

Former Kennedy Law Clerk Argues Stare Decisis No Obstacle to Reversing *Roe* and *Casey*'s "Viability Rule"

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A former law clerk to Justice Anthony Kennedy argues that the doctrine of stare decisis should not stop the Supreme Court from reversing course on *Roe v. Wade*.

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Professor Beck graduated first in his law school class. Before becoming a law professor, he worked for a prestigious law firm, for the U.S. Department of Justice, and for Justice Anthony Kennedy as a law clerk at the U.S. Supreme Court.

In 2012 Professor Beck published an [article](#) in the *Notre Dame Law Review* with the esoteric title “Transtemporal Separation of Powers in the Law of Precedent.”

Tucked away in the article’s dense prose and hundreds of footnotes lies a brilliant argument for why the doctrine of “stare decisis” should not stop the Supreme Court from taking a fresh look at the core rule in abortion law, that government may not prohibit abortion before the child reaches viability.

If you’ve never heard the term “stare decisis,” chances are you will soon.

That’s because the confirmation of Brett Kavanaugh as an Associate Justice of the Supreme Court of the United States has focused attention in a very intense way on the role of federal courts in deciding the abortion issue.

And the doctrine of “stare decisis” is the go-to argument for abortion supporters seeking to protect the status quo.

I. The “viability rule”—the “most central principle” of *Roe v. Wade*

Roe v. Wade and *Planned Parenthood v. Casey* suffer from many defects. One of the key issues implicated in both cases is whether the U.S. Constitution contains a right to abortion and, if so, how strong a right it is.

As the Supreme Court’s abortion precedents currently stand, the core rule is that government may not prohibit abortion before viability, which is defined as the ability of the child to survive outside the womb with medical support. Today, viability occurs [after 22 weeks gestation](#) in the very large percentage of cases.

This rule is known as the “viability rule.” The Supreme Court created the viability rule in the 1973 *Roe* case and affirmed the rule in the 1992 *Casey* case.

The joint opinion in *Casey* described the viability rule as the “most central principle” of *Roe*.

Abortion supporters argue that the viability rule presents an obstacle to many pro-

life policies.

For example, abortion supporters argue that [pain-capable five-month laws](#) are unlawful to the extent they prohibit abortion before viability.

For the same reason, abortion supporters argue that [Mississippi's 15-week limit on abortion](#) is unlawful and should be struck down.

Similarly, to the extent that [laws prohibiting the eugenic practice of Down syndrome discrimination abortion](#) apply before viability, abortion supporters argue that those laws also fail under the viability rule.

Much of Professor Beck's constitutional analysis of the abortion issue, including his analysis of exceptions to the general principle of stare decisis, is related to the viability rule. This article focuses on how the principle of stare decisis relates to the general abortion rule of viability.

II. “Stare decisis”—what it is and why abortion activists invoke it with vigor

Stare decisis is a Latin legal term [meaning](#) “[t]o stand by decided cases; to uphold precedents; to maintain former adjudications.” The doctrine provides guidance for when a court should follow a previous ruling—a “precedent”—and when a court is free to reach an outcome based on its own view of what the law requires.

The doctrine of stare decisis directs when lower courts must follow rulings of higher courts.

But even the Supreme Court—the highest court in the land when ruling on questions of federal law—refers to principles of stare decisis when deciding whether to follow one of its earlier rulings.

Abortion activists love the doctrine of stare decisis. They know the public supports greater limitations on abortion. They also understand that the Supreme Court's core abortion rulings are incredibly weak and unpersuasive.

In other words, abortion advocates know they would probably lose if the Supreme Court were deciding the abortion question fresh, for the first time, this fall.

That's why abortion supporters invoke the concept of stare decisis. Stare decisis doesn't ask how an issue should be decided in the first instance. It focuses on how an issue should be handled once it has already been decided.

In other words, stare decisis provides an argument for upholding the Court's abortion rulings that doesn't depend on showing that the Court reached the correct legal outcome.

“The Court has already found a constitutional right to abortion up to the point of viability,” the argument goes, “and stare decisis means we shouldn’t disturb those rulings.”

III. The three exceptions to stare decisis identified by Professor Beck

The renowned pro-life attorney and legal scholar [Clarke D. Forsythe](#) asserts that the Supreme Court has overruled its prior decisions [in more than 230 cases](#). Forsythe also explains, quoting a dissenting opinion by Justice Alito, that the rule of stare decisis “applies less rigidly in constitutional cases.”

Stare decisis is a very important legal doctrine, but, like all general rules, it comes with exceptions.

Professor Beck has identified three exceptions to stare decisis and argues that the viability rule would qualify for all three.

In his 2012 *Notre Dame Law Review* [article](#) “Transtemporal Separation of Powers in the Law of Precedent,” Professor Beck explains that the Court has made exceptions to the general rule of stare decisis in three types of situations:

1. When an earlier Court “purported to resolve issues not raised by the case before it.”
2. When an earlier Court “acted based on inadequate briefing or cursory deliberation.”
3. When an earlier Court “failed to adequately explain the reasoning underlying a legal conclusion.”

When a previous ruling suffers from one or more of these three defects, Professor Beck explains, the Court is freed from strict adherence to stare decisis and may take corrective action, such as when the Court “narrowly construes prior decisions,” “accords diminished precedential weight,” or “denies stare decisis effect altogether.”

The key question is whether the exceptions to stare decisis apply to the Supreme Court’s earlier abortion rulings establishing and affirming the viability rule. Professor Beck argues they do.

Professor Beck argues the Court would not be bound to the viability rule in a future abortion case because precedents establishing and affirming the viability rule suffer from each of the three defects that undermine the precedential effect normally afforded by the rule of stare decisis.

In Professor Beck’s words, “the Court should not view the viability rule as binding

precedent precluding future examination of the duration of abortion rights on the basis of plenary briefing and argument.”

IV. Exception to stare decisis #1 – Dictum versus holding ... “[T]he issue of the duration of abortion rights was not before the Court in *Roe*.”

The first exception to stare decisis identified by Professor Beck centers on situations where an earlier court “purported to resolve issues not raised by the case before it.”

A. Legal basis for the “dictum versus holding” exception to stare decisis

“The law of precedent,” Professor Beck writes, “places controlling weight on the distinction between holding and dictum.”

In the words of Professor Beck, “The only portions of an opinion entitled to binding effect under the rule of stare decisis are those necessary to resolution of the dispute pending before the precedent-setting court.”

“Portions of an opinion that constitute dicta may be considered for their persuasive value,” Professor Beck writes, “but need not be followed in later litigation.”

The distinction between holding and dictum stems from the deepest roots of federal judicial authority. “We establish courts,” Professor Beck writes, “so that parties who disagree about the application of law in particular circumstances can ask judicial officers to resolve their dispute. With respect to federal courts,” he continues, “the Constitution assigns judges this dispute-resolution function by granting jurisdiction over certain ‘cases’ and ‘controversies.’”

The principle that federal court jurisdiction is limited to resolving only “discrete legal disputes” undergirds and “gives rise to” the distinction between holding and dictum. As Professor Beck explains, “A court’s holding carries precedential authority because, by definition, it encompasses those parts of an opinion necessary to the judges’ assigned task of resolving the case.”

“When a court articulates the holding of a case,” Professor Beck writes, “it carries out the function it is authorized to perform—settling the dispute between the parties. Conversely, statements in dicta lack authority because they are not required for the court to perform its role of resolving the pending legal dispute.”

Professor Beck explains that the distinction between holding and dictum “implicates concerns about the institutional competence of courts.” In Professor Beck’s words, “The circumstances in which a court is authorized to speak the law are also the circumstances in which it can be expected to do so most reliably and

with the greatest forethought.” For this reason, “concerns about the legitimacy of a court’s unnecessary resolution of legal issues interrelate with concerns about institutional competence.”

The distinction between holding and dictum also “implicates concerns” about “the importance of adversarial litigation” and “the quality of the court’s decisionmaking process.” As Professor Beck explains, “Parties involved in a lawsuit have little reason to provide extensive briefing and argument on issues unnecessary to the resolution of the particular case. Therefore, an opinion’s dicta will often concern issues ‘not fully debated’ by the parties.”

In support of this point, Professor Beck cites Chief Justice John Marshall, who “famously explained the reasons for denying precedential effect to dicta.”

“It is a maxim not to be disregarded,” Chief Justice Marshall wrote in the 1821 *Cohens v. Virginia* case, “that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case,” Chief Justice Marshall wrote, “they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.”

In Chief Justice Marshall’s view, “The reason of this maxim is obvious.”

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

As a result, Professor Beck summarizes, “there is a higher risk that a court formulating dicta will possess incomplete information than a court addressing issues directly involved in the parties’ dispute.”

B. Application of the first exception to *Roe*

Professor Beck argues that *Roe* suffers from the “dicta versus holding” defect.

Professor Beck argues that the *Roe* Court’s “articulation of the viability rule constituted dictum, unnecessary to resolve the case before the Court.” In Professor Beck’s words, “The *Roe* litigation involved a challenge to a Texas statute that prohibited *all* abortions except those necessary to save the mother’s life” (emphasis added). The *Roe* Court, Beck recalls, “concluded that a woman has a fundamental right to terminate an unwanted pregnancy and that the states lack a compelling interest in protecting fetal life *at the outset of pregnancy*” (emphasis added). Once the Court reached this conclusion, Professor Beck argues, “the invalidity of the [Texas] statute was established *regardless of how far into pregnancy the right to an*

abortion extends” (emphasis added). In other words, “[t]he validity of the Texas statute did not turn on the question of *when in pregnancy* a state may regulate to protect fetal life” (emphasis added).

Beck cites the Court’s “internal deliberations in *Roe*” as confirmation “that the viability rule represented an attempt to resolve an issue not presented by the pending litigation.”

In a compelling appeal to historical sources, Professor Beck explains that “[t]he files of Justice Blackmun and other retired Justices show that the viability rule did not make its way into the *Roe* opinion until the third draft circulated to the Court.”

- “The first draft would have invalidated the Texas statute on vagueness grounds, while the companion opinion in *Doe v. Bolton* would have recognized a constitutional right to abortion of unspecified duration.”
- “The second draft of *Roe* (following reargument of the case) rested its analysis on a constitutional right to abortion, but indicated that this right would last only through the first trimester of pregnancy.”

Professor Beck explains that “Justice Blackmun’s cover memorandum accompanying this draft acknowledged that the opinion ‘contains dictum’ and that the proposed first-trimester cutoff point ‘is arbitrary, but perhaps any other selected point, such as quickening or viability, is equally arbitrary.’”

Professor Beck continues. “Justice Stewart subsequently commented on this second draft of *Roe*, noting,” in a quotation set out by Professor Beck, that “[o]ne of my concerns with your opinion as presently written is *the specificity of its dictum*—particularly in its fixing of the end of the first trimester as the critical point for valid state action. I appreciate the inevitability and indeed wisdom of dicta in the Court’s opinion,” Stewart comments, “but *I wonder about the desirability of the dicta being quite so inflexibly legislative.*”

- According to Professor Beck, “The viability rule appeared in the third draft of *Roe*, replacing the first-trimester line drawn in the previous version.”

In Professor Beck’s view, “Justice Blackmun’s acknowledgement that *Roe*’s second draft included dictum, Justice Stewart’s identification of the first-trimester cutoff as part of that opinion’s dicta, and the fact that the third draft’s shift to a viability cutoff did not alter the Court’s analysis all show the majority’s awareness that adoption of the viability rule was unnecessary to review of the Texas statute.”

“Indeed,” Beck continues, “at least two other Justices in the majority made comments in internal memoranda indicating that the *Roe* Court did not need to draw a line specifying the duration of abortion rights.”

V. Exception to stare decisis #2 – Inadequate briefing and argumentation ... The *Roe* Court “adopted the viability rule without the benefit of adversarial briefing or argument on the duration of abortion rights.”

The second exception to stare decisis identified by Professor Beck centers on situations where an earlier court “acted based on inadequate briefing or cursory deliberation.”

A. Legal basis for the “inadequate briefing and argumentation” exception to stare decisis

As with the first exception to stare decisis, the second exception is likewise deeply rooted in the structure, aims, and character of our federal judicial system.

“If the legal system’s only goal were resolution of disputes,” Professor Beck writes, “we could replace judges with coin flips.”

But it’s not, and we don’t.

That’s because “we believe law can play a socially beneficial role in influencing behavior,” which means we also believe that “law possesses some degree of determinacy or predictability.”

However, for a legal outcome to be “plausible,” it must be “consistent with the language of the law, understood in light of the conventions of legal interpretation and the dictates of reason.”

The process of endeavoring to reach such outcomes—that is to say, the process of legitimate judicial decisionmaking—is a very human one, making it subject to the possibility of error, as well as to the possibility of great achievement.

As Professor Beck puts it, “some judicial opinions will be better than others.” Similarly, some judicial opinions “will be more accurate (or, indeed, truthful) in describing the relevant facts.” And some judicial opinions will be “more faithful in applying the relevant legal directives in light of our shared interpretive norms.”

One of the most important aids to the very human process of judicial decisionmaking is a robust system of adversarial briefing and argumentation. In Professor Beck’s words, “appellate courts such as the United States Supreme Court rely on briefing and argument to enhance the quality of the decisions issued by judges.

“Inadequate briefing and argument,” Beck argues, “contribute to inadequate judicial

opinions.”

“Good briefing and argument do not guarantee good decisions,” Professor Beck writes, “but they increase the likelihood that judges will produce thoughtful rulings, truthful about the relevant facts, faithful to the applicable law, and useful in accomplishing the goals the legal system seeks to advance.”

Professor Beck identifies at least three significant benefits to the judicial decisionmaking process that flow from a robust system of adversarial briefing and argumentation.

- Forcing more robust thinking

Adversarial briefing and argumentation can “highlight important considerations the judge might otherwise overlook.”

As Professor Beck explains, “The human mind sometimes begins forming views on an issue based on relatively minimal information. Judges may reach tentative conclusions when they first hear about a case, but those conclusions will often prove untenable in light of a more complete understanding of the dispute.”

Adversarial briefing and argumentation provide a remedy. “Hearing a party’s position on contested issues,” Professor Beck explains, “can force a judge to question his or her assumptions about the case and take account of information undermining the judge’s initial reaction.”

- Exposing blind spots

As Professor Beck explains, “adversarial briefing can help to overcome ‘blind spots’ arising from a judge’s background.”

“Each judge comes to a case from a particular perspective shaped by the judge’s experiences. A judge needs to see what the dispute looks like from the perspectives of the parties.”

“Getting a different angle on the issues in controversy,” Professor Beck explains, “may help a judge remove the blinders created by his or her background and see more clearly the ‘practical ramifications’ of a particular outcome for those most directly affected.”

In this approach, “The parties can present their positions in the strongest possible terms and give the best exposition of how their interests will be impacted by the litigation.”

- Thoroughly “sifting” contested positions

Professor Beck explains that the adversarial process “allows for a thorough sifting

of the positions advanced by the contending parties.”

Professor Beck quotes the ancient proverb, “The first to present his case seems right, till another comes forward and questions him.” In other words, “Many arguments may appear persuasive when considered in isolation.”

Adversarial briefing and argumentation provide a remedy. “In adversarial litigation,” Professor Beck writes, “each side has an incentive to highlight omissions and expose flaws in the other side’s position, rounding out the court’s awareness of the relevant facts and law and the strengths and weaknesses of potential legal resolutions.”

The “extensive course of briefing and argument” for cases argued in the U.S. Supreme Court, in particular, “gives each side multiple opportunities to make their strongest points and highlight weaknesses in the other side’s submissions.”

* * *

Given the strong case for adequate briefing and argumentation, it should not surprise that, according to Professor Beck, “[a] number of Supreme Court opinions identify inadequate briefing and argument as a factor justifying denial of precedential effect to a legal proposition derived from an earlier opinion.”

Professor Beck quotes from a Supreme Court opinion stating that “[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”

However, “even as to issues actually addressed by the Court,” the “lack of full briefing and argument, by itself, diminishes the precedential value of an opinion.” In the words of the Supreme Court, as quoted by Professor Beck, “[W]e have felt less constrained to follow precedent where, as here, the opinion was rendered without full briefing or argument.”

Professor Beck also quotes individual Supreme Court justices in support of the limitation on precedent stemming from inadequate briefing and argumentation.

- “Justice Souter, for instance, has said that ‘[s]ound judicial decisionmaking requires ‘both a vigorous prosecution and a vigorous defense’ of the issues in dispute and a constitutional rule announced sua sponte is entitled to less deference than one addressed on full briefing and argument.”
- “Justice Brennan criticized the Court’s departure from stare decisis in another case because ‘[n]one of the reasons we have hitherto deemed necessary for departing from the doctrine of stare decisis are present,’ such as that the rejected decision ‘proceeded from inadequate briefing or

argumentation.”

- Professor Beck also cites Justice Antonin Scalia writing that “[j]udicial decisions do not stand as binding ‘precedent’ for points that were not raised, not argued, and hence not analyzed.”

At bottom, “Since we believe briefing and argument helps a court reach more reliable conclusions, we put correspondingly less faith in legal conclusions reached without the benefit of full briefing and argument.” In other words, “The fact that briefing and argument in the earlier case were inadequate tends to undermine confidence in the legal conclusion reached by the precedent-setting court.”

Professor Beck acknowledges that inadequate briefing and argumentation are factors in stare decisis analysis, not always dispositive, and must be balanced against other factors in the light of “the purposes served by briefing and argument.”

However, “requiring courts to rely on the work of their predecessors makes less sense if we have reason to distrust the legal analysis in the earlier opinion.”

B. Application of the second exception to *Roe*

Professor Beck argues that *Roe* also suffers from the inadequate briefing and argumentation defect.

In Professor Beck’s words, “Given that the duration of abortion rights was not really at issue in *Roe*, it is perhaps no surprise that the parties failed to brief the question.”

According to Professor Beck, “Those challenging the Texas statute denied that the state possessed a compelling interest in fetal life that would support the legislation as written but did not speculate about whether a more narrowly drawn statute might further such an interest.”

At the same time, “The defenders of the statute claimed a compelling state interest in protecting fetal life from the outset of pregnancy.”

In other words, the parties in *Roe* “did not address the question of, assuming a right to abortion, how far into pregnancy it extends.”

What’s more, Beck explains, at oral argument the advocates “avoided answering such line-drawing questions.”

To wit, Professor Beck argues, the *Roe* Court “adopted the viability rule without the benefit of adversarial briefing or argument on the duration of abortion rights.”

VI. Exception to stare decisis #3 – Inadequate legal justification “scholars have long recognized that the [*Roe*] Court utterly failed to justify the viability rule”

The third exception to stare decisis identified in Professor Beck’s research centers on situations where the Court has “failed to adequately explain the reasoning underlying a legal conclusion.”

A. Legal basis for the “inadequate legal justification” exception to stare decisis

According to Professor Beck, “[j]ust as the Supreme Court has applied the law of precedent to deny or minimize stare decisis effect when a ruling resulted from a substandard decisionmaking process, it has also used the law of precedent to enforce the discipline of careful opinion writing.”

Professor Beck identifies three broad categories where the Court has applied this principle, with various effect, including (1) cases summarily disposed without an opinion offering explanation of the reasons, (2) opinions purporting to resolve or assuming the answer to the legal question but through “conclusory” analysis or “scanty” reasoning, and (3) “full opinions” that were, in the Court’s words, “badly reasoned.”

As to the third category, Professor Beck writes that “in cases involving a full opinion on the merits of a legal question, the Court has indicated that it is appropriate to reconsider earlier precedent that was ‘badly reasoned.’”

Professor Beck finds the roots of this third exception to stare decisis deep in the character, limits, and aspirations of our judicial system.

“[W]e ask courts to write opinions that explain the legal analysis leading to an announced outcome,” Professor Beck writes. “Just as briefing, argument, and collaborative deliberation tend to enhance the quality of judicial decisions, the process of writing opinions can improve judicial decisionmaking as well.”

Professor Beck explains that “[w]riting out one’s legal analysis serves as a discipline that can force judges to think more carefully and systematically about the issues in dispute.”

“The requirement of written justification forces a judge to move from a gut reaction to a reasoned conclusion.”

Put another way, “The writing process forces the court to face important issues and decide whether a particular outcome can be explained in a defensible way.”

At stake is not only the quality of a judicial opinion, but its credibility in the eyes of the litigants and the public at large. “When a court offers persuasive explanations for its decisions,” Professor Beck writes, “its opinions tend to bolster the court’s legitimacy in the eyes of the public.”

The legitimacy of federal courts “matters,” Professor Beck writes, “because the efficacy of courts in fulfilling their functions depends to a large extent on public acquiescence.”

That’s because “[c]ourts have only limited capacity to compel submission, so voluntary compliance by the public is critical.”

In Professor Beck’s words, “Widespread doubt about the legitimacy of the courts would profoundly impact their ability to perform their public functions.”

Fundamentally, “Reasoned opinions explaining judicial outcomes promote the rule of law values underlying the law of precedent.” That’s because “[a] court’s explanation of the principles applied and its analysis of how those principles interact with the relevant facts can offer guidance as to the possible application of those principles in later cases. In this manner,” Professor Beck concludes, “the publication of judicial opinions provides direction to lawyers, litigants, and future courts.”

B. Application of the third exception to *Roe*

Professor Beck argues that *Roe* also suffers from the defect of inadequate legal justification.

According to Professor Beck, “scholars have long recognized that the Court utterly failed to justify the viability rule.”

Professor Beck quotes Professor John Hart Ely explaining that *Roe*’s discussion of viability “seem[ed] to mistake a definition for a syllogism,” Professor Laurence Tribe writing that the *Roe* opinion “offers no reason at all for what the Court has held,” and Professor Christopher Eisgruber describing the *Roe* Court’s defense of the viability rule as “blatantly circular.”

The famous pro-life attorney and scholar [Clarke D. Forsythe](#) and his co-author [Stephen B. Presser](#), now Raoul Berger Professor of Law Emeritus at the Northwestern Pritzker School of Law, [have documented additional examples](#) of scholars criticizing *Roe*. Forsythe and Presser write, “Many renowned constitutional scholars—including Alexander Bickel, Archibald Cox, John Hart Ely, Philip Kurland, Richard Epstein, Mary Ann Glendon, Gerald Gunther, Robert Nagel, Michael Perry, and Harry Wellington—have recognized the lack of any constitutional foundation for *Roe*.”

Forsythe and Presser also quote Justice Lewis Powell, Jr. as referring to *Roe* and *Doe* as “the worst opinions I ever joined.”

In a separate publication, Forsythe sets out his own, lengthy criticism of *Roe*, including a specific critique of the viability rule. (See Section III [here](#), and in particular, Section III.E.)

Surely one of the most impressive criticisms ever lodged against *Roe* comes from Judge William H. Pryor, Jr. Before becoming a federal circuit judge, Pryor described *Roe v. Wade* as “the worst abomination of constitutional law in our history.” He then [stood by that assessment](#) when confronted with it at his confirmation hearing.

Professor Beck invokes a standard set out by Justice Stephen Breyer in a discussion of the infamous *Dred Scott* opinion. In that discussion Justice Breyer asserted that, as quoted by Professor Beck, “in a highly visible, politically controversial case with public feeling running high,” the Court’s opinion should be “principled, reasoned, transparent, and informative.”

In Professor Beck’s view, *Roe* fails the Breyer test.

VII. *Casey* did not cure *Roe*’s defects

In 1992, nearly 20 years after *Roe*, the Court issued its ruling in the *Planned Parenthood v. Casey* abortion case. According to Professor Beck, “the *Casey* plurality purported to reaffirm the viability rule, in part on the basis of stare decisis, it did not cure the defects in the *Roe* Court’s defense of the rule.”

Professor Beck offers several arguments for this conclusion, including

1. “[A]s in *Roe*, the Pennsylvania regulations at issue in *Casey* applied from the outset of pregnancy. As a consequence, the reaffirmation of the viability rule in *Casey* also represented dictum, unnecessary to resolution of the issues before the Court.”
2. “[T]he parties in *Casey* did not brief the Court on potential arguments for or objections to the viability rule.”
3. “*Casey* did not rectify *Roe*’s failure to justify the viability rule in constitutional terms.” “In attempting to justify the viability rule,” Professor Beck writes, “the *Casey* plurality asserted that viability marks ‘the independent existence of [a] second life’ that ‘can in reason and all fairness be the object of state protection that now overrides the rights of the woman.’” However, “This cryptic and conclusory justification left unaddressed a host of critical questions.” In the end, “*Casey* did not rectify *Roe*’s failure to justify the viability rule in constitutional terms.”

“In short,” Professor Beck concludes, “the viability rule falls into the category of legal rules that the Court has repeatedly invoked, and even applied, but never ‘squarely addressed.’”

Law professor Michael Stokes Paulsen [has argued](#) that “*Casey* is the worst Supreme Court constitutional decision of all time.”

VIII. Conclusion

When the Supreme Court purported to reaffirm the viability rule in the 1992 *Casey* decision, the Court stated that “no changes of fact have rendered viability more or less appropriate as the point at which the balance of interests tips.”

Further, the joint opinion in *Casey* authored by three justices including Justice Anthony Kennedy described *Roe* as “a reasoned statement, elaborated with great care,” described the viability rule as the “most central principle” of *Roe* and a “rule of law” and “component of liberty” that “we cannot renounce,” and stated that “there is no line other than viability which is more workable.”

However, the *Casey* Court explained that it was affirming *Roe*’s central holding “with whatever degree of personal reluctance any of us may have.”

Furthermore, the joint opinion admitted that the issue of viability was “not before us in the first instance.”

The joint opinion explained that “[w]e do not need to say whether each of us, had we been Members of the Court when the valuation of the state interest [in the protection of potential life] came before it as an original matter, would have concluded, as the *Roe* Court did, that its weight is insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions.”

Fifteen years later, in the 2007 *Gonzales v. Carhart* partial-birth abortion case, the majority opinion applied the *Casey* standards.

However, as Professor Beck has explained in [a 2013 article](#) published in the *McGeorge Law Review*, the Court’s opinion in *Gonzales* “introduced *Casey*’s standards with the statement ‘[w]e assume the following principles for the purposes of this opinion,’ as if the majority was saving for another day the question of whether the *Casey* plurality opinion should continue to control.”

In the same article Professor Beck goes on to explain that the Court’s opinion in *Gonzales* “later referenced ‘the principles accepted as controlling here,’ reinforcing the impression that the majority might not be fully committed to *Casey* as a final statement of the Court’s position on abortion rights.”

Any doubts the Court might have about the viability rule would be well-placed. [The](#)

[viability rule is extremely flawed and cannot be justified.](#)

In this article, I have set out Professor Beck's arguments for why the principle of stare decisis does not block the Court from overturning the viability rule.

In his 2012 *Notre Dame Law Review* [article](#) "Transtemporal Separation of Powers in the Law of Precedent," Professor Beck argues that stare decisis should not block the Supreme Court from reconsidering the duration of abortion rights—*i.e.*, the viability rule—in a future abortion case.

In Professor Beck's view, "the Court should not view the viability rule as binding precedent precluding future examination of the duration of abortion rights on the basis of plenary briefing and argument. To be binding on future Courts," Beck writes, "a ruling on a matter of such consequence as the duration of the constitutional right to abortion should be the product of careful deliberation and adequate justification in a case where the ruling matters to the outcome of the litigation. Absent these conditions," Beck continues, "the viability rule does not warrant treatment as binding precedent entitled to adherence as a matter of stare decisis."

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