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The Mutation of Choice Recent Development.

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RECENT DEVELOPMENT

THE MUTATION OF CHOICE

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I. INTRODUCTION

The most effective way of making people accept the validity of the values they are to serve is to persuade them that they are really the same as those which they, or at least the best among them, have always held, but which were not properly understood or recognized before. The people are made to transfer their allegiance from the old gods to the new under the pretense that the new gods really are what their sound instinct had always told them but what they had only dimly seen. And the most efficient technique to this end is to use the old words but change their meaning.[1]

1. FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM 157 (1944).

Writing during World War II, Austrian economist Friedrich A. Hayek presciently observed the incredible power of language.[2] Hayek warned his readers that language was being distorted to serve political goals, primarily in an attempt to justify the changing social and moral values of the times.[3] According to Hayek, *freedom* had historically meant only freedom from arbitrary and coercive government powers.[4] A subtle linguistic change, however, transformed this traditional meaning of freedom into "freedom from necessity, release from the compulsion of the circumstances which inevitably *limit the range of choice* of all of us."[5] Hayek recognized the economic and political implications of this alteration of the word *freedom* and perceived the subsequent socialist distortion of economic choice to be a disguise for "equal distribution of wealth."[6] Thus, Hayek lamented that the linguistic distortion of *freedom* and *liberty* left these "words so worn with use and abuse that one must hesitate to employ them to express the ideals for which they [previously] stood."[7]

Subsequent generations have remained oblivious to the semantic ploys being used to alter the values these words once held.[8] Even today, values

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2. *See id.* at 158–59 (describing confusion that results from change in meaning of liberty).

3. *See id.* (explaining how perverting meanings of various moral and political terms allows those words to "serve as instruments of totalitarian propaganda"). Hayek was writing specifically about his belief that definitions of liberty were being distorted to introduce socialist ideology. *See id.* at 157–58 (lamenting misleading use of word liberty by socialists). His writings created "a stir" among academics at the time. WILLIAM EBENSTEIN & ALAN O. EBENSTEIN, GREAT POLITICAL THINKERS 903 (5th ed. 1991).

4. *See* FRIEDREICH A. HAYEK, THE ROAD TO SERFDOM 25 (1944) (noting that original meaning of *freedom* was "freedom from coercion, freedom from arbitrary power of other men, release from ties which left the individual no choice but obedience to the order of a superior").

5. *Id.* at 26 (emphasis added).

6. *Id.* Hayek found that the idea of freedom had been manipulated to be just another word for "power or wealth." *Id.* In actuality, he believed, the promise of freedom was a disappearance of the range of economic choice for people, and, in essence, "freedom was thus only another name for the old demand for an equal distribution of wealth." *Id.*

7. *Id.* at 14; *see* Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 210 (1995) (perceiving Hayek's construction of liberty as immunity from state interference but not "unfettered freedom").

8. This Recent Development does not suggest that all members of subsequent generations are unaware of political language distortion. Numerous philosophical discussions regarding language distortion span a variety of disciplines. This Recent Development suggests only that the majority of United States citizens is unaware of the current way in which these terms are being employed for political purposes. *See* Peter Goodrich, *Law and Language: An Historical and Critical Introduction*, 1984 J.L. & SOC'Y 173, 173 (noting that although legal theories have always been dependent upon linguistic analysis, "no coherent or systematic account of the relationship of law to language has ever been achieved").

are being manipulated through the distortion of language, and, once again, *freedom* and *liberty* are the vehicles being used to transport out the old values and usher in the new ones. Nowhere is this manipulation of language more apparent than in the ongoing discussion about abortion, one of the most volatile debates in the United States. Both sides of this debate have advanced their choice of terminology—baby or fetus, freedom of choice or murder—as the proper way to frame the discussion.[9] Most recently, the ongoing debate over language has erupted in the feud over partial-birth abortion,[10] a type of abortion that has been described as "4/5ths infanticide, 1/5th abortion."[11] In this context, words appear to have been manipulated in such a way as to render them void of their original meaning.[12]

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9. One needn't look further than the editorial page to see how opponents vie to have their terminology accepted. *Compare Letter to the Editor from Raymond I. Knight*, INDIANAPOLIS NEWS, May 3, 1997, at A4 (describing abortion as murder and partial-birth abortion as "satanic sacrifice"), *with* Kimberly Mills, Editorial, *Doctor Exposes 'Partial-Birth' Abortion Lies*, SEATTLE POST-INTELLIGENCER, Apr. 27, 1997, at F2 (preferring "intact D & E" as correct term for partial-birth procedures and arguing that procedure is almost always done for therapeutic reasons).

10. Partial-birth abortion is defined as "any abortion in which a living baby is partially delivered before killing the baby and completing the delivery." Partial-Birth Abortion Ban Act of 1995, H.R. REP. NO. 104-267, at 2 (1995). Partial-birth abortions are also referred to as D & E dilation and extraction, or intact D & E, or intact D & X. *Partial-Birth Abortion Ban Act of 1997: Hearings on H.R. 1122 Before the Senate Committee on the Judiciary*, 105th Cong. (1997) (statement of Curtis Cook, M.D., maternal-fetal medicine), *available in* 1997 WL 8221117.

11. NATIONAL CONFERENCE OF CATHOLIC BISHOPS, SECRETARIAT FOR PRO-LIFE ACTIVITIES, 4/5 INFANTICIDE 1/5 ABORTION (on file with the *St. Mary's Law Journal*). "Why all the furor over partial birth abortion? Because unlike any other abortion, this procedure kills a living infant when she is almost fully delivered from her mother's womb. It's a painful, brutal procedure that's paving the way to open infanticide." *Id.*; *see* Terence Hunt, *Bill to Ban Late-Term Abortions Is Vetoed: Dole Says Procedure 'Blurs the Line Between Abortion and Infanticide*,' PEORIA J. STAR, Apr. 11, 1996, at A1 (reporting Senator Dole's position that partial-birth abortion technique is close to infanticide).

12. St. Thomas Aquinas (1225–1274) declared natural law to be "nothing else than the rational creature's participation of the eternal law." I ST. THOMAS AQUINAS, SUMMA THEOLOGICA q.91 a.2 (Fathers of the English Dominican Province trans., 1947). In his discussion of natural law, Aquinas outlines the first precept of natural law: "*good is to be done and pursued, and evil is to be avoided.*" *Id.* at q.94 a.2. (emphasis in original). Aquinas viewed all subsequent natural law precepts as based on this first precept. *Id.* From this discussion, Aquinas concluded that "whatever the practical reason naturally apprehends as man's good (or evil) belongs to the precepts of the natural law as something to be done or avoided." *Id.* Aquinas's words, however, are frequently misunderstood as an argument that humankind innately knows what is good or evil and that law should be promulgated on this basis. The error of this interpretation lies in the failure to consider Aquinas's words within the context of Divine law:

> Besides the natural and the human law it was necessary for the directing of human conduct to have a Divine law. . . . First, because it is by law that man is directed how to

This Recent Development suggests that the United States Supreme Court has played a major role in this linguistic manipulation by using the United States Constitution to authorize nearly unlimited individual freedom, thus abandoning the document's Christian natural law foundation[13] in its abortion decisions. The Court, while professing adherence to the letter of law of the Constitution, has redefined words such as *life*, *liberty*, and *freedom* in order to persuade society that the new values are really the same as the values society has always held. Thus, the Court continues to speak natural law language, but with a new perverted meaning.[14]

This Recent Development focuses on the role of linguistic manipulation in the modern social and political debate over partial-birth abortions and argues that the issue can be settled by looking to Christian natural law principles. To set the background for this discussion, Part II of this Recent Development discusses President Clinton's veto of legislation entitled the Partial-Birth Abortion Ban Act, that would have prohibited this type of abortion. Part III summarizes the United States Supreme Court's preeminent abortion cases to illustrate the logic employed by the Court in these decisions and to attempt to predict how it might resolve a challenge to a partial-birth abortion ban's constitutionality. Part IV reviews the role of Christian natural law in the American legal system and examines how natural law principles have been twisted to reach morally unacceptable results. Finally, Part V calls for both an end to partial-birth abortions and a renewed commitment to the sanctity of human life.

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perform his proper acts in view of his last end. And indeed if man were ordained to no other end than that which is proportionate to his natural faculty, there would be no need for man to have any further direction of the part of his reason, besides the natural law and human law which is derived from it. But since man is ordained to an end of eternal happiness which is inproportionate to man's natural faculty, . . . therefore it was necessary that, besides the natural and the human law, man should be directed to his end by a law given by God.

Id. at q.91 a.4. Although discoverable through reason, natural law is guided by Divine law.

13. *See* A.E. Dick Howard, *The Indeterminacy of Constitutions*, 31 WAKE FOREST L. REV. 383, 384 (1996) (noting that in advocating break from British authority, early American colonists often referred to natural law, or "God's law"); Harry V. Jaffa, *Graglia's Quarrel with God: Atheism and Nihilism Masquerading As Constitutional Argument*, 4 S. CAL. INTERDISCIPLINARY L.J. 715, 719–20 (1996) (illustrating Founders' adherence to Christian natural law).

14. *Cf.* BRENDAN EDGEWORTH, LEGAL STUDIES: LEGAL POSITIVISM AND THE PHILOSOPHY OF LANGUAGE: A CRITIQUE OF H.L.A. HART'S 'DESCRIPTIVE SOCIOLOGY' (1986), *reprinted in* LEGAL POSITIVISM 147 (Mario Jori ed., 1992) (recognizing futility of assuming that language can be divorced from historical context and still be understood).

II. PRESIDENT CLINTON VETOS THE PARTIAL-BIRTH ABORTION BAN ACT OF 1995—THE "HEALTH" EXCEPTION

The Partial-Birth Abortion Ban Act of 1995[15] (Ban) represented an attempt by Congress to prohibit abortions in which a baby is partially delivered prior to being aborted.[16] In this procedure,

> [t]he surgeon introduces a large grasping forceps . . . through the vaginal and cervical canals into the corpus of the uterus. When the instrument appears on the sonogram screen, the surgeon is able to open and close its jaws to firmly and reliably grasp a lower extremity (leg). The surgeon then applies firm traction to the instrument . . . and pulls the extremity into the vagina.
>
> With a lower extremity in the vagina, the surgeon uses his fingers to deliver the opposite lower extremity, then the torso, the shoulders and the upper extremities (arms).
>
> The skull lodges at the internal cervical os.
>
> At this point, the right-handed surgeon slides the fingers of the left hand along the back of the fetus and "hooks" the shoulders of the fetus with the index and ring fingers (palm down).
>
> While maintaining this tension, lifting the cervix and applying traction to the shoulders with the fingers of the left hand, the surgeon takes a pair of blunt curved Metzenbaum scissors in the right hand. He carefully advances the tip, curved down, along the spine and under his middle finger until he feels it contract the base of the skull under the tip of his middle finger.
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> [T]he surgeon then forces the scissors into the base of the skull under the tip of his middle finger.
>
> [T]he surgeon then forces the scissors into the base of the skull or into the foramen magnum. Having safely entered the skull, he spreads the scissors to enlarge the opening.
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> The surgeon removes the scissors and introduces a suction catheter into this hole and evacuates the skull contents. With the catheter still in place, he applies traction to the fetus, removing it completely from the patient.[17]

The legislative history of the proposed Ban on this horrific procedure includes the report of a nurse who witnessed a partial-birth abortion and described it as the most horrible experience of her life. The nurse recal-

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15. H.R. 1833, 104th Cong. (1995).

16. *See President Vetoes Bill Banning Rare Abortion Procedure*, SAN ANTONIO EXPRESS-NEWS, Apr. 11, 1996, *available in* 1996 WL 2828249 (explaining briefly partial-birth abortion procedure and legislative response to such procedure).

17. H.R. REP. NO. 104-267, at 3 (1995).

led, "The baby's body was moving. His little fingers were clasping together. He was kicking his feet. All the while his little head was stuck inside."[18] This graphic description of the procedure demonstrates the need for moral considerations in decisions regarding the legality of partial-birth abortions.[19] The vetoed Ban attempted to articulate such considerations, providing criminal sanctions against abortionists who perform this procedure.[20]

Notwithstanding the obvious need for a moral response to this procedure, and in spite of approval from both houses of Congress for the Ban, President Clinton vetoed the legislation on April 10, 1996. Congress did not attempt to override Clinton's veto until September 1996.[21] This attempt resulted in the House of Representatives voting to cancel the veto by a 285–137 margin.[22] The Senate, however, sustained the president's veto following a "wrenching debate."[23] Voting 57–41, the Senate fell nine

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18. *Id.* at 4.

19. *See* Kent Greenawalt, Lecture, *Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. L. REV. 1, 32 (1986) (opining that resolution of moral permissibility in abortion context lies in assessment of "the moral respect owed the fetus, against whatever interests, claims or rights the pregnant woman has to rid her body of the fetus"). Another commentator illustrates this need for moral bearings:

> The mores, not the law, are the best protection of the weak and dependent. A law which communicates that abortion is a serious moral issue and that the fetus is entitled to protection will have a more beneficial influence on behavior and opinions, even though it permits abortion under some—even many—circumstances, than a law which holds fetal life to be of little or no value and abortion to be a fundamental right.

MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 61 (1987).

20. H.R. REP. NO. 104–267, at 2 (1995). Section 1531 prohibited partial birth abortions, stating: "[w]hoever, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than two years or both." *Id.* Under the provisions of this legislation, the abortionist would also be liable for civil damages. *Id.*

21. *President Vetoes Bill Banning Rare Abortion Procedure*, SAN ANTONIO EXPRESS-NEWS, Apr. 11, 1996, *available in* 1996 WL 2828249. "The House approved the measure by a veto-proof margin of 286–129, but the Senate, at 54–44, was well short of the two-thirds needed to override a veto." *Id.*

22. *House Votes to Cancel Veto of Abortion Rule*, SAN ANTONIO EXPRESS-NEWS, Sept. 20, 1996, at A1. Achieving a "stunning reversal," the House voted to overturn Clinton's veto of the bill. *Id.* The vote achieved two goals: it revitalized debate over abortion, and it shifted the political debate from an individual rights discussion to the "often-grim details" of abortion. *Id.* Republican Representative Christopher Smith of New Jersey proclaimed, "[t]his was the most historic vote in the House since *Roe v. Wade*." *Id.* The victory came after several House members, who had supported abortion rights, voted against the White House. *Id.*

23. *Senate Sustains President's Veto of Late-Term Abortion Ban*, SAN ANTONIO EXPRESS-NEWS, Sept. 27, 1996, at A9.

votes shy of the two-thirds majority needed to override the president's veto.[24]

Clinton's veto ultimately rested upon his assertion that the Ban must include a provision allowing partial-birth abortions to protect the mother's health.[25] Although the Ban provided an affirmative defense for cases where the abortionist reasonably believed a partial-birth abortion was necessary to save the life of the mother,[26] Congress did not go so far as to include a general "health" exception.[27] This failure to include the word "health" was with good reason. The Supreme Court, in *Doe v. Bolton*,[28] held that the term "health," when used in conjunction with abortion legislation, has been construed by the Court to mean "psychological as well as physical well-being."[29] In *Bolton*, the Court found that what is in the health interests of the mother is a medical judgment that includes "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."[30] Thus, given the extremely broad nature of this judicial definition, the inclusion of a "health" exception as requested by President Clinton essentially would have rendered the Ban inefficacious in protecting the lives of late-term

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24. *Id.* Twelve Democratic senators voted to override Clinton's veto. *Id.* Some senators viewed anti-abortion groups as using partial-birth abortion as a first step to undermining abortion rights. *Id.* Three senators who originally voted against the ban changed their votes to override the veto. *Id.*

25. Terence Hunt, *Bill to Ban Late-Term Abortions Is Vetoed: Dole Says Procedure 'Blurs the Line Between Abortion and Infanticide,'* PEORIA J. STAR, Apr. 11, 1996, at A1.

26. H.R. REP. NO. 104-267, at 2 (1995). The Ban also provided that to qualify for the affirmative defense, the abortionist must show that he or she reasonably believed that there was not another procedure available to save the mother's life. *Id.*

27. *See* Terence Hunt, *Bill to Ban Late-Term Abortions Is Vetoed: Dole Says Procedure 'Blurs the Line Between Abortion and Infanticide,'* PEORIA J. STAR, Apr. 11, 1996, at A1 (relaying that Congress rejected Clinton's request for health exemption).

28. 410 U.S. 179 (1973).

29. *Doe*, 410 U.S. at 191-92.

30. *Id.* at 192. Admittedly, these factors constitute health. The argument against using the term "health" relates only to the unbounded nature of this term when the diagnosis is that of an abortionist. Similarly, the facts of *Doe v. Bolton* are recognized as lamentable. At the time she sought an abortion, Doe was twenty-two years old, a former mental patient, nine weeks pregnant, and the mother of three other living children. *Id.* at 185. Because of Doe's poverty, the two older children were placed in foster homes, while the youngest child was placed for adoption. *Id.* Prior to reconciliation with her husband, who had recently abandoned her, Doe lived with her indigent parents and eight siblings. *Id.* These facts illustrate a terribly sad situation, but if one accepts that there is no difference between the older children and the innocent unborn child, then one realizes that abortion is not a "solution." Viewed from this perspective, the unborn child is not any more expendable than Doe's older children. The older children were equally victims of their circumstances, yet no one had suggested that they should be eliminated for economic or societal reasons.

babies. Cognizant of this, a majority of Congress refused to concede to the president's request.

It is unclear how necessary a health exception is. There is some debate over the reason behind most partial-birth abortions. According to some evidence, those procedures performed in the last weeks of pregnancy are performed to protect the health of the mother or in instances where the developing infant is found to have a serious defect.[31] Partial-birth abortions performed in the second trimester, however, may be elective in more cases than not.[32] A panel of The American College of Obstetricians, while ultimately opposing the Ban, stated in January 1996 that it could not identify any circumstances under which partial-birth abortions would be the only option available to save the life or preserve the health of the mother.[33] In May 1997, the American Medical Association endorsed a ban on partial-birth abortions, stating "[i]t is a procedure which is never the only appropriate procedure."[34] In the same year Ron Fitzsimmons, executive director of the National Coalition of Abortion Providers, announced that he had lied about the number of partial-birth abortions performed nationwide on healthy babies for non-therapeutic purposes.[35]

In partial response to this announcement, legislation banning partial-birth abortions was reintroduced[36] in February 1997. The revived Ban passed in the House with an excess of the two-thirds majority needed to override a presidential veto.[37] Unfortunately, however, even if Congress

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31. *See* Karen Hosler, *House OKs Ban on Late Abortions: 295-136 Vote Means Clinton Again Faces Bill He Vetoed in '96, Fate Lies with Senate, Advocates of the Plan Added 10 Supporters Since Last Year*, BALT. SUN, Mar. 21, 1997, at A1 (describing supporters' belief that partial-birth procedure "is a rare technique, a last resort for some women facing severe health problems for themselves or their fetuses").

32. *See Partial-Birth Abortion Ban Act of 1995, Hearing on H.R. 1833 Before the Senate Judiciary Committee*, 104th Cong. (1995) (statement of Sen. Orrin G. Hatch) (relating interview with Dr. Martin Haskell, who stated that about 80% of all partial-birth abortions performed between 20-24 weeks are elective), *available in* 1995 WL 685993.

33. Diane M. Gianelli, *Medicine Adds to Debate on Late-Term Abortion: ACOG Draws Fire for Saying Procedure 'May' Be Best Option for Some*, AM. MED. NEWS, Mar. 3, 1997, *available in* 1997 WL 9149197.

34. Helen Dewar, *AMA Backs 'Partial-Birth' Abortion Curb: Endorsement of Legislation Comes As Senate Vote Nears*, WASH. POST, May 20, 1997, at A1.

35. *See* Karen Hosler, *House OKs Ban on Late Abortions: 295-136 Vote Means Clinton Again Faces Bill He Vetoed in '96, Fate Lies with Senate, Advocates of the Plan Added 10 Supporters Since Last Year*, BALT. SUN, Mar. 21, 1997, at A1 (stating that Fitzsimmons revised his estimate from about 450 procedures annually, done for extreme health reasons, to thousands performed each year, many on healthy women carrying healthy babies).

36. Partial-Birth Abortion Act of 1997, H.R. 1122, 105th Cong. (1997).

37. *See id.* (reporting on House vote of 295 to 136 in favor of returning bill to President Clinton).

is eventually successful in passing the Ban over a certain presidential veto, this legislation would still face a major obstacle, the United States Supreme Court. It is possible that the Court, which has for decades refused to adequately protect the unborn's right to life, will hold a ban on partial-birth abortions unconstitutional.

III. The Anticipated Direction of the Court Regarding the Ban

A. *Previous Abortion Decisions*

President Clinton's recent veto of the Partial-Birth Abortion Ban Act[38] is merely the latest in a series of setbacks for unborn infants. The unborn initially lost their fight for a constitutional right to life in 1973, in the United States Supreme Court's controversial decision, *Roe v. Wade*.[39] Through a manipulation of the terms "fetus" and "person," the *Roe* Court essentially took the "right to life" from one class of citizens and gave the "right of liberty" to another class.[40] In *Roe*, the State of Texas argued that it had a compelling interest in protecting prenatal life from elective abortions.[41] In addressing that argument, the Court conceded that "[i]f this suggestion of personhood is established, [Roe's] case . . . collapses, for the fetus'[s] right to life would then be guaranteed specifically by the [Fourteenth] Amendment."[42] However, because no case prior to *Roe* had defined a fetus as a person, the Court looked to the Constitution for guidance.[43] Finding no explicit application of the term "person" to the unborn in the Constitution, the Court ruled that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."[44]

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38. H.R. 1833, 104th Cong. (1995).

39. 410 U.S. 113 (1973).

40. *See Roe*, 410 U.S. at 129, 152–54 (discussing rights of liberty and privacy in context of abortion and freedom to choose).

41. *Id.* at 156.

42. *Id.* at 156–57. *But see* Joe Coudert, *Jury Rules Manslaughter in Fetus's Death*, San Antonio Express-News, Oct. 18, 1996, at A1 (construing Texas's penal code definition of "person" to mean "an individual"). Texas district court Judge Robert Blackmon allowed a jury to use the penal code definition of "person" in an intoxicated manslaughter case. *Id.* Based on this definition, the jury convicted a drunk driver in the fatal injury of a child whose mother was seven months pregnant at the time of the collision. *Id.* After an emergency caesarean procedure, the child was born alive but died a few days later. *Id.*

43. *Roe*, 410 U.S. at 157.

44. *Id.* at 158. *But see* Jay Alan Sekulow & John Tuskey, *The "Center" Is in the Eye of the Beholder*, 40 N.Y.L. Sch. L. Rev. 945, 958 (1996) (arguing that *Roe's* definition of personhood rejects Western ethic of sacredness of human life).

In support of its conclusion, the *Roe* Court also resorted to a medical dictionary and found that the word *fetus* referred to "the developing young in the human uterus."[45] Latching onto the concept of developing life, the Court concluded that a state's interest in protecting this life was not "compelling"[46] during the first trimester of a woman's pregnancy, but that as the fetus moved toward viability, the state interest in protecting the fetus increased.[47] Thus, according to the Court, a state may completely ban abortions only after fetus viability, and it may not ban even post-viability abortions where the procedure is necessary to save the life or preserve the health of the mother.[48] Thus, because partial-birth abortions are performed on unborn babies as young as nineteen weeks,[49] the *Roe* holding might prevent a total ban on this procedure.

While not going so far as to overrule *Roe*, the Court modified its holding nearly ten years later in *Planned Parenthood v. Casey*.[50] In *Casey*, the Court held that a state's interest in regulating abortions may extend even into the first trimester of the pregnancy. However, because the *Casey* majority viewed *Roe* as establishing a constitutional hierarchy that placed liberty above life,[51] the Court announced that "a State's interest in the protection of life falls short of justifying any plenary override of individual liberty claims."[52] The plurality in *Casey* then manipulated the term "abortion," equating it with any typical "medical treatment," and stated that *Roe* merely placed limits on governmental regulation of this treatment.[53] However, because medical technology had developed since *Roe* to the stage where "fetuses" became viable at an earlier age,[54] the *Casey* Court recognized that a state's interest in barring this "medical treatment" had become more expansive. Accordingly, the Court's majority dismissed its previous trimester standard as a non-essential holding of

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45. *Roe*, 410 U.S. at 159.

46. *Id.* at 163.

47. *Id.* at 162-63.

48. *Id.* at 163-64.

49. Jay Alan Sekulow & John Tuskey, *The "Center" Is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945, 956 (1996). Fetus viability is believed to be at approximately the 25th-gestation week. Eric Zorn, *Abortion Foes Trying Harder: Gaining Ground*, CHI. TRIB., Apr. 8, 1997, *available in* 1997 WL 3536570.

50. 505 U.S. 833 (1992).

51. *See Casey*, 505 U.S. at 857 (finding that preservation of bodily integrity and personal autonomy surpass state interest in protecting developing life).

52. *Id.*

53. *Id.* "*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." *Id.*

54. *Id.* at 860.

Roe[55] and replaced it with an "undue burden" standard.[56] This new standard prohibits state regulation that places "a substantial obstacle to a woman seeking an abortion."[57] The *Casey* Court specifically reaffirmed *Roe's* holding that "'subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or *health* of the mother.'"[58]

Casey has largely been viewed as a setback for pro-choice advocates. Following the position taken by the Court, certain abortion limitations adverse to the pro-choice position, such as parental and spousal notification, are sheltered.[59] Most important, however, the *Casey* decision theoretically allows states to regulate or prohibit non-therapeutic abortions subsequent to fetus viability.[60] Ultimately, this means that although a woman has decided to have an abortion, a state may find that her decision is not final until it is ratified by a physician as necessary for health reasons. Pro-choice proponents objecting to *Casey* contend that the woman, not the doctor, should be the ultimate decision-maker over her own body.[61] From this perspective, *Casey* infringes a woman's liberty right.[62]

In addition, forty states, relying no doubt on *Casey's* undue burden standard, have enacted restrictions and prohibitions on post-viability abortions, many specifically targeting partial-birth procedures.[63] For example, Iowa has criminalized, under the term 'feticide,' any abortion performed after the second trimester unless the abortion is performed to

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55. *Id.* at 873. "We reject the trimester framework, which we do not consider to be part of the essential holding of *Roe*." *Id.*

56. *Casey*, 505 U.S. at 874. "Only where state regulation imposes an undue burden on a woman's ability to make this decision does the power of the State reach into the heart of the liberty protected by the Due Process Clause." *Id.*

57. *Id.* at 878.

58. *Id.* at 879 (emphasis added) (quoting *Roe*, 410 U.S. at 164-65).

59. *See id. passim* (upholding waiting period and parental notification).

60. *Id.* at 879 (affirming *Roe's* holding that states may regulate or proscribe post-viability abortions except where necessary to preserve life or health of mother).

61. *See Casey*, 505 U.S. at 881–87, 899–901 (allowing parental consent, informed consent, waiting period, and record-keeping regulations).

62. *See* Michelle S. Kayne, Greco v. United States: *A Step Forward or Backward from* Roe v. Wade?, 17 WOMEN'S RTS. L. REP. 367, 367 (1996) (describing *Casey* as "a partial step backward" from decisions establishing liberty interest in choosing abortion).

63. Roy Rivenburg, *Partial Truths in the PR War over a Form of Late-Term Abortions: Both Sides Are Guilty of Manipulating the Facts, Here's What They Are (and Aren't) Saying*, L.A. TIMES, Apr. 2, 1997, at E1 [hereinafter *Partial Truths*] (quoting National Abortion Federation Spokesperson statement that 40 states have laws restricting post-viability abortions).

preserve the life or health of the mother.[64] However, *Casey's* holding may not be sufficient to uphold such bans, at least insofar as they prohibit pre-viability procedures. Because *Casey* maintained the line between a woman's right to choose an abortion and a state's interest in regulating that choice at fetus viability, its ruling may restrict attempts to ban at least pre-viability partial-birth abortions.[65]

B. *Anticipating the Court's Decision*

If grass-root efforts successfully revive the Ban at some future date, the legislation undoubtedly would be contested as unconstitutional. Therefore, it is likely that the fate of the Ban ultimately would be dropped into the lap of the United States Supreme Court.[66] The dissenting views expressed in the legislative history of the failed Ban have outlined some of the arguments that would be presented to the Court in support of the position that the Ban is unconstitutional.[67] These arguments assert that the terms in the legislation are vague, that the physician is not given fair warning, that the undue burden standard of *Planned Parenthood v. Casey*[68] is violated, and that the Ban interferes with a physician's decision to select the type of abortion that is best for his or her patient.[69]

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64. IOWA CODE ANN. § 707.7 (West 1997); *see also, e.g.*, IDAHO CODE § 18-608 (1996) (stating that second-trimester abortions must be in best medical interest of mother, and third trimester abortions may only be performed when judgment of attending physician, corroborated by another doctor, is that procedure is necessary to save mother's life or that fetus, if born full term, would be unable to survive); MICH. COMP. LAWS ANN. § 333.17516 (West 1997) (prohibiting "partial-birth abortions" except where necessary to save mother's life in instances where no other medical procedure will suffice); UTAH CODE ANN. § 76-7-310.5 (1996) (prohibiting partial-birth abortions unless other abortion procedures would pose risk to life or health of woman); WIS. STAT. ANN. § 940.04 (1996) (criminalizing abortion of "quick," or viable, child unless necessary to save life of mother).

65. *See* Jay Alan Sekulow & John Tuskey, *The "Center" Is in the Eye of the Beholder*, 40 N.Y.L. SCH. L. REV. 945, 960-61 (1996) (stating that *Casey* prohibits states from banning post-viability abortions that are needed to protect woman's health or life).

66. *See* MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 24–25 (1987) (relaying that abortion law of United States, in contrast with other countries, has not resulted from "the give-and-take of legislative processes," but was established by Court). *But see* Planned Parenthood v. Casey, 505 U.S. 833, 1002 (1992) (Scalia, J. dissenting) (denouncing Court's involvement in abortion area). Justice Scalia admonishes that "[the Court] should get out of this area, where [it] ha[s] no right to be, and where [it does] neither [the Court] nor the country any good by remaining." *Id.*

67. *See* Partial-Birth Abortion Ban Act of 1995, H.R. REP. NO. 104-267, at 22-27 (1995) (dissenting views).

68. 505 U.S. 833 (1992).

69. *See* H.R. REP. NO. 104–267, at 22–23 (1995) (dissenting views).

In spite of these arguments, *Casey* and *Roe*,[70] taken together, leave room for argument over the constitutionality of a ban on partial-birth abortions, even if viability is maintained as the point at which a state's interest in protecting human life fully outweighs a right to an abortion. In *Roe*, the Court distinguished between medical and legal definitions of personhood and life and held that, before the law, the unborn are not persons.[71] However, both *Roe* and *Casey* acknowledge that the closer the baby gets to viability, the greater interest a state has in regulating the termination of the pregnancy.[72] A nineteen-week-old fetus is close to viability,[73] and, as broad as the Court-created liberty interest for a woman seeking an abortion is, surely this interest is outweighed by the compelling presence and suffering of this unborn child who is subjected to a partial-birth abortion.[74]

The child's existence and presence is acknowledged by all who speak on this issue, even opponents of the Ban. For example, when President Clinton signed the veto, he stated that "[the women who had partial-birth abortions] had to make a potentially life-saving, certainly health-saving, but still tragic decision to have the kind of abortion procedure that would be banned by [the Partial-Birth Abortion Ban Act]."[75] With this statement, Clinton acknowledged that partial-birth abortions are tragic.[76] The statements of some women who have had partial-birth abortions make this even more painfully clear. In attendance at the presidential veto ceremony, several of these women tearfully told of their unborn babies' deformities as justification for the decision to terminate their pregnancies.[77] Furthermore, even a letter addressed to one of the senators opposing the Ban from Dr. Dru Elaine Carson, the director of Reproductive Genetics at Cedars-Sinai Medical Center in Los Angeles, implicitly recognized the aborted fetus as human life. In her letter, Dr.

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70. 410 U.S. 113 (1973).

71. *Roe*, 410 U.S. at 162.

72. *See Casey*, 505 U.S. at 869 (holding that state's interest in life during later part of pregnancy allows state to restrict woman's right to terminate pregnancy); *Roe*, 410 U.S. at 162–63 (explaining that state's interest in protecting health of pregnant women and potentiality of human life increases as woman nears delivery of child).

73. *See supra* note 49 and accompanying text.

74. *See* Roy Rivenburg, *Partial Truths*, L.A. TIMES, Apr. 2, 1997, at E1 (suggesting that presence of infant's body may affect any Court decision on partial-birth abortion).

75. *In Their Own Words*, BOSTON GLOBE, Apr. 14, 1996, at 78.

76. *Id.*

77. *Id.* One mother who had a partial-birth abortion said, "I didn't make the decision for my child to die . . . God made the decision for my child to die." *Abortion Foes Rip Clinton for Veto: Dole Criticizes 'Extreme' Position*, ATLANTA J.-CONST., Apr. 11, 1996, at A1. She also said that her unborn son had nine major disorders, one of which was a fluid-filled cranium without any brain tissue. *Id.*

Carson never even attempted to suggest the non-existence of life in her description of events surrounding a partial-birth abortion, in which she wrote:

> [Abortionist, the late Dr. McMahon] provides dignity for all of his patients: the mothers, the fathers, the extended families and finally to the fetuses themselves. He does not "mangle" fetuses, rather they are delivered intact and that allows us . . . to evaluate them carefully, and for families to touch and acknowledge their baby in saying goodbye.[78]

Doctor Carson revealed the complicated nature of partial-birth abortions by mixing her terms, using both the words *fetus* and *baby* to describe the same life. Moreover, even in her initial use of the word *fetus*, she refers to providing dignity to fetuses themselves. Can there be any doubt that this prominent doctor recognized the aborted infant as having been alive and, thus, deserving dignity in death?

Based on the description of the baby's body writhing in pain during a partial-birth abortion,[79] and considering doctors' testimony during the partial-birth-abortion hearings that developing life can feel pain at twenty weeks,[80] the Supreme Court, if called upon to determine the constitutionality of a ban on these procedures, should recognize the compelling interest that the nearly fully developed infant has in life.

However, as the legislators who dissented to the initial ban illustrate, it is possible that, using the *Roe-Casey* viability standard, the Court will refuse to recognize this interest. Because a state's interest has been so closely connected to infant viability, the Court may find that the government cannot altogether ban the procedure when the unborn child is not viable, such as when it is insufficiently mature or when it is so severely malformed that death after birth is certain.

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78. H.R. REP. NO. 104-267, at 32 (1995).

79. *See id.* at 4 (relaying testimony that "this is a dreadfully painful experience for any infant subjected to such a surgical procedure"). *But see id.* at 32 (describing cephalocentesis as "extremely humane and rapid" procedure of removing "cebrospinal fluid from the brain causing instant brain herniation and death" and causing no struggling of fetus).

80. *See id.* at 4 (finding well-documented evidence that studies of fetuses aged 20–34 weeks are "highly sensitive to pain"). Professor Robert White, Director of Neurosurgery and Brain Research Laboratory at Case Western Reserve School of Medicine, testified, "[w]ithout question, all of this is a dreadfully painful experience for any infant subjected to such a surgical procedure." *Id.*

The Court's illogical position on the personhood of the unborn further suggests it may find a partial-birth abortion ban unconstitutional.[81] In refusing to recognize unborn life as within the protection of the Constitution, the Court has allowed women to believe that their liberty interest is supreme, but real "choice" actually is absent. True choice requires knowledge and the availability of a range of options. Once equipped with information and options, a woman then possesses the requisites for evaluating decisions in light of her values.[82] Without valid information, women are lured into a false version of reality and are denied the opportunity to comprehend the true nature of their decisions.[83] In other words, the Court has created a fiction through its manipulation of the word "person," and, in turn, has created what amounts to an absolute sovereignty for pregnant women. This falsely created sovereignty clearly has overshadowed the truth that an unborn baby is a human life.[84]

IV. RETHINKING THE WAY THE COURT VIEWS NATURAL LAW

A. *The Alleged Subjectivity of Natural Law*

An earlier Supreme Court, tied more closely to the Christian natural law principles on which this country was at least partly founded, might have reached a different result. However, the Court long ago rejected such natural law reasoning. This rejection of natural law rests primarily on the premise of its subjectivity and on the belief that subjectivity is undesirable in the political realm.[85] Somehow, natural law adversaries perceive its exclusion as the both the elimination of subjectivity from law and the removal of subjective morality from public discussion. This belief is incorrect in two respects. First, other legal theories do not remove subjectivity from the law.[86] Instead, in more positivistic theories, subjective

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81. *See Roe*, 410 U.S. at 156–57 (ruling that "[i]f this suggestion of personhood is established, [Roe's] case, of course, collapses, for the fetus'[s] right to life would then be guaranteed specifically by the [Fourteenth] Amendment").

82. *See also* Krisztina Morvai, *What Is Missing from the Rhetoric of Choice? A Feminist Analysis of the Abortion Dilemma in the Context of Sexuality*, 5 UCLA WOMEN'S L.J. 445, 455 (1995) (stating that "rhetoric of 'choice' has misled many women").

83. *Id.*

84. *See* POPE JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR, § 35 (1993) (noting that value of human freedom enjoys primacy over truth).

85. *See* Phillip J. Closius, *Social Justice and the Myth of Fairness: A Communal Defense of Affirmative Action*, 74 NEB. L. REV. 569, 571 (1995) (noting natural law's subjectivity); Jason F. Robinson, Book Review, *Gerber's* to Secure These Rights, 12 J.L. & POL. 123, 128 (1995) (calling natural law "uncertain and malleable").

86. *See* John W. Van Doren, *Positivism and the Rule of Law, Formal Systems or Concealed Values: A Case Study of the Ethiopian Legal System*, 3 J. TRANSNAT'L L. & POL'Y 165, 202 (1994) (stating that positivist notion of totally objective decision-makers is "myth").

morality merely operates under the pretext of "Modern Utilitarianism,"[87] or "Secular Humanism."[88] In the realm of abortion jurisprudence, this disguised subjectivity is readily apparent when the Court takes sides on its so-called "constitutional interpretation" only to find the various justices remain in the same ideological corner as they occupied in the previous debate. It cannot be denied that subjectivity enters decisions in the political realm.[89] For example, it was the *Casey* court that held that each generation will receive a new interpretation of what the Constitution means[90]—hardly a timeless, non-subjective law.

Second, just as the Court's current jurisprudence has been mislabeled as objective, so too has the characterization of natural law as subjective been misguided. Natural law has commonly and mistakenly been construed as a law based on humankind's ability to "naturally" know what is right and what is wrong, and with this knowledge, to promulgate law.[91] The brevity of this version of natural law is unacceptable to Christian natural law theorists for a variety of reasons, but mainly because this description eliminates the source of natural law, God.[92] St. Thomas Aquinas, the most frequently cited authority on natural law, stated that

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87. *See* Jonathan Edward Maire, *The Possibility of a Christian Jurisprudence*, 40 AM. J. JURIS. 101, 116 (1995) (discussing connection between "modern utilitarianism" and "religion").

88. *See* John T. Noonan, Jr., *The Tension and Ideals: Religious Human Rights in the United States*, 10 EMORY INT'L L. REV. 183, 187–88 (1996) (noting Hugo Black's identification of secular humanism as religion and possible argument that judiciary advances this 'religion').

89. *But see* Planned Parenthood v. Casey, 505 U.S. 833, 850 (1992) (positing that Court's obligation is not to mandate its own moral code, but rather to "define the liberty of all").

90. *See id.* at 901 (delineating Constitution as covenant that "[e]ach generation must learn anew").

91. I ST. THOMAS AQUINAS, SUMMA THEOLOGICA q.99 a.5 (Fathers of the English Dominican Province trans., 1947). But this statement is often taken out of context, as is illustrated by an earlier Thomist Article:

> It was fitting that Divine law should come to man's assistance not only in those things for which reason is insufficient, but also in those things in which human reason may happen to be impeded. . . . Hence there was need for the authority of the Divine law to rescue man from both these defects.

Id. at q.95, a.2; *see* A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 103 (1992) (calling position that God cannot be removed from natural law "mistaken"). Simmons finds natural law to hold "that there are universally binding ("objectively valid") moral rules, knowable by use of our natural faculties. . . ." *Id.*

92. I ST. THOMAS AQUINAS, SUMMA THEOLOGICA q.99 a.3 (Fathers of the English Dominican Province trans., 1947) (stating, "The precepts of the natural law are general, and require to be determined: and they are determined both by human law and by Divine law").

"naturally known principles are universal."[93] According to Aquinas, these universal principles are determined by Divine law, not by mere human reason.[94]

Thus, natural law need not be considered subjective. Natural law involves positive precepts that are universally binding.[95] As Pope John Paul II explains:

> [natural] law cannot be thought of as simply a set of norms on a biological level; rather it must be defined as the rational order whereby [humankind] is called on by the Creator to direct and regulate his [or her] life and actions and in particular to make use of his [or her] own body. To give an example, the origin and foundation of the duty of absolute respect for human life are to be found in the dignity proper to the person and not simply in the natural inclination to preserve one's own life. Human life, even though it is a fundamental good of [humankind], thus requires moral significance in reference to the good of the person who must always be affirmed for his [or her] own sake.[96]

Natural law, therefore, is not an animal-like instinct akin to self-preservation, nor is it to be equated with the human conscience.[97] Instead, it is of a higher order and follows the dictates of the Creator. The call by the Creator is not mere subjective adherence to morally held beliefs, but rather "universal and permanent laws correspond[ing] to things known by the practical reason and . . . applied to particular acts through the judgment of reason."[98] The precepts of natural law are exceptionless[99] and not open to subjectivistic interpretation.

B. *Natural Law v. Natural Rights*

The Supreme Court, however, has consistently rejected the universal in favor of the relativistic. Under the Court's current natural rights ap-

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93. *See* Kent Greenawalt, Lecture, *Natural Law and Political Choice: The General Justification Defense—Criteria for Political Action and the Duty to Obey the Law*, 36 CATH. U. L. REV. 1, 34 (1986) (denouncing claim that citizens should rely exclusively on secular grounds in making choices). In reality, religious convictions pervade a person's perspective on problems. *Id.* For example, to ask Catholics to "pluck out their religious convictions" and compartmentalize their beliefs is both unrealistic and objectionable. *Id.* at 35.

94. *See supra* note 12 and accompanying text.

95. JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR § 52 (1993).

96. *Id.* § 50.

97. Russell Hitinger, *Natural Law As "Law": Reflections on* Veritatis Splendor, 39 AM. JURIS. 1, 4 (1994) (providing that natural law is real law and cannot be equated with conscience).

98. JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR § 52 (1993).

99. *Id.*

proach to the Constitution, which values individual autonomy above all else,[100] legitimacy is bestowed on the woman's choice to have an abortion.[101] But the natural law questions the legitimacy of this choice, because natural law is based on the premise that the binding force of a law depends on its connection with reason.[102] In other words, natural law demands that a law's validity lies in its being just.[103] For Christian natural law theorists, justness depends on the human law's relationship to Divine law.[104]

Such Christian natural law theory, however, is and has been excluded from the Court's opinions for decades.[105] Similarly, as one writer observes, natural law has been excluded from public discussion, because "by fiat, religious belief—alone among beliefs—is prohibited from public discourse; by fiat, religious believers—alone among believers—are prohibited from employing in a rational discourse the facts they hold about the universe."[106] But, given the intrinsically moral underpinnings in the issue of reproductive choice and the right to life, it is imperative that natural law be included in the current abortion debate.[107]

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100. *See* Margaret Y.K. Woo, *Biology and Equality: Challenge for Feminism in the Socialist and Liberal State*, 42 EMORY L.J. 143, 170 (1993) (stating natural rights ideology is grounded in idea of individual autonomy).

101. *Contra* Doe v. Bolton, 410 U.S. 179, 189 (1973) (denying that pregnant woman has absolute right to abortion). The Court found that a medical judgment determining the necessity of an abortion extends beyond physical health. *Id.* at 190-92. Factors of this medical judgment can include factors relevant to the well-being of the patient—"psychological, familial, and the woman's age." *Id.* at 192.

102. *See* I ST. THOMAS AQUINAS, SUMMA THEOLOGICA q.91 a.3 (Fathers of the English Dominican Province trans., 1947) (discussing human law, Aquinas finds that "human reason needs to proceed to the more particular determination of certain matters. These particular determinations, devised by human reason, are called human laws.").

103. *Contra* NEIL MACCORMICK, THE SEPARATION OF LAW AND MORALS (concluding that certain schools of thought in both positive law and natural law theories view that bad law is valid, but compliance is open issue), *in* NATURAL LAW THEORIES: CONTEMPORARY ESSAYS 105, 107 (Robert P. George ed., 1994).

104. *See supra* notes 91–99 and accompanying text.

105. *But see* Daniel Westberg, *The Relation Between Positive and Natural Law in Aquinas*, 11 J.L. & RELIGION 1, 1 (1994) (positing that discussions involving relationship between natural law and positive law have become prominent).

106. J. Bottum, *Facing Up to Infanticide*, FIRST THINGS, Feb. 1996, at 43–44.

107. *But see* Roe v. Wade, 410 U.S. 113, 116 (1973) (finding philosophy, religious training, and values as factors complicating abortion issue).

C. *(Re)Defining Liberty*

Under the current Supreme Court interpretation, liberty is viewed as a "rational continuum"[108] that encompasses reproductive liberty as a constitutional guarantee. Based upon this interpretation, it is apparent that the Court has changed the Christian natural law concept of *liberty* into an unrecognizable, mutated form. Therefore, an analysis of the natural law meaning of liberty is necessary to illustrate the underlying fallacy of the Court's modern construction of this term in the abortion context. The resulting implicit hierarchy of liberty over life created by the Court's divergence from the natural law meaning of liberty has tremendous implications for all future discussions about abortion and its constitutionality.

Constitutional protection of a woman's choice to terminate her pregnancy is derived from the constitutional right of *liberty*.[109] Ultimately, this liberty interest becomes the divisive issue in the abortion debate. Those opposed to abortion view liberty as a freedom that only extends to the point where another is negatively affected by the woman's exercise of liberty over her body.[110] In contrast, the proponents of the right to choose an abortion view a woman's choice in matters concerning her body as beyond the realm of governmental regulation.[111] Thus, in the abortion proponents' hierarchy of values, individual liberty reigns.[112]

According to the *Casey* majority, liberty is "a promise of the Constitution that there is a realm in which government may not enter."[113] This judicial understanding of liberty, based on a strong preference for upholding individual natural rights, developed through significant alterations of natural law theory.[114] However, as one writer suggested decades ago, liberty, in its purest sense, is not an end, but rather an element of free-will:

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108. Planned Parenthood v. Casey, 505 U.S. 833, 848 (1992) (quoting Poe v. Ullman, 367 U.S. 497, 543 (1961)).

109. *Casey*, 505 U.S. at 846.

110. *See* Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of* Planned Parenthood v. Casey, 45 AM. U. L. REV. 77, 81 (1995) (describing *Casey* as decision that recognizes that "state's efforts to pigeonhole women" in reproductive rights area impinges on liberty and not just privacy).

111. *See id.* at 121–23 (discussing proponents' view that woman should have control over her own body in context of right to privacy).

112. *See id.* at 126 (acknowledging that *Casey* took fetus-rights versus woman-rights controversy and rightly turned it into "context of autonomy and the ability to define one's own concept of existence").

113. *Casey*, 505 U.S. at 847.

114. *See* James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 AM. J. JURIS. 185, 215–16 (1994) (detailing history of natural law theorists).

> *Human liberty* is that property of the will in virtue of which the will has the power to act or not to act, to act in one way or to act in another, when all the elements for the proper determination of itself are present. This freedom is called freedom of choice or simply free will and is liberty with regard either to the contradictory or to the contrary.[115]

Applying these concepts, it becomes apparent that the *liberty* interest, which the modern Court construes as an all-encompassing right, presupposes the inherent ability of humankind to choose, for without the ability to choose, one could not exercise that right.[116] This underlying ability, or freedom, is crucial to any discussion of liberty.[117]

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115. IGNATIUS W. COX, LIBERTY: ITS USE AND ABUSE 1 (1939).

116. The issue of humankind's ability to choose spans centuries of religious and philosophical discussions. An American philosopher, William James, discussed this topic at length. *See* WILLIAM JAMES, AN ADDRESS TO THE HARVARD DIVINITY STUDENTS, ON THE DILEMMA OF DETERMINISM (1884), *reprinted in* THE WRITINGS OF WILLIAM JAMES 587-610 (John J. McDermott ed., 1977) (discussing religious and ethical facets of "radical empiricism"). James wrote in the late 19th and early 20th centuries, and, while not advocating religion as a means to overturn determinism, he recognized the implications of a secularly ordered society. *Id.* James explored the many inconsistencies between deterministic theories, and classified the theories into two categories: 'soft' and 'hard' determinism. *Id.* at 590. The first category, into which James lumps most theories, is "soft determinism,—the determinism which allows considerations of good and bad to mingle with those of cause and effect in deciding what sort of a universe this may rationally be held to be." *Id.* at 600. *Soft* determinism is ambiguous; it allows both for freewill conceptions and deterministic principles. *Id.* This form of determinism, while acknowledging the universe as determined, provides exceptions for free will. This provision then allows ethical considerations to rise above the predetermined world. *Id.* James took issue with deterministic dualisms and labeled such theories as 'soft,' but interpreted them as weak.

Conversely, "[o]ld-fashioned determinism was what we may call *hard* determinism. It did not shrink from such words as fatality, bondage of the will, necessitation, and the like." *Id.* Hard determinism is mechanical and is best described as 'pure' determinism: determinism without exceptions. *Id.* In this category, humankind has no options, no free will, no control, and no choice. *Id.* Moral decisions are impossible, irrational, and not a matter for consideration, a fact that is evidenced through James's definition of determinism:

> It professes that those parts of the universe already laid down absolutely appoint and decree what the other parts shall be. The future has no ambiguous possibilities hidden in its womb: the part we call the present is compatible with only one totality. Any other future complement than the one fixed from eternity is impossible. The whole is in each and every part, and welds it with the rest into an absolute unity, an iron block, in which there can be no equivocation or shadow of turning.

Id. This assessment of the deterministic principle disallows the existence of undetermined action by an individual.

117. *See* Gerald V. Bradley, *Moral Truth, the Common Good, and Judicial Review* (instructing that "[f]ree choice must be an uncaused decision to adopt one of two or more incompatible options"), *in* CATHOLICISM, LIBERALISM, & COMMUNITARIANISM: THE CATHOLIC INTELLECTUAL TRADITION AND THE MORAL FOUNDATIONS OF DEMOCRACY

Jean Gerson, a fifteenth-century philosopher, provided the earliest recognitions of liberty as an ability.[118] As one natural rights commentator, Richard Tuck, explains: "[F]or neither the Romans nor the early medieval lawyers could liberty be a *ius*, a right."[119] As Tuck notes, Gerson was the first natural law thinker to assimilate *ius* with *libertas*:

> [*I*]*us* is a *facultus* or power appropriate to someone and is accordance with the dictates of right reason. *Libertas* is a *facultas* of the reason and will towards whatever possibility is selected. . . . *Lex* is a practical and right reason according to which the movements and workings of things are directed towards their ends.[120]

Thus, prior to the advent of later, seventeenth-century natural rights theorists, Gerson found liberty to be a right premised on an ability. To Gerson, however, this ability had a prerequisite, namely, that it be executed according to "divine right reason."[121] He believed that "[e]ach has this *ius* as a result of a fair and irrevocable justice maintained in its original purity, or natural integrity."[122]

Based upon the teaching of natural law theorists, then, liberty as an ability or freedom becomes a "right" only if it follows the "right reason." It is this right reason that distinguishes liberty from license, and it is this prerequisite that the Court has failed to consider in the abortion debate. The Court's use of constitutional liberty, with respect to abortion, is not derived from a morally driven ability, but from an individual-centered

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115, 118 (1995). Bradley cites Pope John Paul II's position on morality that individuals can and do freely make moral choices, and it is one's choices that shape one's character. *Id.*

118. RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 25–26 (1979); *see* A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 96 (1992) (agreeing with Tuck that Gerson may have been earliest natural rights theorist). Simmons perceives Gerson's natural rights ideas as being ignored during the Renaissance era but revived in the 1580s. A. JOHN SIMMONS, THE LOCKEAN THEORY OF RIGHTS 96 (1992).

119. RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 26 (1979).

120. *Id.* at 26–27 (1979) (quoting Jean Gerson, IX OEUVRES COMPLÈTES 145 (P. Glorieux ed., 1973)); *see* A DISSERTATION ON THE LAW OF NATURE, THE LAW OF NATIONS, AND THE CIVIL LAW IN GENERAL, 5 (*printed for* J. Roberts, 1723) (relaying that *jus* is found in every constitution and is defined as "[t]hings right and decent to be done, and that forbids the contrary, by imposing a necessary Obedience on those for whom such Law was made and ordain'd") (antiquated spelling and capitalization modernized). This anonymous writing distinguishes *jus* from *lex* and finds *lex* to mean the part of law committed to writing. *Id.* at 4.

121. *Id.* at 27 (emphasis added) (quoting Jean Gerson, III OEUVRES COMPLÈTES 145 (P. Glorieux ed., 1973)).

122. RICHARD TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT 27 (1979) (quoting Jean Gerson, III OEUVRES COMPLÈTES 145 (P. Glorieux ed., 1973)).

"natural" right. This individualistic type of right, although derived from natural law, is actually separate from it.

The separation of natural rights from natural law began with Thomas Hobbes, and was aided by John Locke, who "completed the destruction of classical and Scholastic Natural Law by converting it from a bulwark for liberty and justice as an inheritance of constitutional law, to a revolutionary doctrine of liberty and equality as an abstract, inherent, individual 'natural right.'"[123] Even Locke's view of subjective natural rights, however, included a moral basis.[124] True liberty, as apart from Court-made reproductive liberty, demands that the choice involved in exercising the ability adhere to moral boundaries.[125] As Aquinas stated, "The first precept of law is that good is to be done and pursued and evil is to be avoided."[126] This premise of natural law is antithetical to court-made abortion law, which elevates liberty even to the exclusion of life and morality.[127] In its abortion decisions, the Court has divorced morality-based natural law from its moral element. Pope John Paul II made this point in his encyclical letter addressed to Catholic bishops, "The Splendor of Truth: *Veritatis Splendor*."[128] In this letter, the Pope points to a crucial element ignored by the Court in its abortion decisions—that "freedom is not only the choice for one or another particular action; it is also within that choice, a *decision about oneself* and a setting of one's own life, for or against the Good, for or against the Truth, and ultimately for or against God."[129] Absent this element of moral judgment, the Court apotheosizes

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123. PETER J. STANLIS, EDMUND BURKE AND THE NATURAL LAW 19 (1958).

124. *See* James H. Hutson, *The Emergence of the Modern Concept of a Right in America: The Contribution of Michel Villey*, 39 AM. J. JURIS. 185, 213 (1994) (discussing Locke's belief that "a right was a moral power").

125. *See* Douglas W. Kmiec, *Liberty Misconceived: Hayek's Incomplete Relationship Between Natural and Customary Law*, 40 AM. J. JURIS. 209, 210 (1995) (perceiving Hayek's construction of liberty to entail individual action tempered by moral duty).

126. I ST. THOMAS AQUINAS, SUMMA THEOLOGICA q.94 a.2 (Fathers of the English Dominican Province trans. 1947).

127. *See* Mary Ann Glendon, A Beau Mentir Qui Vient De Loin: *The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 Nw. U. L. REV. 569, 584 (1989) (acknowledging that emphasis of American law on liberty is "often to the exclusion of other social values"). Glendon also notes that the United States has taken "a posture of rigorous official indifference toward moral issues." *Id.* at 585. Citing a Canadian court, Glendon proposes that "a society can be 'free and democratic' without leaving the individual in splendid isolation of her 'rights' and turning the realm of morals largely over to the play of market forces," guided by respect for the dignity inherent in the human person. *Id.* at 591 n.71 (citing R. v. Oakes [1986] S.C.R. 103).

128. POPE JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR 82-84 (1995).

129. *Id.* at 82–83.

liberty.[130] The Court's definition of liberty reflects this apotheosization, for it extends the meaning of liberty from a procedural right not to be incarcerated to encompass matters of substantive law.[131] Along these lines, the Court has reasoned:

> [Liberty] is a is rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, and which also recognizes, what a reasonable and sensitive judgement must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgement.[132]

While this Recent Development does not suggest that liberty should be limited to a mere procedural right or a "series of isolated points pricked out"[133] of the Due Process Clause, it does suggest that the Court's expansion of liberty into the choice to abort late-term babies goes beyond a mere separation from its natural law roots. With its abortion decisions, the Court has actually perverted the concept of liberty and allowed choice to mutate into the unrecognizable form of reproductive autonomy that would allow even the tragic deaths of nearly full-term infants by partial-birth abortions.

D. *The Freedom to Play God?*

Through this new form of liberty, the Court has extended liberty from a woman's right to matters concerning her own body to the destruction of an innocent life. Partial-birth abortions extend the concept of liberty even further, to include the right to determine if a particular baby is fit to

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130. *See id.* at 73 (commenting that freedom has been exalted close to point of idolatry); *see also Casey*, 505 U.S. at 851 (finding liberty to be central to intimate and personal choices). "[P]ersonal dignity and autonomy[ ] are central to the liberty protected by the Fourteenth Amendment." *Casey*, 505 U.S. at 851. The Court continued, "[a]t the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State." *Id. But see id.* at 983–84 (Scalia, J. dissenting) (finding adjectives used by Court's majority in its description of *liberty* to be applicable to many types of conduct previously held not to be entitled to protection under Constitution). Although the *Casey* majority held the right to abort "inheres in liberty" because of the intensely personal nature of the decision, Justice Scalia's position is that other "intimate and deeply personal" decisions can be proscribed constitutionally. *Id.* Examples include homosexual sodomy, polygamy, adult incest, and suicide, which are also decisions involving "personal autonomy and bodily integrity." *Id.* at 984.

131. *Compare* U.S. CONST. amend. V (discussing liberty in relation to procedural law), *with Casey*, 505 U.S. at 846-47 (acknowledging that literal interpretation of Constitution suggests *liberty* is procedural, but finding that for past century *liberty* has been construed as containing substantive component).

132. *Casey*, 505 U.S. at 848 (citing Poe v. Ullman, 367 U.S. 497, 543 (1961)).

133. Poe v. Ullman, 367 U.S. 497, 523 (1961).

live. In other words, under the undue burden standard,[134] a woman may be able to choose not only whether she wants to have a baby, but also whether a particular baby is worthy to live. This choice has therefore mutated from a personal choice not to be pregnant, with the side effect of the destruction of an innocent life, to a primary choice to intentionally destroy a life that the woman perceives as substandard. According to opponents of the Ban, women typically do not choose this type of abortion because they do not want a baby.[135] Instead, they choose it because they do not want a *particular* baby who has deformities.[136] If this claim is true,[137] it raises sobering implications. It is one thing for a woman to choose her personal desires as superior to that of the developing life within her. However, the implications become more troublesome when the woman has chosen to discard this particular child because of its imperfections. In such a case, the woman's role has shifted from that of an individual exercising the personal liberty of controlling one's body to that of an omniscient being capable of deeming who is worthy of life.[138] As one U.S. senator put it, "[I]f we sanction the brutal destruction of those who are not perfect, who are not chosen or not convenient, who are unseen or undefended, who among us would be spared?"[139] Is this the type of moral "end" that the liberty right should provide the "means" to achieve?

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134. *See* Planned Parenthood v. Casey, 505 U.S. 833, 876 (1992) (articulating Court's standard for allowing abortions). Regulations designed to foster the health of a woman seeking an abortion are valid if they do not constitute an undue burden. *Id.* at 878.

135. *See* Terence Hunt, *Bill to Ban Late-Term Abortions Is Vetoed: Dole Says Procedure 'Blurs the Line Between Abortion and Infanticide,'* PEORIA J. STAR, Apr. 11, 1996, at A1 (quoting mother as saying she had no other choice and that she "didn't make the decision for my child to die").

136. *See id.* (citing pain and anguish of several mothers whose children underwent partial-birth abortion because of medical problems).

137. *See supra* note 31–34 and accompanying text (raising questions about true motives for second-trimester partial-birth abortions).

138. *See* Robert J. Muise, Note, *Professional Responsibility for Catholic Lawyers: The Judgment of Conscience*, 71 NOTRE DAME L. REV. 771, 774 (1996) (noting perspective that God, alone, has authority to end life). Muise states:

> Clearly, by giving serious attention to divine revelation, one looks at legal questions in a different light. If, for example, one recognizes God as the creator of human life and the only one with full authority to ordain how that life should be lived and when it may lawfully be taken, this will surely influence one's views on abortion, euthanasia, fetal experimentation, in vitro fertilization, capital punishment, and a host of life-and-death issues.

Id. (quoting Edward J. Murphy, *The Sign of the Cross and Jurisprudence*, 69 NOTRE DAME L. REV. 1285, 1291-92 (1994)).

139. *Senator Pushes for Ban on Late-Term Abortions: He Said Supporters of the Procedure Have Misled the President*, ORLANDO SENTINEL, Apr. 6, 1997, at A22 (quoting Sen. Rick Santorum, R-Pa.).

One might argue that the United States is immune from temptations to practice eugenics, but only a few years ago, it was inconceivable that an American president and a substantial number of legislators would allow abortions during the third trimester.[140] Similarly, the idea of a medical doctor advocating the elimination of deformed infants for both the family's and society's financial considerations would have been unimaginable only a short time ago. Choice advocate Dr. Carson, for example, warned the legislators of the result of outlawing partial-birth abortions, stating: "[Y]ou will be condemning a generation of malformed newborns to a life of very expensive pain and suffering. The payment due on that bill is going to be very, very costly to the Government because eventually you and I are going to be maintaining these children."[141] Although Dr. Carson also noted that the payment on one's personal grief can probably never be adequately paid,[142] the trend is unmistakable.

E. *Implications of the Rejection of Natural Law*

Opponents of partial-birth abortions are not oblivious to the moral dilemma posed by this procedure. Rather, they are simply keenly attuned to the implications of outlawing this particular type of abortion. By bringing the legs, arms, and torso of the infant into plain sight, the justification for aborting any baby, at whatever stage, who was previously camouflaged by the term "fetus," disappears. If it is wrong to kill a baby whose only connection to abortion is that the head remains in the mother's womb while the baby is killed, then it necessarily follows that the next question becomes how it can be just to abort the same baby just because the baby's entire body is within the womb rather than outside it.

The legislators who voted against a ban on partial-birth abortions[143] recognized that such a ban would necessarily encompass this issue and would ultimately "chip away" at abortion rights.[144] Additionally, Kate Michelman, the president of National Abortion and Reproductive Rights Action League denounced the Ban as "devastat[ing to] *Roe v. Wade* and the freedom to choose."[145] In fact, no one seems to deny this claim. In-

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140. *See Partial-Birth Abortion Act of 1995*, H.R. REP. NO. 104-267, at 22 (1995) (dissenting views) (stating that Ban, if enacted, "would constitute the first-ever general federal ban on a form of abortion").

141. *Id.* at 33.

142. *Id.*

143. *See id.* at 27 (listing names of senators opposing Ban).

144. *Id.* at 22 (dissenting views) (finding this legislation to be "a large step toward stripping away as many of the protections for legal abortion that the majority can manage").

145. *President Vetoes Bill Banning Rare Abortion Procedure*, SAN ANTONIO EXPRESS-NEWS, Apr. 11, 1996, *available in* 1996 WL 2828249. Michelman applauded Clinton's veto,

deed, it appears that the Ban would have contributed to Justice Scalia's goal of disassembling "the mansion of constitutionalized abortion" created by *Roe*, "doorjamb by doorjamb, no matter how wrong [*Roe*] may be."[146]

The manner in which the issue of morality is dealt with in the partial-birth abortion context likely will control future political "moral" decisions. While abortion discussions of the past focused on the semantics of the term *fetus* to obscure the issue of the unborn's humanity, this manipulation of terms is no longer possible in partial-birth abortions, because the fully developed body becomes visible prior to having its life taken. Previously, women were tricked out of making the correct moral decision because of the term "fetus," which implied nothing more than either an "organism" or "tissue."[147] In other words, the so-called "choice" granted these women was not a real choice because they were never confronted with the possibility that they might be killing an unborn baby. The Court has also fallen into this trap:

> [A]s a matter of federal constitutional law, a developing organism that is not yet a "person" does not have what is sometimes described as a "right to life." This has been and, by the Court's holding today, remains a fundamental premise of our constitutional law governing reproductive autonomy.[148]

But in the case of partial-birth abortion, the "smoke and mirror" pro-choice semantics[149] can no longer obscure the reality of life.

The Court has explicitly said that if a fetus was shown to be a person under the law, then it would be entitled to the protections of the Consti-

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saying that it illustrated the importance of a pro-choice presidency in that it would safeguard "reproductive rights against a Congress intent on returning women, step by step, to the back alleys." *Id.*

146. Webster v. Reproductive Health Servs., 492 U.S. 490, 537 (1989) (Scalia, J. concurring).

147. *See* J. Bottum, *Facing Up to Infanticide*, FIRST THINGS, Feb. 1996, at 43 (relaying the argument of feminist Naomi Wolf that pro-abortion rhetoric has denied women "a 'moral-framework' with which to understand abortion"). "The blind adherence to privacy rights and 'the refusal to use a darker and sterner and more honest moral rhetoric' have robbed women of a 'sense of sin,' and consequentially of the possibility of grief, atonement, and healing." *Id.; see also* Cardinal Bernard Law, *A Road Map to the Year 2000 and Beyond*, COLUMBIA, Oct. 1995, at 8, 9 (stating that voters are "lulled into moral relativism by those who would present individual choice as the moral norm").

148. *Casey*, 505 U.S. at 913–14.

149. *See id.* at 857 (equating "abortion" with "medical treatment"). The Court stated, "*Roe*, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection." *Id.*

tution. However, because it has allowed women and their doctors to determine for themselves whether a fetus is life, the Court and society in general have focused on the liberty right of the mother. This misguided focus represents a blatant deviation from a moral perspective and the Declaration of Independence's "right to life."[150] Arguably the ever-growing blur of individual liberty has erased the sanctity of human life. It is critical that society understands the implications of this version of *liberty* not only for the baby, but also for what this evolved liberty encompasses.

A number of years ago, Pope John Paul II recognized that these liberty interests were becoming blurred with life interests when he spoke about democracy, and stated:

> Democracy cannot be idolized to the point of making it a substitute for morality or a panacea for immorality. Fundamentally, democracy is a 'system' and as such is a means and not an end. Its 'moral' value is not automatic, but depends on conformity to the moral law to which it, like every other form of human behavior, must be subject: in other words, its morality depends on the morality of the ends which it pursues and of the means which it employs.[151]

Applied to the partial-birth abortion context, one must particularly question the morality of the "ends" being pursued. If the woman's liberty right of reproductive freedom includes the right to abort even fully developed, viable babies with only their heads remaining in the womb, then what is the legitimate "end" of this freedom? In most cases, that "end" is to prevent an allegedly misfit child from being brought into the world. Thus, in such an instance, it is much harder to classify this decision as merely a choice to have one's body not be subjected to pregnancy, because the woman has already carried the baby into the second and third trimester before being alerted of its deformities. The woman's right to determine her own body's destiny has become her right to decide another body's fitness.

V. CONCLUSION

Partial-birth abortion must be viewed not only as a morally questionable practice in the already controversial realm of abortion, but also as an indicator of the direction the United States is moving with regard to respect for all human life. President Clinton, legislators, doctors, and mothers all express remorse for their part in partial-birth abortions. Yet, politically and personally, they continue to endorse the practice. These

150. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).
151. JOHN PAUL II, EVANGILITA: SPLENDOR OF LIFE § 70 (1993).

individuals have indicated that "defective" infants are one form of life that regrettably is disposable. The position that morality is relative has led these people to the belief that, although they feel the wrongness and recognize the aborted as life, it is not necessarily wrong to abort defective babies. The woman's right to choose the form of the baby she desires, the economic burdens on society and the family, the emotional crosses that must be borne by the family, and the difficult life destined to the infant child are evaluated hierarchally and are determined to be above the right to life itself.

In *Roe*, the Court employed the following logic:

> According to the 5th Amendment of the Constitution, a person cannot be deprived of life without Due Process of law.
>
> If F is a person, then F is entitled to the right to life.
>
> Utilizing the Constitution, the Court finds that:
>
> A is a person because A is an x.
>
> B is a person because B is a y.
>
> C is a person because C is z.
>
> F is not a x, y, or z.
>
> Therefore, F is not a person and is not entitled to the right to life.

The error of this logic is blatant.[152] Because an unborn person was not specifically mentioned in the Constitution as being a person, it was found that he or she was not entitled to constitutional protection. It necessarily follows that anyone not specifically mentioned by the Constitution as being a person is not entitled to Due Process before being deprived of constitutionally guaranteed rights. Using this classification process to determine if an individual is entitled to the right to life could lead to absurd results. Aliens and corporations would merit protection, but, similar to the unborn, homosexuals, for example, are not specifically mentioned in the Constitution, and would not be protected as "persons." If one is not specifically mentioned, then no protection is guaranteed, and, given the hierarchy used in the abortion context, another's liberty, economic factors, and medical concerns can take precedence over the life of those not declared "persons."

Such reasoning has frightening implications. As wide-scale health reform looms, one might ask which "persons" will be entitled to health care benefits? In the health care context, will the same factors—defectiveness and economic concerns—override entitlement to care? No one would argue that medical science must continue to work to eliminate birth de-

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152. *See* Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 945 (1996) (affirming that if inductive arguments are used, truth of premises does not guarantee truth of conclusion).

fects, rather than simply choosing to eliminate the defective. To ensure that the former path is taken, however, morality and religion should be allowed to enter political discussion in order to ground the debate.

Ultimately, human life should be revered regardless of its condition. The partial-birth abortion must be legislatively banned, and the liberty right of women must be viewed in its proper perspective. That liberty right should not continue to be lowered to the status of a hollow individual entitlement, but should be raised to its constitutionally intended status as a morally constrained freedom or ability. Along these lines, Pope John II warns:

> [S]ince the human person cannot be reduced to a freedom which is self-designing, but entails a particular spiritual and bodily structure, the primordial moral requirement of loving and respecting the person as an end and never as a means implies, by its very nature, respect for certain fundamental goods, without which one would fall into relativism and arbitrariness.[153]

Hopefully, his warning will be heeded.

153. JOHN PAUL II, THE SPLENDOR OF TRUTH: VERITATIS SPLENDOR § 48 (1993).