

**IF STANDING BEAR COULD TALK . . .
WHY THERE IS NO CONSTITUTIONAL
RIGHT TO KILL A PARTIALLY-
BORN HUMAN BEING**

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INTRODUCTION

In 1868, a government official attempted to justify the killing of Native American children by the U.S. military by stating that “[n]its make lice.”¹ It was not until 1879 that a federal court held, in the historic case of *United States ex rel. Standing Bear v. Crook*,² that Native Americans were “persons” for purposes of federal law. Now, 120 years later, some of the same legal arguments that were made in an attempt to deny civil rights protection to Standing Bear and other Native Americans are once again being made to deny legal protection to other vulnerable human beings. This time, the victims are partially-born children, delivered up to their head and dangling just inches from complete independence. Once again, the threshold legal issue which must be addressed is whether such children are “persons” for purposes of federal law.

In the mid and late 1990s, the United States Congress and the majority of state legislatures separately addressed a growing public concern regarding the controversial medical procedure legally denominated as “partial-birth abortion,” and now known medically as “D&X” abortion or “intact D&E” abortion. Legislators across the country were so repulsed by the procedure that twenty-seven states and the United States Congress passed statutory bans on partial-birth abortion.³ As one federal court described it, the partial-birth abortion/D&X procedure “is gruesome and inhumane.”⁴ More specifically, the procedure is described as follows:

When the fetus is presented feet first, [the physician], using forceps, pulls the feet of the living fetus from the uterus into the vaginal cavity and then pulls the remainder of the fetus, except the head, into the vaginal cavity to a point where the base of the fetal skull is lodged in the uterine side of the cervi-

1. DEE BROWN, BURY MY HEART AT WOUNDED KNEE 90 (1970) (quoting Colonel John M. Chivington).

2. 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14891).

3. States passing statutory bans on partial birth abortion include: Michigan (1996); South Dakota (1997); Mississippi (1997); Georgia (1997); South Carolina (1997); Arkansas (1997); Arizona (1997); Montana (1997); Alaska (1997); Indiana (1997); Alabama (1997); Nebraska (1997); Tennessee (1997); Rhode Island (1997); Louisiana (1997); Illinois (1997); New Jersey (1997); Iowa (1998); Florida (1998); Idaho (1998); West Virginia (1998); Virginia (1998); Kentucky (1998); Oklahoma (1998); Wisconsin (1998); North Dakota (1999); and Missouri (1999). The 104th U.S. Congress passed the Partial-Birth Abortion Ban Act on March 27, 1996. The act was vetoed by President Clinton on April 10, 1996. The House voted to override the veto, 285-137, but the Senate vote was short of the needed 2/3 majority. The 105th Congress passed the Partial-Birth Abortion Ban Act on October 8, 1997. President Clinton vetoed the act on October 10, 1997. The House again voted to override the veto (296-132), but the Senate failed to override the veto by a margin of three votes (64-36) on September 18, 1998.

4. *Evans v. Kelley*, 977 F. Supp. 1283, 1319 n.38 (E.D. Mich. 1997). Even some abortion practitioners believe it “is a particularly hideous procedure.” *Id.*

cal canal. At that point, the size of the head will not permit him to pull it through the cervical canal into the vaginal cavity. To decompress the fetal skull and evacuate the contents in order to pull it through the cervical canal, [the physician] uses an instrument to either tear or perforate the skull to allow insertion of a cannula and removal of the cranial contents.⁵

One nurse who actually observed the D&X procedure stated:

I have been a nurse for a long time, and I have seen a lot of death – people maimed in auto accidents, gunshot wounds, you name it. I have seen surgical procedures of every sort. But in all my professional years, I had never witnessed anything like this.⁶

She described its effect on a partially-born child as follows:

[The physician] brought the ultrasound in and hooked it up so that he could see the baby. On the ultrasound screen, I could see the heart beat. As [the doctor] watched the baby on the ultrasound screen, the baby's heartbeat was clearly visible on the ultrasound screen.

[The doctor] went in with the forceps and grabbed the baby's legs and pulled them down into the birth canal. Then he delivered the baby's body and the arms – everything but the head. The doctor kept the head right inside the uterus.

.....

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.

I was really completely unprepared for what I was seeing. I almost threw up as I watched [the doctor] doing these things.

Next, [the doctor] delivered the baby's head. He cut the umbilical cord and delivered the placenta. He threw the baby in a pan, along with the placenta and the instruments he had

5. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1106 (D. Neb. 1998) (citations omitted), *aff'd*, 192 F.3d 1142 (8th Cir. 1999), *petition for cert. filed*, No. 99-830 (U.S. Nov. 15, 1999).

6. *Partial Birth Abortion Ban: Hearing on HR 1833 Before the Senate Judiciary Committee*, 104th Cong. 18 (1995) (statement of Brenda Pratt Shafer, R.N.). This procedure is not common, compared to the D&E procedure. However, Dr. LeRoy Carhart, a Bellevue, Nebraska, abortion practitioner, testified at trial that he attempts to perform the procedure on every unborn child he aborts after 16 weeks gestation.

just used. I saw the baby move in the pan. I asked another nurse, and she said it was just reflexes.

....

The woman wanted to see her baby, so they cleaned up the baby and put it in a blanket and handed it to her. She cried the whole time. She kept saying, "I am so sorry, please forgive me." I was crying too. I couldn't take it. That baby boy had the most perfect angelic face I think I have ever seen in my life.⁷

Despite the unprecedented public outcry against this procedure (from both "pro-life" and many "pro-choice" legislators, doctors and citizens),⁸ most of the state partial-birth abortion statutes have since been enjoined or declared unconstitutional.⁹ Many of these cases remain in the courts at various stages of litigation or appeal. Due to the number of cases making their way through the courts, and due to several minority decisions upholding partial-birth abortion bans, it is quite possible the validity of the state statutes will ultimately be decided by the United States Supreme Court.¹⁰ This article will focus on a threshold constitutional issue, heretofore largely avoided by the lower courts, which should be squarely addressed by the Court in any review of state partial-birth abortion statutes. That issue is whether the legal framework established in *Roe v. Wade*,¹¹ and its progeny, applies to a child which is more outside the uterus than inside. In other words, is there a constitutional right to kill a partially-born human being - or are partially-born children entitled to the protection of the Fourteenth Amendment?

The article will explain why partial-birth abortion cases can, and should, be decided outside the legal framework of *Roe* and its progeny, based on the legal classifications concerning personhood created in *Roe* itself. The right of a mother to abort her child applies, according

7. *Id.*

8. Many partial-birth abortion statutes have been passed by overwhelming majorities of both pro-life and pro-choice legislators. For example, Nebraska's statute passed with only one dissenting vote. Nebraska Legislative Journal, 95th Leg., 1st Sess. 2609 (1997) (record of final vote on LB 23). The federal Partial Birth Abortion Ban Act received the support of over two-thirds of the members of the U.S. House in 1996 and again in 1997. Teresa R. Wagner, *The Partial-Birth Abortion War*, THE WORLD AND I, 88-89 (Sept. 1999).

9. See, e.g., *Carhart v. Stenberg*, 192 F.3d 1142 (8th Cir. 1999) (listing numerous decisions of federal district courts), *petition for cert. filed*, No. 99-830 (U.S. Nov. 15, 1999).

10. Nebraska's partial-birth abortion statute was the first to be reviewed at the Circuit Court level. The Eighth Circuit upheld the lower court's decision invalidating the Nebraska statute as well as other lower courts' decisions invalidating the Arkansas and Iowa partial-birth abortion statutes.

11. 410 U.S. 113 (1971).

to *Roe*, only to “the unborn.” Thus, on its face, abortion jurisprudence is limited in applicability to children in utero. The evidence presented in partial-birth abortion cases nationwide makes it clear that the partial-birth abortion/D&X procedure involves a child more outside of the uterus than inside.¹² Since there is no Supreme Court precedent preventing the States from protecting partially-born human beings,¹³ courts need not, and should not, apply the framework articulated in *Roe* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*¹⁴ to partial-birth abortion statutes.

As discussed below, partial birth places a child in a legal status superior to that of mere chattel. Given that partial-birth abortion cases present an issue involving life and death, and given the states’ judicially-recognized interest in fetal life even prior to partial birth, the Court should not place partially-born human beings in the same category as “the unborn” for purposes of reviewing state statutes regulating the partial-birth abortion procedure.

I. THE ABILITY OF THE STATES TO PROTECT PARTIALLY-BORN HUMAN BEINGS IS A QUESTION OF FIRST IMPRESSION AND SHOULD BE SQUARELY ADDRESSED BY THE UNITED STATES SUPREME COURT

Lower federal courts are obliged to follow clear legal precedent regardless of whether it may seem unwise or even morally repugnant to do so. However, a court need not extend questionable jurispru-

12. One court noted in its preliminary injunction memorandum that there was no evidence establishing whether the child undergoing a partial-birth abortion was in the “birth” process. *Carhart v. Stenberg*, 972 F. Supp. 507, 529 n.35 (D. Neb. 1997). However, a state need not establish that fact. A state need only show that the child is not “unborn” or in utero. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part). Nationwide, the evidence has clearly established that the procedure in question is not performed on a child in utero, but rather on a child protruding all but inches from complete expulsion. As one plaintiff abortionist admitted, during D&X or “intact D&E” abortions the abortionist “extracts the fetal body intact, usually feet first, until the cervix is obstructed by the after-coming head, which is too large to pass through the cervix.” *Carhart*, Complaint at ¶ 30, *Carhart v. Stenberg*, 972 F. Supp. 507 (D. Neb. 1997) (No. 4:97 CV3205). Thus, it is clear that the child is mostly *outside* of the womb. Therefore, the children involved are in a different situation than the “unborn.” It is not necessary for the State to prove any more than this to distinguish the case from *Roe v. Wade*, 410 U.S. 113 (1973) and its progeny. Nonetheless, the medical evidence does show that the challenged procedure involves induced uterine contractions followed by a breech delivery, and thus a birth process. *Carhart v. Stenberg*, 11 F. Supp. 2d 1099, 1105 (D. Neb. 1998) (“The AMA report describes the intact D&X as ‘deliberate dilation of the cervix, usually over a sequence of days; instrumental conversion of the fetus to a footling breech; breech extraction of the body excepting the head.’”), *aff’d*, 192 F.3d 1142 (8th Cir. 1999), *petition for cert. filed*, No. 99-830 (U.S. Nov. 15, 1999).

13. *Carhart*, 972 F. Supp. at 529.

14. 502 U.S. 833 (1992).

dence into new areas or apply it in areas outside of where there is clear precedent.¹⁵ This is especially true when a federal court is reviewing the validity of a state statute.

As one federal court has noted, "there is no precedent" regarding the treatment of the partially born as persons.¹⁶ Therefore, this question is a matter of first impression. In such cases, basic principles of federalism as well as the Supreme Court's admonitions in *Casey* favor deference towards a state's legislative judgment. As the Court emphasized in *Casey*, the states' interests in preserving human life have not, heretofore, been given due regard by the lower courts.¹⁷ Since there is no precedent prohibiting States from protecting partially-born human beings, it is appropriate to defer to a state's legislative determination rather than the wishes of the most extreme elements of the abortion industry. As shown by the following examples, courts have faced similar questions throughout the history of the development of civil rights in the United States.

In 1856, the United States Supreme Court held that a "free negro of the African race, whose ancestors were brought to this country and sold as slaves, is not a 'citizen' within the meaning of the Constitution of the United States" and "the special rights and immunities guaranteed to citizens do not apply to them."¹⁸ This infamous decision was eventually overturned by the blood of thousands on the battlefields of the Civil War. Despite the ratification of the Fourteenth Amendment in 1868, the treatment of some individuals as "nonpersons" persisted in the courts. In fact, Native Americans were not recognized as "persons" under the laws of the United States until 1879.¹⁹

In 1973, the United States Supreme Court held that notwithstanding "the well-known facts of fetal development," the "unborn" are not "persons" under the Fourteenth Amendment.²⁰ The result has been that more than one out of every four American children conceived since 1973 have been aborted, most for purely elective reasons.²¹

Now courts are faced with the question of whether partially-born human beings, delivered three-fourths outside of the womb, are "per-

15. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997).

16. *Carhart*, 972 F. Supp. at 529.

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

18. *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 393 (1856) (from syllabus I, 4, 5, 6).

19. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14891).

20. *Roe v. Wade*, 410 U.S. 113, 155, 162 (1973).

21. *Statistical Abstract of the United States*, U.S. Bureau of the Census 117th ed. 83 (1997).

sons” under the Fourteenth Amendment. In a preliminary injunction memorandum, one federal court brushed this issue aside by noting that “there is no precedent” for treating partially-born human beings as persons.²² Amazingly, this is, in essence, the same argument made by the federal authorities in support of denying civil rights protection to Standing Bear and thirty-five other Native Americans in April of 1879 – exactly 119 years previous – in the same court. In *Standing Bear*,²³ Federal District Judge Elmer S. Dundy expressly addressed and rejected this argument:

I must hold, then, that Indians, and consequently the relatives, are “persons,” such as are described by and included within the laws before quoted. It is said, however, that this is the first instance on record in which an Indian has been permitted to sue out and maintain a writ of habeas corpus in a federal court, and therefore the court must be without jurisdiction in the premises. This is a non sequitur. I confess I do not know of another instance where this has been done, but I can also say that the occasion for it perhaps has never before been so great.²⁴

The fact that there is no clear precedent regarding the status of partially-born children does not mean a court must conclude that they are without constitutional protection.²⁵ The United States Supreme Court should refuse to add partially-born human beings to the infamous list of those considered “nonpersons.”

II. *ROE* AND *CASEY* DO NOT PROHIBIT THE STATES FROM PROTECTING PARTIALLY-BORN HUMAN BEINGS

A. UNDER *ROE*, A CHILD’S LEGAL STATUS CHANGES AT BIRTH

Although the arbitrary and unscientific trimester framework of *Roe* was discarded by the courts years ago,²⁶ *Roe* nonetheless remains instructive on certain points of abortion law. It is clear that even under the more restrictive framework applied in *Roe*, which the Supreme Court in *Casey* said failed to give proper weight to the states’

22. *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997).

23. 25 F. Cas. 695 (C.C.D. Neb. 1879) (No. 14891).

24. *United States ex rel. Standing Bear v. Crook*, 25 F. Cas. 695, 697 (C.C.D. Neb. 1879) (No. 14891).

25. *Standing Bear*, 25 F. Cas. at 697 (No. 14891). See *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985) (noting that “a corporation is a ‘person’ within the meaning of the Fourteenth Amendment”).

26. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 873 (1992).

interests, a child's legal status changes dramatically at birth.²⁷ In short, the Court has arbitrarily chosen birth, not viability, as the thaumaturgical moment when a child gains the constitutional status of personhood. Consequently, it is of great significance that a child in parturition is not "unborn," and that the Court has never recognized a constitutional right to kill a partially-born human being.

B. ABORTION OCCURS IN UTERO

Abortion jurisprudence is, to a significant extent, a word game. In a legal context where a child is a non-person one minute and a person the next, terminology and definitions are of critical importance. In this light, it is clear that the killing of partially-born children is inherently different from a true abortion. Abortion is typically defined as the termination of a pregnancy,²⁸ which occurs "within the uterus."²⁹ However, pregnancy differs from parturition or childbirth.³⁰ "Child-birth is defined as 'parturition,' '[t]he act of giving birth.'"³¹ Thus, recognition of a heightened legal status for a partially-born child is not inconsistent with either *Roe* or *Casey* because the right to choose abortion, recognized in *Roe* and *Casey*, applies only with respect to "the unborn."³² A child who is partially outside his or her mother cannot properly be termed "unborn." During the typical partial-birth abortion procedure as described by practitioners, the child is three-fourths born. Only a few inches of the child could arguably be said to be "unborn." Thus, the child, as a whole, is partially-born, not "unborn."³³

27. *Roe v. Wade*, 410 U.S. 113, 160-63 (1973) ("until live birth"; "before live birth"; "upon live birth"; "born alive"; "Perfection of the interests involved . . . has generally been contingent upon live birth.").

28. See, e.g., NEB. REV. STAT. § 28-326(1) (1995).

29. *McNill v. New York City Dept. of Corrections*, 950 F. Supp. 564, 569 (S.D.N.Y. 1996) (citations omitted).

30. See, e.g., *Kirkhuff v. Nimmo*, 683 F.2d 544, 549 (D.C. Cir. 1982).

31. *McNill*, 950 F. Supp. at 569 (quoting WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 255, 858 (1994)).

32. *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 913 (1992) (Stevens, J., concurring in part and dissenting in part).

33. This is really a matter of common sense. No rational person using common sense would describe a child delivered up to its neck as "unborn." *Black's Law Dictionary* defines "born" as the "[a]ct of being delivered or expelled from mother's body, whether or not placenta has been separated or cord cut." BLACK'S LAW DICTIONARY 167 (5th ed. 1979). This definition presents a logical conundrum for those who argue that the child is "unborn" until completely expelled, since the placenta and umbilical cord are, in their legal framework, equal in significance with the head. They are all "products of conception" which are merely medical waste and not parts of a person.

C. THE SUPREME COURT HAS NEVER STRUCK DOWN A STATUTE PROTECTING THE PARTIALLY-BORN

It is true that the status of a partially-born child is a gray area not yet clearly determined by the Supreme Court. Thus far, however, the Court has left protection in place for the partially-born. In *Roe*, the Court noted that a Texas statute, which prohibited killing a partially-born child, was not challenged. The Court set out the statute, which provides: "Whoever shall during parturition of the mother destroy the vitality or life in a child in a state of being born and before actual birth, which child would otherwise have been born alive, shall be confined in the penitentiary for life or for not less than five years."³⁴ The Texas parturition homicide statute is still on the books today,³⁵ and has been found to be good law subsequent to *Roe*.³⁶

D. *CASEY* CONTINUES TO RECOGNIZE THAT THE RIGHT TO ABORTION CONCERNS ONLY "THE UNBORN"

Justice Stevens, in the crucial portion of his partial concurrence and partial dissent in *Casey*, noted that:

The Court in *Roe* carefully considered, and rejected, the State's argument "that the fetus is a 'person' within the language and meaning of the Fourteenth Amendment." After analyzing the usage of [the word] "person" in the Constitution, the Court concluded that the word "has application only postnatally." . . . "In short, the unborn have never been recognized in the law as persons in the whole sense."³⁷

This "fundamental premise" underlying abortion jurisprudence³⁸ is directly at issue in cases challenging partial-birth abortion statutes. As Justice Stevens noted, "live birth" triggers perfection of the unborn child's legal personhood. While "unborn," a child may still be legally killed to preserve the life, and possibly the "health," of the mother even after viability.³⁹ Thus, partial live-birth is a constitutionally sig-

34. *Roe v. Wade*, 410 U.S. 113, 118 n.1 (1973). "Parturition" is "the action or process of giving birth to offspring." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 859 (1985).

35. TEX. CIV. STAT. ANN. art. 4512.5 (West 1976).

36. See *Showery v. State*, 690 S.W.2d 689, 692 (Tex. App. 1985); Tex. Att'y Gen. Op. No. H-369 (1974) (The statute "is not, in truth, an abortion statute."). *Id.* at 3.

37. *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part) (discussing the principles underlying abortion jurisprudence) (citations omitted). Justice Stevens went on to quote *Roe*'s foundational premise that "[p]erfection of the interests involved . . . has generally been contingent upon *live birth*." *Id.* (quoting *Roe*, 410 U.S. at 162) (emphasis added).

38. *Casey*, 505 U.S. at 914 (Stevens, J., concurring in part and dissenting in part).

39. It is important to remember that viability and personhood are two distinct legal concepts. A child becomes a person under the Fourteenth Amendment at birth – regardless of "viability."

nificant event. Since legal personhood "has application . . . postnatally,"⁴⁰ the passage of the child partly outside the womb is an event which differentiates the legal status of the child from one which has not left the womb. Therefore, a child which is all but a few inches from completing birth is no longer "unborn."

Consistent with *Roe*, the *Casey* decision recognizes the legitimate interests of the states "in the health of the woman and in protecting the potential life within her."⁴¹ Once a child is partially, if not mostly, outside the mother's body, she can no longer be correctly classified as "within [the mother]."⁴² The passage of the child partly, i.e., all but a few inches, outside the womb has great legal significance since "*Roe* . . . may be seen . . . as a rule . . . of personal autonomy and bodily integrity."⁴³ A woman's interest in "personal autonomy and bodily integrity" is compromised and diminished once the child is partially outside the woman's body. For example, in some states, even under state law prior to the enactment of partial-birth abortion statutes, it was a criminal offense to kill a child that was delivered outside the mother, but still connected to the umbilical cord and undelivered placenta remaining within the mother.⁴⁴ The difference between partial-birth abortion and murder, therefore, is literally mere inches.

Some may argue that personhood only attaches when the child is completely extracted from the mother. However, that is not what *Roe* said. *Roe* said that the "unborn" are not persons. Those who are partially born are no longer "unborn." Therefore, the act of delivering all but a few inches of a child before killing it has constitutional implications. That child is no longer "unborn" but is partially born and at least partially, if not completely, clothed in personhood. This may seem semantical. However, as noted above, abortion jurisprudence is based on definitions and arbitrary distinctions. It must be remembered that the States did not arbitrarily condemn "the unborn" to persona non grata status with respect to the Fourteenth Amendment. The States are entitled to use and rely on the exact line of demarcation established by the Court.

40. *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part).

41. *Id.* at 871 (emphasis added).

42. *Id.* See Floor Debate LB 23, 95th Leg. 1st Sess. 58R (Neb. June 3, 1997) (statement of Sen. Pam Brown) (stating "there are some issues about this procedure that challenge even those of us who believe in a woman's right to choice . . . at least part of the fetus is outside the uterus . . .").

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

44. See, e.g., NEB. REV. STAT. § 28-331 (Reissue 1995) (statute requiring attending physician performing an abortion to preserve the life any child born alive, regardless of gestational age, even where placenta and umbilical cord are still attached and remaining inside the mother). Again, this presents a conundrum for those who insist a child is "unborn" until completely expelled since, under their legal framework, the placenta is legally indistinguishable from the head as both are mere products of conception.

In sum, the rules and legal tests set forth in *Casey* and *Roe* have application only to "the unborn," and do not govern state protection of a partially-born child. Therefore, to sustain a ban on killing a partially-born human being, a State need only have a rational basis for the prohibition. A ban on partial-birth abortions is rationally related to a number of legitimate state interests which have been described in detail by the courts.⁴⁵

III. A PARTIALLY-BORN HUMAN BEING IS A PERSON UNDER THE FOURTEENTH AMENDMENT

The Fourteenth Amendment provides that:

All persons born or naturalized in the United States . . . are citizens of the United States and of the State wherein they reside. No State shall make or enforce . . . any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of laws⁴⁶

The question is whether a partially-born human being qualifies as a "person" under this provision. The fact that it is even a question is amazing when one considers that some nonliving, nonhuman entities are persons. A corporation is a legal entity which has no mind, body, or soul. Yet, "[i]t is well established that a corporation is a 'person' within the meaning of the Fourteenth Amendment."⁴⁷ If a legal fiction may be a "person," surely a partially-born human being, just inches from complete independence, is a person as well. While "the unborn" have been denied status as persons and citizens under the Fourteenth Amendment by the United States Supreme Court, the partially born have never been relegated by the Court to this sub-person status.⁴⁸

Partial-birth abortion is not protected by *Roe* or *Casey* since it occurs during an induced birth process on a live child. This fact can be seen by examination of trial testimony describing how abortionists perform the partial-birth abortion/D&X procedure:

1. The doctor sees the unborn child on his ultrasound screen. He sees the position and parts of the child. "Under ultrasound, you can see the extremities. You know what is

45. See, e.g., *Washington v. Glucksberg*, 521 U.S. 702 (1997) (interest in preserving the integrity of the medical profession); see generally *State v. Joubert*, 224 Neb. 411, 399 N.W.2d 237 (1986) (interest in preventing brutality, barbarism, atrocities and depravity).

46. U.S. CONST. amend. XIV, § 1.

47. *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 881 n.9 (1985).

48. See, e.g., *Roe v. Wade*, 410 U.S. 113, 118 n.1 (1973); *Showery v. State*, 690 S.W.2d 689, 692 (Tex. App. 1985).

what. You know what the foot is, you know what the arm is, you know what the skull is."⁴⁹

2. He intentionally grabs the child and pulls it into the birth canal. "By grabbing the feet and pulling down on it or by grabbing a knee and pulling down on it, usually you can get one leg out, get the other leg out"⁵⁰
3. The unborn child is alive during all the above steps. "I can see fetal heartbeat on the ultrasound."
4. A breach birth process is then continued. "We remove the feet and continue with traction on the feet until the abdomen and the thorax [chest] come through the cavity. At that point . . . you have to bring the shoulders down . . . and then at that point the . . . base of the fetal skull is usually in the cervical canal."⁵¹
5. Induced maternal contractions are used to aid in the birth process.⁵²
6. Then, just before delivery is completed, the child is intentionally killed. "[A]nd that's where you would rupture the fetal skull to some extent and aspirate the contents out."⁵³

As is evident from the above description, the partial-birth abortion process is really nothing more than infanticide thinly veiled in abortion terminology. In this light, statutory bans on partial-birth abortion are clearly constitutional as they are rationally related to a state's interest in preserving the life of its partially-born citizens.

In sum, there is no logical basis for a court to conclude that a child, which is a few inches from being delivered, is a "nonperson," but the same child delivered an additional few inches is a "person." Such a distinction is irrational and arbitrary. Irrational and arbitrary distinctions, especially in the context of life and death, are a cancer on the rule of law and breed disrespect and mistrust of the judicial system. Such a reading of the Fourteenth Amendment is contrary to sound logic and law, and is not dictated by any decision of the United States Supreme Court. The Fourteenth Amendment should not be read as excluding partially-born children from legal protection.

49. Record at 110, *Carhart v. Stenberg*, 11 F. Supp. 2d 1099 (D. Neb. 1998) (No. 4:97CV3205) (testimony of partial-birth abortionist Dr. LeRoy Carhart).

50. Record at 110, *Carhart* (No. 4:97CV3205).

51. *Id.* at 112.

52. *Id.* at 85, 163.

53. *Id.* at 112.

IV. THE TRANSITION FROM THE STATUS OF BEING "UNBORN" TO BEING PARTIALLY BORN IS A CONSTITUTIONALLY SIGNIFICANT EVENT WHICH DIFFERS FROM THE CONCEPT OF VIABILITY

One objection to providing legal protection to partially-born children is that they are not necessarily "viable" at the time of the procedure. Such objections, however, display a lack of understanding of the fact that providing legal protection to partially-born children is not a change from existing law.

The birth process has constitutional significance which is separate and distinct from the concept of viability. The United States Supreme Court, not the states, based the test for personhood on birth, rather than viability, for purposes of the Fourteenth Amendment's right to life. Nonetheless, some lower courts have failed to recognize the important legal distinction between being "born" and being "viable."⁵⁴ It is true that only those "unborn" children who are also "viable" may be protected (at least in theory) by the states from abortion. However, such protection comes in spite of the fact that the viable unborn are still not legally "persons." The states' ability to regulate post-viability abortion is based on the Court's holding that the states have a compelling interest in protecting such "potential" persons at this stage of development.⁵⁵

In contrast, it is well established that all "born" children are "persons" for purposes of the Fourteenth Amendment regardless of whether or not they are "viable." A fetus who is prematurely delivered or aborted alive, prior to viability, is a person for all legal purposes.⁵⁶ Medically, they are a terminally-ill person, since they are not able to sustain life for very long outside the womb. However, dying persons are still persons that are afforded protection by the states. Consequently, for a court to conclude that viability is the only constitutionally-significant status is simply incorrect and ignores clear precedent to the contrary.⁵⁷

The constitutional significance of birth, and its distinction from viability, can be understood from the fact that a Section 1983 civil rights action, for deprivation of the right to life under the Fourteenth Amendment, could be brought on behalf of a nineteen-week old, non-viable prematurely-born baby who faced death at the hands of a government hospital official who wanted to euthanize the child, rather

54. See, e.g., *Carhart v. Stenberg*, 972 F. Supp. 507, 529 (D. Neb. 1997).

55. See, e.g., *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

56. See, e.g., *Showery v. State*, 690 S.W.2d 689 (Tex. App. 1985).

57. See, e.g., *Carhart*, 972 F. Supp. at 529.

than allowing her to die naturally after her premature birth.⁵⁸ Likewise, criminal homicide charges could be, and have been, brought due to the killing of a "non-viable" child after live birth.⁵⁹ These examples highlight the significance of the "parturition homicide" statute left standing in *Roe*, under which the killing of a partially-born child was made a criminal offense.

The significance of the distinction between birth and viability can also be understood by examining the consequences of failing to recognize the difference between the two. If there was no constitutional distinction between the concepts of viability and birth, then some untenable results would follow. If only viability mattered, abortionists would not need to kill the baby while inside the mother. If the child was not "viable," an abortionist could completely deliver the "non-viable" baby and then inject its heart with digoxin or cause death in any other manner, including a blow to the head or a knife to the heart.

Such a barbaric and absurd result cannot be, and is not, a correct reading of the state of the law in the United States. In fact, this precise issue was considered by a state appellate court in 1985. In *Showery v. State*,⁶⁰ a physician was convicted of murdering an infant seconds after birth.⁶¹ The defendant performed an abortion, extracting the child alive, and then immediately suffocated the child by placing the child in a plastic bag, with the placenta over its face, and submerging the child in a bucket of water.⁶² The defendant claimed his prosecution violated the United States Supreme Court's decision in *Planned Parenthood of Central Missouri v. Danforth*⁶³ "on grounds of unconstitutional overbreadth in relationship to viability as established in *Roe*."⁶⁴ On appeal, the doctor claimed he could not be prosecuted for "conduct directed at a non-individual"⁶⁵ because he claimed the murder charge was "founded upon conduct affecting a non-viable fetus."⁶⁶

The court conducted an extensive analysis of the viability versus birth issue and expressly stated that the Supreme Court "did not hold that life begins at viability. Viability was solely adopted as the point of compelling State interest justifying State regulation on behalf of the

58. See *Guyton v. Phillips*, 606 F.2d 248, 250 (9th Cir. 1979) (that Section 1983 action may be brought on behalf of a "living human being").

59. *Showery*, 690 S.W.2d at 691.

60. 690 S.W.2d 689 (Tex. App. 1985).

61. *Showery v. State*, 690 S.W.2d 689, 691 (Tex. App. 1985).

62. *Showery*, 690 S.W.2d at 691.

63. 428 U.S. 52 (1976).

64. *Showery*, 690 S.W.2d at 691.

65. *Id.* at 692.

66. *Id.* at 694.

life potential in the fetus.”⁶⁷ The court found that the concept of viability announced in *Roe*, *Danforth*, and *Franklin v. Colautti*⁶⁸ applied only “[to fetuses] in utero.”⁶⁹ The court also specifically held that States may enact criminal penalties for “conduct directed toward the fetus after removal from the mother’s body” prior to viability.⁷⁰

V. STATES HAVE A LEGITIMATE INTEREST IN PREVENTING NEONATICIDE AND INFANTICIDE WHICH IS SERVED BY BANNING THE KILLING OF PARTIALLY-BORN CHILDREN

Shocking cases of “neonaticide,” or the killing of newborn children, have come to light in recent years across the United States. In southern California, a twenty-year old business major “strangled her newborn, then pushed her into a trash chute.”⁷¹ In New Jersey, an eighteen-year old high school senior was charged with murder “after delivering her infant son in a bathroom stall during her senior prom and then allegedly choking him to death before tossing him into the garbage.” Two days later in Los Angeles, a nineteen-year old was charged with “killing her newborn baby girl and then dumping her in a garbage can outside her home in a middle-class suburb.” In Delaware, a college freshman and her boyfriend were charged “with killing their newborn son and leaving his body in a trash bin.”⁷²

Newsweek magazine quotes a psychiatry professor as saying, “[t]he mother who kills a newborn . . . doesn’t see it as a human or a child . . . They think of it as a foreign body that has passed through them.”⁷³ Although, this thinking may be consistent with the reasoning of *Roe*, the practice of neonaticide is still a criminal act. According to Federal Bureau of Investigation statistics, the number of children murdered, under a week old, has increased ninety-two percent since 1973— the year *Roe* was decided.⁷⁴

The above referenced, nationally-reported cases graphically demonstrate the problem that would be created by categorizing infants who are partly outside of their mother’s bodies as “nonpersons.” To do so would effectively authorize the killing of infants during birth.

67. *Id.*

68. 439 U.S. 379 (1979).

69. *Showery*, 690 S.W.2d at 693.

70. *Id.* at 693-95.

71. Barbara Kantrowitz, *Cradles to Coffins: It's An Unusual Crime, But Neonaticide Still Shocks The Public And Perplexes Researchers*, NEWSWEEK, July 7, 1997, available in 1997 WL 9316029, at * 1-3.

72. *Id.*

73. *Id.*

74. Marc Peyser, *Death in a Dumpster (teenagers Amy Grossberg and Brian Peterson Jr., charged with murdering their newborn baby boy)*, NEWSWEEK, Dec. 2, 1996, available in 1996 WL 13455414, at *2.

CONCLUSION

The right of a mother to abort her child applies only with respect to "the unborn." Thus, on its face, abortion jurisprudence is limited in applicability to children in utero. The evidence presented in partial-birth abortion cases nationwide makes it clear that the partial-birth abortion procedure involves a child more outside of the uterus than inside. Courts need not, and should not, apply the *Roe-Casey* legal framework when reviewing States' efforts to protect partially-born human beings. There is no constitutional right to kill a partially-born human being.