does not supply a principled defense of the viability rule grounded in the Constitution. Likewise, though delay in obtaining an abortion may plausibly be viewed as implied consent to state regulation, the plurality offered no reason

¹¹⁴ *Casey*, 505 U.S. at 870.

¹¹⁵ *Id.* at 865-66.

¹¹⁶ *Id.*; see *supra* notes 31-46 and accompanying text.

¹¹⁷ David Smolin suggests that "[f]ertilization would appear more workable than viability." Smolin, *supra* note 96, at 137 n.82. A fertilization rule would certainly be easier to apply. Likewise, a line drawn at any gestational age or based on any easily determined milestone in fetal development would remove much of the guesswork inherent in the viability rule. See *supra* text accompanying note _____. In any event, this argument gives no reason for adopting viability over other lines that would be at least equally workable.

to select viability as the point at which consent would be presumed. The same argument could be made in favor of drawing the line at the end of the first trimester, at quickening or at many other points in pregnancy.¹¹⁸

We are left, then, with the first argument from the quoted passage, the plurality's contention that viability marks "the independent existence of [a] second life" that the state may protect notwithstanding the constitutional claims of the mother. David Smolin suggests that the *Casey* plurality here falls into the same error as the Court in *Roe*, mistaking the definition of viability for a syllogism.¹¹⁹ This critique carries considerable force. The phrase "independent existence of [a] second life" could simply be the plurality's way of rephrasing the definition of "viability," in which event *Casey* offers nothing to justify the viability rule beyond what the Court gave us in *Roe*.

For the sake of discussion, though, let us suppose that a generous reader could understand the *Casey* plurality to imply a syllogism in the following form:

- | | |
|----------------|--|
| Major Premise: | The state may protect a fetus against abortion only when the fetus constitutes a "second life" with an existence "independent" from the mother. |
| Minor Premise: | The fetus becomes a second life with an independent existence at viability, when there is a realistic possibility of maintaining and nourishing life outside the womb. |
| Conclusion: | Only a viable fetus may receive state protection against abortion. |

Framing the syllogism in this fashion allows us to consider whether a requirement of a second life with an independent existence could be viewed as a constitutional principle justifying the Court's selection of viability as the controlling line.

The initial problem with the suggested syllogism concerns the ambiguous language of the major premise. The terms "second life" and "independent existence" in *Casey* could mean at least two quite different things, depending on whether the plurality had in mind a purely biological concept, or rather a particular sort of "life" or degree of "independence" thought to carry moral or legal significance. If we understand the terms in a purely biological sense, there may be something to the idea that courts should deem a "second life" with "independent existence" a necessary condition for state protection. Imagine, for example, state legislation premised on an interest in protecting hearts and lungs against the effects of smoking. If the state purported to authorize a legal action against a particular smoker on behalf of his cardiopulmonary system, pursued perhaps by a

¹¹⁸ Smolin, *supra* note 96, at 137 n.82 ("This perhaps explains why the line can be drawn earlier than birth, but utterly fails to explain why the State cannot prohibit previability abortions.").

¹¹⁹ *Id.* ("Stating the definition of viability as a defense of the viability standard has long been ridiculed by even pro-choice commentators.").

guardian *ad litem*, one might anticipate judicial resistance to the claim. It would seem ludicrous for the state to invest a person's body parts with legal interests that could be asserted against the person himself.

But if this is all *Casey* meant by a “second life” with “independent existence”—that two distinct biological organisms must exist before the state may protect one against the other—then the major premise of the *Casey* syllogism seems relatively trivial. More importantly, on this reading of *Casey*'s language, the minor premise is patently false. No one can reasonably doubt that a developing fetus constitutes a living biological organism distinct from its mother long before the point of viability. Indeed, a recognition of the biological distinction between the mother and the fetus would appear to underlie the *Casey* plurality's conclusion that the state has a legitimate interest in unborn human life from the outset of the pregnancy.¹²⁰

The second possible reading of *Casey* would understand the plurality to be referencing some legal or moral concept of what constitutes a second “life” or an “independent existence” worthy of protection by the state. At this point, though, the joint opinion leaves the reader to her own devices. Nothing in *Casey* tells us precisely what the plurality meant by a second life with an independent existence (assuming, by hypothesis, that the terms do not simply rephrase the definition of viability). Nor does the opinion explain how these concepts relate to state regulatory power or the manner in which the plurality derived these requirements from the Constitution.

Consider the critical questions *Casey* leaves unaddressed. First, why should dependence on another disqualify someone from state protection? In fields such as prisoners' rights, parent-child relationships and the rights of comatose patients, the fact of dependence is thought to create legal interests, not eliminate them.¹²¹ Justice Kennedy recognized in his *Stenberg* dissent that the state interest in protecting dependent human life applies likewise to the life of a fetus.¹²² Second, if “independence” matters, why insist on the particular form of hypothetical independence associated with viability? In other contexts, the law has conferred legal protection on the unborn at earlier stages of pregnancy, based on either genetic independence from the mother (conception) or the capacity for independent movement (quickening).¹²³ Third, how does this independent existence requirement flow

¹²⁰ *Casey*, 505 U.S. at 846 (“the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child”).

¹²¹ Beck, *supra* note 6, at 729.

¹²² *Stenberg v. Carhart*, 530 U.S. 914, 962 (2000) (Kennedy, J., dissenting) (“A State may take measures to ensure the medical profession and its members are viewed as healers, sustained by a compassionate and rigorous ethic and cognizant of the dignity and value of human life, even life which cannot survive without the assistance of others.”) (citing *Washington v. Glucksberg*, 521 U.S. 702, 730-734 (1997)).

¹²³ Some jurisdictions include the unborn within their homicide statutes from the point of conception. See Philip G. Peters, Jr., *The Ambiguous Meaning of Human Conception*, 40 U.C. DAVIS L. REV. 199, 200 (2006) (“Many states criminalize the killing of early embryos with feticide or fetal homicide statutes.”); see *id.* at 203-04 (suggesting that such statutes contain an ambiguity because “conception” is actually a multi-stage process that takes place over time). A few permit wrongful death claims based on negligent injury to a pre-viable fetus. John M. Breen & Michael A. Scaperlanda, *Never Get Out 'a the Boat: Stenberg v. Carhart*

from the Constitution? *Casey*, like *Roe*, fails to offer any constitutional principle interrelating state power and fetal entitlement in a way that would justify the Court's continued adherence to the viability rule.¹²⁴ Ultimately, all *Casey* adds to the silence of *Roe* is a stray sound bite—"independent existence of the second life"—turned loose upon the United States Reports without any hint of its constitutional parentage.

Our analysis of *Roe* and *Casey* has shown that neither opinion offered a principled justification for the viability rule, demonstrating the constitutional warrant for treating viability as the controlling line in fetal development. It becomes increasingly difficult therefore to avoid the judgment of the *Casey* majority: "[A] decision without principled justification [is] no judicial act at all."¹²⁵ At the very least, the Court has fallen short of its obligation to act transparently and explain its rulings in a way calculated to convince the public of their constitutional legitimacy. Based on the reasoning of *Casey*, the Court has a duty to provide a constitutional justification for the viability rule or to jettison the rule as an arbitrary compromise, properly within the legislative rather than the judicial sphere.¹²⁶

C. Justifying the Viability Rule after *Gonzales v. Carhart*

At the heart of the debate over the viability rule is the value the Constitution permits a state, in the exercise of its regulatory power, to attribute to the developing fetus. *Roe* concluded that, in the abortion context, the state may not ascribe to a recently-conceived human being the same value as a newborn infant.¹²⁷ The *Roe* Court did recognize a state interest in "protecting the potentiality of human life" that increased in strength as the pregnancy progressed.¹²⁸ But not until fetal viability did this interest in protecting fetal life become sufficiently "compelling" to permit prohibition of abortion.¹²⁹

and the Future of American Law, 39 CONN. L. REV. 297, 317-18 & n.92 (2006); Dena M. Marks, *Person v. Potential: Judicial Struggles to Decide Claims Arising from the Death of an Embryo or Fetus and Michigan's Struggle to Settle the Question*, 37 AKRON L. REV. 41, 71-74 (2004). A conceived but unborn heir has long been entitled to inherit from a decedent's estate so long as the heir is subsequently born alive. *Roe*, 410 U.S. at 162. The common law attached significance to the point of fetal "quickening"—"the first recognizable movement of the fetus *in utero*," *id.* at 132, 134, which typically occurs between 16 and 20 weeks, several weeks before viability. Kirsten Rabe Smolensky, *Defining Life From the Perspective of Death: An Introduction to the Forced Symmetry Approach*, 2006 U. CHI. LEGAL F. 41, 72 n.158 (2006) (quoting FRANK A. MANNING, *FETAL MEDICINE: PRINCIPLES & PRACTICE* 46 (1995)). Georgia law requires "quickening" for a wrongful death action, but defines quickening in terms of the ability of the fetus to move its limbs, rather than requiring maternal perception of movement. *See Citron v. Ghaffari*, 542 S.E.2d 555, 557 (Ga. App. 2000); Smolensky, *supra*, at 73. *See generally* Wardle, *supra* note 97, at 912 n.181.

¹²⁴ Faigman, *supra* note 97, at 575 ("The juncture of viability does not have independent constitutional significance, at least insofar as it lacks an explicit constitutional value to support it.").

¹²⁵ *Casey*, 505 U.S. at 865.

¹²⁶ *See supra* notes 31-46 and accompanying text.

¹²⁷ *Roe*, 410 U.S. at 159 (Texas claimed that life begins at conception); *id.* at 162 (state cannot adopt theory of life overriding woman's right to abortion).

¹²⁸ *Id.* at 162-63.

¹²⁹ *Id.* at 163-64.

Casey concluded that the state's interest in potential life had been undervalued in the cases following *Roe*.¹³⁰ The state, accordingly, could recognize ample value in the life of a previable fetus to support certain abortion restrictions, such as waiting periods and informed consent laws.¹³¹ But the *Casey* plurality continued to view viability as the point at which the state could attribute sufficient worth to the fetus to warrant prohibition of abortion.¹³²

It may be, as several Justices have suggested, that the viability line is entirely arbitrary from a constitutional perspective.¹³³ There may in fact be no constitutionally-relevant distinction between a viable fetus and a previable fetus that requires the state to treat them differently. My claim in this article, however, is less ambitious. I seek to show only that last term's *Gonzales* opinion makes it more difficult to flesh out and defend a principled constitutional justification for the viability rule along the lines alluded to in *Casey*.

Let me first be clear what I am *not* arguing. It is not my purpose to demonstrate that the holding in *Gonzales* is inconsistent with the viability rule.¹³⁴ The majority carefully drafted its opinion to allow future adherence to the viability rule should the Court so choose.¹³⁵ Applying *Casey*'s "undue burden" standard, the Court concluded that the federal ban on intact D&E abortions did not on its face impose "a substantial obstacle to late-term, but previability, abortions."¹³⁶ The statute at issue in *Gonzales* placed no restriction on abortions performed using the standard D&E procedure.¹³⁷ *Gonzales* can be reconciled with the rule that a state may not prevent abortion of a previable fetus because the legislation reviewed in *Gonzales* did not purport to do so, simply prohibiting one means by which a previability abortion might be carried out.

But if the Court ever takes up the challenge of *justifying* the viability rule in constitutional terms, its decision in *Gonzales* will complicate the task considerably. This is true no matter which reading we adopt for *Casey*'s statement that viability marks the "independent existence of [a] second life."¹³⁸ If we understand that phrase in a biological sense, to mean that the previable fetus does not constitute a biological organism distinct from the mother, *Gonzales* reached the opposite conclusion. The *Gonzales* Court upheld

¹³⁰ *Casey*, 505 U.S. at 873, 875,

¹³¹ *Id.* at 881-87 (upholding informed consent and waiting period provisions).

¹³² *Id.* at 870.

¹³³ See *supra* notes 6-7, 11 and accompanying text.

¹³⁴ Thus, I am not taking the position Justice Ginsburg took in criticizing the majority opinion. See *Gonzales*, 127 S. Ct. at 1641, 1649-50 (Ginsburg, J., dissenting).

¹³⁵ See *id.* at 1626-27 (noting that not all the Justices in the majority agreed with *Casey*, but "assuming" its principles applicable in this case).

¹³⁶ *Id.* at 1632.

¹³⁷ *Id.* at 1634-35.

¹³⁸ *Casey*, 505 U.S. at 870.

application of the federal statute to a pre-viable fetus “because, by common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb.”¹³⁹ Thus, one possible reading of *Casey*’s justification for the viability rule cannot be reconciled with *Gonzales*.

The other possible reading of *Casey* treats the phrase “independent existence of [a] second life” as referring to a legal or moral concept, rather than a biological one.¹⁴⁰ The idea here is that only at viability does the fetus attain the *degree* or *kind* of independence from the mother necessary to support a prohibition of abortion. Prior to *Gonzales*, if the Court wished to go down this path in seeking to establish the legitimacy of the viability rule, it would have needed to derive from the Constitution a principled theory interrelating state power and fetal entitlement in such a way that the state interest in protecting fetal life (a) exists at the outset of pregnancy,¹⁴¹ (b) grows in strength as the pregnancy progresses,¹⁴² but (c) does not become strong enough to warrant a prohibition of abortion until the precise moment that the fetus can survive outside the womb.¹⁴³ Difficult as such a demonstration would be (which may explain why the Court has never attempted it), *Gonzales* now requires something more if the Court wishes to justify the viability rule in a manner consistent with its precedents. Now the Court will need an even more subtle and discriminating constitutional analysis, capable of explaining why the state may ascribe sufficient value to a pre-viable fetus to protect it against death by one means, but may not value it sufficiently to protect it against death by other means.

The dissenting Justices in *Gonzales* saw little basis for distinguishing between the intact D&E procedure prohibited by the statute and the standard D&E that remain unregulated:

Nonintact D & E could equally be characterized as “brutal,” involving as it does “tear[ing] [a fetus] apart” and “ripp[ing] off” its limbs. “[T]he notion that either of these two equally gruesome procedures . . . is more akin to infanticide than the other, or that the State furthers any legitimate interest by banning one but not the other, is simply irrational.”¹⁴⁴

The *Gonzales* majority may be correct in responding that Congress could rationally distinguish between the two forms of abortion, viewing the intact D&E procedure as presenting moral concerns not presented by a standard D&E abortion.¹⁴⁵ The possible distinction the majority perceived between the procedures, however, offers little assistance in justifying the viability rule. To say that a legislature *may* distinguish

¹³⁹ *Gonzales*, 127 S. Ct. at 1627.

¹⁴⁰ See *supra* notes 120-24 and accompanying text.

¹⁴¹ *Casey*, 505 U.S. at 846.

¹⁴² *Roe*, 410 U.S. at 162-63.

¹⁴³ *Casey*, 505 U.S. at 870.

¹⁴⁴ *Gonzales*, 127 S. Ct. at 1637 (Ginsburg, J., dissenting) (quoting *Stenberg*, 530 U.S. at 946-47 (Stevens, J., concurring)).

¹⁴⁵ *Gonzales*, 127 S. Ct. at 1634-35.

between the two procedures for *legislative* purposes does not show why it *must* distinguish between them on *constitutional* grounds. If Congress may ascribe sufficient value to the pre-viable fetus to protect it from intact D&E, why may it not protect the same fetus against the standard D&E? Why should the worth a state may recognize in a not-quite-viable fetus turn on the method by which it will be aborted?

The Court upheld the federal statute in *Gonzales* in part on the rationale that Congress has a legitimate interest in erecting a barrier against infanticide. The majority quoted a congressional finding that the intact D&E procedure has a “disturbing similarity to the killing of a newborn infant.”¹⁴⁶ It approved the congressional goal of “draw[ing] a bright line that clearly distinguishes abortion and infanticide.”¹⁴⁷ The Court thus deemed a late-term fetus, even prior to viability, sufficiently similar to a newborn infant that Congress could believe partial delivery of the fetus in the abortion process would make abortion and infanticide harder to tell apart. Once the Court has permitted the government to analogize the pre-viable fetus and the newborn infant in this fashion, it becomes more difficult to maintain that viability effects a decisive change in the fetus. It becomes less plausible that the viable fetus is different in kind for constitutional purposes from the same fetus an hour before or a day before or a week before it reaches viability.

In the post-*Gonzales* world, the task of establishing the legitimacy of the viability rule has become significantly more demanding. The Court still must offer a principled constitutional theory interrelating state power and fetal entitlement. Now, however, that theory must explain why the state interest in protecting fetal life (a) exists at the outset of pregnancy, (b) grows in strength as the pregnancy progresses, (c) warrants protecting a pre-viable fetus against an intact D&E abortion due to the similarity of that fetus to a newborn infant, but nevertheless (d) does not warrant protecting the fetus from other abortion methods until it can survive outside the womb. This is the challenge presented if the Court wishes to satisfy *Casey*'s test of legitimate constitutional decisionmaking.

III. Conclusion

In the contentious arena of abortion rights, *Casey* suggests that all the Justices would agree on the importance of judicial legitimacy. They would likewise agree that legitimacy requires the Court to offer principled justifications for its constitutional decisions. The Court's unanimity on these points gives hope that it may be willing to take up the largely neglected question of the rationale for the viability rule, one important component in this highly visible segment of the Court's constitutional jurisprudence.

¹⁴⁶ *Id.* at 1633-34 (quoting Congressional Findings).

¹⁴⁷ *Id.*