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I am submitting herewith a thesis written by David A. Lufkin, Sr. entitled "Medical Autonomy in Crisis: The Destruction of the Right to Privacy." I have examined the final electronic copy of this thesis for form and content and recommend that it be accepted in partial fulfillment of the requirements for the degree of Master of Arts, with a major in Philosophy.

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MEDICAL AUTONOMY IN CRISIS: THE DESTRUCTION OF THE RIGHT TO PRIVACY

A Thesis Presented for the Master of Arts Degree
The University of Tennessee, Knoxville

David Andrew Lufkin, Sr.
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ABSTRACT:

This thesis is presented for a Master of Arts and Science Degree at the University of Tennessee, Knoxville, from the College of Liberal Arts, Department of Philosophy, with a concentration in medical ethics.

The thesis's argument assumes that rules of ethics or morality should be rules and guidelines of uniformity and therefore universal in nature and scope. In that assumption, the thesis adheres to the present problematic state of ethics, and in particular, medical ethics. In response to that state it asks: without imprint from religious morality, upon what foundation can we design a system for medical ethics? In particular, does the rule of law and interpretation of our Federal Constitutional rights in the United States of America offer any guidance for a foundation of medical ethics?

Still more specifically, the issues of concern here will be the following. First this thesis will explore the connection between the medical term "autonomy" and the legal terms "privacy" and "liberty." Secondly, the thesis will focus on an examination of the nature of medical autonomy which the Supreme Court of the United States reached in the landmark Roe v. Wade decision. Is the interpretation of the Constitution of the United States of America, adopted in that decision, an interpretation that defines such rights as the Constitutional right of privacy, a method that can be depended upon for guidance or foundational support for a right of medical autonomy? If not, what conclusions can be reached by this analysis?

As the thesis will conclude, while medical autonomy and what the courts call "privacy" and "liberty" when discussing medical cases appear to be the same thing, interpretation of the Constitution of the United States of America does not provide us with a relevant tool for guidance with respect to the ethics of medical autonomy. The standard interpretation of the Roe v. Wade decision as concerning a national, and therefore uniform right of privacy in making medical decisions, akin to medical definitions of autonomy, was destroyed by the United States Supreme Court decision in the cases known as Washington/Vacco.

We are not here to advocate abortion. We do not ask this Court to rule that abortion is good or desirable in any particular situation.

We are here to advocate that the decisions as to whether or not a particular woman will continue to carry or will terminate a pregnancy is a decision that should be made by that individual, that in fact she has a constitutional right to make that decision for herself, and that the State has shown no interest in [or sufficient legal status to allow interfering with that decision.

Sarah Weddington, in oral argument before the Supreme Court of the United States in Roe v. Wade, as related in A Question of Choice.

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CHAPTER ONE:

INTRODUCTION:

> ***Emerson's brief waffled: "Whether one derives the right of privacy from a composite of the Third, Fourth, and Fifth Amendments, from the Ninth Amendment or from the 'liberty' clause of the Fourteenth Amendment, such a constitutional right has been specifically recognized by this court. . ."***
>
> ***Griswold v. Connecticut, 381 U.S. 479 (1965)***[1]

In the last forty years there has been a decrease of paternalism by the medical profession and a growing sign of strength in consideration of personal autonomy and privacy in the arena of medical choices.[2]

Concerning this development, on what foundation would we place the philosophical architecture of medical ethics? Physician John Bell, writing in 1847, proposed in the opening line of his "Introduction to the Code of Medical Ethics" that "Medical Ethics, as a branch of general ethics, must rest on the basis of religion and morality."[3]

Today, there are still attempts to ground philosophy in theological reflection. However, one of the methods of philosophical ethics has been an attempt to separate this study from religious teaching and place it upon a foundation in the secular world. This is

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[1]N.E.H. Hull & Peter Charles Hoffer, *Roe v. Wade: The Abortion Rights Controversy in American History*, (Lawrence: University Press of Kansas 2001), p. 83.

[2]For a very good article on this point, see Alan Goldman, "The Refutation of Medical Paternalism", in Steinbock, Arras & London, *Ethical Issues in Modern Medicine*, 6th Edition (New York: McGraw-Hill, 2003), p. 56ff. Goldman's article will hereinafter be referred to as Goldman.

[3]John Bell, "Introduction to the Code of Medical Ethics", in The Codification of Medical Morality, edited by R. Baker (Dordrecht: Kluwer Academic Publishers, 1955), pp. 65-72.

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why philosophy studies the teachings of Aristotle, and his search for *eudaimonia,* analyzes David Hume's theories of human nature, or Kant's theories of universalized maxims or laws of morality, which would be analogous to the laws of nature.[4]

Of course, this is much too broad a concern for this thesis. An attempt will be made to focus on a small portion of this tide of events, namely, on the ethics of autonomy, and how this subject relates to concerns in jurisprudence regarding "privacy" and "liberty" in important United States court decisions. Along the same lines, we will consider issues involving the word "choice" as used both by the medical profession in speaking of patient autonomy and by courts in addressing the rights of liberty and privacy. One of the first conclusions of this thesis will be that the medical term "autonomy" and the legal terms of "liberty" and "privacy" appear to mean the same thing when courts have attempted to determine individual medical rights.

As we will see in Chapter Two of this work, autonomy is one of the major issues in today's philosophical conversation concerning medical ethics, and has been on the forefront of this discussion for some time but particularly since the publication of

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[4]See Aristotle, *The Nicomachean Ethics*, in *Oxford World's Classics*, translated with an introduction by David Ross, revised by J.L. Ackrill and J.O. Urmson (Oxford: Oxford University Press, 1988), David Hume, *A Treatise of Human Nature*, 2nd edition, with text revised and notes by P.H. Nidditch, analytical index by L.A. Selby-Bigge (Oxford: Clarendon Press, 1998), Immanuel Kant, *Groundwork of the Metaphysics of Morals*, translated and edited by Mary Gregor, with an introduction by Christine M. Korsgaard (Cambridge: Cambridge University Press, 1997). See also, Henry Sidgwick, *The Methods of Ethics*, 7th edition, with a foreword by John Rawls (Indianapolis: Hackett Publishing Company, 1981) for an illustrative study of these theories and comparisons and conclusions about them.

Principles of Biomedical Ethics by Tom L. Beauchamp and James F. Childress.[5]

In the United States of America we historically and legally proclaim this philosophical value of autonomy. It is written between the lines of our political theories of representative democracy and the values we place on individual choice. For instance, the second paragraph of the Declaration of Independence of the United States of America states:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, *Liberty* and the pursuit of Happiness.[6]

In addition, the preamble of the United States Constitution reads as follows:

> We the people of the United States, in order to form a more perfect union, establish justice, insure domestic tranquility, provide for the common defense, promote the general welfare, and *secure the blessings of liberty to ourselves and our posterity*. . .[7]

While the study of the philosophy of medical ethics expresses this issue in terms of the right of autonomy, the practice of constitutional interpretation has come to express it as the right of privacy and liberty. For several decades beginning in the 1960s, theories of

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[5]This work is now in its 5th edition: Beauchamp & Childress, *Principles of Biomedical Ethics*, (Oxford: Oxford University, 2001). This work is known as one of the supports of the *principlism method* of medical ethics. As we will see in Chapter Two, this method is considered important to many writers in medical ethics. Hereinafter referred to as Beauchamp & Childress.

[6]*The Declaration of Independence of the United States of America,* U.S. National Archives & Records Administration, at http://www.archives.gov/nation_archives. The emphasis has been added.

[7]*The Constitution of the United States of America*, copy obtained from the Legal Information Institute at http://www.law.cornell.edu/constitution/constitution.preamble. The emphasis has been added.

medical ethics moved towards this emphasis on personal autonomy and the choice of the patient and away from the traditional paternal viewpoint of the medical professional.[8] In that same time period, developments in the law expressed the right of privacy in the Roe v. Wade decision as a woman's right to a medical abortion and concluded with the concern of the right of physician-assisted suicide.[9] The latter right, which would seem to many to follow from the of Roe v. Wade decision, and its basis in constitutional interpretation, came before the United States Supreme Court in what has become known as the Washington/Vacco decisions.[10]

Rather than the uniformity and universality that one would cherish in a guideline for an ethical code, the United States has seen the murder of abortion-performing doctors and the jailing of Dr. Kevorkian for the taking of a human life while assisting a patient in performing suicide. These last matters, both the killing of abortion physicians and the jailing of Dr. Kevorkian, are the result of judgments not by the common sense of modern civilization, but rather by the influence of an ethical code created by religious

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[8]There has been a counter-trend to this movement towards autonomy in recent years with claims being made that medical patients are too autonomous and that perhaps autonomy needs to be balanced with other considerations such as benevolence.

[9]Roe v. Wade, 410 U.S. 113 (1973). For the non-legal person not familiar with case decision citation, the easiest way to review the decisions of the United States Supreme Court or state supreme courts is to visit FindLaw.com, a web service provided by a foundation within Cornell University.

[10]Washington v. Glucksberg, 96 U.S. 110 (1997) and Vacco v. Quill, 95 U.S. 1858 (1997). These cases came to the United States Supreme Court as separate cases but were consolidated for hearing. Individually, the cases will be referred to as Washington v. Glucksberg and Vacco v. Quill. When discussed jointly, they will be referred to as Washington/Vacco.

indoctrination and laws influenced for thousands of years by such religious morality. Both the murder of physicians assisting in abortion and public reaction to physician-assisted suicide, even where the patient is riddled with intolerable pain, come from a religious teaching that values human life, any such life, even when its existence and value is medically questioned. Almost all movement against the right to abortion based on privacy and attacks on the right to physician-assisted suicide come from organizations and individuals tied to religious ideology.

The destruction of a human fetus has never been recognized as murder in the English or American common law. However, it is considered by some to be a form of murder before birth. Physician-assisted suicide, even in the most desperate circumstances of medical illness, is generally thought to be killing before life is through. Both are considered unmoral and unethical by some religious teachings in the Western world.[11]

In this historical context, the choice of autonomy, and of privacy, even in medical choices, was allegedly outweighed by the state's interest in the protection of human life. However, in 1973 the United States Supreme Court, in the Roe v. Wade decision, acknowledged and recognized a United States Constitutional right of privacy, a right of autonomy in making medical choices.[12] This was the declaration by the Supreme Court

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[11]There are some arguments in the literature that the Roman Catholic Church did not always treat abortion "as a sin." The thought of unwanted pregnancy, many times the creation of "the sin of sex," made abortion palpable rather than bringing a child to term out of wedlock. This changed dramatically in the last one-hundred years.

[12]Roe v. Wade is a "landmark" case decision, according to both legal scholars and historians. It was chosen for inclusion in the *Landmark Law Cases and American Society* series. See Hull & Hoffer: *Roe v. Wade: The Abortion Rights Controversy in American History* (Lawrence: University Press of Kansas, 2001). This book is hereinafter

of the United States that a right of privacy existed in a long line of prior decisions by the Court and was protected by the American Constitution.[13] In our governmental system this judicial power of the United States Supreme Court of course outweighed both the legislative power that normally creates the law and the executive power that enforces such laws.

Could this constitutional interpretation of our rights be extended to form a foundation or at least give guidance to a national and uniform ethical policy concerning medical concepts of autonomy? Following the Roe v. Wade decision in 1973, it first appeared that this decision and its affirmation of a constitutional right to privacy would bring about a national policy for the medical ethics community concerning autonomy and the making of medical decisions, at least in the abortion rights arena.[14] Many thought, at

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referred to as Hull & Hoffer.

[13]Sarah Weddington relates that she first started to research the law to overcome the Texas anti-abortion statute by looking at the "privacy" decisions of the U.S. Supreme Court:

> Soon I was finding U.S. Supreme Court decisions supporting a position that there were certain personal decisions the government had no business making. I ran to find Ron [her husband and a fellow lawyer] after I read Griswold v. Connecticut. . .

Sarah Weddington: *A Question of Choice* (New York: Penguin Books, 1992, 2nd ed.1993), p. 41. This book is hereinafter referred to as Weddington.

[14]This is documented carefully by Weddington, p. 151:

> There were spontaneous celebrations for the Court's decision around the country. Reactions from many recognized women leaders flashed across the news wires. People often tell me that they remember vividly where they were when they heard about two events: the death of President John F. Kennedy and the decision in *Roe v. Wade* . . . .

Also, see citations to David J. Garrow: *Liberty and Sexuality: The Right to Privacy and the Making of Roe v. Wade* (Berkeley: University of California Press, 1994, 2nd ed.1998) below.

the time, that the decision meant much more than this and that it was a tremendous victory for individual rights. This was a decision of vast importance for patient decision-making and personal medical autonomy.

This thesis will argue that a careful examination of the United States Supreme Court and other state court decisions following Roe v. Wade shows that it was hoped and believed by many in the medical and legal communities that this decision would develop a national policy of autonomy in medical decision-making. This conclusion about the Roe v. Wade decision was evidenced by the In Re Quinlan case decided by the New Jersey Supreme Court in 1976.[15] A careful examination of this case will be given to support the argument that this court decision was based expressly on the United States Supreme Court decision in Roe v. Wade. This decision also extended the right of autonomous choices to a medical patient's guardian who had petitioned the court for such authority.

The thesis's argument will follow the development of other cases that soon followed, such as the later decision by the same New Jersey Supreme Court of In Re Conroy,[16] and another United States Supreme Court decision concerning the case of Nancy Cruzan.[17] It is argued that these cases established further rights and guidelines of medical choice built upon the foundation and guidance of the right of privacy established by Roe v. Wade.

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[15]In Re Quinlan, 70 N.J. 10, 355 A. 2nd 647 (1976). Hereinafter referred to as the Quinlan decision.

[16]In Re Conroy, 98 N.J. 321, 486 A. 2nd 1209 (1985). Hereinafter referred to as Conroy.

[17]Cruzan v. Director, MDH, 497 U.S. 261 (1990). Hereinafter referred to as Cruzan.

However, this progress toward establishing a national ethical policy, and therefore a policy of uniformity and universality concerning medical rights of autonomy, through the interpretation of United States Supreme Court decisions was terminated for the present by a set of companion cases heard before the United States Supreme Court in 1997, and known as the Washington/Vacco decisions.[18] In these decisions the Supreme Court of the United States did not follow the Roe v. Wade decision. Decided twenty-five years earlier, Roe v. Wade declared a constitutional right of privacy which was national in scope. However, the decision in the Washington/Vacco cases declared the underlying issues of medical autonomy concerning the legal rights of patient decision-making concerning the issue of physician-assisted suicide to be fully within the determination of the fifty different states.

How, without overturning the decision of Roe v. Wade, could the Supreme Court of the United States reach such drastically different results? How can one case give the constitutional right to a mother to allow a physician to abort a fetus, alleged by some to be murder, and yet the other decision deny such a right to allow a physician to end one's own life? Does medical autonomy in decision-making exist as a constitutional right, or does it not?

This thesis will show that starting with a line of argument developed by the Cruzan decision, the Supreme Court of the United States decisions backed away from a national policy and the declaration of a constitutionally protected right in medical decision making. At least on the issue of physician-assisted suicide, once again the policy in these matters of

[18]See footnote 10.

medical autonomy is to be decided by the individual states. This, as a result, has left the United States of America without a national policy of determinative autonomy in medical decision making on some issues, allowing the State of Oregon to unilaterally sanction physician-assisted death while it remains illegal in all other states. At the same time, abortion, as a constitutional right, exists throughout the nation on a uniform scale.[19] Both of these results are based solely on the interpretation of the United States Constitution by the Supreme Court of the United States, yet arriving at two very different conclusions. The right to end your life by physician-assisted suicide remains a right only within the State of Oregon.[20] This means that there is a lack of uniformity and universality concerning the medical right of autonomy within the United States of America. Some portions of this right are national in scope. Some however, are non-existent, or available only to the citizens of certain states.

This is a very inconsistent result, and one that does not speak well for the use of

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[19]David Garrow believes that the abortion right will always remain, leaving us in a dichotomy of ethical guidance. He states:

> The Supreme Court's firm commitment to *Casey* accurately reflected the remarkable imposing stability of American public opinion about abortion. Twenty-five years' evidence indicated that while significant numerical variations could be generated by differently worded questions, a clear majority of Americans opposed any governmental action to overturn the constitutional consensus represented by *Casey*.

Garrow, p. 737.

[20] Known as the Oregon Death With Dignity Act, this statute became law in 1997 after a second public referendum. It is codified as ORS.127.800 and can be found on FindLaw.com. The Act first started as a public initiative in 1994 by the citizens of Oregon, not its legislature. It was held in abeyance by Federal Court injunction until the Supreme Court decision of Washington/Vacco which allowed such decisions to become law, but only on a state-by-state basis. A lot of information can be found about the Act on the Oregon Department of Health Services web site, www.dhs.state.or.us.

constitutional interpretation of our rights, even of our rights in the medical ethics field, to arrive at a universal and uniform national policy. The Roe v. Wade decision, as we will see, is very specific: we, as Americans, have the right to privacy in medical choices. However, no matter how specific this constitutional interpretation is, and no matter that it still exists as good constitutional law in this country, having never been fully overturned, the Washington/Vacco decision and other cases have limited the extent to which it can be regarded as determinative of our rights in other areas of medical choice. Thus we continue to have the tragic result of such circumstances as the Terri Schiavo case in the State of Florida[21], where without a national policy and declaration of the ethical rights existent in medical choices, a guardian, a family, a state legislature and governor have battled for fourteen years to establish or deny the right that Roe v. Wade presumptively gave Ms. Quinlan's surrogate almost thirty years ago.

In reality, this thesis will argue that these very issues were clarified by the Quinlan case back in 1976. A surrogate, under Quinlan, which followed the implications of Roe v. Wade, has the right to make these type of choices for such a person as Ms. Schiavo. Mr. Schiavo has been clothed in those legal garments for almost all of the fourteen years of this Florida struggle, and wanted to terminate his wife's technological life support many years ago. Several years ago a Florida court decision cleared the way for this to happen. Unfortunately, Ms. Schiavo's parents have been allowed to interfere, as well as the

[21]See Schiavo v. Governor of Florida Jeb Bush, et. al., SC FL 04-925 (October 14, 2004). Additional litigation continued from the fall of 2004 to the resolution of the case with Ms. Schiavo's death in March of 2005, but not until President Bush and the US Congress passed special legislation and five appeals were made to the US Supreme Court.

legislature and governor of Florida, and then the United States Congress and President, in a situation that would have never been legally allowed, if Roe v. Wade had been allowed to stand for what Quinlan stated it supported.

The problem is as this thesis describes: Cruzan started a process in 1990 that the Washington/Vacco decisions cemented: the state courts can no longer look to Roe v. Wade for a national policy. Each state is allowed to come up with its own policy, based on its on procedural rules and other matters. This will give every person like Ms. Schiavo's parents a chance to get in the litigation door. With Cruzan and the disaster of the Washington/Vacco decisions, that is what is left of the judicial issue of autonomy. Without these United States Supreme Court decisions, Mr. Schiavo's relief would have been a direct appeal to the Federal Court on the grounds that there was a violation of Roe v. Wade, i.e., the national right of privacy, a Federal Constitutional Right, uniform and complete across the United States.

This is a drastic and terrible conclusion to the promise and brilliance of the Roe v. Wade decision, a decision that was about so much more than a right to abortion. Roe v. Wade was the hope for medical autonomy through privacy of choice. It was the test of time, based on many, many years of constitutional interpretations as to our rights under the most basic of our legal foundations.[22] Despite them, we cannot find an effective, uniform and universal solution to the quandary of medical ethics or autonomy within the limits of such constitutional interpretation. What was the hope and dream of an important

[22]In deciding Roe v. Wade, the Supreme Court of the United States looked back historically over more than one hundred years of Supreme Court decisions that had solidly built the right of privacy as a constitutional right.

constitutional right, the right of privacy, has evolved into a United States Supreme Court that is indifferent to the need for a coherent system, a national system, a uniform system of medical ethics, even on the issue of privacy and autonomy.[23]

[23]This is best summed up by a statement from Sarah Weddington:

> When *Roe* was decided, pro-choice forces were at the top of the seesaw. By 1989 that had reversed and the opposition to abortion was at the top, as a result of being better funded, more vigilant and passionate, and of having elected presidents who agreed with them in 1980, 1984, and 1988. They were often seen in demonstrations and picketing abortion providers. Pro-choice forces were at a low point, having been unable to blunt or stop the juggernaut or to energize the majority of citizens who supported reproductive freedom.

Weddington, p. 211.

CHAPTER TWO:
WHAT ARE THE CONCEPTS OF AUTONOMY, PRIVACY & LIBERTY CONCERNING MEDICAL ETHICS?

> ***Roe's declaration that abortion was no longer a crime made the case into a symbol–for advocates of abortion rights a symbol of autonomy, of choice, and ultimately women's control of their reproductive lives. . .***[24]

What does autonomy mean when used in the medical context by bioethicists? How does this differ, if at all, from the definitions of "liberty" and "privacy" which have been used by the courts and legal profession in determining our legal rights?

Alan Goldman has stated this concerning autonomy:

> Personal *autonomy* over important decisions in one's life, the ability to attempt to realize one's own value ordering, is indeed so important that normally no amount of other goods, pleasures or avoidance of personal evils can take precedence. . .Especially when decisions are important to the course of our lives, we are unwilling to relinquish them to others, even in exchange for a higher probability of happiness or less risk of suffering. . .[25]

In the meantime, when Tom L. Beauchamp and James F. Childress designed their theory of medical ethics they settled on a system of medical principles.[26] There are four major principles in their system, autonomy, nonmalefience, beneficence, and justice,[27] and

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[24]Hull & Hoffer, p. 4.

[25]Goldman, p. 63. The emphasis is added.

[26]Beauchamp & Childress. See footnote 3.

[27]*Ibid.*, p. 12.

Beauchamp and Childress take up autonomy first.[28] The authors quickly state that "Respect for the autonomous choices of persons runs as deep in common morality as any principle, but little agreement exists about its nature, scope, or strength."[29] They also state:

> Personal *autonomy* is, at a minimum, self-rule that is free from both controlling interference by others and from limitations such as inadequate understanding, that prevent meaningful *choice*.[30]

Now "choice" is an interesting word, and as we will see, it became the battle-cry for the women's movement that led into the movement for legalization of abortion.

Beauchamp and Childress go on to state that two conditions are necessary for the type of autonomy that they have in mind, *liberty* and agency, and they define agency as having the capacity for intentional action.[31] The authors also point out that when you bring these concepts to the medical arena, many problems develop because of "the patient's dependent condition and the medical professional's authoritative position."[32] Beauchamp & Childrress's theory of autonomy is also tied to two philosophers of the

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[28]Beauchamp & Childress, p. 57. However, the authors stress that its order of presentation "does not imply that this principle has priority over all other principles."

[29]*Ibid.*

[30]*Ibid.* p. 58. The emphasis is added to the quote. However, it should be noted that this statement is footnoted by Beauchamp and Childress and refers to "Two Concepts of Liberty" from *Four Essays on Liberty*, Isaiah Berlin (Oxford: Oxford University Press, 1969) and also to texts on criminal law and those of self respect. Again, the emphasis is added, but points out that Beauchamp & Childress's concept of autonomy is drawn immediately from concepts of both liberty and criminal law.

[31]*Ibid.*

[32]*Ibid.*, p. 61.

modern period, Immanuel Kant and John Stuart Mill:

> Kant argued that respect for *autonomy* flows from the recognition that all persons have unconditional worth, each having the capacity to determine his or her own moral destiny. To violate a person's autonomy is to treat that person merely as a means, that is, in accordance with others' goals without regard to that person's own goals . . . Mill's position requires both not interfering with and actively strengthening autonomous expression, whereas Kant's entails a moral imperative of respectful treatment of persons as ends in themselves.[33]

Gregory Pence states Mill's contribution as follows:

> . . . John Stuart Mill (in *On Liberty*) applied his principle of harm to define or delimit private or "self-regarding" actions. Mill held that so far as such actions are concerned, the individual should be *autonomous*: that the source of values is individual experiences and *choices* (in other words values are not imposed by the state); and that the state should have no power to force an individual to act for the public good or even in his own best interest. In essence, Mill saw individual rights as conditions limiting what government may do to citizens[34].

Beauchamp and Childress believe that this philosophical theory equips autonomy with both a positive and a negative obligation:

> As a *negative* obligation: *Autonomous actions should not be subjected to controlling constraints by others* . . .As a *positive* obligation, this principle requires respectful treatments in disclosing information and fostering autonomous decision-making.[35]

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[33]Beauchamp & Childress, p. 64. The reference to Kant's work is to Immanuel Kant: *Foundations of the Metaphysics of Morals* (Indianapolis: Bobbs-Merrill, 1959), translated by Lewis White Beck, and also, I. Kant: *"*The Doctrine of Virtue", Part II, *Metaphysics of Morals,* translated by Mary Gregor (Philadelphia: University of Pennsylvania Press, 1964), p. 127. The emphasis is added.

[34]Gregory E. Pence: *Classic Cases in Medical Ethics: Accounts of Cases that have Shaped Medical Ethics with Philosophical, Legal and Historical Background*, 4th edition, (Boston: McGraw-Hill, 2004), p. 78. The text is hereinafter referred to as Pence.

[35]Beauchamp & Childress, p. 64.

Obviously, such positive and negative autonomous obligations may come into conflict, and may come into conflict with other sorts of obligations. The authors note that "Respect for autonomy has only prima facie standing and can sometimes be overridden by competing moral considerations."[36] In other words, there may be times when the principle of autonomy must be given up or affected by one of the other three major principles in Beauchamp and Childress's system. In much the same way, Beauchamp and Childress believe that such a balancing must exist between concepts in ethical theory construction, a process now known as *reflective equilibrium*, a term borrowed from the philosopher John Rawls.[37] Rawls regarded such justification as a "reflective testing of our moral beliefs, moral principles, theoretical postulates, and other relevant moral beliefs in order to make them as coherent as possible."[38] Obviously this same type of reflective testing or balancing is necessary when faced with conflicts between the concept of autonomy and the other major principles.[39]

This type of process, whether called reflective equilibrium or something else, is

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[36]Beauchamp & Childress, p. 65.

[37]*Ibid*, p. 398. Beauchamp and Childress actually use the term in the text prior to this explanation (see p. 152), but it is tied to Rawls specifically on page 398 and adopted by the authors at this point. Rawls may not have used the term "balancing" but he did see "judgments as provisionally fixed points" which were "liable to revision." The footnote by Beauchamp & Childress at that point is to John Rawls: *A Theory of Justice* (Cambridge: Harvard University Press, 1971; revised edition 1999), with reference to multiple pages.

[38]*Ibid.*

[39]This type of reflective testing or balancing is just one of several possible mechanisms for confronting conflict. There might be others, such as "specification."

very closely akin to what is involved in deliberations by the Supreme Court of the United States and other courts in balancing the competing state interests against the interests of liberty, privacy and choice that will dominate the discussions of the case decisions which follow in this thesis. This process is also regarded as a source of authority in medical ethics. This can be seen when Beauchamp and Childress conclude their section on autonomy with the following:

> We have also maintained that construing respect for *autonomy* as a principle with priority over all other moral principles, rather than one principle in a framework of prima facie principles, gives it too much weight. The human moral community, indeed morality itself, is rooted no less deeply in the three clusters of principles to be discussed in the next three chapters.[40]

While Beauchamp and Childress discuss "privacy" in an entirely different part of their book,[41] the part dealing with "professional-patient relationships," this does not mean that they think it is totally separate from the concept of autonomy. Here the authors specifically mention the development of considerations of "privacy" in the Supreme Court of the United States, even mentioning Griswold v. Connecticut by name.[42] The decision of Roe v. Wade is mentioned only in a footnote to the text, at which point the authors state:

> It seems inapposite to make a right that protects individual or familial interests one of *privacy* rather than *liberty* or *autonomy*. However, the right to privacy encompasses both rights of limited physical and informational access, as well as rights of decisional freedom, and reducing this right to a right to be free to do something or a right to act

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[40]Beauchamp & Childress, p.104. The emphasis is added.

[41]*Ibid.*, p. 293ff.

[42]Griswold v. Connecticut, 381 U.S. 479 (1965).

autonomously creates confusion. . .[43]

The authors then discuss the different concepts of privacy, borrowing from author Anita Allen. These are described as:

> . . .*informational privacy*, which biomedical ethics often emphasizes; *physical privacy*, which focuses on persons and their personal spaces; *decisional privacy*, which concerns personal choices; and *proprietary privacy*, which highlights property interests in the human person.[44]

To this, Beauchamp and Childress add a fifth form of privacy, *relational or associational privacy,*[45] but they do not spend much time discussing it.

Unlike Beauchamp and Childress, Onora O'Neill discusses relational autonomy and its conflict with the medical profession in her recent book, *Autonomy and Trust in Bioethics*.[46] Because O'Neill is influenced by continental philosophical thinking, her concept of autonomy is very different from viewpoints expressed by American bioethicists. Keep in mind that in the United States one major motivation for the movement promoting autonomy was to escape what was considered an overreaching paternalism by the medical

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[43]Beauchamp & Childress, p. 294. The emphasis is added.

[44]*Ibid.*, p. 294. Allen's work is "Genetic Privacy: Emerging Concepts and Values", in Mark A. Roth editor, *Genetic Secrets: Protecting Privacy and Confidentiality in the Genetic Era* (New Haven: Yale University Press,1997), pp. 31-59.

[45]*Ibid*, p. 295. However, Beauchamp and Childress's concept of relational privacy is very different in scope from that of Onora O'Neill's *relational autonomy*, which is discussed further in the text.

[46]Onora O'Neill: *Autonomy and Trust in Bioethics* (Cambridge: Cambridge University Press, 2002). This work is hereafter referred to as O'Neill.

profession.[47] Physicians were specially trained, and in the opinion of the profession knew best when it came to medical decisions. This is very obvious in the Code of Medical Ethics written for and adopted by the medical profession in 1847.[48] In contemporary times, especially after World War II, many Americans were better educated and were convinced that they were able to understand and define medical answers and make decisions for themselves. O'Neill's opinion, however, is that trust of the medical professions is in disarray and that the contemporary ethical theory of autonomy fails to understand this need for trust of the medical profession.. O'Neill sees this as a problem in the misunderstanding of what autonomy means and should mean, arguing that autonomy must be a relational and not an individualistic principle.

Of the four principles expressed by Beauchamp and Childress, O'Neill believes that the concept of autonomy is misconstrued. While most Americans see autonomy as "a matter of independence, or at least as a capacity for independent decisions and actions," O'Neill claims that autonomy must be regarded as relational:

> . . . in speaking about obligations we shift from a way of thought that is often viewed (both by protagonists and opponents) as individualistic, to one that takes *relationships* between obligation bearers and right holders, including institutionally defined relationships . . . We do not know what our obligations are if we cannot specify to whom we owe them.[49]

O'Neill bases her belief in the relational character of autonomy on the philosophy

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[47]Pence, p. 78. "During the early development of bioethics, this concept of individual autonomy became very important in the *patient rights movement*." (Emphasis added).

[48]See footnote 3.

[49]O'Neill, p. 81.

of Kant.[50] This conception of autonomy is very different from that which is brought to mind by Beauchamp and Childress, or by the court decisions in this country about the rights of choice and privacy. However, this work by O'Neill is a classic example of how little consolidation, even in terminology, exists in the field of medical ethics.[51] It also points out how the approach to medical ethics which has developed under the European influence is grounded in different concepts attributed to some of the same basic terms.[52]

Beauchamp and Childress give expression to the traditional American view of autonomy, as expressed in medical ethics in the United States. They trace the history of this American concept of privacy and autonomy to Warren and Brandeis' "celebrated 1890 article "The Right to Privacy"[53] wherein it was argued that "a legal right to privacy flows from fundamental rights to life, liberty, and property." Beauchamp and Childress mention that perhaps the right to privacy comes from "a cluster of other rights, from

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[50]O'Neill, p. 83. She states:

> The advantages of grounding rights in obligations can be secured only if good arguments for central human obligations can be found. . . In this enterprise Kant's work remains the most significant; it is also notable for the central role he assigns to autonomy. .

[51]Pence also warns (p.79) about the overreaching of autonomy when it states:

> Modern bioethics has been accused of worshiping autonomy at the expense of other values such as community and family solidarity. No where does this seem truer than in its glorification of assisted suicide by young individuals who are not terminally ill.

[52]O'Neill is British.

[53]Beauchamp & Childress, p. 295. We will see later that other legal scholars believe this article, written in the Harvard Law Review, is the foundation of the rights of privacy in American tort law.

which this right is derivative," citing the work of Judith Thomson.[54] After mentioning other theories, however, Beauchamp and Childress conclude:

> The primary justification, we suggest, resides in a third rationale, based on the principle of respect for *autonomy*. We often respect persons by respecting their autonomous wishes not to be observed, touched, or intruded upon. On this account, rights of *privacy* are valid claims against unauthorized access that have their basis in *the right to authorize or decline access*. These rights are justified by rights of autonomous *choice* that are correlative to the obligations expressed in the principle of respect for *autonomy*. In this respect, the justification of the right to *privacy* parallels the justification of the right to give an informed consent that we developed in Chapter 3.[55]

It is also important to note that the medical concept of informed consent parallels the United States Fourth Amendment Constitutional prohibitions against unlawful search and seizure. When the Supreme Court of the United States expressed its idea of privacy as a constitutional right, the idea, like that of the different kinds of autonomy intersected many different subject matters and many different issues. That is why, even though issues of autonomy can differ from those imitating other kinds of autonomous expression, the issue of privacy covers it all. Therefore, there is a very strong argument, supported by Beauchamp and Childress, that the medical right to autonomy parallels the rights to privacy and liberty discussed in legal circles.. Goldman states:

> For this reason the most fundamental right is the right to control the course of one's life, to make decisions crucial to it, including decisions in life-or-death medical contexts.[56]

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[54]Beauchamp & Childress, p. 296. Thomson's work is "The Right to Privacy," *Philosophy and Public Affairs* 4 (Summer 1975) 295-314.

[55]*Ibid.*, p. 296. The emphasis is added.

[56]Goldman, p. 64.

Charles Sykes, in his book *The End of Privacy*, reminds us where the concept of privacy or confidentiality began in the medical profession, namely, in the Hippocratic Oath itself, dating from the fifth century B.C.E.:

> What I may see or hear in the course of the treatment or even outside of the treatment in regard to the life of men, which on no account one must spread abroad, I will keep to myself holding such things shameful to be spoken about.[57]

Sykes continues with this thought and states, "If there is one area of life where most Americans expect privacy, it is in their relationship with their doctors." [58] And, indeed, the medical profession today is caught in the very cross-hairs of dispute over this sort of confidentiality and right of privacy, when Sykes reminds us that:

> A short list of those who might have access to a medical file would include HMOs, insurance companies, private and public databases, pharmacists, hospital workers, and employers. Especially in managed care, confidential medical information is shared with a startlingly wide range of providers including insurers, pharmacists, state health organizations, researchers, employers, marketing firms, and pharmaceutical companies. The Medical Information Bureau in Boston maintains files on 15 million people who have applied for various kinds of insurance.[59]

Obviously, then, the medical profession has to be concerned with privacy.

There have been few decisions by the Supreme Court of the United States or other state courts that have directly connected the concept of privacy in the medical field to that of privacy in other lines of Supreme Court decisions. There have been a few exceptions,

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[57]Charles J. Sykes: *The Attack on Personal Rights-At Home, At Work, On-Line, and in Court* (New York: St. Martin's Griffin, 1999), p. 98. Hereinafter referred to as Sykes.

[58]*Ibid.*

[59]*Ibid*, p. 102.

as Sykes notes:

> But as to legal rights: "In the 1996 case *Jaffee v. Redmond*, the Supreme Court went further toward protecting medical *privacy* than it had ever gone before, declaring that any communications between a psychotherapists and patient are confidential and could not be subpoenaed or revealed in an federal case.[60]

But, Sykes continues:

> But what seems to be shocking when applied to the intimate secrets of therapy is routine when it comes to general medical care. Unlike the relationship between therapist and patient, the Supreme Court has never recognized a similar privilege for medical doctors and their patients.[61]

However, the Supreme Court of the United States has entered the medical arena in other important decisions that did not arise from privilege or confidentiality. The first two of these were the cases of Griswold v. Connecticut in 1965, concerning the right to obtain and distribute contraceptives, and Roe v. Wade, the case concerning the abortion rights of women. In these cases, legal scholars and historians alike found a connection between the medical concepts of autonomy and choice, and the legal concept of privacy and liberty. N.E.H. Hull and Peter Charles Hoffer put it this way:

> In the late 1960's, advocates of women's legal right to abortions selected the word "choice" to promote their cause. . .*choice* went hand in hand with the concept of *privacy*, a legal right that was almost one hundred years old by the time it was featured in the *Roe* opinions, but one that had only been recently been applied to women's reproductive experience."[62]

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[60]Sykes, p. 102.

[61]*Ibid*, p. 106. Dr. Graber at the University of Tennessee Department of Philosophy also has concluded that there is no protection in Tennessee's state law that would back up the doctor-patient status of confidentiality.

[62]Hull & Hoffer, p. 4. The emphasis is added.

Thus we begin to see that with the Griswold decision in 1965, followed closely by Roe v. Wade in 1973, the bioethical concepts of autonomy and the legal concepts of privacy and liberty began to merge. This is obviously reflected in the philosophy of Beauchamp and Childress as already mentioned. It is also the theory of Ellen Alderman and Caroline Kennedy, who wrote in their book *The Right to Privacy* about this connection of the legal and medical issues:

> The Constitution has also been interpreted to protect another form of *privacy*, the right to make decision involving family life and procreation, including contraception and abortion. However, this form of privacy is not explicitly set out in the Constitution, but is derived from the broader concept of "*liberty*," and is therefore somewhat harder to define and more controversial. . .[63]

These authors give an illuminating view of the connection between these medical rights and the legal rights of liberty. For instance, they state:

> Constitutional protection of a woman's decision to end a pregnancy is based in the Due Process Clause of the Fourteenth Amendment. That clause declares that no person will be denied "life, *liberty* or property, without due process of law." Beginning nearly a hundred years ago, the Supreme Court interpreted "liberty" as encompassing certain fundamental rights not specifically listed in the Bill of Rights. Giving substance to the term "liberty" in this way is known as "substantive due process." In this view, rights "deeply rooted in this Nations's history and tradition" and "implicit in the concept of ordered *liberty* such that neither liberty for justice would exist if they were sacrificed,"are protected.[64]
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> Additionally, In the Griswold case Justice William O. Douglas wrote that "We deal

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[63] Ellen Alderman & Caroline Kennedy: *The Right to Privacy* (New York: Vintage Books, A Division of Random House, Inc., 1997), p. xvi. Hereinafter referred to as Alderman & Kennedy. The emphasis is added.

[64] *Ibid.*, p. 55. The emphasis is added.

with a right to privacy older than the Bill of Rights."[65] Alderman and Kennedy put it this way:

> Justice Douglas pointed out that many rights which are not specifically mentioned in the Constitution but are derived from specific provisions have long been protected by the Court. For example, freedom of association is an extension of the guarantees of freedom of speech and assembly. Justice Douglas found that the spirit, structure, and specific provisions of the Bill of Rights created "zones of *privacy*" which are broad enough to protect aspects of personal and family life . . .[66]

Later, when the abortion decision of Roe v. Wade was threatened by other case decisions before the United States Supreme Court, Justice Blackmun, who had authored the opinion for the Court in Roe v. Wade, wrote:

> In a Nation that cherishes liberty, the ability of a woman to control the biological operation of her body. . . must fall within that limited sphere of individual *autonomy* that lies beyond the will or power of any transient majority. . .This Court stands as the ultimate guarantor of that zone of *privacy*, regardless of the bitter disputes to which our decision may give rise. . .[67]

Finally, Alderman and Kennedy find that the "autonomy" of medical decisions and the "liberty" and "privacy" of legal decisions are best tied together by the words of Justice Sandra Day O'Conner in her written opinion in the Casey decision. They state:

> Justice O'Connor then defended substantive due process and, in turn, the right to *privacy*. She concluded that the Court was not limited by practices current at the time the Bill of Rights was written or the Fourteenth Amendment adopted. Rather, as it had concluded in *Griswold* and *Roe*, the Court found that its responsibility was to balance individual *liberty* against the demands of organized society through an exercise

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[65] Alderman & Kennedy, p. 57.

[66] *Ibid.*, p. 57. The emphasis is added.

[67] *Ibid.*, p. 63. The emphasis is added.

> of reasoned judgment. "It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the state," the Court declared.[68]

So, according to this distinguished Justice of the Supreme Court, courts have a duty to "balance individual liberty against the demands of society through an exercise of reasoned judgment." This sounds very much like the balancing of Beauchamp and Childress' four major principles when conflicts arise, or like the process of reflective equilibrium theorized by philosopher John Rawls and adopted by Beauchamp and Childress as the means by which the medical profession should balance the conflicts between the different theories of medical ethics. It is also obvious from this review that the constitutional interpretation by the Supreme Court of the United States, and, by other courts, of our legal rights of liberty and privacy have used language very similar to that used in the examination of the concept of autonomy by those who speak of issues in medical ethics.

Thus, on the day that the Casey decision was handed down in 1992, in a very unusual departure from the normal practice of the court, Justice Anthony Kennedy *read aloud* to the Court's audience that

> These matters, involving the most intimate and personal *choices* a person may make in a lifetime, choices central to personal dignity and *autonomy*, are central to the *liberty* protected by

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[68] Alderman & Kennedy, p. 63. The comments about the limitations of the Court's power of review either at the time of the Bill of Rights passage or the 14th Amendment's passage were aimed directly at the opinion of Chief Justice Rehnquist's dissents in this matter, as we will see. The emphasis is added.

the Fourteenth Amendment. . . [69]

Additionally, Garrow put it this way:

> Undoubtedly the most powerful and eloquent section of the [Casey] opinion was the ensuing discussion of Roe v. Wade and *stare decisis* that had been crafted by [Justice] David Souter:
>
> "For two decades of economic and social developments, people have organized intimate relationships and made *choices* that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the nation has been facilitated by their ability to control their reproductive lives . . .An entire generation has come of age free to assume *Roe's* concept of *liberty* or personal *autonomy* has left *Roe's* central holding as a doctrinal remnant. . ."[70]

Finally, a quote from Yale's Harold Lasswell:

> The presumption in favor of *privacy* follows from our respect for freedom of *choice* for *autonomy*, for self-direction on the part of

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[69]Garrow, p. 694. The emphasis is added. Mark Gitenstein was Chief Counsel of the Senate Judiciary Committee at the time of Bork's nomination to the Supreme Court. He wrote in a footnote to the Epilogue of his book, *Matters of Principle*, which is about the Bork nomination, the following about O'Connor, Kennedy and Souter after the Casey decision:

> This manuscript was finished before the Supreme Court's decision in the Pennsylvania abortion case [meaning Casey] as well as a number of enlightened First Amendment decisions and the emergence of a clearly moderate center on the Court, composed of Justices O'Connor, Kennedy, and Souter. These developments are further evidence of the point of this epilogue–that it is irresponsible to write off this Court simply because it has become more conservative." This may explain O'Connor and Souter's words quoted above, and gives hope that the constitutional right of privacy may still survive.

[70]*Ibid.*, pp. 694-695. After reviewing these quotes from Justices O'Conner and Souter in the Casey decision, Garrow states (p. 737):

> After 1992 no serious scholar of the Supreme Court could any longer doubt that the constitutional core of *Roe*, as upheld and re-affirmed in *Casey*, was secure for all time.

everyone.[71]

From all of the above, it is therefore one of the conclusions of this thesis that the bioethicist's concept of autonomy, with respect to both information and decisions, and the legal notions of liberty and privacy derive from the same historical context and *are basically the same philosophical concept.*[72] In fact, after the Roe v. Wade decision, Garrow states:

> Any number of legal writers would go on to make the point that some alternative term or concept other than "privacy," such as either "autonomy" or simply "liberty," ought to be frankly acknowledged as the substantive core of what was at issue in *Roe*. . . [73]

For this reason, this thesis will trace the development of this constitutional right established by the Supreme Court of the United States in earlier cases and in Roe v. Wade. It will follow its extension through other major decisions of the that Court and other courts in this country. However, such a path will conclude with the decision of the United States Supreme Court in the Washington/Vacco decision in 1997. As if Alderman

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[71]Garrow, in the Afterword, p. 741. Garrow, on this same page, probably says it better: "The right to privacy is inherent in the right to liberty."

[72]One of the most conclusive proofs of this is contained in a quote from Justice Ruth Bader Ginsburg, prior to the time she was appointed to the Supreme Court of the United States, which is captured by David Garrow in his book on p. 613. Ginsburg stated that Roe v.Wade was impaired,

> . . . by the opinion's concentration *on a medically approved autonomy idea*, to the exclusion of a constitutionally based sex equality perspective. . . Academic criticism of *Roe* . . . might have been less pointed had the Court placed the woman alone, rather than the woman tied to her physician, at the center of its attention.

The emphasis is added.

[73]Garrow, p. 614. See Garrow's Footnote #25, which appears on p. 916 of his book and cites a large number of law review articles and other sources on this issue.

and Kennedy could foresee the issue when they published *The Right to Privacy*, they concluded the introduction to the section of their book on "Privacy and the Self" with these words:

> In this decade, the looming privacy battle has to do with decisions at the end of life–the right to refuse medical treatment, the right to die, the right to assisted suicide. Can a competent person refuse medical treatment in order to end his life? Can people seek help in hastening their deaths? If they are incompetent, who decides for them . . . From the beginning of life to its end, the right to privacy often protects our most fundamental decisions. But courts struggle to balance new technology and old values, societal interests and individual freedom.[74]

As we will see, the Washington/Vacco decision answered those questions and defined the limits, for now, of our constitutional right of privacy. By the United States Supreme Court's declaration in this case, such a right does not extend to physician-assisted suicide. To understand how the Supreme Court of the United States reached this decision in the wake of the Griswold and Roe v. Wade constitutional interpretations, we will have to carefully examine the history of these cases.

[74] Alderman & Kennedy, p. 54.

CHAPTER THREE:
THE SUPREME COURT DECISION IN ROE V. WADE:

> ***Roe v. Wade and its companion cases remain the most divisive and controversial judicial decisions of the twentieth century. . . . Roe was a watershed event in American women's history, coming at a time when feminism had developed but not yet established the legal basis for its reform program. . .***[75]

[1] Background:

Americans love the law.

Some argue that there are more lawyers per capita in the United States than in any country on the face of the earth. It appears to be the appeal of democratic and representational legislation that set this standard of belief in the law. Even though it is, by far, not a perfect system, it is believed by Americans to be a better system than exists elsewhere. Whether this is still true or not, with the influence of money and media, we still believe that the representatives we elect to the process that creates the law represents the will of the people. Americans strongly believe that they can, through appropriate action, involve themselves in changing the system by involvement in changing the law. Further, we have this amazing and somewhat perplexing belief in the rule of law, a fact that continues to surprise the rest of the free world. An excellent example of this belief was Vice President Gore's quiet resolve to follow the ruling of the United States Supreme Court that effectively ended the debate as to who had won the presidential race in the year 2000. This was despite the fact that Gore, not Bush, had won the majority of votes cast.

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[75]Hull & Hoffer, p. 3.

The Supreme Court made a ruling, and the election was over.

Modern Americans hang on the resolution offered by the Supreme Court of the United States to those issues that confront us in the legal, moral and ethical realm almost with the dependency of religious fervor.[76] Nothing else was able to turn back the Jim Crow legislation that followed the Civil War like Brown v. The Board of Education.[77] Whether it is the resolution of voting rights, conflicts between the states, or the very essence of our freedom under the Bill of Rights, there is nowhere else in the world where the people of a nation surrender quite so completely to the dictates of the supremacy of judicial law.[78]

This is the very essence of the Supreme Court of the United States. The legislative power enacts the law, the executive branch enforces it, but the Supreme Court *interprets* the Constitution. The Supreme Court of the United States relates what the Constitution

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[76]Marian Faux: *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision That Made Abortion Legal* (New York: Cooper Square Press, 2001), p. 305. Faux states:

> That there is no appeal from the Supreme Court is a fact that most Americans accept, and Supreme Court decisions generally unite the nation more divide it. For example, although only a minority of people believed the public schools should be segregated before the *Brown v. Board of Education* ruling, polls taken in the weeks after the Supreme Court decision ordering desegregation showed a shift in opinion that could only be attributed to a fairly widespread acceptance of the Court's ruling. . .Roe v. Wade, unfortunately, would prove to be the *exception*.

The emphasis is added. Hereinafter referred to as Faux.

[77]Brown v. The Board of Education 344 U.S. 1 (1952). See the above note.

[78]Again, nothing else can explain the resolution of the 2000 Presidential race in this country. A candidate for what is arguably the most powerful position in the world *with a majority of the popular votes* stepped aside in favor of his rival purely upon the dictates of a United States Supreme Court opinion. While the electoral college actually decides who wins such an election, what was at stake was *what electors would be chosen*.

means, what it allows, and whether or not laws passed by the Congress of the United States or any individual state's legislature conflict with the underlying basic foundation of our government, the Constitution of the United States of America. In so doing, the Supreme Court of the United States has become the final and most probative force in telling us what the Constitution allows.

What a compelling force! Can we rely on this source of power to set national policies that will effect ethical and moral norms on some subjects of medical ethics? Can the Supreme Court of the United States become the final and most authoritative force to tell us what is ethically right or wrong concerning these issues? Can this power of judicial review be a source for a foundation on some issues of ethics generally, but more specifically, a source for a resolution of the quandary we find ourselves facing in the field of medical ethics concerning the issues of autonomy and privacy?

We need such answers in medical ethics. In many circumstances the power of law and judicial interpretation can react to the fast-paced innovation that is going on in the world today better than any alternative. Technology virtually rips along, destroying tradition and thousands of years of moral center in its wake. Because we wish to live longer, healthier lives, a major amount of technological innovation is directed at medical care and research, forcing us to confront the battleground of ethical challenge in today's world: genetic engineering, stem cell research, and a multitude of other issues such as technology that is vastly expensive, and yet a medical practice that sets a standard of care

that it is wiping out all reserves of ability to pay for it.[79]

Hospital ethics committees and institutional review boards can do some of this work. However, they do not have the force and effect of law. They cannot establish rights nor can they by themselves enforce obligations nor the duties of those involved except on a limited and local scale. Additionally, there is an ethics committee for every hospital and many different types of institutional review boards. Setting the norm or medical ethical agenda should not be done by the very entity that needs the direction and rules to follow. Consider the research horrors of the past, not only in Nazi Germany but in this country when the rules were left up to those doing the medical research. These agencies *will have to use standards and codes of ethics that are developed elsewhere.* These committees and boards also do not have authority outside of their setting.[80] Even as powerful as the American Medical Association is in promulgating opinions and ethical policies, it does not speak for all medical professionals but only its own members. Even then the AMA has not been consistent in the interpretation and implementation of its own

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[79]As this thesis was being written, such a conflict erupted in the State of Tennessee. The Governor reacted to the state's inability to fund its medicare program, TENNCARE, by suggesting to the legislature a withdrawal of medicare insurance from over 350,000 people in one swipe of his executive budget making capabilities. To do otherwise, he claimed, would bankrupt the entire state government. However, judicial intervention by a federal court initially stayed the Governor actions.

[80]Even though this is true, The President's Commission for the Study of Ethical Problems in Medicine and Biomedical and Behavioral Research, in their report *Deciding to Forego Life-Sustaining Treatment,* argued for delegating as many of these decisions as possible to the local institution. It was their thought that the local board could take into account the particularities of the individual case whereas a national policy would be too broad.

policies.[81]

Only state and federal governments can make these decisions with legal force or rule of law. Legal force, and the rule of law, is not only needed, it is required by our constitutional system of federal, state and local government. Even though history teaches that moral force alone can succeed, it is usually backed by religious doctrine, which has witnessed extremes such as making murderers out of those claiming to uphold the sacredness of life. Our system also requires a separation of moral authority backed by religion from the legal implementation of our governing authority. Additionally, as just emphasized, individual states and local government entities cannot set up such rules and policies of medical ethics with any national uniformity or universality. If we are going to wish for a policy of medical ethics that is fair, and affects all equally, it will have to be established by the national government.

Congress has attempted this, with the FDA and the Department of Health and Human Services' review and enforcement of research and medical practices. Even though this process has accomplished a great deal of good, the procedure and its implementation has suffered under the weight of politics and interference from those with monied interests.[82] If we are to look to the government of the United States for such rule making

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[81]See note 129 of this paper for an excellent example. This note sets out the major policies and guidelines established by the AMA just on the subject of physician-assisted suicide. A careful review of these written policies and other rules established by the AMA will show a basic inconsistency. A fine example is the wording that "patient autonomy is to be respected" in the same rule that denies access to physician-assisted suicide.

[82] Consider today's headlines concerning the pharmaceutical product Vioxx and other Cox2 inhibitors, which many claim were allowed by the FDA despite plenty of warnings

and norm-setting, then we would be better off with the Supreme Court's review of that basic instrument, that basic foundation of all of our government, the Constitution of the United States. Only the Supreme Court of the United States has such power to review and interpret this legal document. In addition, would it not be best to look for foundational support for ethical systems within the very legal foundation of our society?

Could this hope of some national policy stream into the content of philosophical ethics? Can philosophers and bioethicists look to the force of judicial interpretation of the Constitution of the United States to supply some guidance in the formation of ethical theory on the limited subject of privacy?

[2] The Decision:

> ***As a husband and as a father of a daughter, I am moved by. . .what Roe truly means–that our most private decisions can be made behind the closed doors of our homes, with our families, and in private conversations with our hearts. . .***
> ***President Bill Clinton***[83]

It is still somewhat difficult for us to understand the importance of Roe v. Wade. This decision dates back to 1973 and is tossed about in legal discussion, and even in the

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that the medicines were not safe. But then, articles in the press allege that Merck, the manufacturer of Vioxx, spends more on publicity and lobbying efforts than the Pepisco Corporation. The same private interests of money and politics have also corrupted the review of such issues by the Supreme Court of the United States, as this thesis will concludes.

[83]This quote by the former President appears on the cover of Sarah Weddington's book, *A Question of Choice*.

discussion of medical ethics, as "the abortion case." While it clearly focused on abortion and made paramount decisions for the legality of that medical procedure, Roe v. Wade is not merely an abortion case. Fundamentally, and, in review of the order of the opinion's declarations, this Supreme Court decision is about freedom and personal liberty.

Following a long history of cases attempting to establish what is basically referred to as the Penumbra of the Bill of Rights, those rights which are incorporated by essence, but not specifically set out in the Constitution, the Supreme Court of the United States declared in this case that we, as Americans, *have a constitutional right of privacy*. However, not everyone agrees that there is even such a thing as a Constitutional right of privacy. For instance, Charles J. Sykes has stated:

> The word "privacy" does not appear in the U.S. Constitution, an omission that has led some conservative critics to question whether there is any constitutional right to privacy. Even as the Court explicitly recognized the right of privacy in the 1960s, prominent jurists insisted that the court was simply manufacturing the right out of whole legal cloth. "I like my privacy as well as the next one," wrote Justice HugoBlack, "but I am nevertheless compelled to admit that the government has a right to invade it unless prohibited by some specific constitutional provision." Similarly, Justice Potter Stewart insisted, "I can find no such general right of privacy in the Bill of Rights, in any other part of the Constitution, or in any case before decided by this Court."[84]

Regardless of these attitudes, the Supreme Court of the United States undertook an examination of these "privacy rights" in Roe v. Wade. This case came to the United States Supreme Court as a class action lawsuit challenging the constitutionality of the

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[84]Sykes, p. 82. The quotations from the justices are drawn from Ellen Alderman and Caroline Kennedy: *The Right to Privacy* (New York: Vintage Books, 1997), p. 58. Despite what Sykes calls "these skeptics," the rights of privacy existing in English common law, the colonies, and the laws of the United States *does* exist. See this discussion beginning on p. 83 of Sykes.

Texas criminal abortion statute. The local Federal District Court ruled by way of declaratory judgment that Texas law violated Roe's rights according to the 9th and 14th Amendments to the United States Constitution. The case came to the United States Supreme Court directly because the issue appealed concerned injunctive relief.[85] The actual ruling of the Court was that the Texas law violated the 14th Amendment's Due Process Clause based on the finding that this proposed state action was prohibited by the right of privacy. The fact that this included a woman's qualified right to terminate her pregnancy, even at the expense of the fetus, was a secondary conclusion with respect to this important legal right.[86] This is also exactly what the U.S. 9th Circuit Court of Appeals said in its opinion striking down the State of Washington's statutes in the

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[85]See pp. 4-5 of Roe v. Wade as to these facts contained in the opinion. There is a tremendous body of discussion in legal circles about what is not in the opinion. Roe is not really the name of the plaintiff, but a derivative of the use "Jane Doe" to keep her identity secret. Her name was actually Norma McCorvey. There are theories that the case, especially the injunctive relief, was staged in order to get the case quickly to the United States Supreme Court. One of the most interesting things about the decision historically is that the woman who was Roe now publically speaks out against abortion rights. See Faux, pp. 327-28. McCorvey, Faux relates, now describes herself "as the most famous cleaning woman in America."

[86]*Ibid.* See the 3rd Head Note of the opinion (the first two deal only with standing issues). The Court immediately set out the Rule of Law: "State criminal abortion laws, like those involved here. . .violate the Due Process Clause of the Fourteenth Amendment, which protects against state action the right to privacy. . ." The Court goes on to establish that this "includes a woman's qualified right to terminate her pregnancy." By the very wording of the opinion, Justice Blackmun meant this ruling to be about more than abortion rights and about more than just Texas law. Also see Sarah Weddington's comments on receiving word of the Court's opinion in Roe v. Wade, p. 161 of *Question of Choice*:

> I checked off the significant points: There is a constitutional right of privacy; pregnancy is fundamental; the State had no compelling reason to prohibit abortion to the extent the anti-abortion laws had provided. The Texas laws were unconstitutional. . .

underlying decision that became the Washington/Vacco case before the United States Supreme Court.[87]

The "Penumbra" of the Bill of Rights had been discussed by the Supreme Court of the United States in a long line of cases.[88] In these cases, the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution of the United States. The cases established this right in various places within the Constitution, from the 1st, 4th, 5th, 9th, and 14th Amendments to the "Penumbra of the Bill of Rights." However, those earlier opinions were focused on particular freedoms, and focused on different places in the United States Constitution for their support. The Supreme Court of the United States was concerned that these prior decisions make it clear that only personal rights that can be deemed "fundamental" or implicit in the concept of ordered liberty fall under this protection of privacy. However, the right had previously been extended to activities relating to marriage, procreation, contraception, family relationships, child rearing and education by these earlier cases.

When the Supreme Court of the United States took up the case of Roe v. Wade Justice Blackmun, who wrote the opinion for the Court, carefully reviewed all this prior case history in a way that no previous opinion had quite consolidated in one location. The opinion followed the individual issues with the previous rulings, showing on what grounds and in what set of facts the right to privacy had previously been extended. This history, instead of isolating Roe v. Wade as just an abortion case, clearly shows the

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[87]See the discussion on p. 76 of this text.

[88]See notes 22 and 84.

development of the rule of law through Supreme Court decisions based on this right of privacy beginning in 1891. This decision, while extending the right of privacy to the medical procedure of abortion, more importantly stands *as the best clarification of this valid constitutional right*.[89] In the previous cases the Court examined and formed their opinions based on a right of privacy or zone of protection of privacy. However, in the Roe v. Wade decision Justice Blackmun immediately reviewed whether the state laws in those areas violated the Due Process Clause of the 14th Amendment. Blackmun wrote that this Amendment to the United States Constitution legally *invalidates any state law that in any way violates this Constitutional right of privacy.* Even though nine jurists sit on the Supreme Court, only two justices dissented in this landmark case. Justice White filed a dissenting opinion, in which Rehnquist joined. Rehnquist filed his own dissent as well.[90]

After two procedural points, the Blackmun's opinion noted the importance of the issue before the bench. The states, declared the opinion, cannot regulate the issue of a women's right to abortion "without regard to the stage of her pregnancy and other interests involved" without violating the Due Process Clause of the Fourteenth

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[89]Both Weddington in *Question of Choice* and Sykes in *The End of Privacy* adopt this way of viewing the importance of the decision in Roe v. Wade throughout their books.

[90]I am using the text of the opinion found at FindLaw.com. This information is provided on p. 2 of the opinion. It is historically important to note the Rehnquist dissent, in that we will see his influence in altering the importance of the Roe v. Wade decision as early as the Cruzan opinion. This factor greatly increased when the United States Supreme Court reached its decision in Robert P. Casey v. Planned Parenthood of Southeastern Pennsylvania et. al., 91 U.S. 744, 91 U.S. 902 (1992), which was a definitive opinion of the court on abortion regulation by the states. This case will hereinafter be referred to as Casey. Rehnquist's theory on this issue becomes fully clear in the Washington/Vacco decisions, which turn the regulation of rights concerning physician-assisted suicide back to the individual states completely.

Amendment "which protects against state action the right to privacy."[91] Justice Blackmun wrote, "Our task, of course, is to resolve the issue by constitutional measurement, free of emotion and of predilection."[92] The appellant's had brought their appeal to the Supreme Court of the United States directly based on the concept of privacy which had been established by the Supreme Court by the concept of liberty in the Due Process Clause of the Fourteenth Amendment, and by the "personal, marital, familial, and sexual privacy said to be protected by the Bill of Rights or its Penumbras.[93] While the opinion did not specifically characterize these rights as extending to a medical right of privacy involving the concepts of medical autonomy, Roe v. Wade, like its predecessor cases in the field of contraceptive rights, did involve the medical arena. In addition, the Supreme Court of the United States had questioned whether or not this right of privacy would extend to abortion when hearing oral arguments in the Griswold case.[94]

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[91]Roe v. Wade. See head note three on p. 2 of the opinion, as well as the body of the opinion.

[92]*Ibid.*, p. 3.

[93]*Ibid.*, p. 8. The court specifically cites Griswold v. Connecticut, 381 U.S. 479 (1965) and Eisenstadt v. Baird, 405 U.S. 438 (1972) at this specific point. Faux, in her book *Roe v. Wade,* states the importance of Griswold:

> . . . the breakthrough in *Griswold* had not been that the decision had "created" a right of privacy, as critics carpingly claimed, but rather that it had give *a cherished, respected value, privacy, a name.*

See p. 308. The emphasis is added.

[94]Hull & Hoffer p. 87. They state:

> Near the end of the oral argument in *Griswold* when Emerson [one of the attorneys] was using his rebuttal time, Justice Black asked a question that was on more than one of the justices' minds, to judge from Warren's and

For the next fifteen or so pages of the Roe v. Wade opinion Blackmun took up the history of the issue of abortion, beginning with matters as old as the Hippocratic Oath and how this subject had been treated by the common and statutory law. However, the opinion then took up the specific issue of privacy, noting that while the Constitution does not expressly mention this concept,

> In a line of decisions, however, going back perhaps as far as Union Pacific R. Co. V. Botsford, 141 U.S. 250, 251 (1891), the Court has recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution.[95]

Roe v. Wade settled the issue between the states that were in conflict about legalized abortion by making the surgical procedure legal in some circumstances.[96]

The force and rule of law is not perfect: approximately one half of the United States population still debates whether or not the practice of abortion is ethical. As previously mentioned, some detest the legality of the procedure to the point that they are willing to murder the doctors who perform the procedure. The decision, however, created a legal precedent in this country people in this country have, more or less, followed the dictates of the decision that a woman has a right to this medical choice despite personal feelings otherwise, particularly emphasizing a woman's ability to make medical choices

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> Stewart's later remarks. "Would your argument. . . relating to privacy, invalidate all laws that punish people for bringing about abortion. . ."

[95]Roe v. Wade, p.15. It is at this point that the opinion fully describes the history of cases which illustrate this point, carefully pointing out all of the specific and numerous foundations for this right to be found through the Constitution of the United States.

[96]While the actual case arose out of the state of Texas, briefs of *amici curiae* were filed by the Attorney Generals of Arizona, Connecticut, Kentucky, Nebraska, and Utah as well as many professional associations and interest groups. See p. 3 of the Roe v. Wade opinion.

about her own body.[97] This case represents a perfect example of how, over time, a legal ruling has affected a population's ethical beliefs. The Roe v. Wade decision appears, over time, to have given guidance to what our ethical belief should be on the issue of abortion.

However, clearly shown in the Roe v. Wade decision, and many other Supreme Court of the United States' decisions, is the acknowledgment that some state regulation in areas protected by the right of privacy is appropriate. A state may properly assert important interests in "safeguarding health, or in maintaining medical standards," but the sate must have "compelling state interests" to do so. In any case, no prior decision of the Supreme Court of the United States had quite so clearly stated the right of privacy, especially in its extension to the right to make medical decisions.[98] After this decision, many courts and legal scholars in the United States no longer doubted that the constitutional right of privacy existed. However, some legal opinions continue to disagree until this day.

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[97]Many would disagree with this statement. However, the last two presidential elections, in which abortion rights were a key division point between the two major political parties, show quite clearly that the country is almost evenly divided on this issue. People who think that this is not a vast change *in favor of abortion* since 1973 need to recall that only New York and a few other states had legalized abortion prior to the Supreme Court decision in Roe v. Wade. The Court's action in legalizing it throughout the country had the effect that the passage of law always does in highly disputed areas: Americans tend to follow the law. Prohibition was another such issue. However, no one would say today that fewer people are in favor of legal alcohol than they were when prohibition was overturned. Legality always seems to bring acceptance, just as I think it will in the future on the gay marriage issue or when marijuana is finally legalized.

[98]See Weddington's conclusions on this issue in *Question of Choice*. Also, in a discussion on the rights of privacy, Sykes highlights the decision of Roe v. Wade as the "high water mark" of privacy decisions in this country. In fact, Sykes's discussion leading up to Roe v. Wade is entitled "Privacy's High Watermark." (p. 87).

The greatest voice of discontent concerning Roe v. Wade's declaration of a fundamental Constitutional right has to be that of Chief Justice Rehnquist. This can be seen in many opinions, but perhaps is best illustrated in the dissent Justice Rehnquist filed in the Casey decision.[99] Other legal scholars have denied that such a right of privacy even exists, such as jurist Robert H. Bork, formerly a member of the U.S. 2nd Circuit Court of Appeals, who was denied his nomination to the United States Supreme Court by a Congress concerned about his conservative views on the interpretation of the United States Constitution.[100]

While it can be regulated, the right of privacy found in other Supreme Court decisions before Roe v. Wade clearly covered marriage rights, contraception, family

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[99]Planned Parenthood of Southeastern Pennsylvania, et., al., v. Robert P. Casey, et., al., etc. 505 U.S. 833 (1992). There were actually two cases heard in conjunction. I am using the text of the opinion found at the Legal Information Institute which is available on the web at http://supct.law.cornell.edu/supct, This case will be hereinafter referred to as Casey. This issue of the Casey dissent is discussed in detail beginning later in this text.

[100]Bork, and others, believe that only explicitly stated rights exist under the United States Constitution, denying interpretations from the "Penumbra" of the Bill of Rights or other sources. Sykes covers this in End of Privacy on p. 85, as follows:

> For conservative critics like Judge Robert Bork, the discovery (he would say invention) of a constitutional right to privacy by the Supreme Court was an egregious example of the imperial judiciary writing its own pre-conceptions into law.

David Garrow quotes Patrick Moynihan as revealing his decision to vote against Bork when Bork was nominated for the United States Supreme Court:

> . . . it is his restricted vision of privacy which troubles me the most. I cannot vote for a jurist who simply cannot find in the Constitution a general right of privacy. . .[for such a right] is a fundamental protection for the individual and the family against unwarranted state intrusion. Its importance is such that I cannot support anyone for a Supreme Court appointment who would not recognize it.

Many others in the Senate felt the same, obviously. Such was the power of Griswold and Roe v.Wade.

relationships, child rearing, and education. After this landmark decision, the right of privacy had been extended to that of a person having the right to make determinations about the medical choices one faces concerning one's own body. Thus the constitutional right of privacy had perfectly melded, by this opinion, with the medical profession's growth and determination of the patient's right of autonomy. Justice Blackmun specifically referred to this connection in the body of the opinion. He was specifically concerned that abortion be viewed as a "medical procedure."[101] After a discussion of the horrors involved with the history of abortion, and perhaps the state's interest in protection of a woman from "submitting to a procedure that placed her life in serious jeopardy," Blackmun declared that "Modern medical techniques have altered this situation,"[102] meaning that modern abortion did not threaten women with death any more than, as the statistics show, giving birth threatens women's lives. He concluded:

> Consequently, any interest of the State in protecting the woman from an inherently hazardous procedure, except when it would be equally dangerous for her to forgo it, has largely disappeared. Of course, important state interests in the areas of health and medical standards do remain.[103]

This feeling was further solidified in the opinion's conclusion:

> We, therefore, conclude that the right of personal privacy includes the abortion decision, but that this right is not unqualified and must be considered against important state interests in regulation.[104]

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[101] Roe v. Wade, p.14.

[102] *Ibid.*

[103] *Ibid.*, p.14.

[104] *Ibid.*, p. 16.

In his dissent, Justice Rehnquist stated:

> The Court's opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.[105]

Rehnquist was bothered not only by the standing of Roe, and whether she was really pregnant at the time, especially within the first trimester that by the opinion would remain unregulated. He was also incensed at the conclusion of the Blackmun's opinion that a "right of privacy" was involved in this case:

> Even if there were a plaintiff in this case capable of litigating the issue which the Court decides, I would reach a conclusion opposite to that reached by the Court. I have difficulty in concluding, as the Court does, that the right of "privacy" is involved in this case . . .A transaction resulting in an operation such as this is not "private" in the ordinary usage of that word. Nor is the "privacy" that the Court finds here even a distant relative of the freedom from searches and seizures protected by the Fourth Amendment to the Constitution, which the Court has referred to as embodying a right to privacy.[106]

Rehnquist stated that he would have been more supportive if the Court had talked

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[105]Roe v. Wade, pp. 31-32.

[106]*Ibid.*, p. 32. This is not terribly surprising. Hull & Hoffer point out (p. 166) that Rehnquist is "a more consistent and ideologically committed conservative than Powell," and recites that while a law clerk for Supreme Court Justice Robert H. Jackson in the 1952 term, Rehnquist wrote a memo on Brown v. Board of Education "urging that the Court not reject the older separate but equal doctrine in favor of desegregation of the public schools." Hull & Hoffer also note that our present Chief Justice of the United States Supreme Court "served in the Department of Justice in the first Nixon administration advocating widespread wiretapping of suspected criminals without prior court orders and preventive detention of suspected criminals without arraignment. He opposed the right to counsel and other Fourth, Fifth, and Sixth Amendment decisions of the Warren Court." There is no question where Rehnquist will stand should opposition to *The Patriot Act* ever come before the Court.

about interests of "liberty" rather than those of privacy. Pointing out that laws against abortion existed in the several states as the 14th Amendment was being passed, Rehnquist stated that "To reach its result, the Court necessarily has had to find within the scope of the Fourteenth Amendment a right that was apparently completely unknown to the drafters of the Amendment."[107] He concluded:

> There apparently was no question concerning the validity of this provision or of any of the other state statutes when the Fourteenth Amendment was adopted. The only conclusion possible from this history is that the drafters did not intend to have the Fourteenth Amendment withdraw from the States the power to legislate with respect to this matter [abortion].[108]

It is obvious that one of Rehnquist's objections in this dissenting opinion is historical: abortion was already illegal in some states that passed the 14th Amendment, and there was an absence of discussion at that time that this Amendment would overturn those laws. However, the dissent makes clear that Rehnquist's opinion also differs from the Blackmun opinion in that the Court's decision brings constitutional law clearly within the parameters of the medical profession's belief in the autonomy of a patient making medical decisions. Of course, dissents have no legal bearing on the specific issue then before the Court. In any case, Rehnquist was not alone. William Van Alstyne, a well-known legal analyst at the time, was eventually very harsh in his criticism of the Roe v. Wade decision, which he claimed was:

> . . . an aberration of judicial legislation . . .[Griswold] did not imply *Roe*, or anything even close . . . there is not such thing. . .as a personal, free-standing, fundamental right embedded in the Constitution of the United

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[107]Roe v. Wade, p. 33.

[108]*Ibid.*

> States to kill gestating life. *Roe v. Wade*, in suggesting otherwise, proceeded on an assumption not derived or derivable from *Griswold v. Connecticut*, from any previous case, or indeed, from any constitutional clause. It was rather judicial legislation.[109]

Regardless of these dissents, other legal scholars immediately saw things differently:

> The holding in *Roe* is, nonetheless, far more solid than it at first appears, for it is fully consistent with, and reflects a groping toward, principles that are justified in both reason and precedent even if these principles were never adequately articulated by the opinion of the Court.[110]

The acceptance of the Roe v. Wade decision by the legal, medical and press community was swift, and, surprisingly, tremendously in favor of the Court's decision. David Garrow recalls the facts:

> Editorially, the nation's newspapers reacted to *Roe* and *Doe* with overwhelming praise. The *New York Times* welcomed the Blackmun opinion as "a major contribution to the preservation of individual liberties" and said that they offered "a sound foundation for final and reasonable resolution" of the abortion debate. "Nothing in the Court's approach," the *Times* added, "ought to give affront to persons who oppose all abortions for reasons of religion or individual convictions." The *Washington Post* termed the decisions "wise and sound," and the *Los Angeles Times* stated that they were "sensible" as well as both legally and historically "persuasive." The *Boston Globe* said it was "deeply gladdened" by the outcome, and the *Wall Street Journal*, while expressing "certain reservations," said that overall the Court had "struck a reasonable balance on an exceedingly difficult question." The *Philadelphia Inquirer* praised

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[109]Garrow, p. 613. On the same page, Garrow points out that future Supreme Court of the United States Justice Ruth Bader Ginsburg claimed that Roe v. Wade was faulty in that "the Court ventured too far in the change it ordered and presented an incomplete justification for its action." This was surprising in that Ginsburg was head of the American Civil Liberties Union's Women's Rights Project in 1973, the year Roe v. Wade was decided.

[110] Philip P. Heymann and Douglas E. Barzelay: "The Forest and the Trees: Roe v. Wade and its Critics," *Boston University Law Review*, 53 (May 1973): pp. 765-784.

> Blackmun's "admirable reasoned decision," and the *Pittsburgh Post-Gazette* said that the Court had acted with "compassion and intelligence." The *Atlanta Constitution* characterized the result as "realistic and appropriate," and the Raleigh *News and Observer* stated that the decision should be "praised" for "upholding our traditional concept of personal freedom." The *Arkansas Democrat* asserted that the United States was "doubly blessed that this matter was settled by the court rather than by legislation," and the *St. Louis Post-Dispatch* said the Court's action was "remarkable for its common sense, its humaneness and most of all for its affirmation of an individual's right to privacy." Within Texas, the *Houston Chronicle* commended the judgment as "sound" and the *San Antonio Light* concluded that "The ruling is not perfect, but it was as close to it as humanly possible."[111]

Therefore it appeared, by this decision in 1973, that the Supreme Court of the United States had set a standard for medical decisions: one had the right to make medical decisions that affected one's own body, based on a history of constitutional interpretation that was found in the right of privacy. The overwhelming fact arising out of the Roe v. Wade decision was that this was a ruling of national scope in its importance. Not just Texas was affected: the ruling of this decision made clear that any state interference in the first trimester of pregnancy was going to be strictly curtailed, and it was not long before the very idea of privacy in the making of medical choices under the Roe v. Wade decision was extending to other types of medical choices and circumstances by other courts. But, a word of caution is needed, best expressed by Charles Sykes:

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[111] Garrow, pp. 605-606. Garrow also states:

> "Out of some 33,000 doctors who responded to a questionnaire distributed by *Modern Medicine* magazine, however, more than 64 percent voiced approval of the *Roe* and *Doe* decisions . . . Several weeks later, a nationwide Harris Poll found that *52 percent of respondents favored the Supreme Court decision*, with 41 percent registering disagreement and 7 percent saying they were unsure."

(p. 607, emphasis added). Other factors of the case's importance are revealed on p. 608.

> Unfortunately for privacy, it has never quite been able to shake free of the shadow of those "emanations" and "penumbras," or from the suspicion that they were simply covers for what Bork called the "privatization of morality." From *Griswold* to *Roe v. Wade*, the right to privacy would be entangled in the politics of sexuality, contraceptives, and abortion. Inevitably, it was implicated in the cultural division in American society. For Bork, the Court's creation of a right to privacy "has little to do with privacy but a great deal to do with the freedom of the individual from moral regulation.[112]

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[112] Sykes, p. 87. Sykes also states:

> Critics like Bork argued that there could be no right of privacy because none is specified in the Constitution . . .Bork gives relatively short shrift in his own writings to the "natural law," but his disdain for the idea of natural rights seems to lead him toward a positivistic approach to the law. Unless a right is granted in print, it does not exist, or is at least not enforceable in the constitutional system. Indeed, Bork seems unable to find constitutional protection for the right to procreate because it is not specified in the document. Although Bork takes a strict view of the Constitution itself, he seems to suggest a rather expansive view of what the government is permitted to do.

It is important to note that Bork's views were strongly criticized and his nomination to the United States Supreme Court ended in failure. As Sykes concludes, as do many others:

> The Constitution was not designed to exhaustively define the rights of its citizens. In particular, the Ninth Amendment states: 'The enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people.'

(Sykes, pp. 86-87). It was the Ninth Amendment that was referred to by the Ninth Circuit Court of Appeals in denying the Texas abortion statute before the case reached the United States Supreme Court in Roe v. Wade. (Sykes, p. 88). Sykes also has a lengthy discussion concerning the right of privacy as developed in America's law of torts. (p. 91).

CHAPTER FOUR:

A NATIONAL POLICY OF AUTONOMY IN MEDICAL CHOICES?

IN RE QUINLAN AND SUBSEQUENT CASES:

Following the decision of Roe v. Wade by the United States Supreme Court in 1973, controversy swept across the nation. The fight had begun which became known as "the right to life" entities against those who had survived the women's liberation movement of the sixties, those that were "pro choice." To many people, Roe v. Wade was a conclusive victory for liberty, privacy, and in the medical realm, autonomy.[113]

It was this controversy, and an investigation into just what this landmark decision meant, that came before the New Jersey Supreme Court in 1976. The case was known as In Re Quinlan.[114] However, the issue was not that of abortion. Rather, Karen Quinlan had fallen into what became a persistent vegetative state [known as PVS] in March of

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[113]Sarah Weddington stated in *Question of Choice* (p. 327):

> *Roe v. Wade* became the law of the land and a national icon; the Court [the Supreme Court of the United States] *took no further action on pending* [abortion] *cases*. The rulings affected the laws *in forty-four states, thirty-one of them with statutes similar to Georgia's* [a Georgia case was argued in close proximity to Roe].

The emphasis is added. For additional comments on the effect of Roe v. Wade, see Marian Faux's discussion in *Roe v. Wade: The Untold Story of the Landmark Supreme Court Decision That Made Abortion Legal*: (New York: Cooper Square Press, 2001), p. 315. One of Faux's most illuminating points is that the Supreme Court of the United States has reportedly received more mail "45,000 letters at last count, *than any case it had ever handed down*."

Also, See footnote 12. In addition, I was in law school at the University of Tennessee from 1977 until 1980. I took Constitutional Law from a professor who had helped authored the 25th Amendment to the Constitution. There was little doubt in his mind that Roe v. Wade was the greatest accomplishment of extending personal rights since the passage of the 14th Amendment.

[114]Quinlan. I am using a copy of the opinion located at FindLaw.com, under "New Jersey Supreme Court."

1975 after allegedly drinking alcohol and taking various medications. Karen never returned to consciousness, and the issue became that of whether or not her father could have her removed from the ventilator that kept her breathing. The physician in charge of Karen's care felt, that, since Ms. Quinlan was an adult,[115] he could not take instructions from anyone other than his patient, and certainly not from her parents after she had reached legal majority. Her father then petitioned the correct court of jurisdiction to be appointed her legal guardian for the "express purpose of *either* authorizing the admitting physician to withdraw 'all extraordinary procedures for sustaining [his] daughter's vital processes' *or*, if this physician continued to feel that he could not do this in good conscience, to transfer her care to another physician who would do so."[116] Because of this, the issue before the court was not only that of autonomy, the choice and privacy of a patient with a pending medical patient, but also the issue of whether a designated person with legal authority could make such choices for a medical patient.

The issue reached the New Jersey Supreme Court on appeal. Ultimately, the court ruled that as long as an ethics committee agreed with the diagnosis that Karen was definitely in a persistent vegetative state, she could be removed from the respirator.[117]

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[115]Ms. Quinlan had turned twenty-two in March of 1975. In New Jersey, the age of legal majority is twenty one.

[116]*Document CD ROM 0560, Medical Ethics 546*, Dr. Glenn Graber, The University of Tennessee Inter-Campus Graduate Program in Medical Ethics. Also, see pp. 2-13 of the New Jersey Supreme Court opinion.

[117]It is important to note that the respirator and modern ventilator are acquisitions of medical technology that have only existed since the early 1960's. These medical tools, along with the nasogastric feeding tube technology, enabled life support for comatose and PVS patients where in earlier times the patients would have simply died for lack of

Unfortunately, Karen did not die when the respirator was removed, but remained in a coma for an additional nine years, receiving hydration and nutrition by means of the nasogastric feeding tube. She finally died of respiratory failure associated with pneumonia when a decision was made not to administer antibiotics.

The New Jersey Supreme Court stated:

> Although the Constitution does not explicitly mention a right of privacy, Supreme Court decisions have recognized that a right of privacy is guaranteed under the Constitution. The court has interdicted judicial intrusion into many aspects of personal decision. . . Presumably this right is broad enough to encompass a patient's decisions to decline medical treatment under certain circumstances, in much the same way it is broad enough to encompass a woman's decision to terminate pregnancy under certain conditions.[118]

In making this statement, the New Jersey Supreme Court specifically tied their decision concerning withdrawal of the respirator to that long line of United States Supreme Court decisions concerning privacy, and particularly to the decision of Roe v. Wade.[119] Even though the Court had allowed the New Jersey State Attorney General to enter the case, based on a professed "interest of the State in the preservation of life," the New Jersey Supreme Court was very specific:

> Ultimately there comes a point at which the individual's rights overcome the State Interest. It is for that reason that we believe Karen's

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respiration, hydration or nutrition.

[118]Quinlan, p. 23. The New Jersey Supreme Court, at this point, cited Eisenstadt v. Baird, 405 US. 438 (1972), and Griswold v. Connecticut, 381 U.S. 479 (1965), which mirrors the very citation used by the United States Supreme Court in Roe v. Wade.

[119]*Ibid.*, p. 23. The New Jersey Supreme Court also found such protection based on privacy in the New Jersey State Constitution, (1947), Art. I, par. 1.

> choice, if she were competent to make it, would be vindicated by the law.[120]

The Court went on to then extend this right to Karen's guardian. In speaking of the feared criminal prosecution of the doctor who would help her die, the Court stated:

> Furthermore, the exercise of a constitutional right such as we have found is protected from criminal prosecution [citing Stanley v.Georgia, 394 U.S. at 559]. We do not question the State's undoubted power to punish the taking of human life, but that power does not encompass individuals terminating medical treatment *pursuant to their right of privacy*. . .the constitutional protection extends to third parties whose action is necessary to effectuate the exercise of that right where the individuals themselves would not be subject to prosecution or the third parties are charged as accessories to an act which could not be a crime. . .[121]

There is great significance in this language of the New Jersey Supreme Court. First, the decision clearly shows dependance on Roe v. Wade and its confirmation of a constitutional right of privacy. Secondly, the Court extends this position from the issue of abortion in Roe v. Wade to that of withdrawal of a respirator. The Court does this with language that undoubtedly ties the constitutional right of privacy to the exercise of an individual's rights to make medical decisions. Third, a person making a medical decision to terminate medical treatment pursuant to their right of privacy does so in a process wherein their individual right *outweighs any interest that the state may have in preserving life*. Finally, the exercise of this right not only insulates the doctor from criminal prosecution, and here the Court does not mince words, it does so because the doctor's

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[120]Quinlan, p. 24.

[121]*Ibid.*, p. 34. The emphasis has been added. This is a dramatic statement defending O'Neill's theory of relational autonomy: the physician is protected from retaliation by the state because the court saw them as being a necessary entity (an obligation bearer) to the patient's (rights holder's) autonomy.

actions are necessary to effectuate the right. In other words, without the physician's actions, there is no right.

The New Jersey Supreme Court did not stop there. It also stated:

> And, under the circumstances of this case, these same principles would apply to and negate a valid prosecution for *attempted suicide* were there still such a crime in this state. . . [122]

What is the Court saying? There is a constitutional right to privacy extended under the Roe v. Wade case to medical decisions. That right of privacy therefore protects a person's decision to withdraw from a respirator, either directly or through a surrogate decision-maker. Additionally, this protection of the individual's right is greater than the state's interest to protect life, and this would be true even in the case of suicide. Any action by a physician or a third party necessary to effectuate these rights is protected from state action, including criminal charges.[123]

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[122]Quinlan, p. 34.

[123]This protection from criminal prosecution was evidently important to the New Jersey Supreme Court in In Re Quinlan because the local attorney general had threatened the physician in charge of Karen Quinlan with prosecution if he followed the wishes of Karen's father and disconnected the respirator. See p. 2 of the opinion which cites that this local prosecutor was joined in the litigation in order to achieve an injunction against such action.

It is also important to note that Karen was of the Catholic faith, and the Court noted that Pope Pius XII had approved the removal of such "extraordinary means of treatment" and declared that such action was not euthanasia. (p. 14 of the opinion). Pope John Paul II tried to reverse this interpretation of the Catholic faith. For instance, Nicole Winfield reported in an Associated Press article (www. Knox News.com, March 21, 2004, "Vatican City") which states:

> Pope John Paul II said Saturday the removal of feeding tubes from people in vegetative states is immoral and that no judgment of their quality of life can justify such "euthanasia by omission. . . Providing food and water to such patients [PVS] should be considered natural, ordinary and proportional care. . . As such, it is morally obligatory

This is not the Supreme Court of the United States cramming down some federal decision limiting the power of the individual states. This is a state supreme court interpreting the ruling of the Supreme Court of the United States concerning the constitutional right of privacy and agreeing that such a constitutional right limits state action, even the state's interest in preserving life. Privacy had become autonomy in medical decision-making. Other court rulings appeared to justify this interpretation of what would be a national policy for the right of a patient to make medical decisions based on this constitutional right of privacy. The New Jersey Supreme Court fortified the implication of this ideology in 1985 when the case of Conroy came before this judicial body.[124] In this decision, the Court extended its ethical philosophy to the decision to withdraw a nasogastric feeding tube.[125]

In 1990, the United States Supreme Court re-visited the issue of privacy when Cruzan v. Director, MDH came before the Court.[126] The Court held that the United

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. . .euthanasia always is a violation of God's law."

[124]Conroy.

[125]Even though this is true, the Court found on the facts of the case in Conroy that there was not enough evidence to know the wishes of the medical patient who was in a minimal conscious condition. The fact that the New Jersey Court reviewed this case is important: even though they had ruled by Quinlan that the respirator could be removed, Karen Quinlan did not die when it was removed. She lived on based on feeding by the nasogastric feeding tube. That fact may have caused the New Jersey Court to clarify that issue by taking up this case.

[126]Cruzan. Both Conroy and this decision may be found at FindLaw.Com under NJSC and USSC respectively.

States Constitution does not forbid a state to require evidence of an incompetent's wishes as to the withdrawal of life-sustaining treatment by requiring a evidentiary rule of "clear and convincing evidence." Still, the basic rights of privacy remained intact under the Roe v. Wade and previous decisions.[127] However, beginning with the Cruzan decision, a shift developed in the interpretation of the constitutional right of privacy by the United States Supreme Court. Before the decade of the 1990s was finished, any hope of a uniform and national policy of privacy and autonomy in medical decisions had faded into non-existence.

[127]The decision by the Supreme Court of the United States in Roe v. Wade has never been overturned expressly by the Court. However, the Cruzan decision and the case of Planned Parenthood of Southeastern v. Casey, 91 U.S. 744 (1992), and its companion Casey v Planned Parenthood, 91 U.S. 902 (1992), show a specific trend towards returning regulatory power back to the individual states. These cases are hereafter referred to as Casey. The impact of this retreat from the position of the Roe v. Wade decision, and its interpretation as seen in Quinlan by state courts, will be covered in the next chapter. The trend culminates with the decisions of the Washington/Vacco decision in 1998, which is covered in Chapter Six.

CHAPTER FIVE:
LEADING UP TO THE WASHINGTON/VACCO DECISIONS: A NATIONAL POLICY IN CONFLICT

Roe had infuriated a lightly sleeping giant,
And that giant rose up in wrath in the 1970's.[128]

Justice Rehnquist had written one of the two dissents to the opinion of Roe v. Wade in 1973. By 1990, when the case of Cruzan reached the Supreme Court of the United States, Justice Rehnquist had become Chief Justice. The philosophy of his dissent in Roe v. Wade, and of state rights allowing regulation of state procedure over even federal constitutional rights, becomes evident in the Cruzan decision. This decision turned on what burden of evidence a state could require to examine the wishes of an incompetent concerning the withdrawal of medical life support. The Court held that it was not a violation of the United States Constitution for a state to regulate those wishes of an incompetent or unconscious patient by the rule of "clear and convincing evidence." Some would argue that the Cruzan decision was the beginning of a disturbing trend running through contemporary Supreme Court decisions, backing away from the allowance of a federal constitutional right to declare the supremacy of law throughout the country. This was the heart of the Roe v. Wade opinion.

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[128]Hull & Hoffer, p.187.

Even though Roe v. Wade concerned the medical choices of a woman patient deciding whether or not to have an abortion, and thus terminate the alleged life of the fetus, the Supreme Court of the United States had never reviewed a case concerning physician-assisted suicide. This appeared to be the other end of the autonomy question: could a patient decide to take his own life as a medical choice? Also, did physicians have the right or duty to assist them in procuring the technology to do so? It would appear that this issue would have been decided by those cases such as Quinlan, which concerned the removal of life support, such as a ventilator, or the nasogastric feeding tube, which was decided by Conroy. However, in the arena of medical ethics, a difference between "letting die" and "procuring death" had developed. By 1990, when In Re Cruzan reached the court, the medical profession and its main professional organization, the American Medical Association, had clearly defined the ethical correctness of removing life support technology, or deciding not to supply it. On the other hand, assisting in the death of a patient was strictly condemned.[129] The dispute has arisen, even among the experts of medical ethics, as to the issue that has come to be put in terms of a difference between "active" and "passive" euthanasia.

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[129]The condemnation, and its tie to the issue of abortion, is present as early as The Hippocratic Oath, which was written thousands of years ago in ancient Greece. See Owsei Temkin and C. Lillian Temkin: *Ancient Medicine: Selected Papers of Ludwig Edelstein* (Baltimore: The Johns Hopkins University Press,1967), p. 6, for a draft of this oath. The main premise contained in the Oath is "I will neither give a deadly drug to anybody if asked for it, not will I make a suggestion to this effect. Similarly I will not give to a woman an abortive remedy." For modern rules against physician-assisted suicide, see the AMA Policies H-140.952; H-270.965; E-2.211 (which also declares that physicians should support patient autonomy) and H-140.966. These and the Principles of Medical Ethics, established by AMA in June, 2001, can be located at the AMA's website, www.ama-assn.org.

Long ago, James Rachels made the argument that there is not a defensible moral difference between active and passive euthanasia. Rachels stated:

> The distinction between active and passive euthanasia is thought to be crucial for medical ethics. The idea is that is permissible, at least in some cases, to withhold treatment and allow a patient to die, but it is never permissible to take any direct action designed to kill the patient. This doctrine seems to be accepted by most doctors, and it is endorsed in a statement adopted in the House of Delegates of the American Medical Association.[130]

However, Rachels pointed out that by withholding treatment the patient may linger and take longer to die. This may cause the patient to have even more suffering, after the decision has been made to let him die. Thus, Rachels argues, being "allowed to die" can be "relatively slow and painful, whereas being given a lethal injection is relatively quick and painless." Rachel's article claims that some infants born with Down's Syndrome and other birth defects who need surgery in order to live are allowed to die by "withholding treatment." While the surgical need is sometimes very simple, such as a bowel obstruction, these babies are allowed to die. In the case of a patient who is terminal, as determined by medical prediction the physician cannot take action where there is no defect. Rachels called this "deciding life or death on irrelevant grounds." This assertion contains a rare admission or interpretation of the present ethical stance of the medical profession.

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[130]James Rachels, "Active and Passive Euthanasia," *The New England Journal of Medicine*, Vol. 292, No. 2 (January 9, 1975, pp. 78-80. Hereinafter referred to as Rachels. The precise wording that Rachels objected to has since been removed from the AMA *Current Opinions*, but the element of his complaint was added back by the sections on euthanasia and physician-assisted suicide.

In a classic example showing the moral indifference of the distinction between active and passive euthanasia, Rachels suggests a hypothetical thought experiment involving two scenarios. In both, a person stands to inherit from their six year old cousin. In the first scenario, the person sneaks in and drowns the child in a bathtub. In the second, another person sneaks in, intending to do the same, but observes the child slip in the tub and strike his head, then watches the child drown while doing nothing to save the child. One took action, the other "merely watched the child die." Rachels asked: "did either behave better, from a moral point of view?" In 1972, the year before Roe v. Wade was decided, Rachel wrote:

> [I]n statements such as the AMA policy statement that I have quoted, they [physicians] are endorsing this doctrine as a central point of medical ethics. In that statement, active euthanasia is condemned not merely as illegal but as "contrary to that for which the medical profession stands," whereas passive euthanasia is approved. However, the preceding considerations suggest that there is really no moral difference between the two. . .[131]

In this article, Rachels eloquently points out that the AMA and the medical profession at large "should not give the distinction any added authority and weight by writing it into official statements of medical ethics."[132] Passive euthanasia is ethically allowed by the AMA in the form of withholding or withdrawing technical life support. However, "active" treatment, such as writing a prescription that may be used by a patient to end his or her life, cannot be ethically justified according to the same AMA policies. As Rachels points out, and many would argue, how can there be any moral difference

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[131]Rachels. The article appears on pp. 78-80.

[132]*Ibid*.

between two such courses of treatment?

As the Cruzan case reached the Supreme Court of the United States, pressure from many sources, including the Hemlock Society, begun to build toward a resolution over the rights of patient autonomy in the area of medical suicide and physician-assisted death.[133] As with Roe v. Wade, the champions of a national medical policy concerning this difficult division over allowed and non-allowed euthanasia were hoping for decisions that would solve this ethical dilemma. However, the Court's decision in Cruzan was not aimed at establishing a national policy. Rather, Rehnquist's purpose in writing the opinion was to defer to state's rights and state law, of which there are fifty different sets. At a critical juncture of the opinion, Rehnquist wrote:

> Most courts have based a right to refuse treatment on the common law right to informed consent. . .or on both that right and a Constitutional privacy right [meaning Roe v. Wade][134]. . . .State courts have available to them for decision a number of sources-state constitutions, statutes, and common law-which are not available to us. . where the question is simply whether the Federal Constitution prohibits Missouri from choosing the rule of law which it did.[135]

Keep in mind that the issue before the Court was whether or not the state could prescribe "rules of evidence" to determine an incompetent or comatose patient's right to

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[133]The Hemlock Society, which was referred to in Dr. Timothy Quill's famous story of "Diane," is now officially called "End of Life Choices." Its website, www.hemlock.org, lists 68,400 links for persons interested in death and dying issues. Ms. Faye Girsh, Senior Vice President of the society, visited the campus of the University of Tennessee while I was working on this thesis. Her insights were very helpful to some of the argument of this thesis.

[134]Cruzan, p. 6 of the opinion using the FindLaw.com source of the case.

[135]*Ibid.*, p. 8 using the FindLaw.com source of the case.

withdraw treatment, and whether such action violated the United States Constitution. The Roe v. Wade United States Supreme Court decision had declared a national constitutional right of privacy in making those decisions. What Rehnquist is really saying in this paragraph is that the United States Supreme Court is going to defer to state law to make up the rules of procedure and regulations on how the alleged national constitutional right of privacy is to be upheld. Rehnquist is arguing that because the state constitutions and state statutes are not available to the United States Supreme Court, which is a federal court, the decision on implementation of the right of privacy, such as what rule of evidence to use, has to be decided by state law. While Roe v. Wade did implement a rising state interest as the woman's pregnancy proceeded, the woman's right to privacy in her medical decision in the first trimester remained absolute.[136] However, after In Re Cruzan, the absolute right of privacy, at least in some medical decisions, blurred into the inconsistency of fifty different state rules on procedural questions.

Cruzan also begins the replacement of the term "privacy" to stand for this medical right with more use of the term "liberty" in connection with the Due Process Clause. Rehnquist's argument turned on an analogy with issues involving refusal of unwanted

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[136]This "rising state interest" is the very concern of the courts making these decisions. As the pregnancy goes along, the fetus becomes more nearly viable, even more so as medical technology gets better and better. If the individual states have an interest "in preserving life"which they have historically claimed, then such an interest gets stronger as the fetus gets closer to being able to survive outside the womb. Of course, this is the very complication that arises in using the same standard of privacy right for those issues of physician-assisted suicide However, one should ask, since Roe v. Wade was a federal decision and expressed a United States Constitution fundamental right, historically, what has been the national government's interest in preserving life? For instance, there has *never* been a Federal crime of murder in this country until very recently.

treatment, citing Jacobson v. Massachusetts, a relatively unknown case. Why did Rehnquist speak of a "liberty interest from battery," which relied on the interpretation of individual state opinions, when he had at his disposal the grand, national, constitutional right of privacy held by Roe v. Wade?

If one compares Cruzan, a decision of the United States Supreme Court deferring to state law on issues of the autonomy question, to that of Quinlan, a state supreme court decision deferring the autonomy question to the precedence of the federal constitutional law of Roe v. Wade, the obvious conclusion must be reached. For whatever reason, it is obvious that Rehnquist did not cite Roe v. Wade as his compelling authority, even though he alludes to this decision in the above quote wherein he talks of "privacy." What was so clearly obvious to the New Jersey Supreme Court in both Quinlan and Conroy appears to be opaque to the United States Supreme Court in this decision concerning the right to privacy and how it affects all medical decisions.

What possible explanation may be given for the United States Supreme Court's determination not to use Roe v. Wade's constitutional power in this opinion?. The matter at hand worsens when we actually reach the Washington/Vacco decisions. Here is a pair of cases that turn on the medical patient's autonomy in suicide, particularly when the patient needs the physician's assistance to procure death.[137] Yet, in this very lengthy

[137]Many times it is overlooked that a terminal ill patient, while yet conscious, or by prior directive, who has chosen death, they are either too weak, or disabled to accomplish such an end. Thus the very need for "physician assistance." As the New Jersey Supreme Court stated in Quinlan, the surrogate and the physician are protected by helping the patient as right holder make their medical choice under this constitutional right to privacy. I believe that the New Jersey Court would even extend this protection to the physician who assisted in a patient's suicide. See the quotes indicated in the text of this

Washington/Vacco opinion, which is also penned by the hand of Chief Justice Rehnquist, *Roe v. Wade is not even mentioned*.

This trend begins with Cruzan. By its very nature, the Roe v. Wade opinion was clearly relevant to the Court's opinion in that it was a United States Supreme Court decision which was still valid law. Roe v. Wade granted a constitutional right of privacy in medical choices for such patients as Nancy Cruzan. However, Rehnquist's opinion made a tortured dependency on state law the issue of the case, relying on the old defense of criminal battery to withhold treatment rather than the federal constitutional right of privacy. Rehnquist admits this in the body of the opinion, stating that "these cases were few" until Quinlan and blames "the advance of medical technology capable of sustaining life well past the point where natural forces would have brought certain death in earlier times."[138] Rehnquist even mentions that the New Jersey Court in Quinlan found a right of privacy grounded in the federal constitution to terminate treatment, which had been based on Roe v. Wade, but then states:

> After Quinlan, however, most courts have based a right to refuse treatment either solely on the common law right to informed consent or on both the common law right and a constitutional privacy right.[139]

Most courts? When has the Supreme Court of the United States been concerned

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thesis on pp. 52-54. The Oregon DWDA specifically protects the physician from such retaliation, criminal or professional, such as sanctions from the AMA or other professional body.

[138]Cruzan, pp. 5-8. One wonders what Rehnquist's opinion may be today, as he personally faces life-threatening cancer.

[139]*Ibid.*, p. 8.

with what "most courts" are doing? The Supreme Court of the United States is only interested in what *it has done*, and that would be deciding Roe v. Wade. However, Rehnquist then goes on to list state cases that were based more on the informed consent or battery theory than on the privacy issue. This is totally unnecessary to a court that has Roe v. Wade in its arsenal as a federal constitutional right. This is an intentional disregarding of Roe v. Wade in favor of state cases to make a determination in a United States Constitutional case.

This makes no historical or legal sense. However, it makes perfect political sense. Rehnquist is intentionally trying to distinguish the cases of physician-assisted death, or the ethical issue relating to the contrast between "active" and "passive" euthanasia, from the issue of autonomy contrasted to the Roe v. Wade decision. And Rehnquist's reasons for doing so are not so easy to see. On page ten of the opinion, Rehnquist makes the following statement, given the issue of procedural rule in Cruzan, it is out of context and makes no sense:

> Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide.[140]

What does suicide have to do with the issues in Cruzan? Quinlan, a state supreme court decision, followed the right of privacy based on the Roe v. Wade decision, and even extended it to a surrogate guardian. The New Jersey Supreme Court then added language to protect the medical professional and even commented on the extension of the right of privacy to grant autonomy to those medical patients considering suicide. However,

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[140]Cruzan, p. 8.

Rehnquist ignores Roe v. Wade in the Cruzan opinion and strives to find a basis in multiple state laws to support the surrogate's right to disconnect life-sustaining technology based on informed consent and battery which protects the right not to be "touched.". Obviously, there is an issue at play here other than just interpretation of the law based on prior United States Supreme Court decisions. There is even an obvious disregard for the judicial principle of *stare decisis* which the United States Supreme Court usually rigorously follows.[141]

Here we have a minor[142] dissenting jurist in Roe v. Wade, one who dissented in favor of state's rights, effectively overruling the Supreme Court decision in later years as a Chief Justice on a political mission.[143] That mission became particularly clear in the

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[141]*Stare decisis* stands for the principle of constitutional interpretation wherein the court uses past decisions to build upon and enforce decisions that follow. Unless the court specifically and explicitly overturns the prior decision, the court cannot issue an opinion that disregards such prior rulings.

[142]Minor is a choice of words. Rehnquist was not even on the Supreme Court of the United States in 1971 when it first heard Roe v. Wade. He was appointed by President Richard Nixon between the first and second hearings of the case. His opinions about abortion were untested, and Roe v. Wade was one of the very first opinions by the Court that contained him as a member. For a fascinating description of this fact see Weddington, p. 131. Hull & Hoffer put it this way: "Justice Rehnquist, the most junior of the justices. ."(p. 178)

[143]According to Weddington, Rehnquist was wrong from the first, particularly his dissent in Roe v. Wade:

> Rehnquist mentioned recent years when states had anti-abortion statutes but what about the many years before, when the national and state constitutions were written, during which abortion was legal? Even when the anti-abortion laws were passed, the fetus was still not treated as a legal person. When I read his phrase "*right to an abortion*" I wanted to say, *"No, no, it's a right to make one's own choices."*

Weddington, p. 167. The emphasis is added.

Washington/Vacco decision. However, before those cases reached the Supreme Court of the United State's attention, Casey came before the Court.[144]

Casey is the last major word from the United States Supreme Court on the abortion issue as of this date. It is important to note that even in this decision Roe v. Wade is not explicitly overturned. The case did evaluate and further allow individual state regulation of abortion, and attempted to clarify issues that had evolved from prior United States Supreme Court decisions concerning abortion that had been heard since Roe v. Wade. However, the importance of the decision to our purposes here is the boldness of Rehnquist's views, which are dramatically declared in his dissent to this opinion.

There can be little doubt about Rehnquist's position, beginning with his dissent in Roe v. Wade. It is even legally questionable whether or not the Chief Justice of the Supreme Court of the United States, considering the legal doctrine of *stare decisis*, should be quite so open in attacking the position of the United States Supreme Court in the Roe v. Wade opinion. This is still unquestionably a valid decision of the Court.[145] However, in the Casey dissent, Rehnquist says the following:

> We believe that *Roe* was wrongly decided, and that it can and should be overruled consistently with our traditional approach to *stare decisis* in constitutional cases. We would adopt the approach of the

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[144]Casey. I am using the text from the Legal Information Institute found on the web at supct.law.cornell.edu/supct.

[145]Meaning only that the opinion has not been explicitly overturned by any Supreme Court ruling since Roe v. Wade was decided in 1973. It is one of the premises of this thesis, however, that Chief Justice Rehnquist's opinions and the opinions of the Supreme Court in other cases have technically destroyed the value of the Roe v. Wade decision.

> plurality in *Webster v. Reproductive Health Services*, 492 U.S. 490 (1989), and uphold the challenged provisions of the Pennsylvania statue in their entirety.[146]

This is a bold declaration, and some time needs to be spent so that one can understand Rehnquist's opinion on this matter. Just what is driving this jurist to distance himself from the Court's decision in Roe v. Wade?

If one follows Rehnquist's development of this dissent, Rehnquist's quest to overturn the Roe v. Wade opinion becomes quite clear as a process over multiple years and multiple cases. It is important to remember that his dissent in that opinion was a historical review and denunciation of the Supreme Court's opinion in that case, emphasizing that some states had already declared abortion illegal at the time of the passing of the 14th Amendment to the United States Constitution. Supposedly, to Rehnquist, these states would not have passed the 14th Amendment to the United States Constitution if they had realized that this would cause abortion to be legal.[147]

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[146]Casey, p. l of the dissent.

[147]This is really based on a false understanding of history. The Constitution of the United States is called a "living document" because by interpretation it can keep up with the changes that history forces upon us. Times change. When the 14th Amendment was under consideration, abortion usually resulted in damage or death to the woman involved. This caused a state interest "in preserving life" that was no longer true in 1973 when Roe v.Wade was considered by the Court. It is not important what state laws were in effect at some other time in history, which is Rehnquist's error. It is only vital what state interests *at this time* allow intervention with our rights given by the Constitution of the United States.

For confirmation of this lesson of history, see Sykes discussion of it in *End of Privacy*, p. 92. Sykes refers to the Harvard Law Review article written in 1898 by Samuel Warren and Louis D. Brandeis, in which they argued that "political, social, and economic changes entail the recognition of new rights," and that "the common law. . . grows to meet the demands of society." Sykes argues that this article was largely responsible for the foundation of the modern tort system in this country. This is the same

Rehnquist's dissent in Casey provides an excellent depiction of the confusion Rehnquist's opinions have caused concerning the issue of abortion in the United States and his intent to return the entire matter back to separate state regulation. Of course, the problem with separate state regulation is that it sets up the risk of fifty different concepts of legality and denies the United State uniformity on a position of national importance, not only to the women's movement for equal rights, but to universality in consideration of a very important ethical right, the right of autonomy.[148]

Rehnquist admits that the decisions of the United States Supreme Court have left confusion for the lower courts.[149] He even offers the following:

> But, as the Court of Appeals found, the state of our post-*Roe* decisional law with the regulation of abortion is confusing and uncertain, indicating that a reexamination of that line of cases is in order.[150]

But reexamination is not really what Rehnquist is after. This becomes clear, later, when he states:

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article used as a source by Beauchamp & Childress.

[148]Some jurists have argued that such issues should be left to the individual states for the purpose of "allowing experimentation on the issue" because there is a lack of national consensus on the issue. However, I would argue there is no need of "experimenting" with such important issues as fundamental constitutional rights that have previously been interpreted by the United States Supreme Court. Should we allow racial discrimination to be returned to the individual states for reconsideration and such "experimentation?" Also, what does "consensus" have to do with what is ethically correct? There is a lack of consensus on many issues facing this country, such as the use of marijuana, paying one's debts, etc. This does not mean that we should not have universal and uniform rules, especially in the field of ethics.

[149]Casey, p. l of the dissent.

[150]*Ibid*, p. 2 of the dissent.

> The task of the Court of Appeals in the present case was obviously complicated by this confusion and uncertainty. . .this state of confusion and disagreement warrants reexamination of the "fundamental right" accorded to a woman's decision to abort a fetus in *Roe*, with its concomitant requirement that any state regulation of abortion survive "strict scrutiny."[151]

Is Rehnquist saying that the confusion caused by the Supreme Court itself in other opinions, *after* the Roe v. Wade decision, creates a reason to examine whether or not the holding of Roe v. Wade was correct as to its finding that the fundamental right in question exists? Just how does that logically follow? Rehnquist's reasoning apparently begins as follows:

> We have held that a liberty interest protected under the Due Process Clause of the Fourteenth Amendment will be deemed fundamental if it is "Implicit in the concept of ordered liberty. *Palko v. Connecticut*, 302 U.S.97 (1934).[152]

This is essential, and Palko v. Connecticut is in fact one of the very cases the United Supreme Court cited in the Roe v. Wade decision. Rehnquist continues:

> In construing the phrase "liberty" incorporated in the Due Process Clause of the Fourteenth Amendment, we have recognized that its meaning extends beyond freedom from physical restraint.[153]. . . *But a reading of these opinions makes clear that they do not endorse any all encompassing "right of privacy."*[154]

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[151]Casey, p. 4 of the dissent.

[152]*Ibid.*

[153]*Ibid.* , p. 5 of the dissent. Here Rehnquist cites Pierce v. Society of Sisters, 268 U.S. 510 (1925), Meyer v. Nebraska, 262 U.S. 390 (1923), Loving v. Virginia, 388 U.S. 1 (1967), Skinner v. Oklahoma 316 U.S. 535 (1942), Griswold v. Connecticut, 381 U.S. 479 (1965), and Eisenstadt v. Baird, 405 U.S. 438 (1972), all cited and used by the Court in Roe v. Wade which supported the right of privacy.

[154]*Ibid.* The emphasis is added.

As Rehnquist concludes, Roe v. Wade went too far:

> In *Roe v. Wade*, the Court recognized a "guarantee of personal privacy" which "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy. . .We are now of the view that, in terming this right fundamental, the Court in *Roe* read the earlier opinions upon which it based its decision much too broadly. Unlike marriage, procreation and contraception, abortion "involves the purposeful termination of potential life". . .The abortion decision must therefore be recognized as *sui generis*, different in kind from the others that the Court has protected under the rubric of personal or family *privacy and autonomy*..[155]

Rhenquist is arguing that the previous cases, cited both here by him and by the Supreme Court in Roe v. Wade, support the privacy and autonomy of a person or family in decisions of marriage, procreation, and contraception, *but not abortion*, because abortion "terminates potential life"? Does not contraception prevent potential life?[156]

But Rehnquist is not finished. Now we are going to base an interpretation of the United States Constitution on "historical traditions":

> Nor do the historical traditions of the American people support the view that the right to terminate one's pregnancy is "fundamental.". . . On this record, it can scarcely be said that any deeply rooted tradition of relatively unrestricted abortion in our history supported the classification of the right to abortion as "fundamental" under the Due Process Clause of the Fourteenth Amendment.[157]

Just what American people is Rehnquist talking about? First he talks about the Common Law of England. Then he talks about the "turn of the century" in America. Then he

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[155]Casey, p. 5 of the dissent. The emphasis is added. It is important that Rehnquist finds "privacy" and "autonomy" as being the same thing. Are they not also the same as liberty?

[156]The Roman Catholic Church certainly states that contraception prevents life.

[157]Casey, p. 5 of the dissent.

admits that by the time of Roe v. Wade *only twenty-one states still had laws totally outlawing abortion.*.

What Rehnquist ignores in all of this discourse is what the whole Supreme Court recognized in the Roe v. Wade decision. It is not the right to abortion that is then recognized as fundamental, but rather the right to privacy which in this particular case is being applied to medical choices, one of which is the choice of abortion. Since the Constitution of the United States reserves all other rights to the people, beyond that which it denies, our system of government depends on a balancing of individual rights against the need for areas where our law is entitled to allow interference by the state in people's lives. As the historical tradition does show, the state's interest prior to 1973 was *the preservation of life* because, medically speaking, women had traditionally died and suffered from the process of abortion. As the Court recognized in the Roe v. Wade decision, not only had medical technology made the process of abortion much safer, as previously noted, the death rates declining to that of around the death rate from delivering babies, but there was a growing sense of personal autonomy in medical decisions driving choice away from the paternal instinct of the medical profession and placing it squarely in the thoughts of the individual patient. Rehnquist completely ignores this. Why? Because, as he so clearly stated, he has a problem with the alleged fact that abortion terminates life.[158] Traditionally, as previously noted, the law has never supported any legal rights of

[158]Weddington, in *Question of Choice* (p. 141), documents that Rehnquist specifically asked during the second oral argument of Roe v. Wade: "Does the fact that some laws allow abortion in some cases indicate that the weight of history is against the concept of life from the moment of conception?"

the unborn fetus.[159]

Rehnquist is basically challenging the constitutional interpretation of the Supreme Court in Roe v. Wade, in its finding of a fundamental right to privacy extended to the issue of abortion. He bases this challenge not on almost one hundred years of case law by his predecessors, but on a *personal belief as to when life begins.*.

Regardless of this, Rehnquist concludes his dissent as follows:

> For the reasons stated, we therefore would hold that each of the challenged provisions of the Pennsylvania statute is *consistent with the Constitution.*. It bears emphasis that our conclusions in this regard does not carry with it any necessary approval of these regulations. Our task is, as always, *to decide only whether the challenged provisions of a law comport with the United States Constitution*. If, as we believe, these do, their wisdom as a matter of public policy is for the people of Pennsylvania to decide.[160]

This is a questionable statement. One can easily see Rehnquist's preference for state

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[159]Until recently, the law has never recognized "life" until birth. Property rights and the law of wills and estates required "a life in being." Murder of a pregnant woman was one count of murder, not two, etc. Weddington discusses this fact in *Question of Choice* (p. 64). Part of her preparation for arguing Roe v.Wade before the Supreme Court of the United States was a listing of state court opinions and federal laws that had *"decided that a fetus did not have the legal rights of a person*." Her process started with the United States Constitution itself:

> Section 1 of the Fourteenth Amendment of the United States Constitution refers to "*all persons born or naturalized*." A fetus is neither. The actual murder law in Texas, the state from which Roe v. Wade arose, "applied only to the killing of one who had been born." "Property rights were contingent upon being born alive. There had never been a tort [personal injury recovery in Texas as the result of an injury to fetus not born alive (p. 97).

One of her most interesting claims:

> The United States census requires "the whole Number of . . .Persons." Since 1790, although taken every ten years, only those "born" have been counted (p. 135).

The emphasis is added.

[160]Casey, p. 17 of the dissent.

rights, but that was obvious from his dissent in Roe v.Wade. But why should the people of one state have the ability to change a right that is protected by the federal constitution?

Only a careful examination of Rehnquist's words reveal that his determination is not based on a review of the Constitution of the United States. If it were, those words of the United States Constitution, "separation of church and state" should have come to mind, in that a personal belief as to when life begins is usually a religious belief. The Supreme Court of the United States cannot base interpretation of the Constitution on personal beliefs, whether religious or otherwise. The *legal interpretation* of "when life begins" is historically very clear.

State rights are important. But they are not as important as the rights reserved to the people by the United States Constitution. Nothing is clearer than the fact that the position of medical technology concerning abortion had pretty much eradicated any state interest in that medical procedure by 1973. The Constitutional rights of the women involved, their right to privacy as a fundamental right, had grown to the point that it surpassed the state's interest in this matter. And yet Rehnquist, and to some degree the entire United States Supreme Court, seems bent on a course of letting the individual states decide these issue by rules and regulations that deflect and damage the underlying rights of the individuals involved.

Perhaps Charles J. Sykes has said it best in his book *The End of Privacy*.[161] He aptly entitled the chapter of this book on the courts and privacy as "Losing Ground.". Here he states:

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[161]Charles J. Sykes: *The End of Privacy* (New York: St. Martin's Griffin,1999).

> Unfortunately, despite its lengthy philosophical and political pedigree, privacy has a decidedly mixed record in the courts, both as a constitutional question and as a cause of private legal action. In both cases, it is not going too far to say that the state of the law is a mess, a patchwork of false starts, inconsistent applications, and muddled and contradictory rulings. In constitutional law, the courts have lagged far behind the developments in technology in applying the Fourth Amendment. . . [162]

This is a very problematic situation, if one would wish to use constitutional interpretation as a measure or foundation for deciding issues of medical ethics. It is akin to finding out that Moses wrote the seventh commandment because someone was out to kill him.

And yet, prior to the case of Washington/Vacco, the Court's determination to restrict and regulate the privacy rights of individuals had not extinguished the right completely. Unfortunately, that was about to happen.

[162]Sykes, p. 80.

CHAPTER SIX:
THE <u>WASHINGTON/VACCO</u> DECISIONS:

Politics, not law, held abortion rights in its grasp.[163]

When the cases of <u>Washington v. Glucksberg</u> and <u>Vacco v. Quill</u> reached the Supreme Court of the United States, the issue of physician-assisted suicide was directly before the Court for the first time. In <u>Washington v. Glucksberg</u> the question presented was whether the State of Washington's prohibition against causing or aiding a suicide "offended the 14th Amendment." Any student of the <u>Roe v. Wade</u> opinion, especially as interpreted by the New Jersey Supreme Court in <u>In Re Quinlan</u>, would think that such a statute would offend the protection offered by the right of privacy found in the interpretation of the United States Constitution by prior decisions and <u>Roe v. Wade</u>, particularly with the language of the <u>In Re Quinlan</u> decision making the legal connection to a discussion of a person's rights concerning suicide.

However, the United States Supreme Court, in this decision, held that the Washington statute offered no such offense. This was particularly harmful to the progress which was made toward recognizing a constitutional right to privacy in medical decisions by the <u>Roe v. Wade</u> and <u>In Re Quinlan</u> decisions. This was especially striking in that the plaintiffs in the Washington case had specifically asserted that there was a "liberty interest"

[163]<u>Hull & Hoffer</u>, p. 258.

protected by the 14th Amendment concerning the issue of physician-assisted suicide.. The underlying Federal District Court had agreed, in relying both on the Cruzan and on the Casey decision. At first, the 9th Circuit Court of Appeals reversed, but after an additional hearing *en banc*[164], the full court stated the following while discussing Roe v. Wade:

> The Court [in Roe v. Wade] first determined a woman had a constitutional right to choose an abortion. Only after it did so, did it proceed to the second . . .whether the state's prohibition on assistance unconstitutionally restricted the exercise of that liberty. . .[165]

This is partially what this thesis has argued throughout: Roe v. Wade is a case extending the constitutional right of privacy to that of the abortion rights of women, and here is the Federal 9th Circuit Court of Appeals stating that fact. The 9th Circuit Court cited Roe v. Wade at least seven times, In Re Cruzan at least eight times and, of great importance, the Casey decision at least eight times.

The importance of using the Casey decision, which had been decided in 1992, lay in an attempt by the 9th Circuit Court to implement Rehnquist's appeal to "a liberty interest" in that earlier case. This was an attempt to replace the words "a right to privacy" which was used in the in the Roe v. Wade and Quinlan decisions. The 9th Circuit even

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[164]Normally in the Federal Court of Appeals system an appeal is first heard by a panel of three jurists. The request for an *en banc* hearing is a request for the full court to hear the case.

[165]Compassion in Dying v. Washington, [as the case was known in the 9th Circuit Court of Appeals, No. 94-35534]. I am using the form of the opinion found at FindLaw.com, and the quote is from p. 9 of that text. This case is hereinafter referred to as Compassion. Actually, the United States Supreme Court in the Roe v. Wade decision decided that the constitutional right to privacy found in earlier cases *extended* to medical decisions of women considering the medical procedure of abortion.

mentions Rehnquist's famous dissent in the Roe v. Wade decision.[166]

The fact of the 9th Circuit appealing to "a liberty interest" can be seen throughout the opinion, but no better place than their conclusion and decision in this case:

> A common thread running through these cases is that they involve decisions that are highly personal and as well as of great importance to the individual. . .Certainly, few decisions are more personal, intimate or important than the decision to end one's life, especially when the reason for doing so is to avoid excessive and protracted pain. Accordingly, we believe the cases from Pierce to Roe provide strong general support for our conclusion that a *liberty interest* in controlling the time and manner of one's death is protected by the Due Process Clause of the Fourteenth Amendment.[167]

This was an attempt by the 9th Circuit to cure the ills that bothered Rehnquist in his dissent in Roe v. Wade, and in his opinions as Chief Justice in the Cruzan and Casey decisions. The Casey decision was important to the 9th Circuit in that it was a major case revisiting the abortion issue of Roe v. Wade, and even though it allowed more state regulation, the decision did not specifically overturn that prior case. This is seen in the very last words of the 9th Circuit's opinion:

> While the cases we have adverted to lend general support to our conclusion, we believe that two relative prior decisions of the Court, Planned Parenthood v. Casey, 112 S.Ct. 2791 (1992) and Cruzan v. Director, Missouri Health, 497 U.S. 261 (1990), are fully persuasive, and leave little doubt as to the proper result.[168]

This appears to be a solid decision by the 9th Circuit. The decision follows the history of the prior "privacy" cases examined by the Supreme Court in Roe v. Wade but,

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[166]Compassion, p. 12.

[167]*Ibid.*, p. 16. The emphasis is added.

[168]*Ibid*.

more importantly, blends the arguments of the Cruzan and Casey decisions to accommodate Rehnquist's appeal to "liberty." In other words, the 9th Circuit Court of Appeals is stating that the *constitutional right to privacy found in Roe v. Wade is just the same type of right as the right to liberty found by Rehnquist in the later opinions of Cruzan and Casey*. When the combined cases of Washington/Vacco reached the Supreme Court, in yet another opinion written by Chief Justice Rehnquist, the Supreme Court of the United States reversed this 9th Circuit Court opinion. Once again, the Chief Justice cited numerous state laws and the American common law traditions that have punished suicide and assisted suicide, ignoring the federal law in previous constitutional decisions. Rehnquist even boldly points to the Cruzan decision and its reliance on state law and battery concepts rather than on the long line of constitutional decisions that formed the background to the Roe v. Wade decision. Rehnquist cites Cruzan and states that it "was not simply deduced from abstract concepts of personal autonomy."[169] Of course, that is correct, but entirely ignores the constitutional law that led to the Roe v. Wade decision, which is not some "abstract decision" on personal autonomy. The Roe v. Wade opinion follows almost a century of careful deliberations by many different Supreme Court justices that upheld the right to privacy as a constitutional right. As has been carefully explained, the first holding of Roe v. Wade was the finding of a constitutional right to privacy. Secondly, the Court in that opinion discussed whether or not the individual states could take away the liberty interest so found in the form of as a right to

[169]Washington v.Glucksberg, p. 17. I am using the form of the opinion found at FindLaw.com.

privacy. In Roe v. Wade the issue was abortion and whether that medical decision was within the right to privacy in question. The Court said that it was within that constitutional right. This is the judicial importance of that decision, which was expressed by the 9th Circuit Court of Appeals in Casey.

Roe v. Wade deliberately expands the right of privacy found in previous United States Supreme Court decisions to include the right to make an abortion decision. It is obvious what Rehnquist is doing in attempts to fundamentally re-write the Roe v. Wade decision some thirty years later. In the entire opinion of the Washington/Vacco decisions, Rehnquist never uses the word "privacy." It is as if the long line of cases discussing the right of privacy simply disappears.

Near the end of the Washington v Glucksberg opinion, Rehnquist's ideology becomes clearer and more apparent. Once again, he refers to the predominance of state laws, and then writes as follows:

> Through-out the Nation, Americans are engaged in an earnest and profound debate about the morality, legality, and practicality of physician-assisted suicide. Our holding permits this debate to continue, as it should in a democratic society.[170]

This decision by the United States Supreme Court immediately made the Oregon Death With Dignity Act, which had been passed by that State's Initiative process in 1994, legal. However, after the precedent-setting decision in Roe v. Wade, which declared a constitutional right of privacy throughout the United States for the purpose of making decisions in medical matters, did Justice Rehnquist really believe that what was best for

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[170]Washington v. Glucksberg, p. 25. I am using the form of the opinion found at FindLaw.com.

the nation was for the debate on such autonomy to continue to potentially fifty different legal rulings on a question of such ethical importance? It is obvious in reading the opinion that this is exactly what he intended, and thought was best for the country.

This type of legal ideology ignores two hundred years of constitutional law. It also ignores the very idea expressed in the United States Constitution that the United States Supreme Court was to rectify and solve conflicts between the several of the fifty states, and ignores that such a ruling also left conflicts between the different Districts of the Federal Court of Appeals. Rehnquist's decision completely vacated the constitutional line of argument expressed by the 9th Circuit Court of Appeals' decision in Washington and the 2nd Circuit Court of Appeals in the Vacco v. Quill decision that was heard at the same time.[171] Quill was brought by the petitioner and argued more solidly on the basis of the Equal Protection Clause, but the decision of the Supreme Court is also represented by a Rehnquist opinion. The 2nd Circuit Court of Appeals stated it this way:

> New York law does not treat equally all competent persons who are in the final stages of fatal illness and wish to hasten their deaths [because] those in the final stages of terminal illness who are on life support systems are allowed to hasten their deaths by directing the removal of such systems; but those who are similarly situated, except for the previous attachment of life sustaining equipment, are not allowed to hasten death by self-administering prescribed drugs.[172]

The United States Supreme Court decision by Rehnquist goes on to state that the 2nd

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[171] Vacco v. Quill.

[172] *Ibid.*, p. 2, as quoted by the United States Supreme Court in the body of their opinion. I am using the Legal Information Institute's copy of this opinion found in the "Supreme Court Collection" at http://supct.law.cornell.edu. See pp. 727, 729 of the 2nd Circuit's opinion.

Circuit Court believed that "the ending of life by [withdrawal] is nothing more nor less than assisted suicide."[173] As in the Washington v Glucksberg opinion, Rehnquist avoids any use of the word "privacy" in the Quill decision. The case was decided by a ruling that the New York law did not violate the Equal Protection Clause of the United States Constitution, and Rehnquist merely points to the Washington v Glucksberg opinion as the justification for his ruling.

The classic constitutional interpretation of the Equal Protection Clause commands that "no state shall deny to any person within its jurisdiction the equal protection of its laws."[174] However, what Rehnquist centers on is the constitutional interpretation that a fundamental right found to be existing in the United States Constitution can be regulated by the states, so long as it is not regulated completely out of existence. This is essentially the ruling found in the Casey decision when the Supreme Court once again took up the abortion issue. But Rehnquist is slipping from the use of the term "privacy" found as a fundamental constitutional right in Roe v.Wade to emphasis on the interest of "liberty." The Court is not overruling the Roe v. Wade holding, nor any of the cases based on the privacy right handed down historically before that decision. Yet the ultimate decision of the Washington/Vacco decisions is that the states can *completely eradicate physician-assisted suicide.*

If the constitutional right of privacy is a fundamental right, which Roe v. Wade clearly states that it is, then if there is a "compelling state interest" that right can be

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[173]Vacco v.Quill, p. 729 of the 2nd Circuit's opinion.

[174]*Ibid.*, p. 2 of the Supreme Court opinion.

regulated, although not out of existence completely. Quinlan, which found its support in Roe v. Wade, clearly extended this decision to that of withdrawal of life support technology, and even to the issue of a person's medical choice of suicide. In so doing, the New Jersey Supreme Court specifically said, citing Roe v. Wade, that the fundamental right of the individual's privacy in medical decisions *was a greater interest than even the state's interest in preserving life.* Rehnquist totally ignores this ruling, which is basically ignoring the decision of Roe v. Wade. Of course, the United States Supreme Court is not limited by an interpretation by a state supreme court, but surely they are limited by their own prior decision under the Supreme Court's use of the *stare decisis* doctrine described earlier. Regardless, the United States Supreme Court decision in Vacco v.Quill states the following:

> The Equal Protection Clause commands that no State shall "Deny to any person within its jurisdiction the equal protection of the laws." *This provision creates no substantive rights.* SanAntonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973). . . If a legislative classification or distinction 'neither burdens a fundamental right nor targets a suspect c lass,' we will uphold so long as it bears a rational relation to some legitimate end.[175]

True, the Equal Protection Clause does not create substantive rights. And, unfortunately, the Vacco v. Quill case was brought before the Supreme Court on an Equal Protection Clause question. Because of this, the Court here is speaking of the rights associated with that clause of the United States Constitution and not of the right to privacy upheld by Roe v. Wade.

However, the United States Supreme Court's decision in Roe v.Wade definitely

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[175]Vacco v.Quill, p. 2. The emphasis is added.

did interpret a substantive right. In fact, that decision declared a *fundamental constitutional right to privacy*. Without Roe v. Wade, Rehnquist's legal reasoning, as quoted above, would be a sound interpretation of constitutional law. However, in making this declaration, Rehnquist is purposively ignoring the fundamental right interpreted by Roe v. Wade. Even if the Vacco v. Quill decision was based on consideration of equal protection under the laws, the Supreme Court of the United States is not helpless. It did not have to worry about individual state battery law issues, or flail around helpless because the individual states can regulate non-substantive right issues, even out of existence. So Rehnquist is right: the Equal Protection Clause does not create any substantive rights. However, a proper Supreme Court ruling could not ignore *another right* of the petitioners so obviously present: the fundamental right of privacy established by Roe v. Wade to make one's own medical decisions.

The Vacco v.Quill opinion goes on to rely on New York and other state's history of statutes outlawing suicide, and physician assistance in suicide, stating that they "affect and address matters of profound significance to all New Yorkers alike," and that such New York laws "*neither infringe fundamental rights nor involve suspect classifications*," also referring the reader of the opinion to Washington v Glucksberg.[176] This is just the same pattern of using state law and state history to determine constitutional law that Rehnquist first used in the Cruzan opinion. Rehnquist also wrote:

> Unlike the Court of Appeals, we think the distinction between assisting suicide and withdrawing life sustaining treatment, a distinction widely recognized and endorsed in the medical profession and in our legal tradi-

[176]Vacco v.Quill, p. 2. The emphasis is added.

tions, is both important and logical.[177]

The Supreme Court of the United States's opinion then concludes that the decision of the Appellate Court must be reversed in that "These valid and important public interests easily satisfy the constitutional requirement that a legislative classification bear a rational relation to some legitimate end."[178]

When these two decisions of Washington/Vacco are compared to the Casey decision, the glaring error in constitutional interpretation becomes apparent. In Casey, which was a direct review of Roe v. Wade, the Court clearly states that while a state may legitimately legislate rules and regulations that require a legitimate state interest, they cannot legislate a substantive fundamental right out of existence. However, in the decisions of Washington/Vacco, concerning a direct examination of physician-assisted death, the Supreme Court of the United States finds no such fundamental right, and essentially concludes that the states can not only regulate, but deny such interests. This is because Rehnquist, writing in both Washington v.Glucksberg and Vacco v.Quill searches for state history and statutes for support of the alleged right instead of relying on the constitutional right of privacy declared in Roe v. Wade and confirmed in the Casey decision.

As we have seen, through authority as high as the New Jersey Supreme Court in the Quinlan decision and two federal Courts of Appeals behind the Washington/Vacco cases, this is illogical and bad constitutional interpretation. The New Jersey Supreme Court

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[177]Vacco v. Quill, p. 3.

[178]*Ibid.*, p. 5.

based its classic opinion on the right to remove the respirator from Karen Quinlan on United States constitutional law and the decision of Roe v. Wade as to her right to privacy, not state law, or state historical considerations. For the Supreme Court of the United States to decide the Washington/Vacco cases on such state issues and ignore its own decision in Roe v.Wade is not only embarrassing, but it's the argument of this thesis that these decisions will not bear the test of time of constitutional interpretation any more than the Dred Scott decision that found slaves in the United States to be less than full human beings.

The importance of the decision before the Supreme Court of the United States in the Washington/Vacco cases cannot be historically underestimated. No less than twelve different state legislatures, in opposition to what the literature states is the preference of the people, had proposed laws like those in the States of Washington and New York attempting to strike down the right of physician-assisted suicide. When one considers that the State of Oregon received its law as a result of an initiative of its population at large, not the state legislature, it appears there is a large popular recognition of such a right.[179] By some sources at this time, more than two-thirds of the people in the United States are said to

[179]After the Washington/Vacco United States Supreme Court decisions, a referendum was held in the State of Oregon to contest the DWDA a second time. At first passage in 1994, the law was legitimized by a rough 51% to 49% vote. After these Supreme Court decisions, the State of Oregon passed the law with a 60% to 40% margin. I wish to thank Ms. Jo Bryson and Mr. Jim Kronenberg of the Oregon Medical Association in pointing out this fact and for their time and suggestions to me in a personal meeting I had with them at the OMA's office in September, 2004.

support physician-assisted suicide.[180]

Concerning philosophy and medical ethics, the Washington/Vacco decisions are also important because of the *Philosopher's Brief*, which was filed as an *amicus curiae* in favor of physician-assisted suicide by Ronald Dworkin, Thomas Nagle, Robert Nozick, John Rawls, Thomas Scanlon and Judith Jarvis Thomson, some of philosophy's most distinguished scholars at the time.[181] In the introduction to the brief, Dworkin pointed out the significance of the fact that both the 2nd and the 9th Circuit Court of Appeals had ruled that "the Constitution forbids the government from flatly prohibiting doctors to help end such desperate and pointless suffering." He also noted that while the AMA was solidly against the proposed right, the American Medical Students Association filed an *amicus* brief in favor of physician-assisted suicide. This would make it appear that young doctors and medical students are more attuned to the present will of the population at large on this subject. Finally, Dworkin noted that the "double-effect" doctrine was defied by "common

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[180]Marcia Angell, MD: "The Supreme Court and Physician-Assisted Suicide–The Ultimate Right,"*The New England Journal of Medicine*, Vol. 336, No. 1, (January 2, 1997) pp. 5-53. Angell also states that "half the doctors" in the United States support PAS despite the "influential physician's organizations" that oppose PAS. The author saw the importance of the 9th Circuit's reliance on Roe v. Wade in stating:

> Indeed, the Ninth Circuit Court drew an explicit analogy between suicide and abortion, saying that both were personal choices protected by the Constitution and that forbidding doctors to assist would in effect nullify these rights. Although states could regulate assisted suicide, as they do abortion, they would not be permitted to regulate it out of existence.

For an opposite viewpoint of the decision, see George J. Annas, JD, MPH: "The Bell Tolls for a Constitutional Right to Physician-Assisted Suicide," *The New England Journal of Medicine,* vol. 337, No. 15, (October 9, 1997), pp. 1098-1103.

[181]Ronald Dworkin, et. al.: *Assisted Suicide: The Philosopher's Brief*, [a portion of the record of the Washington/Vacco case]. The non-lawyer may find a copy of this brief at http://www.nybooks.com/nyrev. Hereinafter referred to as The Philosopher's Brief.

sense." If the intention of withdrawal of any medical support is death, Dworkin went on, then, while permitted, it is physician-assisted death as well. He concluded that "The distinction between acts that aim at death and those that do not cannot justify a constitutional distinction between assisting in suicide and terminating life support."[182]

Perhaps the most important matter in *The Philosopher's Brief* is Dworkin's observation that the Solicitor General, who bore the responsibility for arguing the Clinton Administration's position on this matter, admitted in his brief that "*A liberty interest was at stake in these cases.*" The *Philosopher's Brief* itself adopted the position of the 9th Circuit Court's opinion, which followed the "abortion cases," with great reliance on Cruzan and concludes with a quote from Justice O'Connor in that case:

> That right encompasses the right to exercise some control over the time and manner of one's death. . . A state may not deny *the liberty* claimed by the patient-plaintiffs in these cases. . .If, on the other hand, this Court reverses the decisions below, its decision could only be justified by the momentous proposition-a proposition flatly in conflict with the *spirit and letter of the Court's past* decisions--that an American citizen does not, after all, have the right, even in principle, to live and die in the light of his own religious and ethical beliefs, his own convictions about why his life is valuable and where its value lies. . .[183]

In that same case Justice O'Conner had also stated: ". . .each individual has a right to make the most intimate and personal choices *central to personal dignity and autonomy*."

Clearly, the Washington/Vacco decisions are incorrect. They are not supported by a correct interpretation of constitutional law, even if one agrees with Rehnquist's preference for consideration of "liberty" over "privacy." In deciding these cases, the United States

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[182]This echoes the writings of James Rachels commented upon earlier.

[183]The Philosopher's Brief, quoting the 9th Circuit in Vacco v. Quill.

Supreme Court ignored the arguments in the *Philosopher's Brief*, the lower Federal Appellate Courts of Appeal in both the 2nd and 9th Circuits, and the rights of the plaintiff's in both cases, in its determination that no right to physician-assisted suicide exists at all. The opinion of the Supreme Court of the United States, in so doing, *never mentions Roe v. Wade nor discusses the constitutional right to privacy found in that decision* .

In deciding the case of Quinlan, the New Jersey Supreme Court relied on the interpretation of the United States Supreme Court in Roe v. Wade that there was a substantive and fundamental right to privacy in the federal constitution. Though such right can be regulated, it can never be regulated out of existence. The court reviewed the historical line of cases upon which the Roe v. Wade opinion depended, and found that the right to privacy in such instances of withdrawing medical life support technologies *will always outweigh the state's right to regulate, especially the state's claim to have an interest in the preservation of life.*. This is the correct constitutional law interpretation.

It is embarrassing, or should be, to anyone legally trained, that the best constitutional law on the issue of the right to privacy exists in a state supreme court interpreting the United States Constitution and United States Supreme Court decisions, and the worst federal constitutional law is represented by the United States Supreme Court itself when it interprets state law to overcome a United States constitutional right.

CHAPTER SEVEN:
CONCLUSION:

> ***No legal historian or constitutional scholar can doubt that Roe is now a centerpiece of our constitutional history, in particular the constitutionalization of the rights of women and the right of privacy.***[184]

This thesis must conclude that the enactment of law in the United States of America, and the interpretation of the United States Constitution by decisions of the Supreme Court of the United States, may, at least initially, offer some guidance and foundation for medical ethics on the issue of autonomy. Such law is the will of the people governed. Additionally, the process of law and judicial interpretation can progress much more rapidly than discussion of the standard foundations of ethical philosophy, which has taken thousands of years to develop. And while it may or may not be a better representation of the ethical feelings of the population of the United States than the edicts of religious authority, it is of course required to uphold the distinct separation of the rule of church and religion in ethical matters from the power of the state which our federal constitution requires. In any case, this thesis can more specifically conclude that what is meant by "autonomy" in medical ethics circles and what is meant by "privacy" and "liberty" in legal circles apparently sprang from the same roots and can be regarded as basically concerned with the same philosophical concept.

Unfortunately, if the ethical right of autonomy depends on uniform and universal

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[184]Hull & Hoffer, p. 6.

rules defining that right, which this thesis is taking for granted, then philosophy cannot in fact depend on the interpretation of the United States constitutional rights with any hope of consistent guidance. The ethic of medical autonomy, whether described as a right of privacy to make medical decisions as in the Roe v. Wade decision, or as described as a liberty interest to decide and make medical choices about one's own body and medical fate as the United States Supreme Court ruled in Cruzan and the Casey decisions, cannot be reconciled with a United States Supreme Court decision completely destroying such a federal and national right. The latter, unfortunately, is what has been done in the decision known as Washington/Vacco.

However, this thesis should not leave this issue without pointing out a significant view that echoes the connection made here between the Roe v. Wade decision and the issue of physician-assisted suicide as in question in the Washington/Vacco decisions. This thesis has exhibited several comments from legal scholars and historians, as well as philosophers, that connect these issues and these United States Supreme Court decisions. However, the view of their connection expressed by Michael J. Perry in his book *We The People: The Fourteenth Amendment and the Supreme Court* resonates, albeit discordantly, with many things that have been said here.[185] Perry's book begins by quoting Justice Harlan's dissent in the famous 1896 Supreme Court decision in Plessy v. Ferguson. In that opinion, Harlan stated in part that "There is a dangerous tendency in these latter days to enlarge the function of the court, by means of judicial interference with the will of the people as expressed by the

[185]Michael J. Perry: *We The People: The Fourteenth Amendment and the Supreme Court* (Oxford: University Press,1999). Hereinafter referred to as Perry.

legislature."[186] Perry's view is that Harlan's reference is to the "will of the people" by *state legislative* action. This may be or may not be what Justice Harlan was referring to in the quoted comment. In any case, Perry states:

> The claim at the heart of today's controversy is substantially the same claim that was at the heart of most earlier controversies about situational rulings by the Court–namely, that in the guise of interpreting the Constitution, the Supreme Court is actually usurping prerogatives that under the Constitution belong to one or more other branches or agencies of government.[187]

Perry takes this view of "usurpation" on the part of the Court directly to the issues of our concern in Chapter 6 of his book, which is entitled "Further Beyond: Abortion and Physician-Assisted Suicide." On the first page of this chapter, Perry states:

> No constitutional decision by the Supreme Court in the modern period of American constitutional law has been more controversial–certainly none has been more persistently controversial–than the Court's ruling in *Roe*. Even after more than a quarter of a century, the legitimacy of the Court's decision is widely and furiously contested.[188]

This is partially true and partially questionable, if one is claiming to be a legal scholar writing in 1999. The first part is certainly true, but as this thesis has pointed out, after Casey in 1992, few legal scholars still question the legitimacy of Roe v.Wade's core. But Perry claims that "*Roe v. Wade* constitutes one of the greatest–and, therefore, one of the worst–judicial usurpations of American politics in the period since World War II..[189] This is a problem: "usurping legislative prerogative," whether state or federal, even if one grants it

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[186]Perry, p. 3.

[187]*Ibid.*, p. 4.

[188]*Ibid.*, p. 151.

[189]*Ibid.*, p. 152

is some kind of "usurpation," is not necessarily *political*. Further, Perry's standard for whether the Supreme Court acts correctly is twofold:

> The Court's ruling that state legislation outlawing pre-viability abortion is unconstitutional is fairly characterized as a judicial usurpation of our politics if the ruling can be grounded neither in any norm established by "We the people" nor in any norm that has become constitutional bedrock for us.[190]

The Fourteenth Amendment, wherein Perry finds all of his authority for all of his conclusions, is very specific about what state legislatures can do, and this has been discussed fully here. This Amendment contains the warning that states cannot "abridge the privileges or immunities" of persons, or "deprive any person of life, liberty, or property, without due process of law," or deny the "equal protection of the laws." This Amendment is all about what the states cannot do, not what legislatures of the states are allowed to do.

In any case, Perry finds that Roe v. Wade cannot be justified by either of his two rules. Recalling the words quoted above of Justices O'Conner, Souter and Kennedy in the Casey opinion, Perry can find no "bedrock" to justify Roe v. Wade, or Casey for that matter. But the real problem with Perry's analysis begins with the title of his book. For he holds himself to a review that only regards the 14th Amendment. This is something that a constitutional scholar can never do. Even though Perry correctly sees the connection between Roe v. Wade and the Washington/Vacco decisions, and many have not, his analysis of the issues involved in those cases is fraught with the same mistake that Chief Justice Rehnquist has now made for over thirty years: the various parts of the Constitution of the United States cannot be reviewed in isolation from one another , nor can one be held to a wholly literal

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[190]Perry, p. 152.

reading of the text. The Constitution, quite simply, must be properly *interpreted*, and done so as a whole document.[191]

Perry's conclusion forgets that the legislative power of the individual states is held as subject to limitation by the 14th Amendment. The Bill of Rights in their entirety speak to limiting the power of the federal government and retaining unmentioned rights to the people. The Constitution, as concerns these Amendments, is addressed to *limiting the power of both the federal and individual states*. More importantly, Perry is one who writes both about abortion and physician-assisted suicide, and yet, who, like Chief Justice Rehnquist, just cannot quite seem to say or write the word "privacy." Perry's analysis ignores the constitutional development that created the liberty and privacy rights. This process did not come from the 14th Amendment alone, but from many of the Amendments and other paragraphs of the Constitution.[192] And finally, as suggested above, Perry's work betrays his confusion over what makes a question "political." Politics certainly is involved in the legislative process of both the national government and the states, but politics is not what the founders of the United States Constitution had in mind when they wrote this historical document, which does not even mention political parties or their function.

Today, unfortunately, "politics," in a distinctly negative sense, has indeed intruded into matters involving the United States Supreme Court. Laurence H. Tribe, the Tyler Professor of Constitutional Law at Harvard University, wrote the foreword to Senator Paul

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[191]This is a basic rule of contract law in the United States of America, and there is no greater contract than that which is represented by the Constitution of the United States.

[192]Perhaps this confusion by Perry explains his rather heated denouncement (pp. 176-177) of philosopher Ronald Dworkin and the other signatories to *The Philosopher's Brief*.

Simon's book *Advice and Consent*.[193] This book is a compelling study of the Robert Bork and Clarence Thomas Supreme Court of the United States nomination battles, along with a historical study of the United States Senate's role in many other nomination fights. Tribe states:

> Since 1969, however, eleven Supreme Court appointments in a row–from Warren Burger in 1969 to Clarence Thomas in 1991–have been made by Republican Presidents applying increasingly ideological criteria, with the Senate dutifully confirming all these nominees except Judge Bork. Despite decades of divided government, the current Supreme Court is one of the least philosophically diverse Courts in American history and *can hardly be said to reflect the range of mainstream constitutional and legal views*. Any Court this lopsided–in any direction–is bound to overlook vital issues, engage in relatively shallow and constricted internal debate, and deprive the future of the great dissents that have so often been destined to become the law long after they have been issued. . . .
>
> To grasp the truly unprecedented nature of the contemporary pattern–with the most recent eleven Supreme Court vacancies filled by Republican Presidents–it is necessary to realize that only four times in all of American history have Presidents of a single political party named more than ten Justices in a row. . .[194]

As I have argued, Washington/Vacco cannot be the proper interpretation of the United States Constitution concerning the Constitutional right to privacy in making medical decisions. As one may now finally put it, such a decision will not stand the test of time, basically because it was a *political* decision and not a constitutional decision. Rather, the understanding and appreciation of the United States Constitution is better served by the decisions of Griswold v. Connecticut and Roe v. Wade. As David Garrow stated:

> But in the end, Harry Blackmun grasped perhaps the simplest but

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[193]Senator Paul Simon: *Advice & Consent* (Bethesda: National Press Books, 1992).

[194]*Ibid.*, pp. 15-16. Garrow calls Tribe "the nation's most quoted law professor of the 1980's." See Garrow, at p. 615.

eventually the most long-forgotten truth of all: "*Roe* against *Wade* was not such a revolutionary opinion at the time."[195]

[195]Garrow, p. 599.

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After practicing law throughout the State of Tennessee and the Southeastern United States for more than twenty years, Mr. Lufkin became the senior partner of the Knoxville law firm of Lufkin Henley & Conner which employed seven attorneys and a staff of twenty. In 1994 he became the first Board Certified Creditor's Rights Attorney in the State of Tennessee and was very active in the Commercial Law League of America, becoming Chair of the Southern Section of the National Bar Association in 1998, a regional territory from Washington, DC, to Texas. While an attorney, Mr. Lufkin lectured extensively throughout the United States on Commercial Law matters and taught classes at the College of Law at the University of Tennessee and many seminars throughout the Southeastern United States.

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