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"Partial-Birth Abortion" Is Not Abortion: *Carhart II*'s Fundamental Misapplication of *Roe*

Samuel W. Calhoun

ABSTRACT: In explaining his constitutional objection to Wisconsin's partial-birth abortion ban, Judge Richard Posner contrasts killing during "normal labor" with partial-birth abortion. The former can be constitutionally prohibited, but the latter cannot. Why the distinction? For Posner, the former involves "killing a live baby that is half-born," whereas the latter does not. This article will show that Judge Posner is correct to assert that killing a baby in the midst of the birth process is not constitutionally protected. But Judge Posner is wrong to say that partial-birth abortion does not kill "a live baby that is half-born." This article will demonstrate that the partial-birth procedure in fact does kill a baby during its birth. Ban-proponents are correct in their long-standing argument that the partial-birth procedure is not really an abortion. Consequently, *Roe*, properly understood, is inapplicable to partial-birth abortion bans. Courts, however, including the U.S. Supreme Court in *Carhart II*, have nonetheless routinely used the analytical framework of *Roe* and *Casey* to evaluate bans. This common mistake undermines current partial-birth abortion jurisprudence. The rational basis test, not *Roe/Casey*, is the proper evaluative tool. Using the correct standard could have significant consequences for future challenges to the federal ban and to the bans of the various states.

THE 2007 U.S. SUPREME COURT decision in *Gonzales v. Carhart* [*Carhart II*][1] would seem to end the long fight over partial-birth abortion. Ever since the 1992 disclosure of the details of the

[1] 550 U.S. 124 (2007). *Carhart II* will hereinafter be used to refer to the *Gonzales* decision, which upheld the Federal Partial-Birth Abortion Ban.

partial-birth procedure, which Congress later described as "gruesome and inhumane,"[2] the majority of Americans, both pro-choice and pro-life, have favored prohibiting it.[3] While ban proponents experienced widespread success in enacting partial-birth abortion bans,[4] almost all were stricken as unconstitutional under *Roe v. Wade,*[5] as modified by *Planned Parenthood of Southeastern Pennsylvania v. Casey*.[6] The defining moment was the Supreme Court's 2000 decision in *Stenberg v. Carhart* [*Carhart I*],[7] which disallowed Nebraska's ban on partial-birth abortion. *Carhart II*, however, upheld a Federal Ban,[8]

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[2] Congressional Finding 14(L), in notes following 18 U.S.C. § 1531 (Supp. V 2000). This same descriptive phrase was used earlier by the first court to rule on the enforceablity of a state partial-birth abortion ban. *Evans v. Kelly*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997). An earlier decision barred enforcement of an Ohio statute that no doubt was motivated by the partial-birth controversy, but was so drafted that it cannot accurately be called a partial-birth abortion ban. See *Women's Medical Professional Corp. v. Voinovich*, 911 F. Supp. 1051, 1063 (S.D. Ohio 1995), aff'd, 130 F.3d 187 (6th Cir. 1997); James Bopp, Jr. & Curtis R. Cook, "Partial-Birth Abortion: The Final Frontier of Abortion Jurisprudence," 14 *Issues in Law & Medicine* 3, 5 n.4 (1998).

[3] Gallup polls show that support for bans rose from fifty-seven percent to seventy percent between 1996 and 2003. Kenneth L. Woodward, "What's In A Name? *The New York Times* on 'Partial-Birth' Abortion," 19 *Notre Dame Journal of Legal Ethics & Public Policy* 427, 433 n.13 (2005). Polls showed that a majority of self-identified pro-choice respondents also favored bans. *Id.*

[4] By 2000, at least thirty states had banned the procedure. See *Stenberg v. Carhart*, 530 U.S. 914, 979 (2000) (Kennedy, J., dissenting). For the history of the Federal Ban, see *infra* note 8.

[5] 410 U.S. 113 (1973).

[6] 505 U.S. 833 (1992). *Roe* as modified by *Casey* will hereinafter be referred to as *Roe/Casey*.

[7] 530 U.S. 914 (2000). *Carhart I* will hereinafter be used to refer to the *Stenberg* decision.

[8] Federal partial-birth abortion bans were passed "by wide margins" in 1996 and 1997, but both were vetoed by President Clinton. *Id.* at 994 n.11 (Thomas, J.,

thus prohibiting the partial-birth procedure nationwide.[9] Why, then, isn't it time to move on to other issues in the continuing national controversy over abortion?

Some indeed are shifting their emphasis. Advocacy groups have wondered what *Carhart II* portends for other abortion restrictions.[10] Some scholars have pondered its implications for other legal issues.[11] But many still focus upon *Carhart II* itself. While the decision does not lack supporters,[12] its more numerous critics have argued, among other

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dissenting). The third Congressional ban, signed by President Bush as the Partial Birth Abortion Ban Act of 2003, passed the House by 281-142, Sheryl Gay Stolberg, "Bill Banning"Abortion Procedure Advances," *The New York Times*, Oct. 3, 2003, at A24, and the Senate by 64-34. Sheryl Gay Stolberg, "Senate Approves Bill to Prohibit Type of Abortion," *The New York Times*, Oct. 22, 2003, at A1. The law is codified at 18 U.S.C. § 1531 (Supp. V 2000) (hereinafter referred to as the Federal Ban).

[9] The approved Federal Ban also shows the states how to craft bans to survive constitutional challenge.

[10] See, e.g., Fundraising Letter, Americans United for Life (June 7, 2007) (on file with author) (stating that *Carhart II* "paves the way for states to pass significant new restrictions on abortion").

[11] See, e.g., Randy Beck, "*Gonzales, Casey*, and the Viability Rule," 103 *Northwestern University Law Review* 249 (2009) (arguing that *Carhart II* erodes the significance of viability in abortion jurisprudence); Steven G. Calabresi, "Substantive Due Process after *Gonzales v. Carhart*," 106 *Michigan Law Review* 1517 (2008) (discussing the decision's impact on substantive due process jurisprudence); David H. Gans, "Severability as Judicial Lawmaking," 76 *George Washington Law Review* 639, 641 (2008) (citing the decision as evidence of the increasing significance of severability doctrine to Supreme Court jurisprudence); B. Jessie Hill, "The Constitutional Right to Make Medical Treatment Decisions: A Tale of Two Doctrines," 86 *Texas Law Review* 277 (2007) (arguing that the decision is a step toward reconciling pre-existing different approaches to the right to make medical treatment choices).

[12] See, e.g., Barry A. Bostrom, "*Gonzales v. Carhart*," 23 *Issues in Law & Medicine* 89 (2007); Richard S. Myers, "The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart* (2007)," in *Life and Learning XVII* (2007) (Proceedings of the Seventeenth University for Life Conference).

things, (1) that *Carhart II* is inconsistent with *Carhart I*;[13] (2) that the Court granted undue deference to the Congressional Findings of Fact underlying the Federal Ban;[14] and (3) that a particular aspect of the Court's rationale–the "regret" factor[15]–is not only based on faulty evidence,[16] but also is demeaning to women.[17]

Beyond this scholarly output, there is additional evidence that *Carhart II* did not completely resolve the issue of partial-birth abortion bans. The Court explicitly contemplated possible as-applied challenges to the Federal Ban.[18] Moreover, federal appellate decisions subsequent

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[13] See, e.g., Michael J. Gerhardt, "Constitutional Humility," 76 *University of Cincinnati Law Review* 23, 40 n.118 (2007); Martha C. Nussbaum, "Foreward: Constitutions and Capabilities: 'Perception' Against Lofty Formalism," 121 *Harvard Law Review* 4, 84 (2007) (explaining that *Carhart II*'s reading of *Carhart I* was "bizarrely narrow").

[14] See, e.g., "The Supreme Court, 2006 Term–Leading Cases," 121 *Harvard Law Review* 185, 265-75 (2007).

[15] In arguing that Congress could reasonably determine that the partial-birth procedure "implicates...ethical and moral concerns that justify a special prohibition," the Court stated that it was "unexceptional to conclude some women come to regret their choice to abort the infant life they once created and sustained." *Carhart II*, 550 U.S. at 158-59. Any such regret would be "more anguished and sorrow[ful]" when "a mother...learns...that she allowed a doctor to pierce the skull and vacuum the fast-developing brain of her unborn child." *Id.* at 159-60.

[16] See, e.g., Nussbaum, *supra* note 13, at 86; Ronald Turner, "*Gonzales v. Carhart* and the Court's 'Women's Regret' Rationale," 43 *Wake Forest Law Review* 1 passim (2008) (implied throughout rather than explicitly stated). Contra Teresa Stanton Collett, "Judicial Modesty and Abortion," 59 *South Carolina Law Review* 701, 731-32 (2008).

[17] See, e.g., Nussbaum, *supra* note 13, at 85-87; Reva B. Siegel, "The Right's Reasons: Constitutional Conflict and the Spread of Women-Protective Antiabortion Argument," 57 *Duke Law Journal* 1641 (2008); Reva B. Siegel, "Sex Equality Arguments for Reproductive Rights: Their Critical Basis and Evolving Constitutional Expression," 56 *Emory Law Journal* 815, 837 (2007).

[18] *Carhart II* involved a facial challenge to the Federal Ban. The Court suggested that an as-applied challenge might be successful under appropriate circumstances. *Carhart*

to *Carhart II* already reveal disputes about whether state attempts to prohibit the partial-birth procedure are enough like the Federal Ban to survive constitutional challenge.[19]

All of this post-*Carhart II* ferment ignores the most striking aspect of the decision: the Supreme Court committed a fundamental classification error. Despite the procedure's name, partial-birth abortion is not an "abortion" as that term was understood by the *Roe* Court.[20] The Texas statute at issue in *Roe* defined "abortion" as destroying "'the life of the fetus or embyro...in the woman's womb.'"[21] *Roe* is replete with language limiting its application to the duration of a pregnancy–a state's regulatory interests become compelling at some

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II, 550 U.S. at 167-68.

[19] Virginia's partial-birth infanticide ban was initially invalidated, but then upheld on appeal. See *infra* notes 240-44 and accompanying text. Michigan failed in its attempts to prohibit the procedure by creating a protected legal status for partially delivered fetuses. See *infra* notes 245-48 and accompanying text.

[20] Since the partial-birth abortion procedure had not been devised at the time of *Roe*, see *infra* note 40 and accompanying text, it is apparent that the *Roe* majority did not actually have it in mind when discussing the concept of abortion. The argument here is that the procedure is also not encompassed by *Roe*'s rationale. Consequently, the term "partial-birth abortion" is a misnomer. The erroneous name in itself has helped defeat the argument that *Roe* is inapplicable to the procedure. One court, for example, referred to the fact that the legislature in question had defined partial-birth abortion as "'an abortion'" that encompassed certain specified conduct. *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000). Another court emphasized that the ban in question "was intended to be codified under an abortion section–evidencing the state's efforts to restrict abortion access." *Causeway Med. Suite v. Foster*, 43 F. Supp. 2d 604, 613 (E.D. La. 1999), aff'd, 221 F.3d 811 (5th Cir. 2000). This Article will demonstrate that the word "abortion" following "partial-birth" should not be allowed to mask the reality that the procedure kills a child during its birth. See *infra* note 27 and accompanying text.

[21] 410 U.S. 113, 117 n.1 (1973). The Texas "abortion" definition also included causing "'a premature birth,'" *id.*, but the Court never focused on this fact. In any event, the act of causing a premature birth would not be covered by the Federal Ban, which requires an "overt act, other than completion of delivery, that kills the partially delivered living fetus." 18 U.S.C. § 1531(b)(1)(B) (Supp. V 2000).

"point during pregnancy";[22] a state cannot criminalize abortion "without regard to pregnancy stage";[23] a state can regulate more "as the period of pregnancy lengthens."[24] At "live birth," all such constraints on a state's regulatory freedom disappear, as the fetus then becomes a person "in the whole sense."[25] The Court thus thought of "abortion" only as an act that terminates a pregnancy at some point prior to live birth.[26] Consequently, to kill a fetus during its live birth is not an abortion under *Roe.*[27]

Partial-birth abortion kills a fetus during its live birth.[28] "'[B]irth'

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[22] 410 U.S. at 163.

[23] *Id.* at 164.

[24] *Id.* at 165.

[25] *Id.* at 162.

[26] In *Webster v. Reproductive Health Services*, the plurality opinion characterized *Roe* as establishing "a constitutional framework for judging state regulation of abortion during the entire term of pregnancy." 492 U.S. 490, 520 (1989). The framework sought to balance state interests in protecting the fetus "against the claims of a woman to decide for herself whether or not to abort a fetus she was carrying." *Id.* Once live birth begins, the "term of pregnancy" is essentially over. *Id.* Moreover, the woman is no longer "carrying" the fetus in the conventional sense of that term. *Id.*

[27] See *infra* notes 92-141 and accompanying text. Thus the term, "partial-birth abortion," is an ironic misnomer. The description, "partial-birth," undoubtedly gives ban proponents a rhetorical edge. So much so that *Newsweek* Contributing Editor Kenneth Woodward argues that *The New York Times*, because of its well-known support of abortion rights, has studiously avoided using what it regards "as a toxic term." Woodward, *supra* note 3, at 436-37, 441-42. But whatever rhetorical advantage opponents of the procedure gain by the phrase, "partial-birth" is offset by the disadvantages of calling the procedure an "abortion." This label no doubt indirectly, and sometimes directly, see *supra* note 20, supports the erroneous perspective that the partial-birth procedure is an abortion properly subject to *Roe*.

[28] The Court in *Carhart II* agrees with this characterization. See *infra* note 91 and accompanying text. "Fetus" is what biologists call an unborn human being beginning at about eight weeks gestational age. Lennart Nilsson & Lars Hamberger, *A Child Is Born* (1990), p. 91. At this developmental stage, "all the organs are already in place.

is the 'passage of the offspring from the uterus to the outside world.'"[29] An intended step of the partial-birth procedure is forcibly to begin pulling a fully formed, living, and intact fetus into the outside world.[30]

Everything to be found in a fully grown human being has already been formed." *Id.* Also, "the growing organism, small as it is, looks human even if quite unlike its parents." Roberts Rugh & Labdrum B. Shettles, *From Conception to Birth: The Drama of Life's Beginnings* (1971), p. 39. "Fetus" thus is the technical term used for an unborn human baby at or beyond a particular gestational age. I will therefore use the terms "fetus" and "baby"/"child" interchangeably. This usage is supported by *Carhart II*, in which the Court speaks most often of the "fetus," 550 U.S. 124 passim (2007), but refers also to "the unborn child," *id.* at 134, 160, "the infant life," *id.* at 159, and "'the baby,'" *id.* at 138-39. Although using "fetus" and "baby"/"child" synonymously is also consistent with the Latin word, "fetus," which "simply means 'offspring' or 'unborn young,'" David K. DeWolf, Book Review/Essay, 26 *Gonzaga Law Review* 257, 259 n.10 (1991) (quoting *American Heritage Dictionary* 260 (1983)), some find it objectionable as revealing "hostility to the right *Roe* and *Casey* secured." *Carhart II*, 550 U.S at 186-87 (Ginsburg, J., dissenting).

[29] *National Abortion Federation v. Gonzales*, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting) (quoting *Dorland's Illustrated Medical Dictionary* 207 (27th ed. 2000)), vacated, 224 Fed. Appx. 88 (2d Cir. 2007). See also *Taber's Cyclopedic Medical Dictionary* 251 (20th ed. 2001) ("[t]he act of being born; passage of a child from the uterus").

[30] The steps of the partial-birth procedure were plainly described by Dr. Martin Haskell in a 1992 presentation at a National Abortion Federation meeting. This description not only played an important role in igniting the partial-birth abortion controversy, see *infra* note 40 and accompanying text, but also has been relied upon in partial-birth abortion decisions as accurately describing the procedure. See, e.g., *Carhart II*, 550 U.S. at 138-39; *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 825-27 (D. Neb. 2004), aff'd, 413 F.3d 791 (8th Cir. 2005), rev'd, *Carhart II*, 550 U.S. 124 (2007). Haskell spoke of grasping a "lower [fetal] extremity" with "a large grasping forcep" and pulling it "into the vagina." Dr. Martin Haskell, "Dilation and Extraction for Late Second Trimester Abortions," presented at the National Abortion Federation Risk Management Seminar (Sept. 13, 1992) (hereinafter "Haskell Presentation"). The surgeon then uses "his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities." *Id.* The accompanying textual sentence makes four assertions about the state of the fetus during the partial-birth process: (1) fully formed; (2) living; (3) intact; and (4) partially in the outside world. It is incontestable that fetuses subjected to the partial-birth procedure are fully formed. According to Dr. Haskell, the procedure is used "in patients 20-26 weeks in

The procedure thus initiates a live birth process.[31] Before the fetus has fully emerged, but when either its head or half its lower body is outside the woman's body,[32] its skull is collapsed.[33] Because the partial-birth

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pregnancy." Haskell Presentation, *supra*. "Even at 20 weeks, doctors say, a developing fetus appears remarkably full-formed, right down to the fingerprints." Roy Rivenburg, "Partial Truths," *Los Angeles Times*, Apr. 2, 1997 (Life & Style), at 1. This can be corroborated by consulting any book on fetal development. See, e.g., Alexander Tsiaras, *From Conception to Birth: A Life Unfolds* (2002). As to whether the fetus is living, in one sense there is no reason for dispute. If the fetus is not living at the time of the partial-birth procedure, the ban does not apply. The Federal Ban is triggered only if "a living fetus" is delivered to a certain point and then killed by an "overt act, other than the completion of delivery." 18 U.S.C. § 1531(b)(1)(A)-(B) (Supp. V 2000). For a discussion of whether the fetus is in fact "alive" during this process, see *infra* note 34 and accompanying text. Regarding intactness, Dr. Haskell describes a two-day process to dilate the cervix prior to the partial-birth procedure. Haskell Presentation, *supra*. This accomplishes sufficient dilation for the fetus's body to be extracted intact, but usually is inadequate to allow the fetus's skull "to pass through." *Id.* See Rivenburg, *supra* (the doctor "pulls out the body except for the head, which is too large to pass without injuring the woman"). For information on the extent to which the doctor brings the fetus outside the woman's body, see *infra* note 32 and accompanying text.

[31] The Court in *Carhart II* explicitly stated that partial-birth abortion involves "birth"–the procedure's effect is to kill "a fetus...just inches before completion of the birth process." 550 U.S. at 157. The Court later found that Congress was reasonable to conclude that the partial-birth procedure "'perverts a process during which life is brought into the world.'" *Id.* at 160.

[32] The Federal Ban only applies if "in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of a breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." 18 U.S.C. §1531(b)(1)(A) (Supp. V 2000). Breech presentations [feet first] are the most common. Thus, "[i]n the usual...[partial-birth procedure,] the fetus' head lodges in the cervix [see *infra* note 207], and dilation is insufficient to allow it to pass." *Carhart II*, 550 U.S. at 138; see *id.* at 150. For evidence that in this situation the required degree of separation from the mother commonly occurs, see *infra* note 208 and accompanying text.

[33] Professor Cynthia Gorney quotes the following as a "fairly accurate [technical] summation" of the partial-birth procedure: "[T]he abortionist uses forceps to pull a living baby feet-first through the birth canal until the baby's body is exposed, leaving

procedure kills a fetus during its live birth,[34] it lies outside the constitutional right recognized in *Roe*. Courts have therefore been mistaken to rely upon *Roe* in evaluating legislative bans.

It is important to stress the modesty of the foregoing thesis. I do not argue here that the partially born are constitutional persons under the Fourteenth Amendment.[35] Nor do I argue here that the partially

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only the head just within the uterus. The abortionist then forces surgical scissors into the base of the baby's skull, creating an incision through which he inserts a suction tube to evacuate the brain tissue from the baby's skull. The evacuation of this tissue causes the skull to collapse, allowing the baby's head to be pulled from the birth canal." Cynthia Gorney, "Gambling With Abortion," *Harper's*, Nov. 2004, at 34. Gorney does not explain why she finds this description only "fairly" accurate. It certainly comports with Dr. Haskell's explanation of the partial-birth procedure: "[T]he surgeon...forces the scissors into the base of the skull...[and] spreads [them] to enlarge the opening. The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents." Haskell Presentation, *supra* note 30. Haskell's description, in conjunction with his account of the prior partial delivery of the fetus, see *supra* note 30, makes it clear that the procedure does in fact kill, as Gorney's account portrays and as Congress has found, a "partially-born child." See Gorney, *supra*; Congressional Findings 14(H) & (K), in notes following 18 U.S.C. § 1531 (Supp. V 2000).

[34] Early in the partial-birth controversy, some ban opponents argued that anesthesia given to the woman kills the fetus before its skull is collapsed. These included nationally syndicated columnist Ellen Goodman. Ellen Goodman, "Pro-life Lawmakers Aren't Looking at All the Pictures," *Roanoke Times*, Nov. 14, 1995, at A7. Kate Michelman, then President of the National Abortion Rights Action League, stated that because anesthesia has already killed the fetus, "it is not true that they're born partially. This is a gross distortion, and it's really a disservice to the public to say this." Effects of Anesthesia During a Partial-Birth Abortion: Hearing Before the Subcommittee on the Constitution of the House Comm. on the Judiciary, 104th Cong. 7 (1996) (transcript of Michelman radio statement). In fact, the early fetal demise argument was the "gross distortion." Anesthesiologists "blasted" it as "scientific bunk." Rivenburg, *supra* note 30 (the article later states that the claim has "been debunked"). See Gorney, *supra* note 33, at 41 (characterizing as a "misstep" and "wrong" ban opponents' argument that "the fetus is always dead by the time the doctor begins" the partial-birth procedure).

[35] This argument has appeared from time to time during the partial-birth controversy, e.g., Bopp & Cook, *supra* note 2, at 27-28; *infra* note 60, but evaluating it is beyond

born are a class of humanity otherwise intrinsically entitled to legal protection.[36] My claim is much more limited: because the partial-birth procedure is not an abortion, a legislative body unencumbered by *Roe/Casey* can appropriately choose to ban it.

Part I will show that the "*Roe* is inapplicable" argument appears throughout the fight to ban the partial-birth procedure. The view was communicated to Congress on multiple occasions by prominent legal authorities. It was also asserted numerous times in ban litigation. To overlook this reality is to miss an important aspect of the partial-birth abortion controversy.

Part II will demonstrate that the constitutional right to abortion choice conferred by *Roe* does not encompass partial-birth abortion. *Roe* strongly implied that it does not apply to killing a baby during its birth. The partial-birth process kills a baby while being born.[37] It is therefore wrong to apply *Roe/Casey* to evaluate partial-birth abortion bans. Doing so illegitimately constrains lawmakers' right to prohibit the partial-birth procedure.[38]

Part III will discuss the consequences of recognizing that

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the scope of this article.

[36] Such an argument might be based, for example, on the "created equal" and "inalienable rights" language of the Declaration of Independence. *The Declaration of Independence* para. 2 (U.S. 1776).

[37] See *infra* note 91 and accompanying text.

[38] Some courts that have rejected the "*Roe* is inapplicable" argument have explicitly recognized judges' duty not to substitute their own policy choices for those of the legislature–a law should be overturned only if it is clearly unconstitutional. See, e.g., *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 130-31 (3d Cir. 2000); *Little Rock Family Planning Services v. Jegley*, No. LR-C-97-581, 1998 U.S. Dist. LEXIS 22325, at *38 (E.D. Ark. Nov. 13, 1998), aff'd, 192 F.3d 794 (8th Cir. 1999). The sincerity of judicial efforts to apply the Constitution correctly in the partial-birth abortion context is not in question. Nonetheless, this article posits that to the extent that courts have applied *Roe* to evaluate partial-birth abortion bans, they have inappropriately limited the freedom of the people, acting through their elected representatives, to curtail the partial-birth procedure.

partial-birth abortion is not an abortion under *Roe*. Most importantly, the partial-birth procedure is not entitled to the same constitutional protection accorded to abortion. Partial-birth abortion bans should therefore be scrutinized under a rational basis standard, not the criteria applicable to abortion legislation. Applying the appropriate constitutional test could very well have dispositive impact if the Federal Ban is ever subjected to an as-applied challenge.[39] Applying the proper standard could also have implications for evaluating state partial-birth abortion legislation in the wake of *Carhart II.*

I. HISTORY

Partial-birth abortion burst into the public consciousness in the early to mid-1990s.[40] Widespread abhorrence quickly led to legislative bans of the procedure.[41] Legal challenges to the bans followed just as swiftly.[42]

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[39] See *supra* note 18 and accompanying text.

[40] According to the Supreme Court, the procedure "gained public notoriety when, in 1992, Dr. Martin Haskell gave a presentation describing his method of performing the operation." *Carhart II*, 550 U.S. 124, 138 (2007). See Rivenburg, *supra* note 30 (the debate arose when "[n]ot long after" Haskell "presented...[his] how-to paper[,]...a copy...found its way to the National Right to Life Committee"). Professor Cynthia Gorney gives 1993 as the start of "intense public argument," the year that "a physician's published description [undoubtedly Dr. Haskell's]... was reprinted in right-to-life journals." Cynthia Gorney, *Articles of Faith: A Frontline History of the Abortion Wars* (1998, 2000), p. 522.

[41] See *supra* notes 4, 8 and accompanying text. The extent of public opposition to the partial-birth procedure is demonstrated not only by the proliferation of bans, but also by some states' multiple attempts to pass a ban that would survive constitutional scrutiny. One example is Virginia. Its 1998 ban of "partial-birth abortion" was invalidated in *Richmond Medical Center for Women v. Gilmore*, 55 F. Supp. 2d 441 (E.D. Va. 1999), aff'd, 224 F.3d 337 (4th Cir. 2000). In 2003, Virginia again tried to ban the procedure by criminalizing "partial birth infanticide." *Richmond Medical Center v. Hicks*, 301 F. Supp. 2d 499 (E.D. Va. 2004), aff'd, 409 F.3d 619 (4th Cir. 2005). This statute was also invalidated. *Id.* The State successfully sought certiorari from the Supreme Court, which, due to *Carhart II*, vacated the Fourth Circuit decision and remanded the case. *Herring v. Richmond Medical Center for Women*,

Critics had three principal arguments for the unconstitutionality of a ban[43]: (1) vagueness,[44] (2) imposition of an undue burden on a woman's right to obtain a pre-viability abortion,[45] and (3) lack of a

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550 U.S. 901 (2007). Virginia initially failed in defending its ban, but on appeal was ultimately successful. *Richmond Medical Center for Women v. Herring*, 527 F.3d 128 (4th Cir. 2008), rev'd on reh'g, *Richmond Medical Center for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009) (en banc). See *infra* notes 240-44 and accompanying text. Michigan's opposition to the partial-birth procedure perhaps surpasses Virginia's. For an account of its dogged efforts to enact a prohibition, including a step requiring the direct involvement of the people of Michigan, see *infra* note 245.

[42] For an early, comprehensive assessment of bans' constitutionality under the *Roe/Casey* standard, see Ann MacLean Massie, "So-Called 'Partial-Birth Abortion' Bans: Bad Medicine? Maybe. Bad Law? Definitely!" 59 *University of Pittsburgh Law Review* 301 (1998). Massie mentions the argument that the partial-birth procedure is not an abortion, *id.* at 363, but does not discuss it.

[43] In addition to claims of unconstitutionality, ban opponents tried in other ways to quell the widespread outcry against the partial-birth procedure. Some used factual distortions. The most notable example was revealed when Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, admitted "that he lied in earlier statements when he said...[that the procedure] is rare and performed primarily to save the lives or fertility of women bearing severely malformed babies." David Stout, "An Abortion Rights Advocate Says He Lies About Procedure," *The New York Times*, Feb. 26, 1997, at A11. In fact, "[i]n the vast majority of cases, the procedure is performed on a healthy mother with a healthy fetus." *Id.*

[44] See, e.g., *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 615-19 (E.D. La. 1999), aff'd on other grounds, 221 F.3d 811 (5th Cir. 2000); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 30 F. Supp. 2d 1157, 1164-66 (S.D. Iowa 1998), aff'd on other grounds, 195 F.3d 386 (8th Cir. 1999); *Evans v. Kelley*, 977 F. Supp. 1283, 1304-11 (E.D. Mich. 1997).

[45] An undue burden "exists if a regulation's 'purpose or effect is to place a substantial obstacle in the path of a woman seeking an abortion before the fetus attains viability.'" *Carhart II*, 550 U.S. at 146 (quoting *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 878 (1992)). The principal argument that partial-birth abortion bans constitute an undue burden is that they prohibit, in addition to the partial-birth procedure, the more common D&E method of abortion. See *infra* text accompanying notes 152, 197. See, e.g., *Eubanks v. Stengel*, 28 F. Supp. 2d 1024, 1033-35 (W.D. Ky. 1998), aff'd, 224 F.3d 576 (6th Cir. 2000); *Evans*, 977 F. Supp. at 1315-19. The undue burden critique also sometimes is based on the lack of

health exception.[46] Ban proponents contested these three points, but soon introduced a new argument pertinent to the *Roe/Casey*-based attack. They argued that *Roe/Casey* were inapplicable because the proscribed procedure, although labeled as a type of abortion, actually is outside the *Roe* conception of what an abortion entails. The procedure kills a partially born baby, i.e., one in the process of being born. It therefore actually either is or nearly is infanticide.[47]

Determining the precise origin of the "*Roe* is inapplicable" perspective is difficult. Although described in a 1999 federal district court opinion as "a unique new argument in abortion litigation,"[48] the

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a health exception. See *infra* note 46.

[46] The health exception argument is premised in the requirement that even post-viability abortion regulations must contain a health exception. See *Carhart I*, 530 U.S. at 929-30. Concerning partial-birth abortion bans, the absence of a health exception has sometimes been relied upon as an independent constitutional deficiency, e.g., *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 613-14 (E.D. La. 1999), aff'd, 221 F.3d 811 (5th Cir. 2000); *Planned Parenthood of Greater Iowa, Inc. v. Miller*, 30 F. Supp. 2d 1157, 1167-68 (S.D. Iowa 1998), aff'd, 195 F.3d 386 (8th Cir. 1999); and sometimes as an element in an undue burden analysis. E.g., *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp. 2d 478, 501-03 (D.N.J. 1998), aff'd sub nom. on other grounds, *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000). The presence of a health exception was a key factor in perhaps the only decision upholding a state partial-birth abortion ban subsequent to *Carhart I*. See *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 444-50 (6th Cir. 2003). *Carhart II* held that the lack of a health exception in the Federal Ban was constitutionally permissible. 550 U.S. at 161-66.

[47] Between 1996 and 1997, the late pro-choice Senator Patrick Moynihan's opinion of the partial-birth procedure changed from the latter to the former. In 1996, he stated that the procedure was "'as close to infanticide as anything I have come upon in our judiciary.'" Barbara Vobejda & David Brown, "Harsh Details Shift Tenor of Abortion Fight; Both Sides Bend Facts On Late-Term Procedure," *The Washington Post*, Sept. 17, 1996, at A01. By 1997, based on Ron Fitzsimmons's confession of how he had lied about the procedure [see *supra* note 43], Moynihan had become convinced that the procedure "is infanticide, and one would be too many." See *Meet the Press* (NBC television broadcast Mar. 3, 1997) (transcript on file with the author).

[48] Foster, 43 F. Supp. 2d at 609.

theory clearly had surfaced by 1998, in court[49] and elsewhere.[50] One advocacy group claims that the "*Roe* is inapplicable" argument originated in its 1997 defense of Arizona's ban.[51] This might well be its first judicial mention,[52] but the theory clearly predates 1997. The approach was asserted at a 1996 House Subcommittee Hearing by Harvard Law Professor Mary Ann Glendon.[53] The earliest mentions of the argument that I have found come from November 1995 by law

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[49] See, e.g., *Verniero*, 41 F. Supp. 2d at 496-98.

[50] Examples include a professional journal article, see Bopp & Cook, *supra* note 2, at 25-27, and a failed Washington State ballot initiative to ban partial-birth infanticide. See Jill R. Radloff, Note, "Partial-Birth Infanticide: An Alternative Legal and Medical Route to Banning Partial-Birth Procedures," 83 *Minnesota Law Review* 1555, 1556-57 (1999).

[51] See "AFA [American Family Association] Law Center defends Arizona ban with novel argument," *AFA Journal*, Jan. 1998, at 18.

[52] *See Planned Parenthood of S. Arizona v. Woods*, 982 F. Supp. 1369, 1377 (D. Ariz. 1997). In addition to this assertion in a lawsuit, the "*Roe* is inapplicable" argument was made several times at a March 1997 Congressional Hearing. See "Partial-Birth Abortion: The Truth: Joint Hearing Before the Senate Committee on the Judiciary and the Subcommittee on the Constitution of the House Comm. on the Judiciary, "105th Cong. 53, 108 (1997) [hereinafter March 1997 Hearing] (Prepared Statement and testimony, respectively, of Douglas Johnson, representing the National Right to Life Committee); *id.* at 72 (testimony of Helen Alvare, representing the National Conference of Catholic Bishops); *id.* at 161 (Letter from Prof. Douglas Kmiec to Sen. Orin G. Hatch & Rep. Henry J. Hyde (Mar. 10, 1997)). The argument was also submitted as part of Congressional floor debate on partial-birth abortion. See *infra* note 75 and accompanying text.

[53] "Origins and Scope of *Roe v. Wade*: Hearing Before the Subcommittee on the Constitution of the House Committee on the Judiciary," 104th Cong. 47 (1996) [hereinafter April 1996 Hearing] (Prepared Statement of Professor Mary Ann Glendon). The "*Roe* is inapplicable" argument was also suggested by Helen Alvare, representing the National Conference of Catholic Bishops, on a television broadcast. *60 Minutes: Partial-Birth Abortion* (CBS television broadcast June 2, 1996) (the procedure "is not truly abortion as the Supreme Court addressed that issue in *Roe v. Wade*").

professors Doug Kmiec[54] and David Smolin[55] at a Senate Judiciary Committee Hearing.[56]

Professor Kmiec came to the view that *Roe* does not cover the partial-birth procedure largely through thinking about the meaning of the word "abortion."[57] His instincts told him that abortion means the termination of a pregnancy, and a search of numerous medical dictionaries confirmed this initial understanding. Thus, an abortion can occur only during an ongoing pregnancy. But doesn't pregnancy end with the beginning of the birth process? How, then, can the partial-birth procedure be an abortion? To Kmiec, the answer depended on what counts as the beginning of birth. Does it mean only a birth begun in the natural way, by God? Or does it also include a birth begun by man's intervention? He determined that, in this secular age, a man-begun process was also a birth, and thus that *Roe* was inapplicable.

Professor Smolin's submission to the November 1995 Hearing is especially interesting because of his interaction with Congress a few months earlier. In June 1995, at the first Congressional Hearing on a proposed federal ban, he submitted a written statement, thus perhaps becoming the first law professor formally to communicate to Congress

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[54] "The Partial-Birth Abortion Ban Act of 1995: Hearing Before the Senate Committee on the Judiciary," 104th Cong. 170, 174, 186, 194, 198 (1995) [hereinafter November 1995 Hearing] (testimony of Prof. Douglas Kmiec); *id*. at 231 (Letter from Prof. Douglas Kmiec to Sens. Orrin G. Hatch & Patrick Leahy (Nov. 27, 1995)).

[55] *Id*. at 345-46 (Written Testimony of Prof. David Smolin).

[56] As was true for Professor Mary Ann Glendon, see *supra* note 53 and accompanying text, other law professors eventually accepted this new argument. See *infra* note 75 and accompanying text.

[57] Telephone Interview with Doug Kmiec, Professor of Law, Pepperdine University School of Law (Aug. 5, 2008) (also the source for the other statements in the text accompanying this footnote). Professor Kmiec was also influenced by the fact that *Roe* explicitly failed to address a Texas statute that criminalized killing a baby in the process of being born. *Id*.; see *infra* notes 103-05 and accompanying text.

on the subject.[58] Smolin stated that "[t]he proposed prohibition of this particular method of abortion constitutes, in constitutional terms, a regulation of abortion."[59] Five months later, however, he argued that killing a partially extracted infant "has never been held [to be] within the constitutional right or liberty to abort.... Thus, the entire constitutional regime created by *Roe*...and...*Casey* is...irrelevant to the constitutional analysis of a ban on partial-birth abortions."[60]

Regardless of its exact origin, the "*Roe* is inapplicable" theory has persisted in the battle over partial-birth abortion bans. Since 1999, the argument has on occasion appeared in legislative documents,[61] but has

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[58] Professor Smolin was scheduled to testify in person, but time constraints made that impossible. "Partial-Birth Abortion: Hearing Before the Subcomm. on the Constitution of the House Judiciary Committee," 104th Cong. 97-102 (1995) [hereinafter June 1995 Hearing].

[59] *Id.* at 98.

[60] November 1995 Hearing, *supra* note 54, at 345. Although Smolin has no specific recollection of why his views changed during this five-month period, Telephone Interview with David Smolin, Professor of Law, Cumberland Law School, Samford University (Aug. 5, 2008), the two statements themselves show how his thinking evolved. In June, Smolin argued that although *Roe* held that the "unborn" are not constitutional persons, a partially born infant might nonetheless have that protected status. June 1995 Hearing, *supra* note 58, at 100. He relied in part upon the fact that Texas's parturition statute, which criminalized killing a baby while being born, was not challenged in *Roe*. *Id.*; see *infra* notes 103-105 and accompanying text. Smolin did not emphasize the significance of this assertion–his discussion of constitutional personhood appears as an interlude in the middle of an argument that a partial-birth abortion ban can survive scrutiny under a *Roe/Casey* analysis. June 1995 Hearing, *supra* note 58, at 100. By November, Smolin had revised his written statement to highlight the constitutional personhood argument. It now came first, as a separate subsection. November 1995 Hearing, *supra* note 54, at 344-45. Smolin's second argument, missing from his June statement, but again relying on the fact that *Roe* "did not rule on the constitutionality of the Texas statute prohibiting the destruction of an unborn child during childbirth," was that the partial-birth procedure does not "trigger[] the abortion liberty." *Id.* at 345. Thus, even if fetuses are not constitutional persons, a partial-birth abortion ban must only satisfy "the rational basis test." *Id.*

[61] See, e.g., Partial-Birth Abortion Ban Act of 2002, Hearing Before the

surfaced most often in judicial proceedings. Numerous federal district and circuit court opinions discuss the theory,[62] and it has been advanced in numerous briefs filed with various courts.[63] Although the approach has in part convinced at least one individual judge,[64] courts have unanimously rejected it.[65] Some have done so by totally ignoring

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Subcommittee on the Constitution of the House Committee on the Judiciary, 107th Cong. 164-65 (2002) (written testimony of Douglas Johnson).

[62] Many partial-birth abortion ban decisions do not mention the theory, e.g., *Planned Parenthood v. Miller*, 30 F. Supp. 2d 1157 (S.D. Iowa 1998), aff'd, 195 F.3d 386 (8th Cir. 1999); *Eubanks v. Stengel*, 28 F. Supp. 2d 1024 (W.D. Ky. 1998), aff'd, 224 F.3d 576 (6th Cir. 2000). Such decisions also have a significant role in any account of the "*Roe* is inapplicable" perspective–as examples of the flaw currently undermining partial-birth abortion jurisprudence.

[63] See, e.g., *infra* note 90 and accompanying text.

[64] Judge Chester Straub "do[es] not believe that a woman's right to terminate her pregnancy under *Roe*...extends to the destruction of a child that is substantially outside of her body." *National Abortion Federation v. Gonzales*, 437 F.3d 278, 298 (2d Cir. 2006) (Straub, J., dissenting), vacated, 224 Fed. Appx. 88 (2d Cir. 2007). See *id.* at 312. While this acknowledgment would seem to compel the conclusion that *Roe* is inapplicable to the partial-birth procedure, Judge Straub would still apply *Roe*, but in a way that would uphold the Federal Ban. See *id.* at 310-13. A 2003 House Judiciary Committee Report makes the same mistake. The Report first states that "partial-birth abortion should not implicate...[the abortion] right because the pregnancy ended once the birth process began and the right to terminate one's pregnancy by aborting one's unborn child does not include an independent right to assure the death of that child regardless of its location to the mother." H.R. Rep. No. 108-58, at 21-22 (2003). But rather than arguing that *Roe* is thus inapplicable to the partial-birth procedure, the Report says only that "the government [therefore] has a heightened interest in protecting the life of the partially-born child." *Id.* at 22.

[65] An interesting case study is the history of the "*Roe* is inapplicable" argument in Virginia. The State in 1998 had tried unsuccessfully to ban "partial-birth abortion." In the ensuing litigation, the State asserted what the district judge called "the rather unusual view that *Roe*...[is] inapplicable because...the Supreme Court did not announce constitutional protections to abortions where 'the child is partially born.'" *Richmond Medical Center for Women v. Gilmore*, 11 F. Supp. 2d 795, 822 (E.D. Va. 1998). The court "decline[d] the State's invitation to circumvent the requirements of Roe," *id.*, a rejection it reiterated in a later phase of the case. *Richmond Medical*

the argument,[66] but others have openly scoffed. Courts have characterized the theory in various ways: unsupported by precedent[67]; "a conceptual theory that...has no relationship to fact, law or medicine"[68]; a "back door effort to limit...[the abortion] right"[69];

Center for Women v. Gilmore, 55 F. Supp. 2d 441, 480 (E.D. Va. 1999), aff'd, 224 F.3d 337 (4th Cir. 2000) (*per curiam*). In 2003, Virginia tried again to ban the partial-birth procedure, this time making its policy rationale clearer by now seeking to ban "partial birth infanticide." A different federal district judge invalidated the new statute, once more rejecting Virginia's attempt "to establish a line [demarking a State's ability to prohibit abortion] in 'terms of whether a fetus was in the process of being born.'" *Richmond Medical Center for Women v. Hicks*, 301 F. Supp. 2d 499, 515 (E.D. Va. 2004). The Fourth Circuit affirmed, without explicitly referring to the State's argument that *Roe* is inapplicable to the partial birth procedure. See *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619 (4th Cir. 2005), vacated & remanded, 550 U.S. 901 (2007), aff'd sub nom. *Richmond Medical Center for Women v. Herring*, 527 F.3d 128 (4th Cir. 2008), rev'd, 570 F.3d 165 (4th Cir. 2009). The Fourth Circuit ultimately upheld the Virginia ban based upon *Roe/Casey* as applied in *Carhart II*, with no reference to the "*Roe* is inapplicable" argument. See *Richmond Medical Center for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009).

[66] A prime example is the Supreme Court in both *Carhart I* and *Carhart II.* See *infra* notes 89-90 and accompanying text.

[67] *Planned Parenthood of S. Ariz., Inc. v. Woods,* 982 F. Supp. 1369, 1377 (D. Ariz. 1997).

[68] *Causeway Medical Suite v. Foster*, 43 F. Supp. 2d 604, 615 (E.D. La. 1999), aff'd, 221 F.3d 811 (5th Cir. 2000).

[69] *Id.* at 619.

ideological[70]; and "specious."[71] Third Circuit Judge Maryanne Barry had an extraordinarily negative reaction to the argument. In a span of two pages, she characterized it as (1) "based on semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion instead of [on] logic or medical evidence"[72]; (2) "a desperate attempt to circumvent over twenty-five years of abortion jurisprudence"[73]; and (3) "an effort to cloud the issues."[74]

This host of derogatory comments suggests that the "*Roe* is inapplicable" argument is frivolous, if not deliberately obfuscating. In fact, courts have been far too dismissive. Part II will demonstrate that sixty-three law professors were correct in stating to Congress that "[t]he destruction of human beings who are partially born is...entirely outside the legal framework established in *Roe v. Wade* and *Planned Parenthood v. Casey*."[75] Courts that have rejected the "*Roe* is

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[70] *Northland Family Planning Clinic v. Cox*, 487 F.3d 323, 346 (6th Cir. 2007), cert. denied, 128 S. Ct. 873 (2008). In affirming the district court's denial of permissive intervention to Standing Together To Oppose Partial-Birth-Abortion (STTOP), the court characterized STTOP's brief as taking "an ideological approach to the litigation rather than attempting to argue for the...[challenged law's] validity under relevant Supreme Court precedent." *Id.* And what was STTOP's principal argument? That *Roe* does "not address the legal status of...transitional person[s]," i.e., human beings in the process of being born. See Final Reply Brief of Proposed Intervenor/Appellant, 2006 WL 3223977, at 14.

[71] *R.I. Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), aff'd, 239 F.3d 104 (1st Cir. 2001).

[72] *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000).

[73] *Id.* at 144.

[74] *Id.* Judge Barry also brands as "mischaracterization" a standard, authenticated description of the partial-birth procedure. See *id.* at 140. It thus is ironic that she herself fails to grasp what the procedure actually involves. See *infra* notes 206-09 and accompanying text.

[75] Letter from sixty-three Law Professors to Sen. Orrin Hatch (May 8, 1997), in 143 *Congressional Record* 8807 (1997).

inapplicable" argument have inappropriately limited the people's power to express their corporate repudiation of the partial-birth procedure.

II. MISAPPLYING *ROE*

In evaluating whether *Roe/Casey* protect partial-birth abortion, an initial response might be to decry the very idea of constitutional protection for killing a baby during its birth[76] via what one federal judge has called "a gruesome, brutal, barbaric, and uncivilized medical procedure."[77] This protest would be understandable, but misguided. Judge John Noonan has reminded us that the long-protected life of American slavery shows that moral depravity does not necessarily mean the absence of constitutional status.[78] The proper legal question is whether *Roe*, properly interpreted, encompasses the partial-birth

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[76] This characterization of partial-birth abortion is not only justified by what the process in fact entails, see *supra* notes 28-34 and accompanying text and *infra* notes 142-86 and accompanying text, but also has been accepted by the Court in *Carhart II.* See *infra* note 91 and accompanying text. For an eloquent denunciation of the idea of constitutional protection for the partial-birth procedure, see *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 180-83 (4th Cir. 2009) (Wilkinson, J., concurring).

[77] *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), aff'd sub nom. *National Abortion Federation v. Gonzales*, 437 F.3d 278 (2d Cir. 2006), vacated, 224 Fed. Appx. 88 (2d Cir. 2007). Cynthia Gorney writes that "[a] tone of queasy resignation permeates parts of [the district judge's] ruling [invalidating the Federal Ban], as though the judge were still reeling from descriptions of things that appear to be constitutionally protected despite being gruesome and brutal and so forth." Gorney, *supra* note 33, at 45.

[78] See John T. Noonan, Jr., "The Root and Branch of *Roe v. Wade*," 63 *Nebraska Law Review* 668, 668-69 (1984). Slavery was not explicitly mentioned in the Constitution, but its "legitimate presence" in American society was implicitly acknowledged by the "three-fifths clause," the "slave-trade clause," and the "fugitive-slave clause." See Don E. Fehrenbacher, *The Dred Scott Case: Its Significance in American Law and Politics* (1978), pp. 26-27.

procedure within the constitutional right to an abortion.[79]

The theoretical concept that *Roe* has only a limited reach presumably is not controversial. For example, no one would argue that the decision protects a woman's right to kill any of her children under the age of two. Another example of *Roe*'s limited scope is provided by Born-Alive Infants Protection Acts. These Acts, at both the federal[80] and state[81] level, are a legislative response to live-birth abortions.[82]

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[79] *Roe* itself, of course, is highly controversial, but the question of its correctness, i.e., whether the Constitution, properly interpreted, confers a constitutional right to an abortion, is beyond the scope of this article.

[80] See *infra* note 85.

[81] Making accurate generalizations about state laws protecting infants born alive following an attempted abortion is complicated. Some such laws are officially named "Born-Alive Infant Protection Acts" and were enacted in the early 2000s more or less contemporaneously with the similarly named Federal Act. See, e.g., 5 *Ill. Comp. Stat. Ann*. 70/1-36 (Supp. 2008) (modeled after the Federal Act); *Mich. Comp. Laws Ann*. §333.1071.73 (2008) (not modeled after the Federal Act). Some states, however, protected born-alive infants long before the recent flurry of legislation. Pennsylvania, for example, as part of its 1974 Abortion Control Act, punished as second degree murder one who, "with intent to do so, ...intentionally and wilfully take[s] the life of a premature infant aborted alive." 35 *Pa. Stat. Ann*. § 6604 (1977). In 1978, this statute was repealed with the entire 1974 Act, but was replaced in 1982 by a provision in Pennsylvania's new Abortion Control Act entitled "Infanticide": "The law of this Commonwealth shall not be construed to imply that any human being born alive in the course of or as a result of an abortion or pregnancy termination, no matter what may be that human being's chance of survival, is not a person under the Constitution and laws of this Commonwealth." 18 *Pa. Stat. Ann*. § 3212(a) (2000). For other examples of this early protection for born-alive infants, see *Mont. Code Ann.* § 50-20-108(1) (2007) (entitled "Protection of premature infants born alive"); and *Neb. Rev. Stat*. § 28-331 (1995) (entitled "Care and treatment of child aborted").

[82] The legislation, at least to federal lawmakers, was considered essential "'to establish...a limit to...[the] sweeping right to abortion'" recognized in *Carhart I*. See Roger Bryon, "Children of a Lesser Law: The Failure of the Born-Alive Infants Protection Act and a Plan for Its Redemption," 19 *Regent University Law Review* 275, 278 (2006-07). The Federal Act was also motivated by the decision in *Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127 (3d Cir. 2000), which alarmed lawmakers by stressing a woman's intent in defining "the scope of her right

Some abortion procedures result in infants born alive.[83] Abortionists nonetheless have either directly killed these newborn infants or left them unattended to die.[84] Born-Alive Infants Protection Acts confer legal personhood status on such babies.[85] This legislation is unaffected by *Roe/Casey*.[86]

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to destroy her offspring." *National Abortion Federation v. Gonzales*, 437 F.3d 278, 311 n.14 (2d Cir. 2006) (Straub, J., dissenting), vacated, 224 Fed. Appx. 88 (2d Cir. 2007). See *infra* note 183.

[83] Liz Jeffries & Rick Edmonds, "The Dreaded Complication," *Philadelphia Inquirer* (Aug. 2, 1981) (Special Reprint Edition). At the time, the Center for Disease Control estimated "400 to 500 abortion live births" each year in the United States. *Id.* The incidence of live births, of course, depends chiefly on the abortion technique used. A D&E abortion [see *infra* note 152 and accompanying text] is "foolproof," i.e., it "never, ever results in live births." *Id.* Prostaglandin instillation, on the other hand, can produce a live birth rate as high as eight percent. Nancy K. Rhoden, "The New Neonatal Dilemma: Live Births From Late Abortions," 72 *Georgetown Law Review* 1451, 1458 (1984). Live births following abortions are a continuing phenomenon. See Shantala Vadeyar, Tracey A. Johnston, Mary Sidebotham & Jean Sands, "Neonatal Death Following Termination of Pregnancy," 112 *BJOG* 1159 (Aug. 2005) (a study of neonatal death following abortion in thirty-one cases over six years in a certain medical region in England).

[84] Jeffries & Edmonds, *supra* note 83. See Bryon, *supra* note 82, at 275-76 (giving real-life examples of born infants "killed or left to die" following abortion attempts). There sometimes is an attempt to provide medical care to fetuses born alive after an attempted abortion. See Magda Denes, *In Necessity and Sorrow: Life and Death in an Abortion Hospital* (1976), p. 39.

[85] For example, the Federal Born-Alive Infants Protection Act defines "'person,' 'human being,' 'child,' and 'individual'" as including "every infant member of the species homo sapiens who is born alive at any stage of development." 1 U.S.C. § 8(a) (2006). "'[B]orn alive'" includes (but is not limited to) an infant who, following "complete expulsion or extraction" from its mother, "breathes or has a beating heart...regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion." *Id.* at § 8(b). Bryon, *supra* note 82, argues that the Federal Act in fact confers very little, if any, actual protection on such infants.

[86] Although the declaration obviously does not bind a court, Michigan's Born Alive Infant Protection Act states: "A woman's right to terminate pregnancy ends when the

The "*Roe* is inapplicable" argument follows naturally from *Roe*'s acknowledged inapplicability to babies born alive. In the partial-birth procedure, the baby is killed before it is completely separated from the woman, but during a birth process–either the baby's entire head or its trunk from above the navel is entirely outside the woman.[87] At this

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pregnancy is terminated. It is not an infringement on a woman's right to terminate her pregnancy for the state to assert its interest in protecting a newborn whose live birth occurs as the result of an abortion." *Mich. Comp. Laws Ann.* § 333.1072(c) (2008). While I have not found a judicial ruling on the constitutionality of Born-Alive Infant Protection Acts, there is substantial legal authority that *Roe* is inapplicable once live birth occurs. The decision most on point is *Showery v. State*, 690 S.W.2d 689 (Tex. Ct. App. 1985), which upheld a murder conviction for a doctor who suffocated a fetus after it was removed alive from its mother's body following an abortion attempt. The court held that *Roe* was irrelevant because "[s]eparation from the mother is a rite of passage beyond the shadow of conflict with her fundamental rights." *Id.* at 693-94. *Nealis v. Baird*, 996 P.2d 438 (Okla. 1999) (upholding a wrongful death action for a non-viable fetus born alive), reached a similar conclusion: "Nothing in *Roe* prohibits the states from affording legal protection to fetuses that are born alive." *Id.* at 454-55. Moreover, Judge Richard Posner has stated that "[o]nce the baby emerges from the mother's body, no possible concern for the mother's life or health justifies killing the baby." *Hope Clinic v. Ryan*, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting) (involving partial-birth abortion bans), rev'd, 249 F.3d 603 (7th Cir. 2001). See *infra* text accompanying note 221. Finally, the history of Pennsylvania's statutory protection for born-alive infants strongly supports the view that *Roe* is inapplicable to such legislation. Both the 1974 and 1982 statutes were part of comprehensive abortion legislation, each entitled "Abortion Control Act." See *supra* note 81. When both of these Acts were challenged as unconstitutional, the born-alive infant protection provisions were not attacked individually, but only as part of the claim that the Acts as a whole were unconstitutional. When the courts in both cases denied these comprehensive claims, Act opponents did not even argue that the born-alive protective provisions were individually invalid. See *American College of Obstetricians & Gynecologists, Pennsylvania Section v. Thornburgh,* 552 F. Supp. 791 (E.D. Pa. 1982) (challenging the 1982 Act), aff'd, 476747 (1986); *Planned Parenthood Ass'n v. Fitzpatrick*, 401 F. Supp. 554 (E.D. Pa. 1975) (challenging the 1974 Act), aff'd sub nom. *Franklin v. Fitzpatrick*, 428 U.S. 901 (1976) (plaintiffs' appeal), aff'd sub nom. *Colautti v. Franklin*, 439 U.S. 379 (1979) (defendants' appeal). Thus, even those eager to challenge abortion restrictions acknowledged *Roe*'s inapplicability to measures protecting humans born alive.

[87] See *supra* note 32 and accompanying text.

stage of partial separation, when the baby clearly is alive, its skull is collapsed.[88] As will now be demonstrated, *Roe* cannot properly be read to protect the right to kill a baby in this manner.

A. *By Its Own Terms Roe Does Not Apply Once the Birth Process Begins*

In view of *Carhart I* and *Carhart II*, it would seem the height of presumption to argue that *Roe* does not apply to the partial-birth procedure. The argument was explicitly discussed in the lower court decisions leading to *Carhart I*.[89] The theory was also articulated in briefs submitted to the Court in both cases.[90] Nonetheless, the Court in both decisions totally ignored the "*Roe* is inapplicable" argument and applied *Roe/Casey* to evaluate partial-birth abortion bans. While the Court's complete disregard of the theory admittedly seems to be its deathblow, this would be an unduly negative assessment. *Carhart II*

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[88] See *supra* note 33 and accompanying text.

[89] In the initial phase of the lawsuit, the State argued that *Roe* did not recognize "'a constitutional right to kill a partially born human being.'" *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997) (abortionist's request for preliminary injunction). The court interpreted this argument as an "invitation to ignore *Roe*" and declined to accept it because there was "no precedent...[that] uses the 'partially born human being' category as a construct for constitutional analysis." *Id.* The court declined that invitation for a "second time" in ruling favorably on the abortionist's request for a permanent injunction. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1132 n.48 (D. Neb. 1998). The Eighth Circuit expressed no final opinion on whether "there is a separate legal category for the 'partially born.'" *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999). Even if there were, the category would not be relevant to the present litigation because the court believed "that the word 'born' refers most naturally to a viable fetus." *Id*. This article demonstrates the deficiencies in this argument. See *infra* notes 159-72 and accompanying text.

[90] For *Carhart I*, see Brief of Amici Curiae Louisiana and Mississippi in Support of Petitioners, 2000 WL 228483, at 2-11. For *Carhart II*, see, e.g., Brief of Amici Curiae the American Center for Law and Justice, 78 Members of Congress, and the Committee to Protect the Ban on Partial-Birth Abortion in Support of Petitioner, 2006 WL 1436694, at 9-11.

acknowledges that the partial-birth procedure kills a baby during its birth.[91] All that remains is for the Court to recognize that *Roe* did not extend constitutional protection to a process that kills a baby after its birth has begun.

The *Roe* Court held that the constitutional right of privacy encompasses "the abortion decision,"[92] i.e., "a woman's decision whether or not to terminate her pregnancy."[93] There plainly is no constitutional right to abort once birth occurs. First, once the fetus is born, it enjoys the protection accorded by the Fourteenth Amendment to the life of every "person."[94] Second, while the Court stated that it would "not resolve the difficult question of when life begins," it was responding to the assertion that "life "begins at conception and is present throughout pregnancy."[95] The Court therefore was only expressing its unwillingness to "speculate" as to when life begins

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[91] This conclusion follows undeniably from several statements in the opinion. The fetus is extracted from the womb by methods "conducive to pulling out its entire body, instead of ripping it apart." *Gonzales v. Carhart*, 550 U.S. 124, at 137 (2007). Doctors thus extract "the fetus intact or largely intact." *Id.* This extraction method is a "delivery" in that it "'assist[s] a woman in childbirth.'" *Id.* at 152 (quoting *Stedman's Medical Dictionary* 470 (27th ed. 2000)). It thus is properly characterized as a "birth process." *Id.* at 157; see *id.* at 160. The fetus, regardless of viability, "is a living organism while within the womb," *id.* at 147–an "unborn child," *id.* at 160; see *id.* at 134, and an "infant life." *Id.* at 159. The doctor then kills the fetus after either its head or "'trunk past the navel is outside the body of the mother.'" *Id.* at 147-48 (quoting 18 U.S.C. § 1531(b)(1)(A) (Supp. IV 2004)). Taken together, these statements acknowledge that the partial-birth procedure kills a baby during its birth. See *id.* at 138-39 (the Court relating a nurse's description of how a doctor stuck "'scissors in the back of...[a "'baby's'"] head'") (quoting H.R. Rep. No. 108-58, at 3 (2003)). For a defense of the Court's characterization, see *supra* notes 28-34 and accompanying text and *infra* notes 142-186 and accompanying text.

[92] *Roe v. Wade*, 410 U.S. 113, 154 (1973).

[93] *Id.* at 153. See *supra* notes 20-27 and accompanying text.

[94] See 410 U.S. at 157-58.

[95] *Id.* at 159.

during a pregnancy.[96] The Court elsewhere stated its belief that at "live birth" both human life[97] and personhood "in the whole sense"[98] unquestionably are present.[99]

But what exactly does "live birth" mean? In particular, what is the status of a fetus in the process of being born? *Roe* is not entirely clear on this point, but it contains important indicators. First, in speaking of both constitutional and ontological personhood, the Court stated that these categories do not include "the unborn."[100] As James Bopp and Dr. Curtis Cook have argued, "[a] baby who is partially delivered cannot properly be termed unborn."[101] In the partial-birth procedure, either the fetus's head or the lower half of its body is outside the woman,[102] i.e., born. Second, the Court quotes, but does not comment upon, a Texas parturition statute, not challenged in the *Roe* litigation, that criminalized killing "'a child in a state of being born and before actual birth.'"[103] Professor Richard Stith argues that this bare reference shows that the Court "explicitly left undecided" the issue of whether the

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[96] See *id.* But as argued by Judge Michael McConnell, the result in *Roe*, withdrawing legal protection for fetal life, shows that the Court in fact decided the question. Samuel W. Calhoun & Andrea E. Sexton, "Is It Possible to Take Both Fetal Life and Women Seriously? Professor Laurence Tribe and His Reviewers," 49 *Washington & Lee Law Review* 437, 453 n.79 (1992).

[97] 410 U.S. at 150, 161.

[98] *Id.* at 161-62.

[99] See *supra* notes 80-86 and accompanying text (discussing Born-Alive Infant Protection Acts).

[100] 410 U.S. at 158, 162.

[101] Bopp & Cook, *supra* note 2, at 26. Justice Scalia argues that the partial-birth procedure involves "killing a human child–one cannot even accurately say an entirely unborn human child." *Carhart I*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting).

[102] See *supra* note 32 and accompanying text; see also *infra* notes 206-08 and accompanying text.

[103] 410 U.S. at 118 n.1.

"momentous shift from sub-human to human life [occurs] at the beginning, in the middle, or at the end of the birth process."[104] Since, however, the Court denies personhood only to "the unborn," one can reasonably read its silence about this Texas statute as suggesting "that abortion jurisprudence does not govern state regulation of procedures during extraction of the child."[105] This conclusion is further supported by an exchange that occurred during the oral arguments in *Roe*:

MR. JUSTICE MARSHALL: What does it [the parturition statute] mean?
MR. FLOWERS:[106] I would think that –
JUSTICE STEWART: That it is an offense to kill a child in the process of childbirth?
MR. FLOWERS: Yes, sir. It would be immediately before childbirth, or right in the proximity of the child being born.
JUSTICE MARSHALL: Which is not an abortion.

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[104] Richard Stith, "Location and Life: How *Stenberg v. Carhart* Undercut *Roe v. Wade*," 9 *William & Mary Journal of Women & Law* 255, 266-67 (2003). Yet Professor Stith himself still argues that to disregard the beginning of the birth process is to act inconsistently with *Roe*'s premise that "[l]ocation–in or out of the womb–...determined whether actual human life existed and whether it was constitutionally protected." *Id.* at 255; see *id.* at 266-67.

[105] Bopp & Cook, *supra* note 2, at 26-27. The U.S. Court of Appeals for the Third Circuit gave two reasons for rejecting this argument based on the Texas statute. First, "[t]he fact that the Supreme Court did not *sua sponte* review a provision no party asked it to review says nothing about its position on that provision or on [the argument that *Roe* is inapplicable to partial-birth abortions]." *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000). This is a good point, but the court ignores the important exchange in oral argument concerning the statute. See *infra* notes 106-07 and accompanying text. Second, the court considered any arguments based upon the statute as inapplicable to partial-birth abortion because the statute, "[b]y its own terms...applies explicitly to killing the fetus...during the process of giving birth, not during an abortion procedure." *Farmer*, 220 F.3d at 144. It will be shown that the partial-birth procedure is an instance of "giving birth." See *infra* notes 142-86 and accompanying text.

[106] Robert C. Flowers was an Assistant Attorney General of Texas. *Roe*, 410 U.S. at 115.

MR. FLOWERS: Which is not–would not be an abortion, yes sir. You're correct, sir. It would be homicide.[107]

Based on this dialogue, it is reasonable to conclude that Justice Marshall, who voted with the majority in *Roe*, did not intend to recognize a constitutional right that would bar states from prohibiting killing a child once delivery has begun.[108] Justice Stewart, also in the *Roe* majority, did not question Justice Marshall's characterization. One can therefore reasonably surmise that he agreed with Justice Marshall's understanding that the right to abortion ends when the birth process begins.

It is noteworthy that *Roe*'s inapplicability to the partial-birth procedure was asserted by numerous law professors during the legislative process leading to the Federal Ban.[109] Those law professors who believed a ban to be unconstitutional had mixed responses. Harvard Professor Laurence Tribe, while never commenting directly on the "*Roe* is inapplicable" theory, demonstrated that he failed to grasp its underlying anatomical facts. Tribe asserts that a ban is irrational

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[107] Transcript of Oral Re-argument, *Roe v. Wade*, 410 U.S. 113 (1972) (No. 70-18) (emphasis added), available at http://www.oyez.org/cases/1970-1979/1971/1971_70_18/reargument (last visited Jan. 25, 2010)) My thanks to my former student, Mark Trapp, for bringing this enlightening colloquy to my attention. See Mark M. Trapp, "Blackmun's Bane," *Enter Stage Right*, Jan. 27, 2003, available at http://www.enterstageright.com/archive/articles/0103/0103abortion.htm (last visited Jan. 25, 2010).

[108] I am aware of the grounds for criticizing placing undue emphasis on this exchange concerning a statute that was not under review in *Roe*. See *infra* note 129 and accompanying text.

[109] As mentioned, sixty-three professors endorsed the theory in a 1997 letter to Congress, submitted in conjunction with congressional debate on the proposed ban. See *supra* note 75 and accompanying text. In addition, *Roe*'s limited scope was asserted by several different law professors on multiple occasions during congressional hearings on the ban. See *supra* notes 53-55, 60 and accompanying text.

because it "defies plausible justification in terms of anything real."[110] How so? Because the ban draws a distinction based, strangely, on the physical location of the fetus between the uterus and the vagina...as though the fetus that is being aborted were suddenly to acquire...traits of personhood, simply by virtue of having been moved from one point to another within the woman's body prior to completion of the abortion procedure.[111] Tribe unaccountably overlooks the crucial fact of the fetus's partial emergence into the outside world.[112]

In 1996, Georgetown Professor Mark Tushnet was asked directly whether the partial-birth procedure, "in which a child is partially delivered before being killed and the delivery is completed[,] is within the scope of the protections afforded by *Roe v. Wade*[.]"[113] Tushnet testified that his "intuition" led him to conclude that *Roe* applied because the Court "drew the line at birth," and it would be difficult to draw it any earlier.[114] This is a particularly interesting response given that Tushnet was Justice Marshall's law clerk when *Roe* was reargued and decided. As already shown, the Justice himself had no difficulty in drawing a line earlier than birth–to him, the word "abortion" did not encompass killing a child during the process of childbirth.[115]

Professor Louis Seidman, another Marshall clerk at the time of *Roe*, would seemingly agree with the distinction drawn by Justice

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[110] March 1997 Hearing, *supra* note 52, at 137 (prepared statement of Prof. Laurence H. Tribe).

[111] *Id.* (emphasis added).

[112] See *supra* note 32 and accompanying text. Tribe is not the only one to make this mistake. See *infra* notes 206-08 and accompanying text (emphasizing Judge Richard Posner's error).

[113] April 1996 Hearing, *supra* note 53, at 123 (question from Rep. Canady, Member, House Committee on the Judiciary).

[114] *Id.*

[115] See *supra* notes 106-07 and accompanying text.

Marshall. Seidman, although arguing in 1995 for a ban's unconstitutionality, came close to admitting the validity of the "*Roe* is inapplicable" theory. Professor Seidman's testimony was preceded by that of Professor Douglas Kmiec, who defended the theory.[116] After Senator Fred Thompson repeatedly pressed for Professor Seidman's response to the distinction Kmiec drew between abortions–covered by *Roe/Casey*–and the partial-birth scenario that he asserted fell outside those decisions,[117] Seidman said, "I suppose if Congress wants to pass a law that prohibits stabbing a scissors into the head of a baby where everything is out of the birth canal but a portion of the head, that would be something we could consider."[118] Judge Richard Posner would allow even more extensive protection for the baby. In explaining his constitutional objection to Wisconsin's partial-birth abortion ban, Posner stated:

> We...do not doubt that if in the course of a normal labor the mother asked her obstetrician to kill the baby in the birth canal and he did so, the state could criminalize this act as infanticide. But here...the state has criminalized merely a procedure, and acknowledged the right to abort by an alternative procedure the same fetus whose death by partial birth abortion would subject the doctor to punishment as a murderer. So there is no issue of infanticide, of killing a live baby that is half-born.[119]

Posner thus flatly proclaims that a state can criminalize killing a baby still wholly within the birth canal,[120] i.e., none of it is outside the

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[116] November 1995 Hearing, *supra* note 54, at 170, 174, 194, 198.

[117] See *id.* at 199-200.

[118] *Id.* at 200.

[119] *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 471 (7th Cir. 1998) (citation omitted).

[120] Professor Laurence Tribe presumably would agree: "Nearly everyone, surely, would think it profoundly wrong if 'people with power' chose to treat an admittedly 'unborn' infant, struggling to push itself through the birth canal during the final

mother.[121] His necessary presupposition is that *Roe* does not extend constitutional protection to such an act.

My principal thesis thus far has been threefold: (1) that the abortion right recognized in *Roe* is delimited by the onset of birth; (2) that the partial-birth procedure entails the beginning of birth; and (3) thus that *Roe* does not constrain legislative bans. It might be argued, however, that my syllogism has a glaring weakness– "birth" as used in *Roe* most probably connoted a full-term delivery. Thus, when Justice Marshall indicated that killing a child during childbirth "is not an abortion," he likely had in mind a full-term fetus emerging from the womb in a routine delivery. Judge Posner obviously had such a fetus in mind when he referred to a state's ability to criminalize killing a "baby in the birth canal" during "a normal labor."[122] Consequently, even if one accepts the proposition that *Roe* has a limited scope, the limitation is not nearly broad enough to encompass the typical partial-birth abortion, which occurs far earlier than full-term.[123]

The foregoing argument can be readily overcome by focusing once more on Justice Marshall's suggestion, via his comment on the Texas parturition statute, that *Roe* does not apply to killing a child during childbirth.[124] The Texas statute criminalized killing "'a child in a state of being born and before actual birth, which child would otherwise

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minutes of its mother's labor, as not yet a person morally entitled to our protection and love." Laurence H. Tribe, *Abortion: The Clash of Absolutes* (1990), p. 120.

[121] Posner speaks of a killing within the birth canal, whereas Seidman refers to killing a baby mostly outside the mother. See *supra* text accompanying note 118. It will be shown that Posner's grasp of the anatomy of the partial-birth procedure is erroneous. See *infra* notes 206-09 and accompanying text.

[122] See *supra* text accompanying note 119.

[123] See *infra* note 134 and accompanying text.

[124] See *supra* text accompanying notes 106-07.

have been born alive.'"[125] The critical phrase is "would otherwise have been born alive." Does it connote a full-term delivery? The clear answer is "no." At the time of Justice Marshall's comment,[126] the only proof Texas required was that, "but for the act of the accused,"[127] the child would have been able to breathe following complete separation from its mother.[128] The common occurrence of premature births plainly shows that breathing ability precedes full-term development. Consequently, Justice Marshall, in indicating that the act prohibited by the Texas parturition statute was not an "abortion," did not contemplate a "full-term baby" constraint on *Roe*'s inapplicability to the birth process.

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[125] *Roe v. Wade*, 410 U.S. 113, 118 n.1 (1973).

[126] Marshall made his observation on October 11, 1972. See *supra* note 107.

[127] *Hardin v. State*, 106 S.W. 352, 353 (Tex. Crim. App. 1907).

[128] This understanding of "born alive" is extrapolated from Texas homicide law. A successful homicide prosecution required proof that the victim was living after complete expulsion from the mother's body. See *Wallace v. State*, 10 Tex. Ct. App. 255, 270 (1881). Showing "aliveness" in turn required a showing that the baby breathed following its complete separation. See *id.* at 271-74. If this test was met, the child was deemed to be "born alive." Thereafter, "'however frail it may be, and however near extinction from any cause,'" a person who intentionally killed it would be guilty of homicide. See *id.* at 275-76. The parturition statute, which covers killings "before actual birth," obviously eliminates any separation requirement. Instead, the question is whether the child, had it not been killed during its birth, would have been able to breathe following its complete separation. The homicide standard of "'however frail'" shows that in 1972 the parturition statute did not require proof that the baby would have been viable, see *infra* note 131, had it not been killed prior to complete separation, despite what at least one court has stated. *R.I. Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), aff'd, 239 F.3d 104 (1st Cir. 2001). This conclusion is bolstered by the fact that Texas, a few years after the oral argument in *Roe*, enacted a definition of "born alive" that plainly excludes a viability requirement: a child is deemed to be born alive, "irrespective of the duration of pregnancy," as long as it breathes or shows other stipulated "evidence of life" after its "complete expulsion or extraction" from its mother." *Tex. Fam. Code Ann.* §12. 05(b) (Vernon 1979) (now codified at *Tex. Fam. Code Ann.* § 151.002(b) (Vernon 2001)).

But isn't it unconvincing to rely so heavily on the specifics of the Texas parturition statute in evaluating Marshall's statement? The statute was not at issue in *Roe*,[129] and one therefore cannot fairly assume that Marshall's brief comment was made in full awareness of its particulars. In addition, there is an indication that the Texas courts themselves believe that *Roe* impacted the constitutionality of the Texas statute. In *Showery v. Texas*,[130] the court stated that "[a] prosecution under [the] statute might necessitate an analysis in terms of viability under *Roe*."[131] This statement does not support the "full-term baby" constraint on *Roe*'s inapplicability to the birth process, but it does suggest that there might be a viability constraint.[132] In fact, *Roe*'s emphasis on viability is a principal reason that many courts have rejected the "*Roe* is inapplicable" approach. A representative assertion is that "*Roe*...categorized fetuses as viable or not viable. No case with which we are familiar uses the 'partially born human being' category as a construct for constitutional analysis."[133]

If there is a viability limitation on *Roe*'s inapplicability to the birth process, the argument that *Roe* does not apply to partial-birth abortion bans is largely defeated, for the partial-birth procedure is mainly used

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[129] See *supra* note 105.

[130] 690 S.W.2d 689 (Tex. Crim. App. 1985).

[131] *Id.* at 692. A fetus is viable when it is "potentially able to live outside the mother's womb, albeit with artificial a*id*." *Roe v. Wade*, 410 U.S. 113, 160 (1973).

[132] The court's statement is far from definitive: *Roe* "might" be pertinent. Moreover, the Showery court's statement was dictum, as the case did not involve a prosecution under the parturition statute.

[133] *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997). See, e.g., *R.I. Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999), aff'd, 239 F.3d 104 (1st Cir. 2001); *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp. 2d 478, 497 (D.N.J. 1998), aff'd sub nom. *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000).

for pre-viable fetuses.[134] *Roe* itself, however, refutes a viability constraint. As already noted, the Court denied personhood only to the "unborn," a word that can reasonably be read to exclude any partially delivered baby, regardless of stage of development.[135] Moreover, to impose a viability constraint is to misperceive the role of viability in *Roe*'s analytical framework. Viability marks the point during a pregnancy at which the state interest in potential life becomes compelling, therefore justifying prohibition of abortion.[136] But the beginning of the birth process means that the pregnancy is essentially over.[137] The "potential life" is now manifest as the baby emerges alive from the woman's body. To acknowledge this reality in no way conflicts with the Court's unwillingness to speculate about when life begins in an ongoing pregnancy.[138] Viability is thus not a prerequisite for the power to legislate constitutionally about the birth process.

There is a final argument that *Roe* did not intend to encompass non-viable, partially born children within the abortion right. As noted, Judge Posner assumes that a state can constitutionally prohibit as infanticide the killing of a baby during "normal labor."[139] But he argues that partial-birth abortion bans are unconstitutional because they do not

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[134] See Woodward, *supra* note 3, at 439 (discussing an investigative report by David Brown of *The Washington Post*).

[135] See *supra* notes 100-01 and accompanying text.

[136] See *Roe*, 410 U.S. at 162-63. However, *Roe* prevents the states from according meaningful protection even to viable fetuses. See *infra* notes 219, 227 and accompanying text.

[137] At one point, the *Roe* Court refers to viability as an "interim point" preceding "live birth." 410 U.S. at 160. This does not mean that "live birth" can only occur after viability. The Court no doubt was referring to a pregnancy of normal length, in which viability does precede birth. To say that live birth can never precede viability would be to contradict medical reality. See *infra* notes 159-72 and accompanying text.

[138] See *supra* notes 95-96 and accompanying text.

[139] See *supra* notes 119-21 and accompanying text.

constitute "killing a live baby that is half-born."[140] Posner's characterization of the partial-birth procedure can be evaluated mpirically. If the procedure does in fact kill "a live baby that is half-born"–a test that does not mention viability–Posner's logic compels the conclusion that partial-birth abortion bans, just like the infanticide laws he endorses, are not subject to *Roe*. The Supreme Court in *Carhart II* acknowledges that the partial-birth procedure does kill a baby during its birth.[141] The next section will demonstrate that the Court is correct. *Roe* therefore does not constrain partial-birth abortion bans.

B. *Partial-Birth Abortion Kills a Baby During Its Birth*

Does the reference to "birth" in "partial-birth abortion" ring true? Ban opponents have strenuously said "no," branding the term as disingenuous,[142] propagandistic,[143] and "inflammatory."[144] Professor Cynthia Gorney has written that "[t]here is no textbook reference to any...medical state called 'partial birth.'"[145] Even if one assumes she is correct–which is doubtful today given the prominence of the partial-birth abortion controversy–this would not mean there is no actual physical state of being partially born. To my knowledge, there is no word that means "a person in the process of going through a door

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[140] See *supra* text accompanying note 119.

[141] See *supra* note 91 and accompanying text.

[142] Alisa Solomon, "Fetal Distraction: In the Fight over Abortion, Women's Rights Seem to Have Disappeared," *The Village Voice*, Jan. 27, 1998, at 49.

[143] See *60 Minutes: Partial-Birth Abortion*, *supra* note 53 (comment of Dr. Warren Hern).

[144] "In Depth: Late-Term Abortions" (*America's Talking* television broadcast June 22, 1995) (comment of Vicki Saporta, Executive Director, National Abortion Federation) (on file with author).

[145] Gorney, *supra* note 33, at 33.

from the inside of a house to the outdoors." This does not mean there are no people who are partially outdoors as they emerge from doorways.

The simplest way to resolve this dispute over use of the term, "birth" is to ask if the phrase "partial birth" describes what actually happens in the partial-birth abortion procedure. It does. As pointed out by Justice Clarence Thomas, "the fetus is all but born when the physician causes its death."[146] The fetus dies while being born, i.e., being removed from the woman's body.[147] Its life is terminated when it "has already emerged partly into what we would call in layperson's terms the outside world."[148] Hence, it was partially born at the time of its death.[149]

As noted, Judge Richard Posner asserts that the partial-birth procedure does not involve "killing a live baby that is half-born."[150] His explanation, however, is curious at best–that a state cannot constitutionally prohibit killing the same fetus "by an alternative procedure."[151] Posner here is referring to the fact that partial-birth abortion bans do not apply to standard D&E abortions, in which a fetus is dismembered and removed from the uterus in pieces,[152] rather than

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[146] *Carhart I*, 530 U.S. 914, 986 n.5 (2000) (Thomas, J., dissenting). Thomas's "all but born" characterization is clearly correct, given that either the fetus's head or over half its lower body is outside the woman's body before it is killed. See *supra* note 32 and accompanying text.

[147] See *supra* note 29 and accompanying text.

[148] November 1995 Hearing, *supra* note 54, at 150 (statement of Helen Alvare). And "partly" means far more than minimally. See *supra* note 146.

[149] "'Partial-birth' as a label emphasizes the fact the delivery of a fetus/baby takes place, but only up to a point...." Woodward, *supra* note 3, at 433.

[150] See *supra* text accompanying note 119.

[151] See *supra* text accompanying note 119.

[152] See *Carhart II*, 550 U.S. 124, 135-37 (2007).

being extracted intact, as in the partial-birth procedure. But does Posner's point matter at all in evaluating what actually occurs during the partial-birth procedure? The fetus either is or is not alive and half-born when killed. The fact that it could be killed in some other way is irrelevant.[153]

But there are other possible objections to characterizing the partial-birth procedure as involving an actual partial birth.[154] Admittedly, the initial picture the word "birth" suggests is a full-term, natural birth.[155] That said, few, presumably, would conclude that "partial-birth" is an inapt description because the procedure takes place far earlier than at full-term[156] and depends upon artificial means.

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[153] Despite the weakness of Posner's argument, one court characterizes it as adequately addressing the concern that striking a partial-birth abortion ban "will condone infanticide." See *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp. 2d 478, 498 (D.N.J. 1998), aff'd sub nom. *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000). For an extended discussion of the rationality of banning the partial-birth procedure, despite the inability to prohibit standard D&Es, see *infra* notes 193-233 and accompanying text.

[154] For the argument that the Federal Born-Alive Infants Protection Act precludes the concept of "partial birth," see *infra* note 163.

[155] In fact, some have criticized the term "partial-birth" for the very reason that "birth" most naturally connotes a full-term baby. See Bopp & Cook, *supra* note 2, at 22. Some ban opponents have further alleged that ban advocates deliberately cultivated the misimpression that the partial-birth procedure normally involves near-term fetuses, see March 1997 Hearing, *supra* note 52, at 86-90 (statements of Kate Michelman), a charge denied by ban proponents. See *id.* at 87-88 (statements of Helen Alvare and Douglas Johnson). There undeniably were some instances when ban advocates gave incorrect information. See Vobejda & Brown, *supra* note 47 (relating Newt Gingrich's assertion that the procedure is used to abort "'child[ren] in the eighth or ninth month'"). In fact, the procedure is mainly used for fetuses of "less than 24 weeks gestation." *Id.* It should be noted, however, that Dr. Martin Haskell stated that he knew of a surgeon who used it "up to 32 weeks or more." Haskell Presentation, *supra* note 30.

[156] See *supra* note 134 and accompanying text.

Deliveries prior to full-term are habitually called premature births,[157] and deliveries that are induced, assisted by forceps, or occur via Caesarian section all constitute births.[158] But there are two more serious arguments: the partial-birth procedure is not a partial "birth" because (1) it involves a fetus who likely is pre-viable; and (2) it aims for a dead, not a live, baby. Neither of these characteristics negates a partial "birth."

1. *Viability Is Not a Prerequisite for Partial Birth*

The U.S. Court of Appeals for the Eighth Circuit, in addressing the "*Roe* is inapplicable" argument, believed there was no need to determine whether there is a "legal category" for the "'partially born,'" to which "the rule of *Roe*...does not apply."[159] This step was unnecessary because the record was insufficient to prove that fetuses subject to the partial-birth procedure were partially born"–the word 'born' refers most naturally to a viable fetus, one that is capable of surviving outside the mother," whereas the case seemed "to be

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[157] James Bopp and Curtis Cook are thus correct in saying that "full-term" and "birth...are two completely different things, both legally and in common parlance." Bopp & Cook, *supra* note 2, at 22. While premature births are not uncommon, "birth" has also been used to describe some quite unusual deliveries prior to full-term. *The CBS Evening News* of June 6, 2008 contained an intriguing segment entitled "Born Twice." It was the story of Macee McCartney, who had prenatal surgery at twenty-five weeks. To perform the procedure, the doctors temporarily pulled the uterus from her mother's body and then pulled half of Macee's body outside the uterus. The CBS correspondent spoke of Macee's "two birth dates," i.e., the day of her surgery–"the first time she was born"–and her delivery-day ten weeks later. *Evening News* (CBS television broadcast June 6, 2008) (transcript on file with the author). Katie Couric referred to the "baby born not once, but twice." *Id.*

[158] Macee's example, *supra* note 157, also shows that "birth" includes non-standard removal from the mother. It is interesting that CBS used "birth," not partial birth, to describe Macee's half-delivered state.

[159] *Carhart v. Stenberg*, 192 F.3d 1142, 1151 (8th Cir. 1999), aff'd, 530 U.S. 914 (2000).

exclusively about non-viable fetuses."[160]

Assuming that "born" does "most naturally" refer to a viable fetus,[161] does non-viability mean there can be no partial birth? In answering this question, it is instructive first to consider viability's pertinence to full-birth status. The National Right to Life Committee's Douglas Johnson gives this view:

> The fetus's location is what matters...if it's all the way out of the woman's body and it's alive, it's been born, no matter how developed it is.... "Let's say you have a baby born at twenty-two and three-quarters weeks," ...[and] "[y]ou have two neo-natologists standing over the incubator, arguing about whether they should do this or that, whether it's futile, whether this baby has a chance. Suddenly somebody rushes in from the corridor and strikes the baby on the head with a hammer. Does anybody dispute that a homicide just occurred? No. One neo-natologist may say a certain intervention is futile here. Another may say, 'No, we should do this or that thing.' But they're both going to grab that guy and call the cops."[162]

Johnson's argument rings true. Viability is clearly irrelevant to birth status for fetuses killed after complete separation from the woman. This is now a legal reality under federal law, even if the separation occurred during an abortion procedure. Under the Federal Born-Alive Infants Protection Act, fully separated infants can fit the definition of

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[160] *Id.* See *R.I. Medical Society v. Whitehouse*, 66 F. Supp. 2d 288, 304 (D.R.I. 1999) (suggesting that non-viability in itself precludes a birth process), aff'd, 239 F.3d 104 (1st Cir. 2001). This article's earlier discussion of viability evaluated and rejected the argument that *Roe*'s implied inapplicability to the birth process encompassed only viable fetuses. See *supra* notes 130-38 and accompanying text. The present discussion of viability evaluates the empirical question of whether the concept of "partial birth" includes only viable fetuses.

[161] See *supra* text accompanying note 155.

[162] Gorney, *supra* note 33, at 44. In this hypothetical, the baby's gestational age when born suggests its possible viability. It is unclear whether Johnson would state the same outcome if the baby were clearly non-viable. Regardless, other legal developments demonstrate that lack of viability should be irrelevant to a fully separated baby's entitlement to legal protection. See *infra* notes 163-68 and accompanying text.

"born alive,"[163] regardless of their stage of development.[164] Viability has also been found to be irrelevant in other contexts. Some states issue birth certificates for babies born alive regardless of viability.[165] Most states allow actions for non-fatal prenatal injuries regardless of when

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[163] See *supra* note 85. One court has used this complete separation requirement to suggest that partially separated infants cannot be "born alive." See *National Abortion Federation v. Gonzales*, 437 F.3d 278, 288 (2d Cir. 2006), vacated, 224 F. App.x 88 (2d Cir. 2007). The court's argument reflects a complete misreading of the statute. The Federal Act includes only fully separated infants within its statutory definition of "born alive," but also says that it shall not "be construed to...deny...or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive.'" 1 U.S.C. § 8(c) (2006). The law thus "affirms the existence and dignity of postnatal life without denying the same of prenatal life." Stith, *supra* note 104, at 275. See *National Abortion Federation v. Gonzales*, 437 F.3d 278, 312 (2d Cir. 2006) (Straub, J., dissenting), vacated, 224 F. App.x. 88 (2d Cir. 2007).

[164] See *supra* note 85. Viability is also irrelevant under most State Born-Alive Infant Protection Acts. See, e.g., 5 *Ill. Comp. Stat*. 70/1.36 (Supp. 2008); *Mich. Comp. Laws* §333.1071(2)(b) (2008). Some states require viability, e.g., *Mont. Code Ann*. §50-20-108(1) (2007) (the statute is not named a "Born-Alive Infant Protection Act," but instead is entitled "Protection of premature infants born alive"), but this is a minority view. See H.R. Rep. No. 107-186, at 7, 13 (2001) (stating that thirty States follow a definition of "live birth" that does not contain a viability prerequisite and applies in a failed abortion context).

[165] E.g., Fla. Stat. §§ 382.002(10), 382.013 (2007); 410 Ill. Comp. Stat. 535/1(5), 535/12(1) (2005). The authors of a 2005 British study, which examined the incidence of completely expelled or extracted living fetuses following abortion attempts, presumably would question this practice. The study documents eighteen examples of pre-viable fetuses that met the criteria of "live birth" according to the World Health Organization definition. Vadeyar et. al., *supra* note 83, at 1159-60. The authors said, "it is clear that there is significant underreporting." *Id.* at 1161. The law required that "all live births and neonatal deaths must be registered." *Id.* at 1159-60. Nonetheless, the authors questioned "what purpose it serves to register as a live birth a fetus that is clearly not capable of being born alive and surviving...because the gestational age is below the clinical limit of viability. This...misleadingly increases the perinatal mortality rate." *Id.* at 1161. It is difficult to imagine a more striking example of an effort to mask the reality of live birth.

during pregnancy they were inflicted.[166] Viability is also not a requirement for wrongful death actions brought in connection with babies who died after being born alive.[167] Criminal convictions have also been upheld for causing the death of a live-born baby, regardless of viability.[168]

Stage of development should also be irrelevant to partial-birth status for partially delivered fetuses. Non-viability does not mean that a partially extracted fetus has not been partially born. The key inquiry

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[166] Paul Benjamin Linton, "*Planned Parenthood v. Casey*: The Flight from Reason in the Supreme Court," 13 *St. Louis University Public Law Review* 15, 47-49 (1993).

[167] *Nealis v. Baird,* 996 P.2d 438, 455 (Okla. 1999): "Reason dictates that a child, once born alive, must be recognized as a person regardless of its ability to sustain life for any particular period of time thereafter." *Hudak v. Georgy*, 634 A.2d 600, 603 (Pa. 1993): "[T]oday we are reaffirming the unremarkable proposition that an infant born alive is, without qualification, a person." The *Hudak* court states that "no jurisdiction...[requires] that a child must be viable at the time of [live] birth in order to maintain an action in wrongful death." *Id.* at 602.

[168] See *Showery v. State*, 690 S.W.2d 689 (Tex. App. 1985) (upholding the murder conviction of a doctor who suffocated a fetus after it was removed alive from its mother's body following an abortion attempt). But cf. *People v. Chavez*, 176 P.2d 92, 94-95 (Cal. Dist. Ct. App. 1947) (stating that a showing of viability is required, but, in finding the evidence sufficient to prove that the "child was born alive and became a human being," only mentions "that the baby was born alive and that it breathed and had heart action"). In the non-abortion context, there is also increasing legal recognition of the irrelevance of viability. The Federal Unborn Victims of Violence Act (Laci and Conner's Law) "provides that if a child *in utero* is injured or killed during the commission of certain federal crimes of violence against its mother, then the assailant has committed an offense against two victims: the mother and the unborn child." Luke M. Milligan, "A Theory of Stability: John Rawls, Fetal Homicide, and Substantive Due Process," 87 *Brigham Young University Law Review* 1177, 1183 (2007) (describing 18 U.S.C. § 1841 (Supp. V 2005)). The Act applies regardless of the unborn child's stage of development. *Id.* at 1183 n.19. Thirty-six states have also "incorporated the double-victim approach into their penal codes[,]" *id.* at 1184, and twenty-four of these "provide that unborn children become legally separate entities upon their conception." *Id.* at 1185 & n.25.

is not viability, but whether the fetus is alive.[169] The Supreme Court in *Carhart II* stated that viability is irrelevant to whether a fetus is alive within the womb: "[B]y common understanding and scientific terminology, a fetus is a living organism while within the womb, whether or not it is viable outside the womb."[170] Viability is also irrelevant to whether fetuses are alive when doctors begin to drag them from the womb during the partial-birth process. As previously shown, the evidence plainly establishes that these fetuses are living up until the time their skulls are collapsed.[171] Since they are "all but" outside the woman when this occurs,[172] they are in fact partially born. To say otherwise is to deny physical reality.

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[169] Because the Federal Ban applies even to non-viable fetuses, one court severely criticized Congress for its "misleading and inaccurate language" suggesting that the partial-birth procedure kills a baby during its birth. *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957, 1029-30 (N.D. Cal. 2004), aff'd sub nom. *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), rev'd, *Gonzales v. Carhart II*, 550 U.S. 124 (2007). To the court, "a 'live' fetus is not the same as a 'viable' fetus." *Id.* at 1030. No one can dispute this point. But it is also indisputable that a non-viable fetus can still be alive. "While a fetus typically is not viable until at least 24 weeks lmp [last menstrual period], it can be 'living'...as early as seven weeks lmp, well before the end of even the first trimester." *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163, 1183-84 (9th Cir. 2006), rev'd, *Gonzales v. Carhart II*, 550 U.S. 124 (2007). Why then is it inaccurate to refer to a living, non-viable fetus, largely outside the woman's body, as partially born?

[170] *Carhart II*, 550 U.S. at 147. In upholding South Dakota's informed consent-to-abortion statute, the Eighth Circuit endorsed the "truthfulness" of a required disclosure describing the fetus as "'a whole, separate, unique, living human being,'" with "'human being'" defined as "'an individual living member of the species of Homo sapiens.'" *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 530 F.3d 724, 735-36 (8th Cir. 2008). As stated by Professor Randy Beck, "[n]o one can reasonably doubt that a developing fetus constitutes a living biological organism distinct from its mother long before the point of viability." Beck, *supra* note 11, at 274.

[171] See *supra* notes 33-34 and accompanying text.

[172] See *supra* note 146 and accompanying text.

2. *Intent to Kill Does Not Negate Partial Birth*

The U.S. Court of Appeals for the Third Circuit, in rejecting the argument that *Roe* is inapplicable to partial-birth abortion bans because a fetus "is in the process of being 'born' at the time of its demise," stated that "[a] woman seeking an abortion is plainly not seeking to give birth."[173] The court saw no need to conduct an independent evaluation as to whether the partial-birth procedure initiates a birth process. In fact, even to suggest that a partial birth occurs was to engage in "semantic machinations, irrational line-drawing, and an obvious attempt to inflame public opinion."[174] The woman's intent to kill indelibly marked the procedure as an abortion.

In refusing to view the partial-birth procedure as an actual partial birth, the Court in *Causeway Medical Suite v. Foster*[175] also stressed the woman's intent–"to terminate her pregnancy"[176]–but in addition relied upon the physician's objective in initiating the alleged "'process of birth.'"[177] "'[B]irth'" is induced "artificially" in order to complete a "particular abortion procedure."[178] This marks the procedure as an abortion, not "the killing of a child during delivery."[179]

To say that intent to kill precludes characterizing the partial-birth procedure as killing a partially born child is to saythat "[t]here [are] no objective facts" about birth and the entity being killed.[180] Once the

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[173] *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 143 (3d Cir. 2000).

[174] See *id.*

[175] 43 F. Supp. 2d 604 (E.D. La. 1999), aff'd, 221 F.3d 811 (5th Cir. 2000).

[176] *Id.* at 612.

[177] *Id.* at 618.

[178] *Id.*

[179] See *id.*

[180] Hadley Arkes, *Natural Rights and the Right to Choose* (2002), p. 276. Professor

"fateful choice" to abort is made, "there [is] no child to be killed, no birth to take place."[181] But intent to kill does not alter what has actually occurred in the real world–the partial emergence of a living baby from the woman's body. This physical reality should override anyone's intent.

Lawmakers have already embraced this principle in the different context of Born-Alive Infant Protection Acts. These laws, previously discussed, recognize that birth has in fact occurred when a fetus is completely separated from the woman, even when the separation results from induced abortion.[182] The Acts thus subordinate the woman and doctor's common intent to kill to undeniable physical reality–the existence of a born, living baby.[183]

Arkes does not refer explicitly to the doctor's intent to kill. He focuses on Judge Barry's opinion in the Farmer decision, which spoke only of the woman's intent. See *supra* notes 173-74 and accompanying text. Arkes thinks that "[i]f there was ever a decision that embodied the very vices it was decrying, this must surely have been it." Arkes, *supra*. Why? Because Judge Barry eschews "objective facts" in favor of "perceptions, ... 'semantics' and 'line-drawing'." *Id.*

[181] Arkes, *supra* note 180, at 276.

[182] See, e.g., *supra* notes 81, 85, 164.

[183] The Federal Born-Alive Infants Protection Act was in part motivated by the "logical implications" of the Farmer decision [*supra* notes 173-74 and accompanying text], i.e., once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law.... [T]here would, then, be no basis upon which the government may prohibit an abortionist from completely delivering an infant before killing it or allowing it to die. The 'right to abortion,' under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place. H.R. Rep. No. 107-186, at 2 (2001). Some might criticize this perspective on Farmer as an alarmist interpretation of what the opinion actually sa*id.* Admittedly, there is nothing in Judge Barry's discussion of the significance of intention explicitly indicating that she would give the mother's intention to kill dispositive weight in assessing the legal status of a fully separated child. Still, this possible expansion of intention's impact has troubled others besides the House Committee. See *National Abortion Federation v. Gonzales*, 437 F.3d 278,

Intention to kill also does not change the physical reality of a partially born baby. As noted, Judge Posner believes that a state could criminally punish a doctor who, at the request of the mother, kills a baby in the birth canal.[184] The intent of the mother and the doctor to kill is no obstacle. Posner denies the partially born state of a baby killed during the partial-birth procedure,[185] but his rationale has been shown to be unpersuasive.[186] No one's intention to destroy should be allowed to mask the actual existence of these partially born babies.

This part has shown that partial-birth abortion is not entitled to the *Roe/Casey* level of constitutional protection. Given that the procedure brutally kills a baby during its birth,[187] diminishing partial-birth abortion's constitutional status in itself would be a worthwhile accomplishment,[188] even if no practical consequences followed. But Part III will demonstrate that "demoting" partial-birth abortion in fact

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311 n.14 (2d Cir. 2006) (Straub, J., dissenting) ("If the intent of the mother controls the scope of her right to destroy her offspring, there is no reason why she should not be able to destroy the child after it has completely been separated from her body."), vacated, 224 F. App.x 88 (2d Cir. 2007); Arkes, *supra* note 180, at 276. At least one abortionist has clearly indicated that he feels obligated to kill a fully separated living fetus "because 'my ultimate job on any given patient is to terminate that pregnancy, which means that I don't want a live birth.'" *Richmond Medical Center for Women v. Herring*, 527 F.3d 128, 152 (4th Cir. 2008) (Niemeyer, J., dissenting). Born-Alive Infant Protection Acts eliminate any uncertainty by according legal protection to living, fully separated babies, regardless of anyone's original intention to kill.

[184] See *supra* text accompanying note 119.

[185] See *supra* text accompanying note 119.

[186] See *supra* notes 151-153 and accompanying text.

[187] See *supra* note 91 and accompanying text.

[188] As previously stated, moral repulsiveness alone does not mean lack of constitutional protection. See *supra* notes 76-78 and accompanying text. But a morally repellant practice should receive only the protection that is clearly mandated. Partial-birth abortion is not encompassed by the abortion right recognized in *Roe/Casey*.

could have a significant impact.

III. Consequences of Diminishing Partial-Birth Abortion's Constitutional Status

If partial-birth abortion does not qualify for protection under *Roe/Casey*, are there any constraints on majority will with respect to the procedure? This part demonstrates that any legislation is still subject to "rational basis" review and that partial-birth abortion bans readily satisfy this standard. The part then comments on some of the implications of using the correct evaluative standard in both the federal and state contexts.

A. *Evaluating Partial-Birth Abortion Bans Under the Rational Basis Standard*

The normal standard for evaluating legislative enactments is the rational basis test. *Williamson v. Lee Optical*,[189] a Supreme Court decision in the business realm, contains a classic explanation of this standard: "It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it."[190] But the test applies beyond a commercial setting. In *Washington v. Glucksberg*,[191] which upheld Washington's assisted-suicide ban, the Court stated that to survive constitutional scrutiny a law must only be "rationally related to legitimate governmental interests."[192]

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[189] 348 U.S. 483 (1955).

[190] *Id.* at 488. See also *Ferguson v. Skrupa*, 372 U.S. 726, 730 n.7 (1963), quoting *Sproles v. Binford*, 286 U.S. 374, 388-89 (1932): "When the subject lies within the police power of the state, debatable questions as to reasonableness are not for the courts but for the Legislature, which is entitled to form its own judgment...."

[191] 521 U.S. 702 (1997).

[192] *Id.* at 728. This was the proper test because the Court had first determined that

Do partial-birth abortion bans satisfy the rational basis standard? Are they reasonably related to furthering legitimate governmental interests? Justice Clarence Thomas has written that there is a clear governmental interest in "prohibiting a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life."[193] This quote reveals a legitimate governmental interest–promoting the value of human life–and a step rationally related to its promotion–banning an act "that approaches infanticide."[194] But does this phrase accurately describe the partial-birth procedure? Here is what one nurse observed:

> The baby's little fingers were clasping and unclasping, and his little feet were kicking. Then the doctor stuck the scissors in the back of his head, and the baby's arms jerked out, like a startle reaction, like a flinch, like a baby does when he thinks he is going to fall. The doctor opened up the scissors, stuck a high-powered suction tube into the opening, and sucked the baby's brains out. Now the baby went completely limp.[195]

While these facts seem to speak for themselves as to the accuracy of

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assisted suicide is not a fundamental right. *Id.* Part II of this article has established that the same is true of partial-birth abortion.

[193] *Carhart I*, 530 U.S. 915, 1006 (2000) (Thomas, J., dissenting).

[194] *Id.* In prohibiting an act "that approaches infanticide," Congress intervened to curtail any movement down a slippery slope toward actual infanticide. See *Carhart II*, 550 U.S. 124, 158 (2007). The Court in *Glucksberg*, in concluding that Washington's assisted suicide ban was "rationally related to legitimate government interests," 521 U.S. at 728, relied in part on the state's "fear that permitting assisted suicide [would] start it down the path to voluntary and perhaps even involuntary euthanasia." *Id.* at 732. In addition, Congress could reasonably "think that partial-birth abortion...'undermines the public's perception of the appropriate role of a physician during the delivery process, and perverts a process during which life is brought into the world.'" *Carhart II,* 550 U.S. at 160. Thus, a ban is rationally related to the legitimate governmental interest of "'protecting the integrity and ethics of the medical profession.'" *Id.* at 157 (quoting *Glucksberg*, 521 U.S. at 731).

[195] *Carhart I,* 530 U.S. at 1007 (Thomas, J., dissenting). The Court in *Carhart II* also relied on this description of the partial-birth procedure. 550 U.S. at 139.

Justice Thomas's description–and to bans' resulting rationality[196]–some have argued that partial-birth abortion bans are irrational because they do not prohibit the more common D&E method of killing a second trimester fetus–pulling it "from a woman's body in dismembered pieces."[197] Justices Stevens and Ginsberg have especially advanced this argument[198] and, in doing so, have heavily relied upon an opinion of Judge Posner.[199] Posner's reasoning therefore warrants a closer look.

Posner's opinion was a dissent to a Seventh Circuit decision upholding partial-birth abortion bans in Illinois and Wisconsin.[200] He used an example of the abortion of a hydrocephalic baby to demonstrate the bans' irrationality:

> If the physician performing the abortion crushes the fetus's skull in the uterus, killing the fetus while the fetus is still entirely within the uterus, he is not guilty of violating either of the statutes.... But if before crushing the fetus's skull the physician turns the

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[196] "The question whether...[there is] a legitimate interest in banning the procedure does not require additional authority.... In a civilized society, the answer is too obvious, and the contrary arguments too offensive, to merit further discussion." *Carhart I*, 530 U.S. at 1007-08 (Thomas, J., dissenting).

[197] Gorney, *supra* note 33, at 33.

[198] See *Carhart II*, 550 U.S. at 181-82, 191 (Ginsburg, J., dissenting); *Carhart I,* 530 U.S. at 946-47 (Stevens, J., concurring); *id.* at 951-52 (Ginsburg, J., concurring). Their perspective has led to the further allegation that Congress's only purpose in enacting the Ban was to "chip away" at *Roe*. See *Carhart II*, 550 U.S. at 191 (Ginsburg, J., dissenting). See also Caroline Burnett, "Comment, The Unconstitutional Purpose Behind the Federal Partial-Birth Abortion Act of 2003," 42 *U.S.F. Law Review* 227 (2007). Similarly, it is asserted that state legislators have supported state bans only to "chip away at the private choice shielded by *Roe*." *Carhart I*, 530 U.S. at 952 (Ginsburg, J., concurring). Judge Posner is credited for originating this "chipping away" characterization of legislative motives. *Id.* It will be shown that this view is untenable.

[199] See *Carhart II*, 550 U.S. at 191 (Ginsburg, J., dissenting); *Carhart I*, 530 U.S. at 946 (Stevens, J., concurring); *id.* at 951-52 (Ginsburg, J., concurring).

[200] *Hope Clinic v. Ryan,* 195 F.3d 857 (7th Cir. 1999), rev'd, 249 F.3d 603 (7th Cir. 2001) (reversed due to *Carhart I*).

fetus around so that its feet are protruding into the vagina, he has committed a felony.[201]

Posner believes that to "any rational person, it makes no difference whether, when the skull is crushed, the fetus is entirely within the uterus or its feet are outside the uterus."[202] How can "the position of the feet"[203] have any moral significance?[204]

Posner's argument fails in part because his facts are wrong. He incorrectly thinks that the partial-birth procedure kills the fetus when it is still entirely within the woman, i.e., its feet are "protruding into the vagina."[205] Posner's misperception is made irrefutably clear in an earlier decision in the same lawsuit, in which he states that "death [occurs] while the body of the fetus [is] in the vagina."[206] There is overwhelming evidence contradicting Posner's conclusion. In part due to instruments used to reduce the distance between the cervix[207] and the outer vaginal opening, pulling the fetus into the vagina generally results in its body being in part, if not largely, outside the woman before it is killed.[208]

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[201] *Id.* at 879 (Posner, J., dissenting).

[202] *Id.*

[203] *Id.*

[204] Posner says there is "[n]o reason of policy or morality that would allow the one [but] would forbid the other." *Id.* See *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 470 (7th Cir. 1998) (another Posner opinion in which he wonders "how a rational legislature could sense a moral difference between" the two different abortion methods).

[205] *Hope Clinic*, 195 F.3d at 879 (Posner, J., dissenting).

[206] *Planned Parenthood of Wisconsin v. Doyle*, 162 F.3d 463, 466 (7th Cir. 1998).

[207] The cervix is the lower "neck of the uterus" through which a fetus moves into the vagina. See *Taber's Cyclopedic Medical Dictionary* 382 (20th ed. 2001), p. 832.

[208] One doctor uses a ring forceps to pull the cervix toward the outer vaginal opening. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 874-75 (D. Neb. 2004), aff'd sub nom.

Posner's blindness to what the partial-birth procedure actually entails[209] is richly ironic, for later in his opinion he criticizes public support for partial-birth abortion bans as based "on sheer ignorance of the medical realities of late-term abortion."[210] In purporting to instruct

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Carhart v. Gonzales, 413 F.3d 791 (8th Cir. 2005), rev'd, 550 U.S. 124 (2007). Sometimes the cervix is pulled "to the level of the entrance to the vagina." *Id.* at 875. This in turn means that when the fetal head lodges at the cervix, "the fetal body past the level of the navel may be outside the woman's body." *Id.* at 874. For similar testimony by other doctors, see *id.* at 853, 860, 866, 869, 871, 877, and 881. Based on this evidence, the court concluded "that the cervix of the woman will frequently be at or very near the vaginal opening and sometimes even protruding outside the woman's body. Hence delivery of the fetal body, including the trunk past the navel, 'outside the body' customarily would be anticipated before the surgery begins." *Id.* at 1034 n.160. See also *Northland Family Planning Clinic, Inc. v. Cox,* 487 F.3d 323, 335 n.4 (6th Cir. 2007) (stating that a tenaculum is used to "shorten[], if not eliminate[], the distance between the cervix" and the outer opening of the vagina), cert. denied, 128 S. Ct. 873 (2008); *infra* note 214 (Justice Kennedy's acceptance of testimony that fetal death occurs when all but the fetus's head is outside the woman's body). The Federal Ban, of course, does not even apply unless either the fetus's head or half its lower body "is outside the body of the mother." See *supra* note 32 and accompanying text. This is also true of State bans that use the same limiting language, such as Virginia's recently upheld Partial-Birth Infanticide Ban. See *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 169 & n.1 (4th Cir. 2009). The statutes that Judge Posner criticized, however, did not make ban application conditional on some described part of the fetus being outside the woman at the time of fetal death. The Illinois and Wisconsin statutes spoke only of "partially vaginally deliver[ing] a living human fetus or infant." See *Hope Clinic v. Ryan*, 195 F.3d 857, 862-63 (7th Cir. 1999), rev'd, 249 F.3d 603 (7th Cir. 2001) (reversed due to *Carhart I*). Nonetheless, the evidence shows that "partially vaginally deliver[ing]" a fetus necessarily involves dragging the fetus partially, if not largely, outside the woman's body.

[209] Posner is not alone in his mistake. As noted, Professor Laurence Tribe misunderstands the procedure, *supra* notes 110-12 and accompanying text, as does Judge Maryanne Barry, *supra* note 74. She thinks that a partial-birth abortion ban is "nonsensical" because it bases "the demarcation line between abortion and infanticide...on where in the woman's body the fetus expires during an abortion." *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127, 144 (3d Cir. 2000).

[210] *Hope Clinic v. Ryan,* 195 F.3d 857, 880 (7th Cir. 1999) (Posner, J., dissenting), rev'd, 249 F.3d 603 (7th Cir. 2001).

the "uninformed," he once more misstates the facts by asserting "that the only difference between [the partial-birth procedure] and the methods of late-term abortion that are conceded all round to be constitutionally privileged is which way the fetus's feet are pointing."[211]

While Posner persistently misstates the facts, Justices Stevens and Ginsberg are unwilling to confront them directly. In their concurring opinions in *Carhart I*, they do not even mention that the partial-birth procedure kills a fetus who is partially, if not largely, outside the woman's body. Similarly, in their dissent in *Carhart II*, they only refer (unfavorably) to any line between "'abortion and infanticide' based not on whether a fetus can survive outside the womb, but on where a fetus is anatomically located when a particular medical procedure is performed."[212] "[W]here a fetus is anatomically located" is a phrase well-calculated to mask the reality lying behind the nurse's observation[213]–moving fingers and kicking feet were visible because they had already emerged from the woman.[214]

Because Judge Posner and Justices Stevens and Ginsberg never directly engage the reality of the partial-birth procedure, it is hard to take seriously their assertions of the ban's irrationality. Professor Cynthia Gorney, however, does not dissemble, but graphically

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[211] *Id.*

[212] 550 U.S. at 186.

[213] See *supra* text accompanying note 195.

[214] "Witnesses to the procedure relate that the fingers and feet of the fetus are moving prior to the piercing of the skull; when the scissors are inserted in the back of the head, the fetus's body, wholly outside the woman's body and alive, reacts as though startled and goes limp." *Carhart I,* 530 U.S. 914, 963 (2000) (Kennedy, J., dissenting) (emphasis added) (statement obviously refers to the nurse's testimony, see *supra* text accompanying note 195). The Federal Ban, of course, in instances of feet-first deliveries like the one observed by the nurse, does not even apply unless the fetus's body from above the navel is outside the woman. See *supra* note 32 and accompanying text.

describes the partial-birth procedure, including the fact that "'the baby's body is exposed'" when it is killed,[215] i.e., its body is largely outside the woman. Despite her clear-eyed recognition of this crucial fact, Gorney too argues that a ban, because it does not prohibit the classic D&E technique, "makes clear ethical sense only to people who don't spend much time thinking about abortion."[216] "[I]sn't it ethically repugnant to press the case that one method of ending fetal life is worse than another? Isn't this like arguing about whether murder by gunshot is societally preferable to murder by strangulation?"[217]

Professor Gorney's question deserves a straightforward answer. Before I do so, however, it is important to emphasize the precise legal issue under discussion–whether partial-birth abortion bans are rationally grounded. The question thus is not whether one agrees or disagrees with Gorney's critique. Nor is the question whether ban supporters can convince everyone else to endorse bans. Rather, all that

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[215] Gorney, *supra* note 33, at 34.

[216] *Id.* at 33.

[217] *Id.* at 44. Gorney specifically addresses these two questions to "the dedicated right-to-life person," *id.*, but her article in effect poses them more generally–via her assertion that because "pulling a fetus from a woman's body in dismembered pieces is legal, medically acceptable, and safe," it makes no "ethical sense" to criminalize the partial-birth procedure. See *id.* at 33. Although it will be shown that this argument is deeply misguided, it has broad support. See, e.g., Nussbaum, *supra* note 13, at 84 (*Carhart II*'s "allusions to the state's respect for fetal life spin like an idle wheel, given that the holding does not actually protect fetal lives, in that it permits a range of alternative techniques for late-term abortion") (footnote omitted); *supra* text accompanying notes 110-111 (Professor Laurence Tribe's similar argument). Cf. Jack M. Balkin, "How New Genetic Technologies Will Transform *Roe v. Wade*," 56 *Emory Law Journal* 843, 849 & n.27 (2007) (in view of alternative permissible ways to kill the fetus, *Carhart II* can be criticized for emphasizing the state interest in potential life); Susan Frelich Appleton, "Gender, Abortion, and Travel After *Roe*'s End," 51 *St. Louis University Law Journal*. 655, 661-62 (2007) (legal alternatives of killing the fetus demonstrate that partial-birth abortion bans serve only the state's "ideological or symbolic interests").

ban proponents must do is make a rational case for their position.[218] This task is readily accomplished, as one of Gorney's own illustrations makes clear.

Gorney points out that a woman twenty-eight weeks pregnant who wants an abortion to better fit her prom dress can legally get one under *Roe*.[219] Does this mean that it makes no "ethical sense" to punish as

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[218] Consider Justice Kennedy's response in *Carhart I* to Justices Ginsberg's and Stevens's assertion that Nebraska's partial-birth abortion ban was irrational because it did not prohibit D&E abortion: "The issue is not whether members of the judiciary can see a difference between the two procedures. It is whether Nebraska can.... [The partial-birth procedure's] stronger resemblance to infanticide means Nebraska could conclude...[it] presents a greater risk of disrespect for life and a consequent greater risk to the [medical] profession and society, which depend for their sustenance upon reciprocal recognition of dignity and respect. The Court is without authority to second-guess this conclusion."

530 U.S. at 962-63 (Kennedy, J., dissenting).

[219] Gorney, *supra* note 33, at 40. This observation succinctly captures *Roe*'s impact on state attempts to limit either the permissible reasons for abortion or the point during pregnancy at which abortion is no longer allowed–*Roe* slammed the door on all such regulatory efforts. Gorney thus acknowledges the validity of abortion opponents' summary of the *Roe* standard: "'[L]egal at any time, for any reason, all the way through the ninth month of pregnancy.'" See *id.* at 39-40. This permissiveness is mandatory due to the broad nature of the health exception that limits a state's power to prohibit even post-viability abortions. *Id.* at 39. See *infra* text accompanying note 227. Gorney's accuracy in describing *Roe* is commendable. Incorrect depictions are legion, in particular those stating that *Roe* only prohibited state restrictions on early abortions. Most surprisingly, even Justice O'Connor has made this mistake. Sandra Day O'Connor, *The Majesty of the Law* (2003), p. 45: *Roe* "struck down as unconstitutional limitations by states on abortions in the first three months of pregnancy." For additional examples, see Jack M. Balkin, "*Roe v. Wade*: An Engine of Controversy" in *What Roe v. Wade Should Have Said,* ed. Jack M. Balkin (2005), p.4 n.4: (describing a 2003 ABC News-Washington Post poll that characterized *Roe* "as giving women the ability to get abortions if they want one at any time during the first trimester"); Gregg Easterbrook, "Abortion and Brain Waves," *The New Republic*, Jan. 31, 2000, at 21, 24 (*Roe* "all but ban[ned]" abortion in the third trimester); and Manny Fernandez, "Abortion Protest Draws Thousands," *The Washington Post*, Jan. 23, 2004, at B1 (*Roe* "prevented states from restricting abortion in the first trimester of pregnancy"). For other examples of accurate

infanticide the killing of babies of that age who have been born prematurely? Of course not. Prohibiting the killing of born infants is essential in any civilized society. Gorney shares this view,[220] despite her awareness that society, due to *Roe*, cannot effectively prohibit the killing of the same baby within the womb.

If protecting babies born prematurely is rational, then so are partial-birth abortion bans. The partial-birth technique kills a baby in the midst of a birth process, just inches from being fully born. Bans are thus supported by the same moral reasoning underlying laws punishing infanticide. Interestingly, Posner provides unintended corroboration in the two opinions already cited. In his heralded 1999 dissent, he defends laws against infanticide because it, unlike feticide, occurs after birth. "Once the baby emerges from the mother's body," Posner opined, killing it can no longer be justified.[221] But there is a right to kill "as long as the baby remains within the mother's body."[222] In the partial-birth process the baby is killed–despite Posner's apparent unawareness

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descriptions of *Roe*, see David Brown, "Late Term Abortions; Who Gets Them and Why," *The Washington Post*, Sept. 17, 1996, at Z12 ("Contrary to a widely held public impression, third-trimester abortion is not outlawed in the United States.... [L]ife-threatening conditions need not exist in order for a woman to get a third-trimester abortion."), and Roy Rivenburg, *supra* note 30, at E8: "If a woman can find a doctor who says her emotional health is disturbed by a pregnancy, she can get an abortion at any stage of pregnancy."

[220] Professor Gorney has referred to infanticide as an "unquestionable wrong." See Gorney, *supra* note 40, at 346. While this does not necessarily connote her support of laws against the practice, elsewhere she has implicitly assumed the legitimacy of laws against "child-killing." See Cynthia Gorney, "Reversing *Roe*: Is Mainstream Right-to-Life Ready for an Abortion Ban?" in *The New Yorker*, June 26, 2006, at 46, 52.

[221] *Hope Clinic v. Ryan*, 195 F.3d 857, 882 (7th Cir. 1999) (Posner, J., dissenting), rev'd, 249 F.3d 603 (7th Cir. 2001).

[222] *Id.*

of the fact–when it no longer "remains within the mother's body."[223] Why then is it irrational to prohibit the procedure? In his 1998 opinion, Posner "do[es] not doubt" that a state could criminalize the "killing [of] a live baby that is half-born."[224] It has been shown that this is precisely what the partial-birth procedure entails.

Nor are bans rendered irrational by their failure to prohibit classic D&E.[225] Judge Posner, a chief proponent of this view, contradicts himself by acknowledging that a state can appropriately criminalize "as infanticide" the killing of a baby in the birth canal during "the course

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[223] See *supra* notes 206-08 and accompanying text.

[224] *Planned Parenthood of Wisconsin v. Doyle,* 162 F.3d 463, 471 (7th Cir. 1998). See *supra* notes 119-121 and accompanying text.

[225] In the *Carhart II* oral arguments, Justice Ginsburg rejected as "beside the point" the Solicitor General's ban defense based on concerns about infanticide. Transcript of Oral Argument at 16, *Gonzales v. Carhart*, 550 U.S. 124 (2007) (No. 05-380). Why? Because bans do not prohibit the killing of the same fetus "inside the womb." *Id.* at 4. In response, the Solicitor General asked Justice Ginsberg to consider a "lawful post-viability abortion": "There is a problem with the mother's health, there is a problem with her life so it's a lawful post-viability abortion. I don't think that anybody thinks that the law is or should be indifferent to whether in that case fetal demise takes place *in utero or* outside the mother's womb. The one is abortion, the other is murder" (*id.* at 16). This reply admittedly was somewhat opaque. Its intended, compelling point was that the freedom to kill a child in the womb does not bestow unlimited power to kill it regardless of its location. See *supra* notes 219-20 and accompanying text. But the Solicitor General, in addition to making post-viability abortions sound more restricted than they are, see *supra* note 219 and accompanying text, failed to clarify what "outside the mother's womb" scenario he had in mind–presumably a premature birth. In any event, Justice Ginsburg either missed or deliberately ignored the point the Solicitor General was trying to make. She replied that "if this case were limited to post-viability abortions it would be a different matter." Transcript, *supra* at 17. This comment is completely non-responsive. If bans applied only post-viability, women still could freely have their viable babies killed *in utero*. See *supra* note 219 and accompanying text. Would post-viability bans therefore be irrational? It thus is clear that Justice Ginsberg in no meaningful sense "corrected" the Solicitor General's emphasis on infanticide prevention, as has been claimed. See Burnett, *supra* note 198, at 261.

of a normal labor."[226] But, as Professor Gorney has correctly stated, *Roe* allows the abortion of even a full-term baby: "If the doctor attests that she needs it...the state is not supposed to interfere, no matter how advanced her pregnancy is."[227] Why then, if partial-birth abortion bans are irrational due to their failure to cover D&E, isn't Posner's defense of such infanticide laws also irrational due to their failure to ban full-term abortions? Both laws criminalize killing a baby while it is emerging from its mother, but neither prohibits killing that same baby before it begins to emerge. Consequently, either both laws are irrational or neither is. I obviously endorse the latter option.[228] The emergence of a child from the mother's body has a broader significance than Posner is able to acknowledge. Once the birth process begins–whatever its nature–the child is a proper subject of governmental protection untrammeled by *Roe*.[229]

The gap in ban coverage admittedly leaves most second trimester fetuses unprotected. But any effort to criminalize D&E would plainly

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[226] See *supra* notes 119-20 and accompanying text.

[227] Gorney, *supra* note 33, at 39. See *supra* note 219 and accompanying text.

[228] Additional support for the rationality of partial-birth abortion bans comes from information on how English physicians are advised to handle the problem of fetuses born alive following abortion attempts. Under English law, such a fetus, if viable, "becomes a child and a deliberate act that causes the death of a child is murder, even if that deliberate act precedes the birth." Vadeyar, et. al., *supra* note 83, at 1159. The authors therefore state "that if an abortion is taking place at a gestational age at which the fetus is capable of remaining alive it is imperative that feticide is performed prior to delivery." *Id.* Does the fact that a fetus can legally be killed before delivery discredit the law designed to protect it after its birth? The obvious answer is "no." Similarly, laws protecting fetuses in the delivery process make "ethical sense," contrary to Professor Gorney's assertion, *supra* text accompanying note 216, even though those same fetuses could be legally killed moments before. (For the argument that it is irrelevant that most fetuses killed via the partial-birth procedure are not viable, see *supra* notes 159-72 and accompanying text.)

[229] But cf. *infra* notes 251-67 and accompanying text (discussing how the protection *Roe* affords to dismemberment D&Es impacts partial-birth abortion bans).

be stricken under the *Roe/Casey* standard. Ban proponents can hardly be branded as "irrational" for failing to prohibit what cannot be constitutionally prohibited.[230] They acted prudently by attacking what was constitutionally open to attack, whether under the theory defended in this Article–that the partial-birth procedure is not encompassed by the abortion right–or on the grounds that *Roe/Casey* permit partial-birth abortion bans.

It is hardly novel for lawmakers to combat incrementally what they believe to be evil. Abraham Lincoln first fought slavery by attempting to restrict its expansion, which he believed the Constitution allowed.[231] He delayed assaulting the institution of slavery itself until changed circumstances made that constitutionally permissible.[232] Legal change may someday permit legislatures so inclined to accord more protection to fetal life. Until that day comes, defending the lives of fetuses who have begun the birth process is a cause to be praised, not belittled as irrational.[233]

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[230] Similarly, opponents of pornography are not irrational for failing to seek to criminalize the private possession of pornography, since such an effort would inevitably fall to constitutional challenge. See *Stanley v. Georgia*, 394 U.S. 557 (1969). But they also are acting rationally in enacting constitutionally permissible prohibitions of the private possession of child pornography. See *Osborne v. Ohio*, 495 U.S. 103 (1990); *New York v. Ferber*, 458 U.S. 747 (1982).

[231] See Abraham Lincoln, First Inaugural Address (Mar. 4, 1861), in *The Collected Works of Abraham Lincoln*, vol. 4 (Roy P. Basler ed., 1953), p. 262.

[232] The Emancipation Proclamation, for example, was not issued until Lincoln felt it could be justified "[a]s a military measure" to deprive the enemy of property. See David Herbert Donald, *Lincoln* (1995), p. 456.

[233] Ban opponents are not the only ones who have criticized bans' emphasis upon fetal location. At least one pro-life advocate has expressed concern about stressing physical location in defending the value of human life. To Richard Stith, "location cannot make an ontological difference." Stith, *supra* note 104, at 263. In terms of their "real worth," it does not matter whether humans are within the womb, partially outside the womb, or wholly outside the womb. See *id.* at 261, 272. Rather, "human nature, membership in our species," is what actually underlies "human dignity." *Id.*

B. *Implications for Federal and State Bans*

1. *Federal Ban*

Carhart II left the door open for an as-applied challenge to the Federal Ban due to its lack of a health exception.[234] But it can be argued that under a rational basis standard a health exception is unnecessary. Lawmakers acted to prohibit partial-birth abortion because it closely approaches infanticide. Surely no one thinks that a law prohibiting infanticide must have a health exception. There is no reason to treat partial-birth abortion bans differently. In fact, differential treatment–requiring a health exception–would be especially inappropriate because bans are inapplicable if the fetus is killed prior to its partial delivery.[235] Thus, by killing the child while it is still in the womb,[236] any perceived health benefits that intact deliveries offer women arguably can still be realized without thwarting the purpose of deterring infanticide.[237]

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at 272. From this perspective, partial-birth abortion bans are problematic because they are grounded on a morally irrelevant factor–physical location. But in this regard aren't partial-birth abortion bans like Born-Alive Infant Protection Acts? Physical location–complete separation–is what puts the latter beyond *Roe*'s scope. See *supra* notes 80-86 and accompanying text. They thus erect "a barrier to stop the right to choose from expanding beyond birth." Stith, *supra* note 104, at 275. But, as Professor Stith recognizes, the laws do not interfere "with the right to life expanding into pregnancy." *Id.* Partial-birth abortion bans are no different. They move the barrier to choice back a little further–to the birth process–but they do not preclude the argument that wholly intrauterine life should be protected as well. Any attempt, however, to further protect prenatal life is currently stymied by *Roe*. But see *infra* note 272.

[234] See *supra* note 18 and accompanying text.

[235] See *Carhart II,* 550 U.S. 124, 147-48, 164 (2007).

[236] Common methods include injecting "the fetus with a toxic agent such as potassium chloride or digoxin." *Evans v. Kelley*, 977 F. Supp. 1283, 1318 (E.D. Mich. 1997).

[237] Justice Ginsberg rejects this assertion due to the health risks associated with killing the fetus via injection. *Carhart II*, 550 U.S. at 180 n.6. The weakness in this argument is the apparent routineness with which prior fetal demise is induced. Dr. Leroy

2. *State Bans*

The potential impact of a rational basis analysis on state partial-birth abortion laws is a complicated subject, and it is beyond the scope of this Article fully to explore it. Rather, the types of issues that might arise[238] will be indicated by briefly considering two state bans–in Virginia and Michigan–whose constitutionality has been assessed subsequent to *Carhart II.* The key inquiry in both cases was whether the challenged bans[239] conformed closely enough to the Federal Ban to be upheld.

Virginia's ban was initially stricken by a Fourth Circuit panel because, unlike the Federal Ban, it was interpreted to apply to doctors intending to perform dismemberment D&Es, but who instead accidentally bring an intact fetus substantially outside the woman.[240]

Carhart, for example, almost always does so for fetuses of at least eighteen weeks gestational age. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 854, 907-08 (D. Neb. 2004), aff'd sub nom., *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), rev'd, 550 U.S. 124 (2007). Further, *The Los Angeles Times* reported that of the 3,000 to 5,000 yearly partial-birth procedures known to one abortion proponent in 1995, every single one was preceded by killing "the fetus in the womb–by injecting it with poison or cutting the umbilical cord." Rivenburg, *supra* note 30 at E8. This high incidence of killing the fetus beforehand must mean that doctors have determined that doing so is not particularly risky.

[238] The lack of a health exception could also be grounds for challenging state bans, if, for example, a state decided that its constitution provides more protection to the abortion right than that conferred by the U.S. Constitution. The potential impact of a rational basis analysis on the asserted requirement of a health exception has already been discussed. See *supra* notes 234-37 and accompanying text.

[239] Michigan's statute was not worded as a ban of the partial-birth procedure, see *infra* notes 245-46 and accompanying text, but that plainly was its purpose.

[240] *Richmond Medical Center for Women v. Herring*, 527 F.3d 128, 137-39 (4th Cir. 2008), rev'd en banc, 570 F.3d 165 (4th Cir. 2009). The Federal Ban does not apply to such situations because it requires that a doctor have had the intent to initiate an intact procedure: "If the doctor intends to remove the fetus in parts from the outset, the doctor will not have the requisite intent to incur criminal liability." *Carhart II,* 550 U.S. at 151.

Since regular D&E is the most common second-trimester abortion technique, subjecting doctors who perform it to the risk of prosecution was held to impose an undue burden on the woman's abortion right.[241] The Fourth Circuit, en banc, reversed and upheld the statute.[242] The court acknowledged that the Virginia ban differs from the Federal Ban by covering doctors who intend a D&E, but unintentionally cause an intact partial delivery.[243] Nonetheless, the ban was constitutional because it has other features that "clearly delineate[] the rare circumstances in which a doctor [would] incur liability, thus enabling a doctor to perform a standard D&E without fear that accidental [substantial] emergence of the fetus" would in itself result in criminal prosecution.[244]

Michigan's statute did not even mention the partial-birth procedure. Instead, "it creates a protected legal status for a partially-delivered fetus that it terms a 'perinate.'"[245] A perinate is "'a

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[241] See *Richmond Medical Center for Women*, 527 F.3d at 145-46.

[242] *Richmond Medical Center for Women v. Herring*, 570 F.3d 165 (4th Cir. 2009) (en banc).

[243] *Id.* at 176.

[244] *Id.* at 179. Consider, for example, a doctor who intends to procure a dismemberment D&E, but instead faces a substantially delivered fetus whose head is "lodged in the cervix." *Id.* at 178. The court believed that this situation would "almost always endanger the mother's life." *Id.* The Virginia ban's life-of-the-mother exception would allow the doctor to "complete the D & E procedure...[with] an unequivocal affirmative defense to any criminal liability under the Virginia Act." *Id.*

[245] *Northland Family Planning Clinic, Inc. v. Cox*, 487 F.3d 323, 327 (6th Cir. 2007), cert. denied, 128 S. Ct. 873 (2008). The statute in dispute, the Legal Birth Definition Act, *Mich. Comp. Laws Ann.* §§ 333.1081-85 (West Supp. 2008), was Michigan's third attempt to prohibit the partial-birth procedure. Its first effort, a partial-birth abortion ban, was struck down in *Evans v. Kelley*, 977 F. Supp. 1283 (E.D. Mich. 1997). Its second effort, entitled the Infant Protection Act, was invalidated in *WomanCare of Southfield v. Granholm*, 143 F. Supp. 2d 827 (E.D. Mich. 2000). The third attempt, entitled the Legal Birth Definition Act, was passed in 2003, but vetoed by the Governor. See Betsy DeVos, "Voters Rebuke Partial-Birth Abortion Veto,"

live human being at any point after which any anatomical part of the human being is known to have passed beyond the...[outer vaginal opening] until the point of complete expulsion or extraction from the mother's body.'"[246] The Sixth Circuit invalidated the statute because it lacked those "anatomical landmarks," i.e., the entire head or the body from above the navel downward, that ensure the Federal Ban does not apply to D&E's.[247] Because the challenged statute prohibited standard D&E abortions, it imposed an unconstitutional undue burden on the abortion right.[248]

How might the introduction of a rational basis analysis have impacted the resolution of these two cases? Concerning the issue raised in the Virginia litigation, a constitutional challenge to bans applicable to doctors who do not from the outset intend to procure an intact, partial delivery would seemingly more likely fail under a rational basis approach than under the *Carhart II* analysis, premised in *Roe/Casey*.

The Grand Rapids Press, June 24, 2004, at A15, available at 2004 WLNR 17813169. It was passed again in 2004, having been proposed by an initiative petition, a process that insulated the measure from the Governor's veto power. *Id.* The petition drive garnered over 460,000 signatures. *Id.* This third effort also ultimately failed. See *Northland Family Planning Clinic, Inc., v. Cox*, 394 F. Supp. 2d 978 (E.D. Mich. 2005), aff'd, 487 F.3d 323 (6th Cir. 2007), cert. denied, 128 S. Ct. 873 (2008). Undeterred, Michigan lawmakers in 2008 passed another partial-birth abortion ban, but it was vetoed by Governor Jennifer Granholm. See Chris Christoff, "Gov. Granholm Vetoes Abortion Bill, Mandatory Helmet Bill," *Detroit Free Press*, June 13, 2008, available at 2008 WLNR 11198631. An override attempt was contemplated. *Id.* At present, another ban, introduced in 2009 and tracking the language of the Federal Ban, is under consideration by the Michigan legislature. Partial Birth Abortion Ban Act., S.B. 147, 148; H.B. 4212, 4213 (2009).

[246] *Northland Family Planning Clinic*, 487 F.3d at 327.

[247] *Id.* at 336-37. The statute is triggered when "'any anatomical part'" passes outside the woman. *Id.* at 327. "'Anatomical part' means any portion of the anatomy of a human being that has not been severed from the body, but not including the umbilical cord or placenta." *Mich. Comp. Laws Ann.* § 333.1085(a) (West Supp. 2008).

[248] See *Northland Family Planning Clinic*, 487 F.3d at 336-37.

After all, an abortionist's intent surely is irrelevant to the legislative goal of preventing infanticide. If an intact, living fetus is partially born, killing it constitutes infanticide no matter what abortion technique was initially intended. The recent Fourth Circuit decision, though, shows that such an expanded ban can be upheld even under *Carhart II*.[249] As stated by Judge Wilkinson's concurring opinion, "[t]he state's interest in protecting life recognized in [*Carhart II*] does not vanish when the intact delivery of the child is unintentional.... The state may prohibit a deliberate and unconscionable act against the intact, partially born child, regardless of how the child got there."[250] Consequently, a rational basis approach is not an absolute prerequisite for according constitutional legitimacy to broader bans.

But a potential constitutional obstacle remains–the possible negative impact of more expansive bans on the availability of dismemberment D&Es.[251] These standard D&Es do not involve partial births,[252] and thus would still be subject to *Casey*'s undue burden standard. One could defend a broader ban's constitutionality by following the lead of the Fourth Circuit in ultimately upholding Virginia's ban–emphasize other statutory safeguards that would protect doctors from liability in such instances.[253] This approach convinced the six judges in the majority, but not the five dissenting judges, who thought that the alleged protections for doctors performing dismemberment D&Es were inadequate.[254] A rational basis approach

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[249] See *supra* notes 242-44 and accompanying text.

[250] *Richmond Medical Center for Women v. Herring*, 570 F.3d 165, 181 (4th Cir. 2009) (Wilkinson, J., concurring) (en banc).

[251] The Fourth Circuit panel initially struck down the Virginia ban for precisely this reason. See *supra* notes 240-41 and accompanying text.

[252] But see the discussion in *infra* notes 260-61 and accompanying text.

[253] See *supra* note 244 and accompanying text.

[254] The dissenters believed that the majority's interpretation of the life-of-the-mother

would provide a way to avoid this debate about the effectiveness of Virginia's particular statutory safeguards. As noted, partial-birth abortion bans already provide a safe harbor for abortionists who do not want to risk prosecution–kill the fetus before taking action that could lead to its intact extraction. An injection to stop the fetal heart makes a ban violation impossible.[255] Subjecting an abortionist to this choice arguably is justified by the legitimate governmental purpose of deterring infanticide.[256] Nor is injection barred by concern for health risks to the woman. While there is some risk,[257] it is counterbalanced by the health advantages of avoiding a dismemberment D&E.[258] Injection is also a more humane way to kill the fetus.[259]

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exception was flawed because it would also permit even intentional partial-birth extractions to proceed without liability for the doctor. 570 F.3d at 193-94 (Michael, J., dissenting).

[255] See *supra* text accompanying note 235.

[256] Critics would undoubtedly brand this suggestion as "irrational" because if the injection alternative kills the fetus, how can one reasonably claim that it furthers a state interest against infanticide? This critique, like the similar criticism based on bans' inapplicability to D&E abortion, gives insufficient weight to a fetus's location at the time of its death. See *supra* notes 219-33 and accompanying text.

[257] See *supra* note 237.

[258] The decisions are replete with assertions that D&Es pose greater health risks to women than the partial-birth procedure. These reputed safety disadvantages were the principal factual basis for the view that partial-birth abortion bans must include a health exception. See, e.g., *Carhart v. Gonzales*, 413 F.3d 791, 801-02 (8th Cir. 2005), rev'd, 550 U.S. 124 (2007); *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957, 1000-01 (N.D. Cal. 2004), aff'd sub nom. *Planned Parenthood Federation of America v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), rev'd sub nom. *Gonzales v. Carhart*, 550 U.S. 124 (2007).

[259] One motivation behind the Federal Ban was concern over fetal pain: "[D]uring a partial-birth abortion procedure, the child will fully experience the pain associated with piercing his or her skull and sucking out his or her brain." Congressional Finding 14(M), in notes following 18 U.S.C. § 1531 (Supp. V 2000). Many of the ban cases contain discussions of the fetus's capacity to feel pain. The conclusions expressed

Concerning the Michigan statute, this Article has earlier stressed that the anatomical landmarks it lacks ensure that the partial-birth procedure does entail, contrary to Judge Posner's assertion, killing a "half-born" baby.[260] But if the *Roe* abortion right is delimited by the onset of birth,[261] should a state be permitted to extend legal protection to babies emerging from the mother's body, but not yet "half-born"? A living, intact baby begins the birth process whenever any part of its body, however small, emerges from its mother. This is so even when caused by an abortionist's pulling an extremity outside the womb for the purpose of initiating a dismemberment D&E.[262] Despite this factual

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vary. One federal district judge accepted as a fact "unrebutted...credible evidence that...[the partial-birth procedure] subject[s] fetuses to severe pain." *National Abortion Federation v. Ashcroft*, 330 F. Supp. 2d 436, 479 (S.D.N.Y. 2004), aff'd sub nom. *National Abortion Federation v. Gonzales*, 437 F.3d 278 (2d Cir. 2006), vacated, 224 Fed. Appx. 88 (2d Cir. 2007). Another judge found that "[t]he issue of whether fetuses feel pain is unsettled in the scientific community." *Planned Parenthood Federation of America v. Ashcroft*, 320 F. Supp. 2d 957, 1002 (N.D. Cal. 2004), aff'd sub nom. *Planned Parenthood Federation of America, Inc. v. Gonzales*, 435 F.3d 1163 (9th Cir. 2006), rev'd sub nom. *Gonzales v. Carhart*, 550 U.S. 124 (2007). In any event, the court said the issue is irrelevant, for if a fetus does feel pain, it would experience "no less and in fact [what] might be greater [pain]" in a D&E abortion. *Id.* A third judge assumes that a non-viable fetus is able to feel pain "at some point during its gestation," but believes the issue to be only "marginally" legally relevant, if at all, in part because all methods of killing the fetus would be painful. *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 1029 (D. Neb. 2004), aff'd sub nom. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), rev'd, 550 U.S. 124 (2007). While the court suggests that it is impossible to differentiate levels of pain between death by being "torn apart" in a D&E abortion versus death by heart stoppage due to injection, see *id.*, this conclusion is plainly counterintuitive.

[260] See *supra* notes 207-08 and accompanying text.

[261] See *supra* notes 87-121 and accompanying text.

[262] Justice Thomas, in *Carhart I,* argued that standard D&Es do not involve birth because the concept of "'delivery'" does not encompass removing "the child from the uterus piece by piece." *Carhart I*, 530 U.S. 914, 990 (2000) (Thomas, J., dissenting). The dismemberment that D&Es entail, however, usually does not occur completely within the womb. See *infra* note 263. Thus, a baby typically is still living and intact

reality, a legislature can only protect what the Court allows to be protected. A triggering standard of "'any anatomical part'" reveals a contradiction in the impact of *Roe*, even if properly interpreted. A partial-birth prohibition at this earliest stage of delivery should be allowed due to *Roe*'s "onset of birth" limitation, but any such ban would impermissibly infringe upon the right to a D&E abortion.[263]

One solution to this dilemma[264] would be to rewrite the Michigan statute to track the Federal Ban, thus presumably ensuring constitutional validity. But this obviously sacrifices the principle that any partially born baby is a proper subject of state protection.[265] An

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when its first limb is torn off.

[263] A D&E abortion typically does not tear the fetus apart completely inside the womb. Rather, the doctor pulls a fetal body part, e.g., a leg, out of the womb and often outside the woman altogether before wrenching it off. The disarticulation is possible due to the resistance caused when the rest of the fetus's body lodges at the cervix. Thus, in a D&E abortion, there will often be times when an intact fetus is partially drawn outside the woman before it is killed. See, e.g., *Carhart v. Ashcroft*, 331 F. Supp. 2d 805, 860, 866, 871, 877-78 (D. Neb. 2004), aff'd sub nom. *Carhart v. Gonzales*, 413 F.3d 791 (8th Cir. 2005), rev'd, 550 U.S. 124 (2007). Applying a partial-birth abortion ban to this situation would obviously subject doctors who perform D&E's to the risk of a ban violation. Cf. *Planned Parenthood of Central N.J. v. Verniero*, 41 F. Supp. 2d 478, 497 & n.11 (expressing concern that interpreting *Roe* as inapplicable to partially born fetuses "could potentially exclude all conventional abortion procedures from constitutional protection"), aff'd sub nom. *Planned Parenthood of Central N.J. v. Farmer*, 220 F.3d 127 (3d Cir. 2000). This result could be avoided by retaining the previously criticized intention requirement. See *supra* text accompanying note 249.

[264] It might be argued that the very existence of this dilemma demonstrates that the interpretation of *Roe* defended in this Article is incorrect. After all, is it plausible that the Court would have written a self-contradictory opinion? The problem with this critique is that rejecting the "*Roe* is inapplicable" perspective does not avoid the issue of self-contradiction. If *Roe* is interpreted as still applying once the birth process begins, then what is one to make of all the evidence suggesting that this is not what the *Roe* Court intended? See *supra* notes 92-141 and accompanying text.

[265] It would also sacrifice the argument that the intention of the doctor should be irrelevant to the legal protection offered to partially born babies. See *supra* text

alternative is to argue that the present Michigan statute satisfies the rational basis test. After all, there is no meaningful moral distinction based on how much of a baby is outside the woman.[266] Doctors' freedom to perform D&E's can be preserved by the practice of killing the fetus before beginning any D&E procedure.[267]

CONCLUSION

With respect to what he calls "live-birth abortion," Justice Scalia thinks it "is quite simply absurd" to believe "that the Constitution of the United States...prohibits...banning this visibly brutal means of eliminating our half-born posterity."[268] Scalia is correct, but for reasons beyond those given in his opinion.[269] As has long been argued, the partial-birth procedure is not encompassed by the abortion right conferred by *Roe*.[270] Consequently, current partial-birth jurisprudence

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accompanying note 249.

[266] It can also be argued that there is no meaningful moral distinction based on whether any of the baby is outside the woman. See *supra* note 233. But some part of a living, intact fetus must be outside of the woman to trigger the "*Roe* is inapplicable" argument.

[267] See *supra* notes 255-56 and accompanying text. As previously discussed, this alternative arguably does not impermissibly put women's health at risk, see *supra* notes 257-58 and accompanying text, and also is supported by humanitarian concern for the fetus. See *supra* note 259 and accompanying text.

[268] See *supra* notes 255-56 and accompanying text. As previously discussed, this alternative arguably does not impermissibly put women's health at risk, see *supra* notes 257-58 and accompanying text, and also is supported by humanitarian concern for the fetus. See *supra* note 259 and accompanying text.

[269] Justice Scalia believed that *Casey* did not support the Court's decision to invalidate Nebraska's ban. See *Carhart I*, 530 U.S. at 953-54 (Scalia, J., dissenting). Whether Justice Scalia was correct as to how *Casey* should be applied to state partial-birth abortion bans is beyond the scope of this article, which instead argues that such statutes are not subject to *Casey*.

[270] This article attempts to establish this proposition beyond challenge. At the very

applies the wrong test. State bans and the Federal Ban are properly subject only to rational basis review.

Prominent ban critics, including Judge Posner and Justices Stevens and Ginsberg, assert that bans are irrational because they do not prohibit D&E abortion. To them, the right to kill by one method bestows an unrestrained right to kill. But D&E is protected by *Roe*, whereas the partial-birth procedure is not.[271] Lawmakers thus have much more freedom to act against the latter.[272] Because they can reasonably conclude that killing a child during its birth verges on infanticide, banning the partial-birth procedure plainly satisfies the rational basis test.[273]

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least, it is hoped that the article demonstrates that the "*Roe* is inapplicable" argument has substantial merit and that courts have been wrong to respond to it dismissively or derisively. See *supra* notes 65-74 and accompanying text.

[271] The principal point of this article is that *Roe*, properly interpreted, does not apply to killing a baby during its birth. There is, of course, an alternative argument for the constitutionality of partial-birth abortion bans. As *Carhart II* demonstrates, bans can be written in a way that satisfies the *Roe/Casey* standard.

[272] For an argument that *Carhart II* opens the door to banning dismemberment D&Es, see Stephen G. Gilles, As Justice Kennedy Sa*id.* See *First Things* (Jan. 2008), at p. 18, available at http://www.firstthings.com/article/2007/12/002-as-justice-kennedy-said. Evaluating this contention is beyond the scope of this article.

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