

BORN-ALIVE INFANTS PROTECTION ACT OF 2001

AUGUST 2, 2001.—Committed to the Committee of the Whole House on the State
of the Union and ordered to be printed

Mr. SENSENBRENNER, from the Committee on the Judiciary,
submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 2175]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 2175) to protect infants who are born alive, having considered the same, reports favorably thereon without amendment and recommends that the bill do pass.

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PURPOSE AND SUMMARY

It has long been an accepted legal principle that infants who are born alive, at any stage of development, are persons who are enti-

tled to the protections of the law. But recent changes in the legal and cultural landscape have brought this well-settled principle into question.

In *Stenberg v. Carhart*,¹ for example, the United States Supreme Court struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist delivers an unborn child's body until only the head remains inside of the womb, punctures the back of the child's skull with scissors, and sucks the child's brains out before completing the delivery. What was described in *Roe v. Wade* as a right to abort "unborn children" has thus been extended by the Court to include the violent destruction of partially-born children just inches from complete birth.

The *Carhart* Court considered the location of an infant's body at the moment of death during a partial-birth abortion—delivered partly outside the body of the mother—to be of no legal significance in ruling on the constitutionality of the Nebraska law. Instead, implicit in the *Carhart* decision was the pernicious notion that a partially-born infant's entitlement to the protections of the law is dependent upon whether or not the partially-born child's mother wants him or her.

Following *Stenberg v. Carhart*, on July 26, 2000, the United States Court of Appeals for the Third Circuit made that point explicit in *Planned Parenthood of Central New Jersey v. Farmer*,² in the course of striking down New Jersey's partial-birth abortion ban. According to the Third Circuit, under *Roe* and *Carhart*, it is "nonsensical" and "based on semantic machinations" and "irrational line-drawing" for a legislature to conclude that an infant's location in relation to his or her mother's body has any relevance in determining whether that infant may be killed. Instead, the *Farmer* Court repudiated New Jersey's classification of the prohibited procedure as being a "partial birth," and concluded that a child's status under the law, regardless of the child's location, is dependent upon whether the mother intends to abort the child or to give birth. Thus, the *Farmer* Court stated that, in contrast to an infant whose mother intends to give birth, an infant who is killed during a partial-birth abortion is not entitled to the protections of the law because "[a] woman seeking an abortion is plainly not seeking to give birth."³

The logical implications of *Carhart* and *Farmer* are both obvious and disturbing. Under the logic of these decisions, once a child is marked for abortion, it is wholly irrelevant whether that child emerges from the womb as a live baby. That child may still be treated as though he or she did not exist, and would not have any rights under the law—no right to receive medical care, to be sustained in life, or to receive any care at all. And if a child who survives an abortion and is born alive would have no claim to the protections of the law, there would, then, be no basis upon which the government may prohibit an abortionist from *completely* delivering an infant before killing it or allowing it to die. The "right to abortion," under this logic, means nothing less than the right to a dead baby, no matter where the killing takes place.

¹ 530 U.S. 914 (2000).

² 220 F.3d 127 (3rd Cir. 2000).

³ *Id.* at 143.

Credible public testimony received by the Subcommittee on the Constitution of the Committee on the Judiciary indicates that this is, in fact, already occurring. According to eyewitness accounts, “induced-labor” or “live-birth” abortions are indeed being performed, resulting in live-born premature infants who are simply allowed to die, sometimes without the provision of even basic comfort care such as warmth and nutrition.

The purposes of H.R. 2175, the “Born-Alive Infants Protection Act of 2001” are:

- (1) to repudiate the flawed notion that a child’s entitlement to the protections of the law is dependent upon whether that child’s mother or others want him or her;
- (2) to repudiate the flawed notion that the right to an abortion means the right to a dead baby, regardless of where the killing takes place;
- (3) to affirm that every child who is born alive—whether as a result of induced abortion, natural labor, or caesarean section—bears an intrinsic dignity as a human being which is not dependent upon the desires, interests, or convenience of any other person, and is entitled to receive the full protections of the law; and
- (4) to establish firmly that, for purposes of Federal law, the term “person” includes an infant who is completely expelled or extracted from his or her mother and who is alive, regardless of whether or not the baby’s development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion.

BACKGROUND AND NEED FOR THE LEGISLATION

I. EROSION OF LEGAL RIGHTS OF BORN-ALIVE INFANTS

It has long been accepted as a legal principle that infants who are born alive are persons who are entitled to the protections of the law, and that a live birth occurs whenever an infant, at any stage of development, is expelled from the mother’s body and displays any of several specific signs of life—breathing, a heartbeat, and/or definite movement of voluntary muscles. Many States have statutes that, with some variations, explicitly enshrine this principle as a matter of State law, and Federal courts have recognized the principle in interpreting Federal criminal laws. Recent changes in the legal and cultural landscape appear, however, to have brought this well-settled principle into question.

A. *The Supreme Court’s Recent Partial-Birth Abortion Decision Erodes the Born-Alive Principle and Creates Confusion Regarding Infanticide and the Legal Status of Abortion Survivors*

On June 28, 2000, in *Stenberg v. Carhart*,⁴ the United States Supreme Court struck down a Nebraska law banning partial-birth abortion, a procedure in which an abortionist dilates a pregnant woman’s cervix, delivers the unborn child’s body until only the head remains inside of the mother, punctures the back of the

⁴ 530 U.S. 914 (2000).

child's skull with scissors, and sucks the child's brains out before completing the delivery. It is a matter of public record that this grisly abortion procedure is extremely painful to the child, is never medically necessary to preserve the life or health of the mother, and indeed is dangerous to women who undergo it. In the words of the American Medical Association, partial-birth abortion is "not medically indicated" in any situation and is "not good medicine."⁵

Notwithstanding the compelling record against partial-birth abortion, the *Carhart* Court held that the abortion right created in *Roe v. Wade* encompasses the right to partial-birth abortion. That is, what was described in *Roe v. Wade* as a right to abort "unborn children" has now been extended by the Court to include the brutal killing of partially-born children just inches from birth. The *Carhart* Court based its bizarre conclusion on claims by abortionists that partially delivering an infant before killing it is safer for the mother because it requires less "instrumentation" in the birth canal and reduces the risk of complications from "retained fetal body parts."⁶ As discussed below, these same claims would support an abortionist's argument that *fully* delivering an infant before killing it is safer for the mother and is, therefore, constitutionally protected.

The *Carhart* Court thus thwarted Nebraska's efforts (and the efforts of numerous other States) to, in the words of Justice Thomas in dissent, "prohibit[] a procedure that approaches infanticide, and thereby dehumanizes the fetus and trivializes human life."⁷ The result of the Court's decision, as Justice Scalia noted in dissent, "is to give live-birth abortion free rein," and to endorse the absurd notion that "the Constitution of the United States, designed, among other things, 'to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity,' prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity."⁸

The *Carhart* Court considered the location of an infant's body at the moment of death during a partial-birth abortion—delivered partly outside the body of the mother—to be of no legal significance in ruling on the constitutionality of the Nebraska law. Indeed, two members of the majority, Justices Stevens and Ginsburg, went so far as to say that it was "irrational" for the Nebraska legislature to take the location of the infant at the point of death into account.⁹ Instead, implicit in the *Carhart* decision was the pernicious notion that a partially-born infant's entitlement to the protections of the law is dependent upon whether or not the partially-born child's mother wants him or her.

⁵Letter from P. John Seward, M.D., Executive Vice President, American Medical Association, to U.S. Sen. Rick Santorum (May 19, 1997) (on file with the Constitution Subcomm. of the House Comm. on the Judiciary).

⁶See *Carhart*, 530 U.S. at 926, 928–31.

⁷*Carhart*, 1006–07 (Thomas, J., dissenting). Justice Thomas noted that "[t]he AMA has recognized that this procedure is 'ethically different from other destructive abortion techniques because the fetus, normally twenty weeks or longer in gestation, is killed outside the womb. The "partial birth" gives the fetus an autonomy which separates it from the right of the woman to choose treatments for her own body.'" *Id.* (quoting AMA Board of Trustees Factsheet on H.R. 1122 (June 1997), in App. to Brief for Association of American Physicians and Surgeons *et al.* as Amici Curiae 1).

⁸*Id.* at 953 (Scalia, J., dissenting).

⁹See *id.* at 946–947 (Stevens, J., concurring) (stating that "the notion that [partial-birth abortion] is more akin to infanticide than [any other abortion procedure] . . . is simply irrational").

Following *Stenberg v. Carhart*, on July 26, 2000, the United States Court of Appeals for the Third Circuit made that point explicit in *Planned Parenthood of Central New Jersey v. Farmer*,¹⁰ in the course of striking down New Jersey’s partial-birth abortion ban. According to the Third Circuit, under *Roe* and *Carhart*, it is “nonsensical” and “based on semantic machinations” and “irrational line-drawing” for a legislature to conclude that an infant’s location in relation to his or her mother’s body has any relevance in determining whether that infant may be killed.¹¹

Instead, the *Farmer* Court repudiated New Jersey’s classification of the prohibited procedure as being a “partial birth,” and concluded that a child’s status under the law, regardless of his or her location, is dependent upon whether the mother intends to abort the child or to give birth. The *Farmer* Court stated that, in contrast to an infant whose mother intends to give birth, an infant who is killed during a partial-birth abortion is not entitled to the protections of the law because “[a] woman seeking an abortion is plainly not seeking to give birth.”¹²

The logical implications of *Stenberg* and *Farmer* are both obvious and disturbing. If the right to abortion entails the right to kill without regard to whether the child remains in the mother’s womb, and a child’s entitlement to the protections of the law depends upon whether or not the child’s mother intends to abort the child or give birth, it follows that infants who are marked for abortion but somehow survive and are born alive have no legal rights under the law—no right to receive medical care, to be sustained in life, or receive any care at all.

Indeed, that is precisely where the abortion right has taken the law in South Africa. Under guidelines promulgated by the South African Department of Health, babies who survive abortions are to be left to die even if they are gasping for breath and struggling to survive.¹³ The guidelines state that “if an infant is born who gasps for breath, it is advised that the foetus does not receive any resuscitation measures.”¹⁴ Many doctors and nurses in South Africa have expressed outrage at the guidelines. One female physician in KwaZulu-Natal said that “[i]t is inhuman and against all my principles. . . . No way will I stand by and do nothing to resuscitate a child. It is impossible and we should not be put in such a position.”¹⁵

A debate over this same issue is also currently taking place in Australia. Some medical experts contend that babies who survive abortions have the right to medical attention from a physician, just as the elderly and terminally ill do.¹⁶ Other experts contend that abortion survivors should not receive medical attention.¹⁷ For example, the chairman of Family Planning Australia, Gab Kovacs,

¹⁰ 220 F.3d 127 (3rd Cir. 2000).

¹¹ See *id.* at 143–44.

¹² *Id.* at 143.

¹³ See Angella Johnson, *Abortion babies “should be left to die”*, Africa News Service, Mar. 3, 1997.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ See Victoria Button, *Experts Divided on Foetus Protocols*, The Age, Apr. 12, 2000.

¹⁷ See *id.*

contends that babies who survive abortions “should be left to succumb in peace, on a cot in a back room, for example.”¹⁸

Moreover, if, under *Carhart* and *Farmer*, a child who survives an abortion and is born alive is not entitled to the protections of the law simply because the child’s mother did not intend to give birth, then there is no basis—other than “semantic machinations” and “irrational line-drawing” based on the infant’s “born” or “unborn” status, bases which the Third Circuit rejected in *Farmer*—upon which the government may prohibit an abortionist from *completely* delivering an infant before killing it or allowing it to die. Under the logic of these decisions, if a woman decides to abort her unborn child, and the abortionist decides that the health risks to the woman are reduced by his *not* stabbing the child in the back of the skull in order to kill the child before completing delivery—the risk reduction occurring because surgical instruments would not be inserted into the birth canal, and the risk of fetal part retention would be reduced—the abortionist may simply completely deliver the child before killing him or her. The right to abortion created in *Roe* thus appears to encompass, at least in the Supreme Court’s view, the right to infanticide.

B. The “Viability” Doctrine in the Supreme Court’s Abortion Jurisprudence Has Eroded the Born-Alive Principle and Created Confusion Regarding the Legal Status of Premature Infants Who Survive Abortions

The “viability” doctrine in the Supreme Court’s decisions in *Planned Parenthood v. Casey*¹⁹ and *Carhart* has also created confusion regarding the legal status of premature infants who survive abortions but have little or no chance of sustained survival. In *Casey*, the Court reaffirmed the right of a woman to abort her unborn child, and adhered to the notion that the government’s interest in protecting the unborn child is related to “viability,” or the child’s capacity for sustained survival independent of the mother, with or without medical assistance. The *Carhart* Court also relied upon the viability doctrine in striking down Nebraska’s partial-birth abortion ban.

The Court’s reliance upon the viability concept in the abortion context appears to have caused some to wrongly conclude that premature infants who survive abortions are not legally-protected persons if they have little or no chance of sustained survival. Indeed, that appears to have been the position of opponents of the Born-Alive Infants Protection Act of 2000, H.R. 4292, which was offered in the 106th Congress. On July 20, 2000, for example, the National Abortion and Reproductive Rights Action League (“NARAL”) issued a press release criticizing H.R. 4292 because, in NARAL’s view, extending legal personhood to premature infants who are born alive after surviving abortions constitutes an “assault” on *Roe v. Wade*.²⁰

¹⁸ *Id.*

¹⁹ 505 U.S. 833 (1992).

²⁰ NARAL Statement: *Roe v. Wade Faces Renewed Assault in the House, Anti-Choice Lawmakers Hold Hearing on So-Called “Born-Alive Infants Protection Act”*, July 20, 2000 (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary). On June 13, 2001, NARAL released a statement in anticipation of the introduction of H.R. 2175: “Consistent with our position last year, NARAL does not oppose passage of the Born Alive Infants Protection Act. Last year’s Committee and floor debate served to clarify the bill’s intent and assure us that it is not targeted at *Roe v. Wade* or a woman’s right to choose.” *Statement of NARAL On The*

According to NARAL, by seeking to provide legal rights to born-alive infants “at any stage of development,” including those not yet considered to have achieved “viability,” the proponents of H.R. 4292 were “directly contradicting one of *Roe*’s basic tenets.”²¹ It will come as a surprise to many that one of *Roe*’s ‘basic tenets’ is that a premature baby who is marked for abortion, but somehow survives and is born alive, is not a person that the law may protect.

Rep. Stephanie Tubbs Jones took a similar position during the Subcommittee on the Constitution’s hearing on H.R. 4292. According to Rep. Jones, providing legal personhood to premature infants who survive abortions “is an attempt to do what the U.S. Supreme Court has strictly forbidden over and over—it unduly restricts a woman’s right to terminate a pregnancy.”²² H.R. 4292 unduly restricted a woman’s right to choose, Rep. Jones contended, by extending protection to fully born, premature infants in “direct contravention of *Roe v. Wade* and subsequent Supreme Court rulings.”²³

The question of whether a live birth has occurred does not, however, depend upon whether an infant is sufficiently developed for sustained survival. The definition of “born alive” contained in H.R. 2175 was derived from a model definition of “live birth” that was promulgated by the World Health Organization in 1950 and is, with minor variations, currently codified in thirty States and the District of Columbia.²⁴ The Illinois statute provides a model of this definition:

Live birth means the complete expulsion or extraction from its mother of a product of human conception, *irrespective of the duration of pregnancy*, which after such separation breathes or shows any other evidence of life such as beating of the heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, whether or not the umbilical cord has been cut or the placenta is attached.²⁵

Pennsylvania’s statute includes a similar but somewhat broader definition: “Live birth means the expulsion or extraction from its mother of a product of conception, irrespective of the period of gestation, which shows any evidence of life at any moment after expulsion or extraction.”²⁶

The reason these statutes do not define a live birth as dependent upon the infant’s gestational age is fairly obvious. Many infants are

Born Alive Infants Protection Act, June 13, 2001 (on file with the Subcomm. on the Constitution of the House Comm. on the Judiciary).

²¹*Id.*

²²*Born-Alive Infants Protection Act: Hearings on H.R. 4292 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 20, 2000 (statement of Rep. Stephanie Tubbs Jones).

²³*Id.*

²⁴See Alaska Stat. § 18.50.950; Ariz. Rev. Stat. Ann. § 36–301; 17 Ca. Adc. § 915; Fla. Stat. Ann. § 382.002; Ga. Code Ann. § 31–10–1; Haw. Rev. Stat. § 338–1; Idaho Code § 39–241; Ill. Ann. Stat. Ch. 410, § 535/1; Kan. Stat. Ann. § 65–2401; Ky. Rev. Stat. Ann. § 213.011; Me. Rev. Stat. Ann. tit. 22, § 1595; Md. Code Ann., Health-Gen. § 4–201; Mo. Rev. Stat. § 193.015; N.J. Stat. Ann. § 26:8–1; N.M. Stat. Ann. § 24–14–2; N.Y. Pub. Health Law § 4130; N.D. Cent. Code § 23–02.1–01; Ohio Rev. Code Ann. § 3705.01; Okla. Stat. Ann. tit. 63, § 1–301; Or. Rev. Stat. § 432.005; R. I. Gen. Laws § 23–3–1; S.D. Codified Laws Ann. § 34–25–1.1; Tenn. Code Ann. § 68–3–102; Va. Code Ann. § 32.1–249; W. Va. Code § 16–5–1; Wyo. Stat. § 35–1–401; D.C. Code § 6–201(9); Minn. R. 4600.0100(Subp. 4); N.C. Admin. Code tit. 15A, r. 19H.0102(5); S.C. Admin. Code 61–19(1)(f); 25 Tex. Admin. Code § 181.1(16).

²⁵Ill. Ann. Stat. Ch. 410, § 535/1 (emphasis added).

²⁶35 Pa. Const. Stat. § 450.105.

born alive at 20 to 22 weeks and survive for hours, even though their lung capacity typically does not permit sustained survival. Under the prevailing standards of medical care, such infants are understood to be born-alive persons and are treated as such, even though they may only live for a short time. They are, for example, treated humanely, given comfort care, and issued a death certificate. And an individual could not escape criminal prosecution for entering a neonatal intensive care unit and murdering one of these infants simply because the infant will only survive for a short time.

Many infants are also born-alive at 23 weeks, and currently have at least a 39% chance of sustained survival, and at 24 weeks with a greater than 50% chance of sustained survival, with the odds improving all of the time. Determining whether any given one of these children should be treated as a born-alive person, on the basis of his or her ultimate viability, could only be accomplished retrospectively, by looking at whether the child actually survived. The law has avoided this conundrum by defining a live birth without regard to the gestational age of the child.

C. Princeton University Bioethicist Peter Singer Advocates Legal Killing of Disabled or Unhealthy Newborn Infants

The principle that born-alive infants are entitled to the protection of the law is also being questioned at one of America's most prestigious universities. In his 1993 book *Practical Ethics*, Princeton University Bioethicist Peter Singer argues that parents should have the option to kill disabled or unhealthy newborn babies for a certain period after birth. According to Professor Singer, "a period of 28 days after birth might be allowed before an infant is accepted as having the same right to live as others."

This contention is based on Professor Singer's view that the life of a newborn baby is "of no greater value than the life of a nonhuman animal at a similar level of rationality, self-consciousness, awareness, capacity to feel, etc." According to Professor Singer, "killing a disabled infant is not morally equivalent to killing a person. Very often it is not wrong at all."

II. EVIDENCE OF THE MORAL AND LEGAL CONFUSION REGARDING THE STATUS OF LIVE-BORN INFANTS

A. "Live-Birth" Abortions

The legal and moral confusion that flows from these pernicious ideas is well illustrated by disturbing events that are alleged to have occurred at Christ Hospital in Oak Lawn, Illinois. Two nurses from the hospital's delivery ward, Jill Stanek and Allison Baker (who is no longer employed by the hospital), testified before the Subcommittee on the Constitution that physicians at Christ Hospital have performed numerous "induced labor" or "live-birth" abortions, a procedure in which physicians use drugs to induce premature labor and deliver unborn children, many of whom are sometimes still alive, and then simply allow those who are born alive to die.²⁷

²⁷ See *Born-Alive Infants Protection Act: Hearings on H.R. 2175 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong., July 12, 2001 (statement of Jill L. Stanek, R.N.); *Born-Alive Infants Protection Act: Hearings on H.R. 4292 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 20, 2000 (statement of Allison Baker, R.N., B.S.N.). On July 20, 2000, during the 106th Congress, the Subcommittee

According to medical experts, this procedure is appropriately used only in situations in which an unborn child has a fatal deformity, such as anencephaly or lack of a brain, and infants with such conditions who are born alive are given comfort care (including warmth and nutrition) until they die, which, because of the fatal deformity, is typically within a day or two of birth. According to the testimony of Mrs. Stanek and Mrs. Baker, however, physicians at Christ Hospital have used the procedure to abort healthy infants and infants with non-fatal deformities such as spina bifida and Down Syndrome.²⁸ Many of these babies have lived for hours after birth, with no efforts made to determine if any of them could have survived with appropriate medical assistance.²⁹ The nurses have also witnessed hospital staff taking many of these live-born babies into a “soiled utility closet” where the babies would remain until death.³⁰ Comfort care, the nurses say, was only provided sporadically.³¹

Mrs. Stanek, who testified in front of the Subcommittee on the Constitution during its hearing on H.R. 4292 and H.R. 2175, testified regarding numerous live-birth abortions that she alleges have occurred at Christ Hospital. The first she described as follows:

One night, a nursing co-worker was taking an aborted Down’s Syndrome baby who was born alive to our Soiled Utility Room because his parents did not want to hold him, and she did not have time to hold him. I could not bear the thought of this suffering child dying alone in a Soiled Utility Room, so I cradled and rocked him for the 45 minutes that he lived. He was 21 to 22 weeks old, weighed about ½ pound, and was about 10 inches long. He was too weak to move very much, expending any energy he had trying to breathe. Toward the end he was so quiet that I couldn’t tell if he was still alive unless I held him up to the light to see if his heart was still beating through his chest wall. After he was pronounced dead, we folded his little arms across his chest, wrapped him in a tiny shroud, and carried him to the hospital morgue where all of our dead patients are taken.³²

Mrs. Stanek testified about another aborted baby who was thought to have had spina bifida, but was delivered with an intact spine.³³ On another occasion, an aborted baby “was left to die on the counter of the Soiled Utility Room wrapped in a disposable towel. This baby was accidentally thrown in the garbage, and when they later were going through the trash to find the baby, the baby

on the Constitution held a hearing on the H.R. 4292, the “Born-Alive Infants Protection Act of 2000,” at which Mrs. Stanek and Mrs. Baker were witnesses. On July 12, 2001, the Subcommittee held a hearing on H.R. 2175, the “Born-Alive Infants Protection Act of 2001,” at which Mrs. Stanek was a witness. Mrs. Baker’s testimony submitted to the Subcommittee during the 106th Congress was entered into the record during the Subcommittee’s hearing on H.R. 2175.

²⁸ See Statement of Jill L. Stanek, R.N., *supra*; Statement of Allison Baker, R.N., B.S.N., *supra*.

²⁹ See Statement of Jill L. Stanek, R.N., *supra*; Statement of Allison Baker, R.N., B.S.N., *supra*.

³⁰ See Statement of Jill L. Stanek, R.N., *supra*; Statement of Allison Baker, R.N., B.S.N., *supra*.

³¹ See Statement of Jill L. Stanek, R.N., *supra*; Statement of Allison Baker, R.N., B.S.N., *supra*.

³² Statement of Jill L. Stanek, R.N., *supra*.

³³ *Id.*

fell out of the towel and on to the floor.”³⁴ Mrs. Stanek further testified regarding a live-birth abortion that was performed on a healthy infant at more than 23 weeks gestation, a stage of development at which premature infants have an almost 40% chance of survival.³⁵ According to Mrs. Stanek,

[t]he baby was born alive. If the mother had wanted everything done for her baby, there would have been a neonatologist, pediatric resident, neonatal nurse, and respiratory therapist present for the delivery, and the baby would have been taken to our Neonatal Intensive Care Unit for specialized care. Instead, the only personnel present for this delivery were an obstetrical resident and my co-worker. After delivery the baby, who showed early signs of thriving, was merely wrapped in a blanket and kept in the Labor & Delivery Department until she died 2½ hours later.³⁶

Mrs. Baker testified regarding three live-birth abortions she witnessed at Christ Hospital. According to Mrs. Baker, she was informed about the live-birth abortions, described by the hospital as “therapeutic abortions,” when she began working in the high risk labor and delivery unit at Christ Hospital in August 1998. She described her first encounter with this procedure as follows:

The first occurred on a day shift. I happened to walk into a “soiled utility room” and saw, lying on the metal counter, a fetus, naked, exposed and breathing, moving its arms and legs. The fetus was visibly alive, and was gasping for breath. I left to find the nurse who was caring for the patient and this fetus. When I asked her about the fetus, she said that she was so busy with the mother that she didn’t have time to wrap and place the fetus in a warmer, and she asked if I would do that for her. Later I found out that the fetus was 22 weeks old, and had undergone a therapeutic abortion because it had been diagnosed with Down’s Syndrome. I did wrap the fetus and place him in a warmer and for 2½ hours he maintained a heartbeat, and then finally expired.³⁷

The second induced-labor abortion Mrs. Baker witnessed involved a 20 week-old fetus with spina bifida who was born alive. According to Mrs. Baker,

[d]uring the time the fetus was alive, the patient kept asking me when the fetus would die. For an hour and 45 minutes the fetus maintained a heartbeat. The parents were frustrated, and obviously not prepared for this long period of time. Since I was the nurse of both the mother and the fetus, I held the fetus in my arms until it finally expired.³⁸

The third incident witnessed by Mrs. Baker involved a 16 week-old fetus with Down’s Syndrome. “Again,” Mrs. Baker testified, “I walked into the soiled utility room and the fetus was fully exposed,

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.*

³⁷ Statement of Allison Baker, R.N., B.S.N., *supra*.

³⁸ *Id.*

lying on the baby scale.”³⁹ Mrs. Baker then found the nurse who was caring for the mother and the baby and offered her assistance. “When I went back into the soiled utility room,” Mrs. Baker said, “the fetus was moving its arms and legs. I then listened for a heartbeat, and found that the fetus was still alive. I wrapped the fetus and in 45 minutes the fetus finally expired.”⁴⁰

When allegations such as these were first made against Christ Hospital, the hospital claimed that this procedure was only used “when doctors determine the fetus has serious problems, such as lack of a brain, that would prevent long-term survival.”⁴¹ Later, however, the hospital changed its position, announcing that although it had performed abortions on infants with non-fatal birth defects, it was changing its policy and would henceforth use the procedure to abort only fatally-deformed infants.⁴²

B. Confusion Regarding the Status of Abortion Survivors

The confusion regarding the status of abortion survivors is reflected in events that happened two years ago in Cincinnati, Ohio. A young woman learned she was pregnant and sought the assistance at the clinic of the abortionist Dr. Martin Haskell, inventor of one variation of the partial-birth abortion procedure.⁴³ Dr. Haskell performed the first step of the partial-birth abortion procedure—dilating the woman’s cervix—and she was to return the next day. The next morning the woman began experiencing severe abdominal pains and reported to the emergency room of Bethesda North Medical Center in Cincinnati. While she was being examined, the young woman gave birth to a baby girl.⁴⁴ The attending physician placed the baby in a specimen dish—like any other substance that is removed from the body—to be taken to the lab by a medical technician. When the technician, Shelly Lowe, saw the baby girl in the dish she was stunned when she saw the girl gasping for air. “I don’t think I can do that,” Ms. Lowe reportedly said. “This baby is alive.”⁴⁵

After doctors concluded that the baby was too premature to survive (by some estimates she was born at 22 weeks, although some members of the hospital staff believed she was older), Ms. Lowe held the baby, whom she named “Baby Hope,” until the child died, wrapping her in a blanket and singing to her as she stroked her cheeks. Ms. Lowe said: “I wanted her to feel that she was wanted. . . . She was a perfectly formed newborn, entering the world too soon through no choice of her own.”⁴⁶ Surprisingly, Baby Hope lived for 3 hours, without the benefit of an incubator or other intensive care, and breathing room air, but her condition was not reassessed by the physicians.⁴⁷ And although it is impossible to determine at this point whether a reassessment would have made any difference in Baby Hope’s ultimate survival, the lack of any

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Jeremy Manier, *Rare Abortions by Induced Labor Probed by State*, Chicago Tribune, Sept. 29, 1999.

⁴² See Jeremy Manier, *Christ Hospital, Network to Allow Fewer Abortions*, Chicago Tribune, Oct. 14, 1999.

⁴³ See *Finger-pointing follows Baby Hope*, Cincinnati Post, Apr. 22, 1999, at 15A.

⁴⁴ See *id.*; see also Mona Charen, *Baby Hope*, Washington Times, May 17, 1999.

⁴⁵ Mona Charen, *Baby Hope, Part 2*, Washington Times, May 24, 1999.

⁴⁶ Mona Charen, *Baby Hope*, Washington Times, May 17, 1999.

⁴⁷ See *id.*

such reassessment, coupled with the attending physician's initial placement of then-breathing Baby Hope in a specimen dish, at least raises serious questions as to whether a similarly-situated infant who was wanted by her mother would have received the same treatment.

Confusion regarding the legal status of abortion survivors is not a problem only in the United States. Evidence of this confusion can be further illustrated by events that occurred in Professor Peter Singer's native country of Australia. On April 10, 2000, in Sydney, Australia, a Coroners Court heard testimony regarding a baby who survived an abortion in 1998 and lived for 80 minutes while hospital staff waited for the baby to die.⁴⁸ When the midwife nurse called the abortion doctor (who was not present) to inform him that the baby had survived, he responded, "So?"⁴⁹ The nurse then did what she could to make the baby comfortable, covering her with a blanket to keep her warm until her breathing and heartbeat slowed and she died.⁵⁰

The coroner who investigated this incident condemned the actions of the abortion doctor, stating that "[t]he [baby] having been born alive deserved all the dignity, respect and value that our society places on human life. . . . The fact that her birth was unexpected and not the desired outcome of the [abortion] should not result in her and babies like her being perceived as anything less than a complete human being."⁵¹ Noting that the old, infirm, sick and terminally ill are all entitled to proper medical and palliative care and attention, the coroner stated that "newly-born unwanted and premature babies should have the same rights. The fact that [the baby's] death was inevitable should not affect her entitlement to such care and attention."⁵²

A similar incident occurred in Germany in 1998.⁵³ In that case, an infant survived an abortion attempt at 25 weeks gestation. The doctors who attempted to abort the baby left it wrapped in a blanket for 10 hours "under observation" but without any medical assistance. The doctors then consulted with the parents and decided to provide the baby medical assistance. The infant survived, but was severely damaged and has had several operations. The German government brought charges against the physicians.

III. THE BORN-ALIVE INFANTS PROTECTION ACT

H.R. 2175, the "Born-Alive Infants Protection Act of 2001," was designed to repudiate the pernicious and destructive ideas that have brought the born-alive rule into question, and to firmly establish that, for purposes of Federal law, an infant who is completely expelled or extracted from his or her mother and who is alive is, indeed, a person under the law—regardless of whether or not the child's development is believed to be, or is in fact, sufficient to permit long-term survival, and regardless of whether the baby survived an abortion. H.R. 2175 accomplishes this by providing that,

⁴⁸See *Australian Baby Lives 80 Minutes After Abortion*, Sydney Morning Herald, Apr. 10, 2000.

⁴⁹*Id.*

⁵⁰See *id.*

⁵¹*Id.*

⁵²*Id.*

⁵³See Andrew Gimson, *Outrage as baby survives abortion*, Daily Telegraph, London, Jan. 8, 1998.

for purposes of Federal law, “the words ‘person,’ ‘human being,’ ‘child,’ and ‘individual,’ shall include every infant member of the species *homo sapiens* who is born alive at any stage of development.” The term “born alive” is defined as

the complete expulsion or extraction from its mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of the voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

As stated above, this definition of “born alive” was derived from a model definition of “live birth” that has been adopted, with minor variations, in thirty States and the District of Columbia.⁵⁴

H.R. 2175 draws a bright line between the right to abortion—which the Supreme Court has now said includes the right to kill partially-born children—and infanticide, or the killing or criminal neglect of completely born children. The bill clarifies that a born-alive infant’s legal status under Federal law does not depend upon the infant’s gestational age or whether the infant’s birth occurred as a result of natural or induced labor, cesarean section, or induced abortion. If, for example, an infant is born alive at a Federal hospital as a result of a failed abortion attempt, this bill makes clear that the attending physicians and other medical professionals should treat the infant just as they would treat a similarly-situated infant who was born as a result of natural labor.

H.R. 2175 thus affirms, as Professor Hadley Arkes stated in testimony received by the Subcommittee on the Constitution, that every child who is born alive “has an *intrinsic* dignity, which must in turn be the source of rights of an intrinsic dignity, which cannot depend then on the interests or convenience of anyone else.”⁵⁵ The bill makes clear that a child’s legal status does not depend upon whether anyone happens to want him or her.

The protections afforded newborn infants under H.R. 2175 for purposes of Federal law are consistent with the protections afforded those infants under the laws of the thirty States and the District of Columbia that define a “live birth” in virtually identical terms. Like those laws, H.R. 2175 would not mandate medical treatment where none is currently indicated. While there is debate about whether or not to aggressively treat premature infants below a certain birth weight, this is a dispute about medical efficacy, not regarding the legal status of the patient. That is, the standard of medical care applicable in a given situation involving a premature infant is not determined by asking whether that infant is a person. Medical authorities who argue that treatment below a given birth weight is futile are not arguing that these low-birth weight infants are non-persons, only that providing treatment in those circumstances is not warranted under the applicable standard of medical care. H.R. 2175 would not affect the applicable standard of

⁵⁴ See discussion *supra*.

⁵⁵ *Born-Alive Infants Protection Act: Hearings on H.R. 2175 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 107th Cong., July 12, 2001 (statement of Professor Hadley Arkes, Amherst College).

care, but would only insure that all born-alive infants—regardless of their age and regardless of the circumstances of their birth—are treated as persons for purposes of Federal law.

IV. CONGRESSIONAL AUTHORITY TO ENACT H.R. 2175

H.R. 2175 is exclusively a definitional provision, identical in structure and function to the immediately preceding provision of the United States Code. That provision, 1 U.S.C. § 7, defines “marriage” and “spouse” for the purpose of construing “any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus of the United States.” H.R. 2175 defines the words “person,” “human being,” “child,” and “individual” for identical purposes.

H.R. 2175 does not, therefore, articulate any new substantive rule of law. Thus, as Professor Gerard V. Bradley of Notre Dame Law School testified before the Subcommittee on the Constitution in the 106th Congress, the Act does not call for an as-yet-unarticulated constitutional basis for lawmaking.⁵⁶ If the Federal law using the word “person,” “human being,” “child,” or “individual,” rests upon a proper enumerated basis, then no *additional* question about enumerated power is raised by Congress’s clarification of what that term means.⁵⁷ For, *if* Congress has the power to count “persons,” to protect “persons” against assault, to grant tax exemptions for all dependent “children,” or to take some other action with regard to “human beings” or “individuals,” that power necessarily implies the authority to provide a definition of “persons,” “children,” and “individuals.” Congress also has the authority to define these terms under the Necessary and Proper Clause of article 1, section 8 of the Constitution.

HEARINGS

The Committee’s Subcommittee on the Constitution held a hearing on H.R. 2175 on July 12, 2001. Testimony was received from the following witnesses: Hadley Arkes, Ney Professor of Jurisprudence and American Institutions, Amherst College; Jill L. Stanek, R.N., Christ Hospital, Oak Lawn, Illinois; Watson A. Bowes, Jr., M.D., Professor Emeritus of Obstetrics and Gynecology, School of Medicine, University of North Carolina at Chapel Hill. Additional material was submitted by Matthew G. Hile, Ph.D.; F. Sessions Cole, M.D.; Gordon B. Avery, M.D., Ph.D.; Advocate Christ Medical Center; and Jill L. Stanek, R.N.

COMMITTEE CONSIDERATION

On July 12, 2001, the Subcommittee on the Constitution met in open session and ordered favorably reported the bill H.R. 2175, by a voice vote, a quorum being present. On July 24, 2001, the Committee met in open session and ordered favorably reported the bill H.R. 2175 without amendment by a recorded vote of 25 to 2, a quorum being present.

⁵⁶ See *Born-Alive Infants Protection Act: Hearings on H.R. 4292 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 106th Cong., July 20, 2000 (statement of Professor Gerard V. Bradley, Notre Dame Law School).

⁵⁷ *Id.*

VOTE OF THE COMMITTEE

1. Final Passage. The motion to report the bill H.R. 2175 was adopted. The motion was agreed to by a rollcall vote of 25 to 2.

ROLLCALL NO. 1

	Ayes	Nays	Present
Mr. Hyde	X		
Mr. Gekas	X		
Mr. Coble	X		
Mr. Smith (Texas)	X		
Mr. Gallegly	X		
Mr. Goodlatte	X		
Mr. Chabot	X		
Mr. Barr	X		
Mr. Jenkins	X		
Mr. Hutchinson	X		
Mr. Cannon	X		
Mr. Graham			
Mr. Bachus	X		
Mr. Scarborough			
Mr. Hostettler	X		
Mr. Green	X		
Mr. Keller	X		
Mr. Issa	X		
Ms. Hart	X		
Mr. Flake	X		
Mr. Conyers	X		
Mr. Frank			
Mr. Berman			
Mr. Boucher			
Mr. Nadler	X		
Mr. Scott		X	
Mr. Watt		X	
Ms. Lofgren	X		
Ms. Jackson Lee			
Ms. Waters	X		
Mr. Meehan			
Mr. Delahunt			
Mr. Wexler			
Ms. Baldwin	X		
Mr. Weiner			
Mr. Schiff	X		
Mr. Sensenbrenner, Chairman	X		
Total	25	2	

COMMITTEE OVERSIGHT FINDINGS

In compliance with clause 3(c)(1) of rule XIII of the Rules of the House of Representatives, the Committee reports that the findings and recommendations of the Committee, based on oversight activities under clause 2(b)(1) of rule X of the Rules of the House of Representatives, are incorporated in the descriptive portions of this report.

PERFORMANCE GOALS AND OBJECTIVES

H.R. 2175 does not authorize funding. Therefore, clause 3(c) of rule XIII of the Rules of the House is inapplicable.

NEW BUDGET AUTHORITY AND TAX EXPENDITURES

Clause 3(c)(2) of House rule XIII is inapplicable because this legislation does not provide new budgetary authority or increased tax expenditures.

CONGRESSIONAL BUDGET OFFICE COST ESTIMATE

In compliance with clause 3(c)(3) of rule XIII of the Rules of the House of Representatives, the Committee sets forth, with respect to the bill, H.R. 2175, the following estimate and comparison prepared by the Director of the Congressional Budget Office under section 402 of the Congressional Budget Act of 1974:

U.S. CONGRESS,
CONGRESSIONAL BUDGET OFFICE,
Washington, DC, July 26, 2001.

Hon. F. JAMES SENSENBRENNER, Jr., *Chairman,*
Committee on the Judiciary,
House of Representatives, Washington, DC.

DEAR MR. CHAIRMAN: The Congressional Budget Office has prepared the enclosed cost estimate for H.R. 2175, the Born-Alive Infants Protection Act of 2001.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Lanette J. Walker, who can be reached at 226-2860.

Sincerely,

DAN L. CRIPPEN, *Director.*

Enclosure

cc: Honorable John Conyers Jr.
Ranking Member

H.R. 2175—Born-Alive Infants Protection Act of 2001.

H.R. 2175 would amend the United States Code by expanding the definition of the words “person, human being, child, and individual” as they are used in any act of the Congress or any administrative ruling, regulation, or interpretation. Under the bill, such words would be defined to include every infant born alive at any stage of development. The bill also would define the term “born alive.”

The interests of those who are born alive are recognized most commonly in the areas of tort law, trust and estate law, and criminal law. Because the words “person, human being, child, and individual” are used frequently throughout the United States Code, CBO cannot determine how the new definitions could be interpreted in all situations. However, CBO assumes that the bill would have no effect on trust and estate law and negligible effect on Federal tort law. In the area of criminal law, CBO expects that the circumstances under which the new definitions could be used to bring lawsuits in Federal court are very limited. Therefore, we estimate that the effect of H.R. 2175 on the Federal budget would be negligible.

Anyone prosecuted and convicted under H.R. 2175 could be subject to criminal fines. Collections of such fines are recorded in the

budget as governmental receipts (revenues), which are deposited in the Crime Victims Fund and spent in subsequent years. Because

H.R. 2175 could affect direct spending and receipts, pay-as-you-go procedures would apply. CBO expects, however, that any additional receipts and direct spending would be negligible because it is not likely that the Federal Government would pursue many cases under this bill.

Because definition changes in this bill would affect such a large number of citations in the United States Code, CBO cannot determine with certainty whether those changes might impose new enforceable duties on State, local, and tribal governments or the private sector. CBO has identified no such instances, however, and believes that it is unlikely that H.R. 2175 would impose new Federal mandates as defined by the Unfunded Mandates Reform Act.

The CBO staff contact for this estimate is Lanette J. Walker, who can be reached at 226–2860. This estimate was approved by Peter H. Fontaine, Deputy Assistant Director for Budget Analysis.

CONSTITUTIONAL AUTHORITY STATEMENT

Pursuant to clause 3(d)(1) of rule XIII of the Rules of the House of Representatives, the Committee finds the authority for this legislation in article I, section 8, clause 18 of the Constitution.

SECTION-BY-SECTION ANALYSIS AND DISCUSSION

Section 1. Short Title. This section provides that the short title of the Act is the Born-Alive Infants Protection Act of 2001.

Section 2. Definition of Born-Alive Infant. This section inserts into chapter 1 of title 1 of the United States Code a new section 8, defining “person,” “human being,” “child,” and “individual” as including born-alive infants. Section 8(a) provides that in determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words “person,” “human being,” “child,” and “individual,” shall include every infant member of the species homo sapiens who is born alive at any stage of development.

Section 8(b) provides that the term “born-alive,” with respect to any member of the species homo sapiens, means the complete expulsion or extraction of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.

Section 8(c) provides that nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being “born alive” as defined in this section.

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3(e) of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (new matter is printed in italics)

and existing law in which no change is proposed is shown in roman):

TITLE 1, UNITED STATES CODE

* * * * *

CHAPTER 1—RULES OF CONSTRUCTION

- Sec.
 1. Words denoting number, gender, etc.
 * * * * *
 8. “Person”, “human being”, “child”, and “individual” as including born-alive infant.
 * * * * *

§8. “Person”, “human being”, “child”, and “individual” as including born-alive infant

(a) *In determining the meaning of any Act of Congress, or of any ruling, regulation, or interpretation of the various administrative bureaus and agencies of the United States, the words “person”, “human being”, “child”, and “individual”, shall include every infant member of the species homo sapiens who is born alive at any stage of development.*

(b) *As used in this section, the term “born alive”, with respect to a member of the species homo sapiens, means the complete expulsion or extraction from his or her mother of that member, at any stage of development, who after such expulsion or extraction breathes or has a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles, regardless of whether the umbilical cord has been cut, and regardless of whether the expulsion or extraction occurs as a result of natural or induced labor, cesarean section, or induced abortion.*

(c) *Nothing in this section shall be construed to affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being “born alive” as defined in this section.*

* * * * *

MARKUP TRANSCRIPT

BUSINESS MEETING

TUESDAY, JULY 24, 2001

HOUSE OF REPRESENTATIVES,
 COMMITTEE ON THE JUDICIARY,
 Washington, DC.

The Committee met, pursuant to notice, at 10:03 a.m., in Room 2141, Rayburn House Office Building, Hon. F. James Sensenbrenner, Jr. (Chairman of the Committee) presiding.

Chairman SENSENBRENNER. The Committee will be in order. A working quorum is present.

The first item on the agenda is the adoption of H.R. 2175, the “Born-Alive Infants Protection Act of 2001.”

[The bill, H.R. 2175, follows:]

107TH CONGRESS
1ST SESSION

H. R. 2175

To protect infants who are born alive.

IN THE HOUSE OF REPRESENTATIVES

JUNE 14, 2001

Mr. CHABOT (for himself, Mrs. MYRICK, Ms. HART, Mr. SMITH of New Jersey, Mr. WELLER, Mr. GREEN of Wisconsin, Mr. SHOWS, Mr. WOLF, Mr. PICKERING, Mr. BAKER, Mr. PHELPS, Mr. MICA, Mr. ISTOOK, Mr. WELDON of Florida, Mr. TIBERI, Mr. DOOLITTLE, Mr. DEMINT, Mr. HANSEN, Mr. WAMP, Mr. LARGENT, Mr. ENGLISH, Mr. RILEY, Mr. BURTON of Indiana, Mr. BARTLETT of Maryland, Mr. PAUL, Mr. BACHUS, Mr. VITTER, Mr. CANTOR, Mr. ADERHOLT, Mr. TERRY, Mr. HAYES, Mr. LEWIS of Kentucky, Mr. OXLEY, Mr. COLLINS, Mr. KELLER, Mr. OBERSTAR, Mr. SOUDER, Mr. POMBO, Mr. CAMP, Mr. HOSTETTLER, Mr. GOODLATTE, Mr. LIPINSKI, Mr. HILLEARY, Mr. STEARNS, Mr. THUNE, Mr. BLUNT, Mr. LUCAS of Kentucky, Mr. PITTS, Mr. HYDE, Mr. SESSIONS, Mr. CRANE, Mr. DEAL of Georgia, Mr. LANGEVIN, Mr. PENCE, Mr. TAYLOR of Mississippi, Mr. ARMEY, Mr. HALL of Texas, Mr. NORWOOD, Mr. WICKER, Mr. AKIN, Mr. BRADY of Texas, Mr. GARY G. MILLER of California, Mr. BARCIA, Mr. DELAY, Mrs. JO ANN DAVIS of Virginia, Mr. PORTMAN, Mr. EVERETT, Mr. GRAVES, Mr. CANNON, Mr. TIAHRT, Mr. RYAN of Wisconsin, Mr. NEY, Mr. ROGERS of Michigan, Mrs. EMERSON, and Mr. KING) introduced the following bill; which was referred to the Committee on the Judiciary

A BILL

To protect infants who are born alive.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Born-Alive Infants
3 Protection Act of 2001”.

4 **SEC. 2. DEFINITION OF BORN-ALIVE INFANT.**

5 (a) IN GENERAL.—Chapter 1 of title 1, United
6 States Code, is amended by adding at the end the fol-
7 lowing:

8 **“§ 8. ‘Person’, ‘human being’, ‘child’, and ‘individual’**
9 **as including born-alive infant .**

10 “(a) In determining the meaning of any Act of Con-
11 gress, or of any ruling, regulation, or interpretation of the
12 various administrative bureaus and agencies of the United
13 States, the words ‘person’, ‘human being’, ‘child’, and ‘in-
14 dividual’, shall include every infant member of the species
15 homo sapiens who is born alive at any stage of develop-
16 ment.

17 “(b) As used in this section, the term ‘born alive’,
18 with respect to a member of the species homo sapiens,
19 means the complete expulsion or extraction from his or
20 her mother of that member, at any stage of development,
21 who after such expulsion or extraction breathes or has a
22 beating heart, pulsation of the umbilical cord, or definite
23 movement of voluntary muscles, regardless of whether the
24 umbilical cord has been cut, and regardless of whether the
25 expulsion or extraction occurs as a result of natural or
26 induced labor, cesarean section, or induced abortion.

1 “(c) Nothing in this section shall be construed to af-
 2 firm, deny, expand, or contract any legal status or legal
 3 right applicable to any member of the species homo sapi-
 4 ens at any point prior to being ‘born alive’ as defined in
 5 this section.”.

6 (b) CLERICAL AMENDMENT.—The table of sections
 7 at the beginning of chapter 1 of title 1, United States
 8 Code, is amended by adding at the end the following new
 9 item:

“8. ‘Person’, ‘human being’, ‘child’, and ‘individual’ as including born-alive in-
 fant.”.

○

Chairman SENSENBRENNER. The Chair recognizes the gentleman from Ohio, Mr. Chabot, the Chairman of the Subcommittee on the Constitution, for a motion.

Mr. CHABOT. Thank you, Mr. Chairman.

Mr. Chairman, the Subcommittee on the Constitution reports favorably the bill H.R. 2175 and moves its favorable recommendation to the full House.

Chairman SENSENBRENNER. Without objection, H.R. 2175 will be considered as read and open for amendment at any point.

The Chair recognizes the gentleman from Ohio to strike the last word.

Mr. CHABOT. Thank you, Mr. Chairman.

This morning, the Committee will consider H.R. 2175, the “Born-Alive Infants Protection Act of 2001.” The Born-Alive Infants Protection Act is designed to protect all born-alive infants by recognizing them as a person, human being, child, or individual for purposes of Federal law.

This recognition would take effect upon the live birth of an infant, regardless of whether or not the child’s development is sufficient to permit long-term survival and regardless of whether the child survived an abortion. The act also clarifies that nothing in the bill shall be construed to affirm, deny, expand, or contract any legal status or legal rights applicable to an unborn child.

This truly is a bill of compassion, a bill that says all of America’s children are precious and should be protected. It has long been an accepted legal principle that infants who are born alive are persons, entitled to the protections of the law. A live birth is consid-

ered to occur whenever an infant is expelled from his or her mother's body and displays any of several specific signs of life: breathing, a heartbeat, or definite movement of voluntary muscles.

Thirty States and the District of Columbia have statutes that, with some variations, explicitly enshrine this principle as a matter of State law, and some Federal courts have recognized the principle in interpreting Federal criminal laws. But recent changes in the legal and cultural landscape appear to have brought this well-settled principle into question.

For example, when the United States Supreme Court struck down Nebraska's partial-birth abortion statute in *Stenberg v. Carhart*, it failed to consider the legal significance of any infant's location relative to its mother's body at the moment he or she is killed during an abortion. What was described in *Roe v. Wade* as a right to abort unborn children was extended to include the violent destruction of partially-born children just inches from birth. The *Carhart* ruling presents a serious threat to the born-alive principle because it left the door open for a future court to explicitly reject the importance of an infant's location relative to his or her mother during an abortion. In fact, this is the position of two members of the *Carhart* majority.

Shortly after the *Carhart* ruling, the Third Circuit Court of Appeals in *Planned Parenthood of Central New Jersey v. Farmer* concluded not only that it was "nonsensical" to prohibit abortions based upon the location of the baby at the moment it is killed, but, also, that an infant who is killed during a partial-birth abortion is not entitled to the protections of the law because, quote, "a woman seeking an abortion is plainly not seeking to give birth."

Under the logic of these rulings, it may ultimately become irrelevant whether a child emerges from the mother's womb as a live baby. That child may still be treated as a non-entity, without rights under the law, no right to receive medical care, to be sustained in life, or receive basic comfort care.

On July 12th, the Constitution Subcommittee received credible evidence that this is, in fact, already occurring. Jill Stanek, a nurse at Christ Hospital in Oak Lawn, Illinois, testified about one aborted baby left to die on the counter of the soiled utility room wrapped in a disposable towel that was accidentally thrown in the garbage. And when they later were going through the trash to find the baby, the baby fell out of the towel and onto the floor.

As Professor Hadley Arkes stated in testimony received by the Subcommittee, the *Carhart* ruling has, indeed, brought us to the threshold of outright infanticide, and it takes but the shortest step to cross that threshold. That's why it's imperative that Congress firmly establish the born-alive principle in Federal law. Although this rule has been codified in most States, the notion that an abortion survivor is not a person still remains plausible precisely because it has not been explicitly refuted or rejected.

It is important to note that H.R. 2175 will not mandate medical treatment where none is currently indicated. As Dr. Watson Bowes told the Subcommittee, "this bill does not legislate how physicians and parents may deal with the decisions about withholding or discontinuing medical or surgical treatment that is considered futile in the care of an infant." Instead, it "deals solely with the criteria that define whether an infant is alive at the time of birth."

The Born-Alive Infants Protection Act draws a bright line between the right to an abortion, which the Supreme Court has now said includes the right to kill partially born children, and infanticide, or the killing of a completely born child—a distinction that the *Carhart* court refused to recognize.

H.R. 2175 was introduced by a bipartisan coalition of more than 70 original cosponsors and was reported favorably by the Subcommittee on the Constitution without amendment. Virtually identical legislation was approved by the House of Representatives last Congress with an overwhelming majority. I urge this Committee to approve this important piece of legislation so that all newborn infants will receive the protection of Federal law regardless of the circumstances of their birth.

I yield back the balance of my time.

Chairman SENSENBRENNER. The gentleman's time has expired.

Who would like to give the opening statement for the minority? The gentlewoman from California strikes the last word and is recognized for 5 minutes.

Ms. LOFGREN. Mr. Chairman, this bill was addressed by the Committee in the 106th Congress, and I believe that this year, as with last year, there will be support on both sides of the aisle for the measure.

I would note, however, although I'm not a Member of the Subcommittee, that the—we often hear these wild stories relative to births, and yet when you dig a bit deeper, you find that those wild stories are not unconfuted. For example, in the story just relayed by the Chairman of the Committee, the hospital itself, the Advocate Christ Medical Center, indicated that the hospital terminates pregnancies only when medically necessary, that no pregnancy is terminated without the informed consent of the family and the Perinatal Ethics Committee, that the hospital always assesses the medical condition of neonates and provides treatment to those who can survive outside the womb and that non-viable fetuses are, in fact, given comfort care that shows respect for life, no matter how brief. So I think it's important that we—while coming together, to note that there's not a hospital in America that would refuse to provide medical care to an infant born. There's certainly, therefore, nothing wrong with codifying that fact in Federal law.

I would note that the language of the bill is sloppily drafted and is more of a political nature than a tightly drawn medical-legal statute. But I'm not going to let that deter me from voting for it because I know that should this ever move through the Senate that the language can be tightened up and made more judicial.

So I would just like to note that there is not a division on the Committee. I think there is misadvised rhetoric, stories that are without foundation, but that will not deter from us all voting for this measure.

Mr. CONYERS. Would the gentlelady yield?

Ms. LOFGREN. I would certainly yield to the Ranking Member.

Mr. CONYERS. Thank you. I'd like to get unanimous consent to insert the statements of Representatives Jerry Nadler and myself at this point?

Chairman SENSENBRENNER. Without objection, so ordered, and also without objection, all Members may insert statements in the record at this point.

[The prepared statement of Mr. Conyers follows:]

PREPARED STATEMENT OF THE HONORABLE JOHN CONYERS, JR., A REPRESENTATIVE
IN CONGRESS FROM THE STATE OF MICHIGAN

Last Congress, we considered legislation similar to H.R. 2175, the “Born-Alive Infants Protection Act.” I supported the bill last Congress—as I support this bill—because it does not change current law.

Although the bill is redundant and somewhat unnecessary, I will vote for H.R. 2175 to reaffirm that all newborns and children are entitled to legal protection.

Importantly, Dr. Watson Bowes Jr., a specialist in obstetrics and maternal-fetal medicine, testified before the Constitution Subcommittee that this bill will not adversely affect the ability of physicians and parents to deal with the heart-rending decisions about withholding or discontinuing medical or surgical treatment that is considered futile in the care of an infant.

Dr. Bowes also confirmed that the bill does not change the standard of care in current law.

Since this legislation will not change the law in any way, the real question is why we are spending time on this bill when there are real health care issues for pregnant women, infants, and children that are going unaddressed.

Over 400,000 pregnant women in the United States are uninsured—making it much more difficult and costly for them to receive proper prenatal care. In order to reduce low birth weight babies, and give infants their best chance for a healthy childhood, proper prenatal care is essential.

In addition, there are 10 million children in this country who are uninsured. These children do not have access to both routine and emergency health care services.

Rather than passing redundant legislation, Congress should be spending its time on proposals to encourage the States to reach out to pregnant women and families to make it easier for them to enroll in Medicaid and the Children’s Health Insurance Program (CHIP).

Finally, we need to fully fund Head Start, which has been proven to improve academic performance for poor and underserved children. Currently, only 25–30% of eligible children are enrolled in Head Start programs. We need to serve 100% of these children.

Only after these other priorities are taken care of, should the Committee spend time on bills that re-state current law.

[The prepared statement of Mr. Nadler follows:]

**Statement by Rep. Jerrold Nadler
Markup on H.R. 2175
Born Alive Infant Protection Act
July 23, 2001**

Thank you, Mr. Chairman. Today we consider legislation reaffirming an important principle which is enshrined in the laws of all 50 states: that an infant who is born and who is living independently of the birth mother is entitled to the same care as any other child similarly diagnosed regardless of whether labor was induced or occurred spontaneously. It has never been particularly clear to me why we need to legislate that which most members of Congress and the general public already assumed to be the law, but if the majority is interested in a belts and suspenders approach, so be it.

This same measure passed just recently as an amendment to the patients' bill of rights legislation in the Senate by a vote of 98 - 0, which is about as uncontroversial as something can get. Even such pro-choice members as our colleague the Junior Senator from California spoke in favor of it.

I am pleased that the majority has made a serious effort to make clear that this bill has nothing to do with matters related to abortion, even going so far as to add a subsection (c) further clarifying that point. Whatever concerns anyone may have had that this might become some clever way to undermine the rights protected under *Roe v. Wade* have, I think, been addressed. Unless someone attempts to disrupt this effort by dragging the abortion debate back into it, I have little doubt that it will be passed without much controversy.

I would like to address the concern that our Republican colleague, the Gentlewoman from Connecticut, Mrs. Johnson, has enunciated most eloquently – that is the standard of care employed by neonatologists when faced with a non-viable new born or a clearly critically ill or massively deformed newborn. These are difficult medical issues and often horrendous circumstances which confront hopeful families every day. I am cognizant of the fact that these are complex issues which doctors, hospitals, families, and courts grapple every day. I would quote the Committee’s report from the last Congress which makes clear that this legislation,

Would not mandate medical treatment where none is currently indicated. While there is a debate about whether or not to aggressively treat premature infants below a certain birth weight, this is a dispute about medical efficacy, not regarding the legal status of the patient. That is, the standard of medical care applicable in a given situation involving a premature infant is not determined by asking whether the infant is a person [this legislation] would not affect the applicable standard of care, but would only insure that all born-alive infants – regardless of their age and regardless of the circumstances of their birth – are treated as persons for purposes of federal law.

I do not want to trivialize the concerns of neonatologists, but I was gratified by the testimony that we received from the majority witnesses at our Subcommittee hearing on this legislation which indicated that, while an infant may be considered “born alive” under this

legislation, it would not in any way substitute the medical judgement of Congress for the judgement of doctors on the scene, or interfere with the painful decisions that families must make under the most difficult of circumstances. We must respect families and not have the big hand of government make their worst moments even more unbearable. I trust that the sponsors of this legislation are in agreement.

There has been a great deal of debate over the question whether there is some sort of recognized legal right to a dead baby when a parent intends to abort a fetus. My colleagues well know that the line drawn by the Supreme Court is that of viability within the womb, and that outside the womb the normal laws governing the appropriate care of newborns, taking into account the prognosis made by a trained healthcare provider, apply. This bill reinforces the law as we know it to be.

I do not anticipate any amendments, and with the Chairman's agreement that we are in accord, I do not see any need to drag out this process.

Thank you, Mr. Chairman.

Mr. CHABOT. Will the gentlelady further yield?

Ms. LOFGREN. I would certainly yield to the gentleman.

Mr. CHABOT. I thank the gentlelady for yielding. I'll be very brief. You mentioned that the language is sloppily worded. I might note that this is the same language that was used by the World Health Organization, a draft of 50 years ago, and is used in many States around the country. So the language—

Ms. LOFGREN. Well, reclaiming my time, they don't have the responsibility for drafting the Federal code. We do. However, as I mentioned, I will vote for this noting that if this proceeds into the Senate that wiser heads will clean up the language and make sure that lawyers around the world can actually—around the country can actually apply it should this ever be applied, which I doubt very much, since this is the standard of care in every hospital in America.

And, with that, I would yield back to the Chairman the remainder of my time.

Chairman SENSENBRENNER. Are there amendments? For what purpose does the gentleman from North Carolina seek recognition?

Mr. WATT. I move to strike the last word.

Chairman SENSENBRENNER. The gentleman is recognized for 5 minutes.

Mr. WATT. Thank you, Mr. Chairman. I actually was going to sit and just let this bill be voted on and vote against it. But I'm afraid my colleague from California left a misimpression that there was no division on the Committee about it, and I don't want to leave that misimpression.

I voted against this bill last year in Committee and on the floor. I voted against it in the Subcommittee. And I intend to vote against it today if anybody calls for a recorded vote, not so much because I disagree with what the proponents of the bill say the bill stands for, but because I still, even after all this time, don't understand the implications of it.

At its best, the bill does nothing, and many of the supporters of this bill say that it does nothing. It does not change existing law. It does nothing. And that's certainly not a compelling reason to vote for a piece of legislation.

But that's not my concern, either. My concern is that the Congressional Research Service has indicated that there are over 15,000 provisions in the United States Code and 57,000 provisions in the Code of Federal Regulations which use the terms "person," "human being," "child," "individual," and we don't have a clue what this bill does with respect to those provisions in the United States Code. And I simply think it's irresponsible for the Judiciary Committee, of all places, to be reporting a bill out and supporting a bill which some people say does nothing and, if it does, then I don't understand the rationale for it.

But if it does something, we at least in the Judiciary Committee ought to understand exactly what it does. What implications does it have for inheritance laws? What implication does it have for the myriad of statutory provisions that use these terms in the United States Code and in the Code of Federal Regulations? And nobody has been able to tell me that, and I'm sorry, I'm just not going to get on this boat just because the boat is moving and maybe there's nothing of harm to be done by this bill.

I'll yield to the gentlelady from California.

Ms. LOFGREN. I would just—I appreciate the gentleman for yielding, and I just wanted to offer my apologies for speaking for him incorrectly and—which I did not mean to do, and I gratefully yield back to the gentleman.

Mr. WATT. I yield back the balance of my time, Mr. Chairman.

Chairman SENSENBRENNER. Are there amendments?

Mr. NADLER. Mr. Chairman?

Chairman SENSENBRENNER. For what purpose does the gentleman from New York seek recognition?

Mr. NADLER. Strike the last word.

Chairman SENSENBRENNER. The gentleman's recognized for 5 minutes.

Mr. NADLER. Thank you. Thank you, Mr. Chairman.

Today we consider legislation reaffirming an important principle which is enshrined in the laws of all 50 States already: that an infant who is born and who is living independently of the birth mother is entitled to the same care as any other child similarly diagnosed, regardless of whether labor was induced or occurred spontaneously.

It has never been clear to me why we need to legislate that which most Members of Congress and the general public already

assumed and knew to be the law. But if the majority's interested in a belts-and-suspenders approach and in restating the law, so be it.

This same measure passed just recently as an amendment to the Patients' Bill of Rights legislation in the Senate by a vote of 98 to nothing, which is about as uncontroversial as something can get. Even such pro-choice Members as our colleague, the junior Senator from California, spoke in favor of it.

I am pleased that the majority has made a serious effort to make clear that this bill has nothing to do with matters related to abortion, even going so far as to add a subsection (C) further clarifying that point.

Whatever concerns we may have had last year that this might become some clever way to undermine the rights protected under *Roe v. Wade* have, I think, been addressed. Unless someone attempts to disrupt this effort by dragging the abortion debate back into it, I have little doubt that this bill will be passed without much controversy.

I would like to address the concern that our Republican colleague, the gentlewoman from Connecticut, Mrs. Johnson, has enunciated most eloquently; that is, the standard of care employed by neonatologists when faced with a non-viable newborn or a clearly critically ill or massively deformed newborn.

These are difficult medical issues and often horrendous circumstances which confront hopeful families every day. I am cognizant of the fact that these are complex issues which doctors, hospitals, families, and courts grapple with every day.

I would quote the Committee's report from the last Congress which makes clear that this legislation, quote, "would not mandate medical treatment where none is currently indicated. While there is a debate about whether or not to aggressively treat premature infants below a certain birth weight, this is a dispute about medical efficacy not regarding the legal status of the patient. That is, the standard of medical care applicable in a given situation involving a premature infant is not determined by asking whether the infant is a person. This legislation would not affect the applicable standard of care, but would only ensure that all born-alive infants, regardless of their age and regardless of the circumstances of their birth, are treated as persons for purposes of Federal law." Close quote.

I do not want to trivialize the concerns of neonatologists, but I was gratified by the testimony that we received from the majority witnesses at our Subcommittee hearing on this legislation, which indicated that while an infant may be considered born alive under this legislation, it would not in any substitute the medical judgment of Congress for the judgment of doctors on the scene or interfere with the painful decisions that families must make under the most difficult of circumstances. We must respect families and not have the big hand of government make their worst moments even more unbearable.

I trust that the sponsors of this legislation are in agreement on this point.

There has been a great deal of debate over the question about whether there is some sort of recognized legal right to a dead baby when a parent intends to abort a fetus. My colleagues well know

that the line drawn by the Supreme Court is that of viability within the womb and that outside the womb the normal laws governing the appropriate care of newborns, taking into account the prognosis made by a trained health care provider, apply. This bill simply restates the law as we always knew it to be.

The rather horrific accounts told by the majority witnesses at the Committee, the same accounts and the same witnesses this year as last, are already illegal, as far as I know, in every State under the Union, and they make a case for better enforcement of the law, but not for any legislation.

This legislation is unnecessary but I believe harmless. If it helps the majority in some way to assuage somebody's conscience, I see no reason to oppose it, as long as it is clear that this has nothing to do with abortion. There is no such thing as "born-alive abortions." That's a figment of somebody's imagination. And we will not fall into a trap, which, again, the majority has assuaged with some clear language this year, of opposing this bill on any such grounds.

I do not anticipate any amendments, and with the Chairman's agreement that we are in accord, I do not see any need to drag out this process.

Thank you, Mr. Chairman. I yield back.

Chairman SENSENBRENNER. Are there amendments? The Chair hears none. Reporting quorum is present. The question occurs on the motion to report H.R. 2175 favorably. All in—all in favor, say aye? Opposed, no? The ayes appear to have it.

The ayes have it. The motion—

Mr. CHABOT. Mr. Chairman? Mr. Chairman, could we have a recorded vote on that, please?

Chairman SENSENBRENNER. Roll call is requested. The Chair will order a roll call. Those in favor of reporting H.R. 2175 favorably will, as your names are called, answer aye; those opposed, no; and the clerk will call the roll.

The CLERK. Mr. Hyde?

Mr. HYDE. Aye.

The CLERK. Mr. Hyde, aye. Mr. Gekas?

Mr. GEKAS. Aye.

The CLERK. Mr. Gekas, aye. Mr. Coble?

Mr. COBLE. Aye.

The CLERK. Mr. Coble, aye. Mr. Smith?

Mr. SMITH. Aye.

The CLERK. Mr. Smith, aye. Mr. Gallegly?

[No response.]

The CLERK. Mr. Goodlatte?

[No response.]

The CLERK. Mr. Chabot?

Mr. CHABOT. Aye.

The CLERK. Mr. Chabot, aye. Mr. Barr?

Mr. BARR. Aye.

The CLERK. Mr. Barr, aye. Mr. Jenkins?

Mr. JENKINS. Aye.

The CLERK. Mr. Jenkins, aye. Mr. Hutchinson?

Mr. HUTCHINSON. Aye.

The CLERK. Mr. Hutchinson, aye. Mr. Cannon?

Mr. CANNON. Aye.

The CLERK. Mr. Cannon, aye. Mr. Graham?

[No response.]
The CLERK. Mr. Bachus?
[No response.]
The CLERK. Mr. Scarborough?
[No response.]
The CLERK. Mr. Hostettler?
Mr. HOSTETTLER. Aye.
The CLERK. Mr. Hostettler, aye. Mr. Green?
Mr. GREEN. Aye.
The CLERK. Mr. Green, aye. Mr. Keller?
Mr. KELLER. Aye.
The CLERK. Mr. Keller, aye. Mr. Issa?
Mr. ISSA. Aye.
The CLERK. Mr. Issa, aye. Ms. Hart?
Ms. HART. Aye.
The CLERK. Ms. Hart, aye. Mr. Flake?
Mr. FLAKE. Aye.
The CLERK. Mr. Flake, aye. Mr. Conyers?
Mr. CONYERS. Aye.
The CLERK. Mr. Conyers, aye. Mr. Frank?
[No response.]
The CLERK. Mr. Berman?
[No response.]
The CLERK. Mr. Boucher?
[No response.]
The CLERK. Mr. Nadler?
Mr. NADLER. Aye.
The CLERK. Mr. Nadler, aye. Mr. Scott?
Mr. SCOTT. No.
The CLERK. Mr. Scott, no. Mr. Watt?
Mr. WATT. No.
The CLERK. Mr. Watt, no. Ms. Lofgren?
Ms. LOFGREN. Aye.
The CLERK. Ms. Lofgren, aye. Ms. Jackson Lee?
[No response.]
The CLERK. Ms. Waters?
Ms. WATERS. Aye.
The CLERK. Ms. Waters, aye. Mr. Meehan?
[No response.]
The CLERK. Mr. Delahunt?
[No response.]
The CLERK. Mr. Wexler?
[No response.]
The CLERK. Ms. Baldwin?
Ms. BALDWIN. Aye.
The CLERK. Ms. Baldwin, aye. Mr. Weiner?
[No response.]
The CLERK. Mr. Schiff?
Mr. SCHIFF. Aye.
The CLERK. Mr. Schiff, aye. Mr. Chairman?
Chairman SENSENBRENNER. Aye.
The CLERK. Mr. Chairman, aye.
Chairman SENSENBRENNER. Are there additional Members who wish to cast or change their votes? The gentleman from California, Mr. Gallegly?

Mr. GALLEGLY. Aye.

The CLERK. Mr. Gallegly, aye.

Chairman SENSENBRENNER. The gentleman from Alabama, Mr. Bachus?

Mr. BACHUS. Aye.

The CLERK. Mr. Bachus, aye.

Chairman SENSENBRENNER. Anybody else? If not, the clerk will report.

The CLERK. Mr. Chairman, there are 24 ayes——

Chairman SENSENBRENNER. Mr. Goodlatte?

Mr. GOODLATTE. Aye.

The CLERK. Mr. Goodlatte, aye.

Mr. Chairman, there are 25 ayes and 2 noes.

Chairman SENSENBRENNER. And the motion to report is agreed to. Without objection, the staff is directed to make technical and conforming changes, and without objection, pursuant to House rules, the Chairman is authorized to go to conference.

ADDITIONAL VIEWS

We write as Members who supported the passage of H.R. 2175 in order to clarify our understanding of this legislation based on a plain reading of the bill's language and the record made by the sponsors as to its meaning.

The bill amends title 1, U.S. Code, to add at the end a definition of the terms "person," "human being," "child," and "individual" to include "any infant member of the species homo sapiens who is born alive at any stage of development."¹ The term "born alive" is defined to require that a fetus is entirely expelled or extracted from the mother and shows breathing, "a beating heart, pulsation of the umbilical cord, or definite movement of voluntary muscles." The definition applies regardless of whether the umbilical cord has been cut or whether the expulsion or extraction occurs through natural or induced labor, cesarean section, or induced abortion. The viability of the fetus outside the womb is not an element of the definition.

A rule of construction in a new subsection (c), absent from the version of the bill passed by the House in the 106th Congress, states that the bill is neutral with respect to abortion rights, providing that the section shall not be construed to "affirm, deny, expand, or contract any legal status or legal right applicable to any member of the species homo sapiens at any point prior to being 'born alive.'" We believe that this clarification further resolves concerns that this legislation may have been intended as a back-door effort to affect abortion and reproductive rights rather than applying solely to the status of an infant following birth. It is also consistent with current law. As a general matter, the Supreme Court has held that "the unborn have never been recognized in the law as persons in the whole sense," and the law has been reluctant to afford any legal rights to nonviable fetuses "except in narrowly defined situations and except when the rights are contingent upon live birth."²

We would note that the full implications of H.R. 2175 are unknown. A complete analysis of the bill would require enormous resources. According to the CRS Memorandum prepared in the 106th Congress, the terms "person," "human being," "child," and "individual" appear in at least 15,000 sections of the U.S. Code and are found in over 57,000 sections of the Code of Federal Regulations. There is no evidence to suggest that the sponsors of this bill have

¹ While the proposed act does not include a specific extension of the "born alive" definition to the term "infant," the title and definition of the act suggest the intent to do so.

² *Roe v. Wade*, 410 U.S. 113, 161-62 (1973). The Supreme Court held in *Roe* that a fetus, even when viable, is not a person under the Fourteenth amendment. *Id.* at 152-53. Although the Court found that the State has a compelling interest in the "potentiality of human life" of the fetus after it reaches viability, it concluded that this interest could not justify prohibiting an abortion even after the point of viability if the abortion is necessary to preserve the life or health of the woman. *Id.* at 162-63.

examined these Federal laws and regulations to identify all of the bill's potential consequences, and the CRS researchers stated that "an evaluation of the statutory and regulatory impact of the act is beyond the resources of [their] office."³

One concern which has been raised is that the bill might affect decisions with regard to the standard of care owed to a previable fetus which has been expelled as a result of spontaneous or induced labor, or to a fetus which is afflicted with massive fetal anomalies. Dr. Gordon Avery, an expert in the field of neonatology, wrote a letter to the Committee arguing that H.R. 2175's definition of "born alive" was too broad, as non-living entities may show involuntary movements such a heartbeat or twitching muscles. He expressed the concern that the definition of "born alive," which would apply to severely premature neonates with "a single gasp, a muscle twitch, any pulsation of the umbilical cord" but no chance of life outside the womb, would cloud the waters for medical professionals and families making decisions as to the appropriate standard of care.⁴

If, however—as we have been assured by the Majority—the bill does not change existing law, it should not affect the decisions of families and neonatologists. Furthermore, according to the Majority report filed in the 106th Congress, the "bright line" of complete extraction would not constrain or in any way chill medical care given to a woman or to her offspring:

[H.R. 4292] would not mandate medical treatment where none is currently indicated. While there is debate about whether or not to aggressively treat premature infants below a certain birth weight, this is a dispute about medical efficacy, not regarding the legal status of the patient. That is, the standard of medical care applicable in a given situation involving a premature infant is not determined by asking whether that infant is a person. . . . H.R. 4292 would not affect the applicable standard of care, but would only insure that all born-alive infants—regardless of their age and regardless of the circumstances of their birth—are treated as persons for purposes of Federal law.⁵

This accords with the testimony received by the Subcommittee on the Constitution from Majority witnesses. Dr. Watson A. Bowes, Jr., a former Chairman of the Committee on Ethics of the American College of Obstetricians and Gynecologists, stated,

"[T]his definition of live birth does not restrict a physician's prerogative to recommend that medical care regarded as futile be

³ Kenneth Thomas & Jon O. Shimabukuro, "The Born Alive Infant Protection Act of 2000," Congressional Research Service Memorandum, at 2, (July 18, 2000).

⁴ Letter of Dr. Gordon B. Avery to Rep. Nadler, June 21, 2001. These are not merely the isolated concerns of an academic neonatologist. In testimony before the Subcommittee in the 106th Congress, Dr. Francis Sessions Cole of Children's Hospital in St. Louis stated that the imposition of this universal definition might "significantly interfere with the agonizing, painful and personal decisions that must be left to parents in consultation with their physicians." In debate on the legislation in the 106th Congress, Rep. Nancy Johnson (R-CT) spoke against the bill on these grounds, saying that it would "deny parents and deny doctors the right to make decisions about premature infants. An infant born at 3½, 4½, 5½ months is a tragedy, and parents in a free society in America deserve the right to determine what medical care they will have, recognizing that the law requires [that] newborns receive all medically indicated treatment." 146 CONG. REC. H8160 (Sept. 26, 2000).

⁵ H. Rep. No. 835, 106th Cong., 2d Sess. 13 (Sept. 11, 2000).

withdrawn or withheld. It is important to keep in mind that this bill deals solely with the criteria that define whether an infant is alive at the time of birth. It does not legislate how physicians and parents may deal with the decision about withholding or discontinuing medical or surgical treatment that is considered futile in the care of an infant.”⁶

In addition, even in the situations described by Majority witness nurse Jill Stanik, Dr. Bowes stated that “I don’t think this [legislation] changes medical care for those babies.”⁷

In light of the fact that H.R. 2175 does not apply to abortion or other pre-birth decisions concerning human reproduction, and that it is clear that the bill does not substitute the judgement of Congress for the judgement of a qualified health care provider, we remain puzzled about the ultimate purpose of this legislation. Insofar as it prohibits the killing of an infant following a live birth, or the denial of treatment where it would be medically indicated and legally required under current law and practice, it reflects the laws of all 50 States, the District of Columbia and the territories of the United States. It is unfortunate that the bill provides a platform for the overheated rhetoric of a few who wish to suggest that viable healthy infants are being permitted to die in our nation’s hospitals, even though the sponsors have never been able to point to so much as one prosecution connected with these alleged activities.

With these understandings and clarifications from the sponsors and their witnesses, we are able to support this legislation.

JOHN CONYERS, JR.
 BARNEY FRANK.
 HOWARD L. BERMAN.
 JERROLD NADLER.
 ZOE LOFGREN.
 SHEILA JACKSON LEE.
 MAXINE WATERS.
 MARTIN T. MEEHAN.
 WILLIAM D. DELAHUNT.
 TAMMY BALDWIN.

⁶Hearing on H.R. 2175, *The Born-Alive Infants Protection Act of 2001 Before the Subcomm. on the Constitution of the Comm. on the Judiciary*, 107th Cong., 1st Sess. 33 (July 12, 2001) (testimony of Dr. Watson A. Bowes, Jr.).

⁷*Id.* at 42.

DISSENTING VIEWS

We voted against H.R. 2175, the “Born-Alive Infants Protection Act,” at the July 24, 2001 House Judiciary Committee markup because this bill has not been studied in a responsible way before being considered by the Judiciary Committee.

According to the Congressional Research Service’s (CRS) analysis of the bill’s virtually identical predecessor from the 106th Congress (H.R. 4292), this bill would amend some 15,000 provisions of the U.S. Code and 57,000 provisions of the Code of Federal Regulations.¹ Both the CRS and the Congressional Budget Office (CBO) reviewed the earlier version of the bill and neither reached a definitive conclusion about what the bill would do. The CRS concluded:

A definitive statutory analysis of the effect of the proposed act would require a review and evaluation of the use of the terms “person,” “human being,” “child,” and “individual” as they appear in all Federal statutes and in agency rulings, regulations or interpretations. A computer search of these terms reveals that they appear in over 15,000 sections of the United States Code, and in over 57,000 sections of the Code of Federal Regulations. Consequently, an evaluation of the statutory and regulatory impact of the act is beyond the resources of our office.²

Similarly, the CBO concluded: “Because the words ‘person, human being, child, and individual’ are used frequently throughout the United States Code, CBO cannot determine how the new definitions could be interpreted in all situations.”³

As we understand the bill’s proponents, they intend to codify and reaffirm, not change, the substantive law. If the purpose of the bill is only to restate present law, then the best way to do that is to pass no bill at all.

Changing the definition of the terms “person,” “human being,” “child,” and “individual” as they appear in more than 72,000 Federal statutes and regulations carries an enormous risk of unintended consequences. The statutes and regulations prospectively affected could include, for example, such wide-ranging topics as criminal laws, inheritance laws, tax laws, tort laws, insurance laws and programs that provide benefits. Moreover, as stated by the CBO: “[b]ecause definition changes in this bill would affect such a large number of citations in the United States Code, CBO cannot determine with certainty whether those changes might impose new enforceable duties on State, local, and tribal governments or the private sector.”⁴

¹ Kenneth Thomas and Jon Shimabukuro, “The Born-Alive Infants Protection Act of 2000,” CRS Memorandum, p. 1, fn. 1 (July 18, 2000).

² *Id.*

³ Congressional Budget Office, Cost Estimate: H.R. 4292 (August 22, 2000)

⁴ *Id.*

In addition, the definitional changes proposed by the bill could create potential confusion and conflicts with State law definitions of what constitutes life and death. An infant could be "born alive" under the new definition in Federal law, but never considered alive under a State statute that determines life based on brain activity.

In light of the many unanswered questions about the effects of the bill, we do not have the certainty necessary to favorably report a bill to the House. Although the original version of this bill was introduced over a year ago, its sponsors have yet to provide any substantive analysis on the effects of the bill, or that the bill will work its symbolic purpose with no unintended consequences or conflicts.

In the end, H.R. 2175 may prove to be the symbolic bill its proponents contend that it is. However, we are not able to reach that conclusion today, and we stand on our vote against this bill.

ROBERT C. SCOTT
MELVIN L. WATT

