ABORTION AND THE RIGHT TO DIE: JUDICIAL IMPOSITION OF A THEORY OF LIFE

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I. INTRODUCTION

The abortion cases[1] and the *Cruzan*[2] right-to-die case are at once very different and very similar. While these cases deal with life at opposite ends of its continuum, both involve attempts by either a state legislature or the Supreme Court to define the meaning and quality of life in a constitutional sense. Considering the abortion cases and *Cruzan* together, it is clear that certain Justices argue for a judicially-imposed definition of life, which changes with the circumstances of the case. This judicial definition of life is extremely dangerous because it is not based in the Constitution, and affords less protection to certain lives as the Justices' views of the importance of those lives change.

To illustrate graphically what these Justices argue, consider the following diagram. At the front end, life increases in importance as one goes from conception to viability to birth. Post-birth, and throughout "normal" childhood and adulthood, the definition of life remains constant. At the back end, the definition of life changes when, as in the *Cruzan* case, a person simply exists (as opposed to "lives"), and her chances of a return to normalcy decrease. The symmetry of this graph is disturbing because it reflects a judicially created hierarchy in which life in certain manifestations is more important, and hence more constitutionally protected, than it is in other forms.

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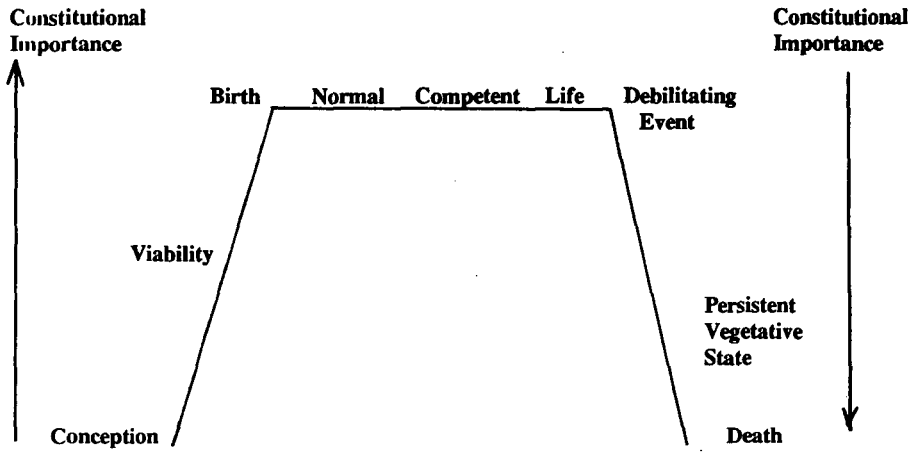
[1] Cases are cited in the order discussed. *See* Roe v. Wade, 410 U.S. 113 (1973), *holding limited by*, Webster v. Reproductive Health Services, 492 U.S. 490 (1989); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983); Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986); Webster v. Reproductive Health Services, 492 U.S. 490 (1989).

[2] Cruzan by Cruzan v. Harmon, 760 S.W.2d 408 (Mo. 1988), *cert. granted sub nom.* Cruzan by Cruzan v. Director, Missouri Department of Health, 492 U.S. 917 (1989), *aff'd*, 497 U.S. 261 (1990).



This article's premise is that, both linguistically and substantively, certain Justices discuss and analyze the definition and quality of life the same way during pregnancy as they do after a debilitating event that results in a comatose or persistent vegetative state, such as that suffered by Nancy Cruzan. This article will look first at the abortion cases, then at the *Cruzan* right-to-die case, and finally at the resultant theory of life that is espoused by certain members of the Supreme Court.

This article only takes issue with the Court's definition of life in the abortion and right-to-die contexts. It does not focus on the legitimacy of the Court's enunciation of a pregnant woman's right to decide whether to terminate her pregnancy. Rather, this article deals only with the countervailing issue of the nature and importance of fetal life, and who makes those judgments.

II. The Abortion Cases

At the outset of his opinion for the Court in *Roe v. Wade*,[3] Justice Blackmun characterizes some of the laws before the Court as reflecting "new thinking about an old issue."[4] The issue to which Justice Blackmun refers is, of course, abortion. Perhaps, though, Justice Blackmun's observation more accurately describes a judicial analysis originating in *Roe* and carried through to the *Cruzan* right-to-die case,[5] where the Court, or at least cer-

[3] 410 U.S. 113 (1973).

[4] *Id.* at 116.

[5] *Cruzan*, 110 S. Ct. at 2863 (Brennan, J., dissenting). Justice Brennan's dissent in *Cruzan* was joined by Justices Marshall and Blackmun. *Id.*

tain Justices, does some "new thinking" about an equally old and profound issue - the definition and quality of life.

A. Roe v. Wade

Roe is the seminal case in which the Court defines life, or more precisely, the state's interest in potential human life during pregnancy.[6] This article contends that the Court actually defines life, even though it purports merely to recognize a state's asserted interest in life. The distinction is important because, while it is clearly outside the judicial function to define either the meaning or quality of life,[7] it is within the Court's role to examine a state's asserted interest in life at different points on its continuum,[8] and to accept or reject the asserted state interest.[9]

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[6] *Roe*, 410 U.S. at 163. Justice Blackmun articulates: "With respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. This is so because the fetus presumably has the capability of meaningful life outside the mother's womb." *Id. Contra infra* note 9; Webster v. Reproductive Health Services, 492 U.S. 490 (1989). For full discussion of *Webster*, *see infra* notes 129-70 and accompanying text.

[7] The *Roe* Court conceded, as it must, that the word "person" as used in the Constitution "has application only postnatally." *Roe*, 410 U.S. at 157. The Court reasoned that "throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today . . . [therefore] the word 'person' as used in the Fourteenth Amendment, does not include the unborn." *Id.* at 158.

[8] To determine the purported state interests during pregnancy, which include maternal health and potential human life, the Court created and constitutionalized the trimester framework by prescribing the following:

> (a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

Id. at 164. The Court reasoned that maternal health is not "compelling" in the first trimester because the mortality rate for a woman to undergo an early abortion "may be less than mortality in normal childbirth." *Id.* at 163. The Court continued:

> (b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may if it chooses, regulate the abortion procedures in ways that are reasonably related to maternal health.

Id. at 164. During this second trimester, the State has an interest in protecting maternal health because the risks of abortion begin to exceed those of childbirth. *Id.* at 163. Finally, the Court enunciates:

> (c) For the stage subsequent to viability, the State in promoting its interest in the *potentiality of human life* may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of life or health of the mother.

Id. at 164-65 (emphasis added). *Contra* Webster v. Reproductive Health Services, 492 U.S. 490 (1989). In *Webster*, the Court upheld a Missouri statute that permitted a physician to perform viability testing on "an unborn child of twenty or more weeks gestational age." *Id.* at 514. In permitting these examinations, the Court, in effect, allowed the State's interest in potential human life to be recognized in the

Although *Roe* has been discussed at great length,[10] this article will confine its review of the case to specific language dealing with the meaning and quality of life. This same approach will be taken with other abortion cases and with the *Cruzan* case. The purpose of this focus is to examine the development of the judicially imposed theory of life.

Justice Blackmun, writing for the Court in *Roe*,[11] first de-

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second trimester. The Court concedes, however, that a fetus is not yet viable; this opinion is contrary to *Roe* at least in respect to those second-trimester pregnancies affected by the viability-testing requirement.

9 For instance, during the first and second trimesters, before viability, a state may require that an abortion be performed at a licensed clinic or hospital and by a licensed physician. *Roe*, 410 U.S. at 163. The state may not however, disturb the physician-patient decision determining whether to abort. *Id. See* Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747 (1986) (holding several sections of the Pennsylvania Abortion Control Act of 1982 unconstitutional because they were not "narrowly tailored" to serve a compelling state interest); Akron v. Akron Center for Reproductive Health, 462 U.S. 416 (1983) (five provisions of an Ohio statute struck down because they imposed a heavy and unnecessary burden on a woman's access to a relatively inexpensive, otherwise accessible abortion); Planned Parenthood v. Danforth, 428 U.S. 52 (1976) (spousal consent provision invalidated because a state has no constitutional authority to give a third party an absolute, and possibly arbitrary, veto power over the decision of the physician and patient). *Cf.* Harris v. McRae, 448 U.S. 297 (1980) (state is not required to fund indigent women's abortions because this does not create a government obstacle to abortion).

10 *See* Lynn A. Baker, *The Prices of Rights: Toward a Positive Theory of Unconstitutional Conditions*, 75 CORNELL L. REV. 1185 (1990); James Bopp, Jr., et al., *Does the United States Supreme Court Have a Constitutional Duty to Expressly Reconsider and Overrule* Roe v. Wade, 1 SETON HALL CONST. L.J. 55 (1990); Ruth Colker, *Abortion and Dialogue*, 63 TUL. L. REV. 1363 (1989); Walter Dellinger & Gene B. Sperling, *Abortion and the Supreme Court: The Retreat from* Roe v. Wade, 138 U. PA. L. REV. 83 (1989); Randall D. Eggert, et al., Special Project, *"Of Winks and Nods"- Webster's Uncertain Effect on Current and Future Abortion Legislation*, 55 MO. L. REV. 163 (1990); Susan R. Estrich and Kathleen M. Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119 (1989); Daniel A. Farber and John Nowak, *Beyond the* Roe *Debate: Judicial Experience With the 1980's "Reasonableness" Test*, 76 VA. L. REV. 519 (1990); Clarke D. Forsythe, *A Legal Strategy to Overturn* Roe v. Wade *after* Webster: *Some Lessons from Lincoln*, 1991 B.Y.U. L. REV. 519 (1991); Christyne L. Neff, *Woman, Womb, and Bodily Integrity*, 3 YALE J.L. AND FEMINISM 327 (1991); Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105 (1989); William VanAlstyne, *Closing the Circle of Constitutional Review from* Griswold v. Connecticut *to* Roe v. Wade: *An Outline of a Decision Merely Overruling* Roe, 1989 DUKE L. J. 1677 [hereinafter *Closing the Circle*]; Mark J. Beutler, Comment, *Abortion and the Viability Standard - Toward a More Reasoned Determination of the State's Countervailing Interest in Protecting Prenatal Life*, 21 SETON HALL L. REV. 347 (1991); Note, *Rethinking [M]otherhood: Feminist Theory and State Regulation of Pregnancy*, 103 HARV. L. REV. 1325 (1990).

11 Justice Blackmun's opinion was joined by Chief Justice Burger, and Justices Douglas, Brennan, Stewart, Marshall, and Powell. Chief Justice Burger and Justices Douglas and Stewart filed concurring opinions. Justice White filed a dissenting opinion joined by Justice Rehnquist. Justice Rehnquist also filed a dissenting opinion.

scribes the rules pertaining to abortion under the common law. The Justice points out that "at common law, abortion performed *before* 'quickening' - the first recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy - was not an indictable offense."[12] Justice Blackmun explains that "a confluence of earlier philosophical, theological, and civil and canon law concepts of when life begins"[13] informed the question of "the point at which the embryo or fetus became 'formed' or recognizably human, or . . . when a 'person' came into being, that is, infused with a 'soul' or 'animated.' "[14] The Justice concludes that "[a] loose consensus evolved in early English law that these events occurred at some point between conception and live birth. This was 'mediate animation.' "[15] Thus there exists, for the first time, a precursor to the constitutional argument[16] that life has different meaning at different stages of the gestational process. At this point, Justice Blackmun drops a footnote containing language and analysis that certain Justices would later use in the *Cruzan*[17] case:

> Early philosophers believed that the embryo or fetus did not become formed and begin to live until at least 40 days after conception for a male, and 80 to 90 days for a female . . . Aristotle's thinking derived from his three-stage theory of life: vegetable, animal, rational. The vegetable stage was reached at conception, the animal at "animation," and the rational soon after live birth. This theory, together with the 40/80 day view, came to be accepted by early Christian thinkers.[18]

It is curious that Justice Blackmun relies, at least in part, on a theory of life that describes the initial phase of existence as the "vegetable stage." Not only is this description linguistically similar to the "persistent vegetative state" language in *Cruzan*,[19] but this stage of early fetal existence occurs in the gestational process at a point that mirrors the persistent vegetative state occurring at the

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12 *Roe*, 410 U.S. at 132 (footnotes omitted) (emphasis in original).

13 *Id.* at 133.

14 *Id.*

15 *Id.* (footnote omitted).

16 *See supra* note 8 for discussion of trimester framework. Chief Justice Rehnquist states, however, that this framework is " 'unsound in principle and unworkable in practice.' " Webster v. Reproductive Health Services, 492 U.S. 490, 518 (1989) (quoting Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 546 (1985)).

17 *See infra* notes 171-289 and accompanying text for full discussion of *Cruzan*.

18 *Roe*, 410 U.S. at 133 n.22 (citations omitted).

19 *See* Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841 (1990); *see also infra* note 175 and accompanying text (defining vegetative state).

other end of life's continuum. During both of these "vegetative" states, certain Justices consider life to be of relatively little value.[20] During the first stage of pregnancy - Aristotle's "vegetable stage" - life is not developed enough to be of significant value, constitutional or otherwise.[21] At the other end of life's span, when a person's condition has deteriorated to the point of her being in a "persistent vegetative state," life is equally devoid of value, at least according to the constitutional theory of life espoused by some Justices.[22]

Two points are worth noting. First, regardless of whether these arguments have or ever had any validity in a moral, ethical, or medical sense,[23] the question is whether these concepts are found in the Constitution,[24] or whether the Court in *Roe* simply borrowed these ideas from other contexts, constitutionalized them, and asserted them as constitutional imperatives.[25]

Second, it is worth considering whether certain ideas, such as distinct and discernible stages of life during pregnancy, become part of the accepted legal vocabulary and culture. Moreover, one should ask whether these ideas consequently become an accepted method of analysis to be applied in different contexts, including the status and importance of life at different points after an accident such as that suffered by Nancy Cruzan. In sum, did the sheer force of the

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20 *See Roe*, 410 U.S. at 163 (Justice Blackmun, joined by Chief Justice Burger and by Justices Douglas, Brennan, Marshall, Stewart and Powell, states that the fetus has "capability of meaningful life outside the mother's womb" only at point of viability); *Cruzan*, 110 S. Ct. at 2863 (Brennan, J., dissenting); *id.* at 2878 (Stevens, J., dissenting).

21 To illuminate this point, the Court stated that Christian theologists were in agreement that before the 40/80 day view, the fetus was "part of the mother, and its destruction, therefore, was not homicide." *Roe*, 410 U.S. at 134.

22 *Cruzan*, 110 S. Ct. at 2863 (Brennan, J., joined by Marshall and Blackmun, J.J., dissenting); *id.* at 2878 (Stevens, J., dissenting).

23 *See Roe*, 410 U.S. at 133 n.22 (discussing different philosophical, theological and medical views).

24 *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on* Roe v. Wade, 82 YALE L. J. 920 (1973). The author states:

> What is frightening about *Roe* is that this super-protected right is not inferable from the language of the Constitution, the framers' thinking respecting the specific problem in issue, any general value derivable from the provisions they included, or the nation's governmental structure. Nor is it explainable in terms of the unusual political impotence of the group judicially protected via-a-vis the interest that legislatively prevailed over it.

Id. at 935-36 (footnote omitted). The commentator then articulates: "The problem with *Roe* is not so much that it bungles the question it sets itself, but rather that it sets itself a question the Constitution has not made the Court's business." *Id.* at 943.

25 *See id.* at 926-49.

Supreme Court opinion in *Roe* change legal analysis by altering the way educated, sophisticated people talked about the subject?[26] Did substance follow form in the sense that it became fashionable, and after a time even intuitive, to think about, discuss, and analyze abortion cases in the terms used by the Supreme Court?[27] Perhaps one of the most difficult things to do when a significant amount of time has passed since the Court rendered a major decision is to go back, analyze, and question the premises and conclusions of that decision.[28] This sort of retrospection is appropriate when the Court appears to repeat its abortion analysis in the *Cruzan* case.

In surveying American law on the subject of abortion, Justice

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[26] Professor James Boyd White has described this phenomenon in relation to the Constitution. The same can be said for Supreme Court opinions which are the ultimate interpretation of the Constitution. Professor White states:

> But to say that a treaty does not bind its partners with hoops of steel or that a Constitution does not, like a dynamo, create something called "power" and distribute it, like steam or electricity, to the various parts of the machine of government is not to say that such instruments achieve nothing. What they actually do is alter the rhetorical conditions of life for those in whose name they are promulgated and those to whom they speak. In a way that the representatives of Corcyra and Corinth would instantly understand, the very existence of such a text as this makes available certain kinds of claim and appeal, certain kinds of movement and action, that would otherwise be impossible. "You are our ally"; "the treaty requires it"; "the Constitution prohibits it." At its most successful, an instrument like this can be said to establish the fundamental terms of new kinds of conversation; for it creates a set of speakers, defines the occasions for and topics of their speech, and is itself a text that may be referred to as authoritative.

JAMES BOYD WHITE, WHEN WORDS LOSE THEIR MEANING 245 (1984).

[27] Professor White also declares:

> The most prominent feature of the judicial opinion is that it is not an isolated exercise of power but part of a continuing and collective process of conversation and judgment. The conversation of which it is a part is not a political conversation of the usual sort, proceeding as such conversations ordinarily do - by a kind of jostling and compromise, focusing mainly on the problem of the immediate present - but a highly formal one, in which authoritative conclusions are reached after explicit argument. These decisions in their turn become the material of future arguments leading to future decisions, and so on in a continuing process of opening and closure, argument and judgment, of which no one can claim to foresee the end.

Id. at 264.

[28] For example, the concept of "separate but equal," when referring to segregation, was held constitutional in Plessy v. Ferguson, 163 U.S. 537 (1896). It took the Court almost sixty years, however, to state that there is no superior, dominant class of citizens. *See* Brown v. Board of Education, 347 U.S. 483 (1954) (discussing desegregation in schools).

Blackmun points out that under early common law,[29] as well as the first state laws on the subject,[30] there was a distinction between abortion performed before and after quickening.[31] The *Roe* Court quickly departs from this early state law concept of a varying definition of life to its own constitutional version of fetal worth at different stages of gestation.

In explication of the state's interests in passing restrictive abortion laws, the *Roe* Court describes "the State's interest - some phrase it in terms of duty - in protecting prenatal life."[32] It is important to emphasize that the Court rejects the premise that life begins at conception,[33] and instead relies on the argument that the state has an interest in potential human life.[34] This distinction is critical because it obviates the need for the Court to rule on when life begins.[35] Moreover, it allows the Court to couch the entire discussion in terms of a state's interest in life at different points of pregnancy[36] while plugging that interest into a typical substantive due process balancing test.[37]

The *Roe* Court then posits that the constitutional right of pri-

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29 Roe v. Wade, 410 U.S. 113, 138 (1973).

30 *Id.* at 138-39.

31 Justice Blackmun explains: "[I]t was not until after the War Between the States that legislation began generally to replace the common law. Most of these initial statutes dealt severely with abortion after quickening but were lenient with it before quickening." *Id.* at 139.

32 *Id.* at 150.

33 The Court posits:

> Some of the argument for this justification rests on the theory that a new human life is present from the moment of conception. The State's interest and general obligation to protect life then extends, it is argued, to prenatal life. Only when the life of the pregnant mother herself is at stake, balanced against the life she carries within her, should the interest of the embryo or fetus not prevail. Logically, of course, a legitimate state interest in this area need not stand or fall on acceptance of the belief that life begins at conception or at some other point prior to live birth.

Id.

34 *Id.* The Court states: "In assessing the State's interest, recognition may be given to the less rigid claim that as long as at least *potential* life is involved, the State may assert interests beyond the protection of the pregnant woman alone." *Id.*

35 *Id.* at 154-55. *Compare* John Matthew Aragona, *Dangerous Relations: Doctors and Extracorporeal Embryos, The Need for New Limits to Medical Inquiry*, 7 J. CONTEMP. HEALTH L. POL'Y 307, 313 n.35, 314 n.36 (1991) ("[T]he United States Supreme Court decisions offer a perspective of when life begins.").

36 *See* Webster v. Reproductive Health Services, 492 U.S. 490, 503-06 (1989) (Court refused to rule on the constitutionality of Mo. Rev. Stat. § 1.205.1(1)(2) (1986), which states that "[t]he life of each human being begins at conception," because it had not been applied, nor was there any threat of its application).

37 *Id.* at 518-21. Chief Justice Rehnquist upheld Missouri's second trimester viability testing requirement because it "is *reasonably designed* to ensure that abortions

vacy, wherever it is based,[38] is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,[39] "and that this privacy interest is a fundamental one, the abridgement of which can only be justified by a compelling state interest."[40]

After concluding that a fetus is not a "person" under the Fourteenth Amendment,[41] Justice Blackmun rejects the invitation to render a judicial opinion as to when life begins: "When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer."[42]

Instead, the *Roe* Court articulates that the state's interests in maternal health or life and potential human life change as pregnancy proceeds, and "at a point during pregnancy, each becomes 'compelling.' "[43] The state's interest in potential human life becomes compelling at viability "because the fetus then presumably has the capacity of meaningful life outside the mother's womb."[44]

In constitutional terms, once the Court decides that a state's interest in potential human life is compelling, it must espouse that the post-viability fetus is intrinsically more valuable or worthwhile than a fetus earlier in pregnancy. Once the Court posits this as a

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are not performed where the fetus is viable - an end which all concede is *legitimate* - and that is sufficient to sustain its constitutionality. *Id.* at 520 (emphasis added).

38 *Roe*, 410 U.S. at 153. *See* Doe v. Bolton, 410 U.S. 179, 200 (1972), where Justice Blackmun explains that the right of privacy is encompassed in "Article IV, Section 2 . . . protect[ing] persons who enter Georgia seeking the medical services that are available there"; Griswold v. Connecticut, 381 U.S. 479, 484 (1965) ("specific guarantees in the Bill of Rights have penumbras, formed by emanations" and through these various amendments, by way of the Ninth Amendment, the right of privacy exists); *id.* at 486 (Goldberg, J., concurring) (the [D]ue Process Clause is the source of the right of privacy); *id.* at 493 (Goldberg, J., concurring) (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1933)) (The Court "must look to the 'traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked fundamental.' ").

39 *Roe*, 410 U.S. at 153.

40 *Id.* at 155. Justice Blackmun enunciates: "Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest,' and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." *Id.* (citations omitted).

41 *Id.* at 158. Justice Blackmun declares: "All this, together with our observation, *supra*, that throughout the major portion of the 19th century prevailing legal abortion practices were far freer than they are today, persuades us that the word 'person' as used in the Fourteenth Amendment, does not include the unborn." *Id.* (footnote omitted).

42 *Id.* at 159.

43 *Id.* at 163.

44 *Id.*

constitutional matter, it is necessarily stating something about the quality of that particular fetal life. It is true that the Court in *Roe* does not speak in terms of the life of the fetus - such a pronouncement would have had major, far-reaching repercussions.[45] The Court clearly declares, however, that the Constitution allows the Court to confer "compelling interest" status on a state's asserted interest in potential human life only at a certain point in pregnancy. In effect, the Court constitutionalizes the notion that certain fetal life is more important than other fetal life and, therefore, will receive greater protection from the judiciary. As we will see, this is precisely what certain Justices argue in the *Cruzan* situation.[46]

Justice Douglas, concurring in *Roe*, is even more emphatic than Justice Blackmun concerning the theory of life. Again, keep in mind that the question is not whether Justice Douglas is correct in some moral or philosophical sense; rather, it is whether his theory is mandated, or even allowed, by the Constitution.

Justice Douglas first asserts that he is "not prepared to hold that a State may equate . . . all phases of maturation preceding birth."[47] The Justice refuses to do so because for him "it is difficult to perceive any overriding public necessity which might attach precisely at the moment of conception."[48] Justice Douglas emphasizes his position by declaring that "the statute is overbroad because it equates the value of embryonic life immediately after conception with the worth of life immediately after birth."[49]

Justice Douglas's comments raise the obvious issue of why these questions are judicial rather than legislative decisions. Quite frankly, it does not matter whether Justice Douglas is able to perceive any overriding public interest attaching at the moment of conception. What matters is that people of a state, through their democratically elected legislators, can perceive such an interest. Justice Douglas's approach is nothing more than an *ipse dixit* that

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45 For example, the Court began its discussion with a history of American law. It stated that the early abortion statutes made abortion a misdemeanor before quickening and second degree manslaughter after quickening. *Id.* at 138. During the late 19th century, however, this distinction disappeared and statutes increased the seriousness of an abortion charge if it were not for the health of the mother. *Id.* at 139. *Cf.* Sylvia A. Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1023 n.243 (1984) (asserting that "fetal life" is different because the fetus is solely dependent on the woman carrying it while "other forms of human life" do not have this unique type of dependency).

46 *See infra* notes 228-89 and accompanying test for discussion of dissenting opinions in *Cruzan*.

47 *Roe*, 410 U.S. at 217 (Douglas, J., concurring).

48 *Id.*

49 *Id.* at 218 (Douglas, J., concurring).

arrogates to the Court a power that properly resides in the legislature.

Justice Douglas, reasserting his difficulty in "perceiv[ing] any overriding public necessity which might attach precisely at the moment of conception,"[50] quotes Justice Clark from a law review article that obviously deals with the definition of life:

> To say that life is present at conception is to give recognition to the potential, rather than the actual. The unfertilized egg has life, and if fertilized, it takes on human proportions. But the law deals in reality, not obscurity - the known rather than the unknown. When sperm meets egg life may eventually form, but quite often it does not. The law does not deal in speculation. The phenomenon of life takes time to develop, and until it is actually present, it cannot be destroyed. Its interruption prior to formation would hardly be homicide, and as we have seen, society does not regard it as such. The rites of Baptism are not performed and death certificates are not required when a miscarriage occurs. No prosecutor has ever returned a murder indictment charging the taking of the life of a fetus. This would not be the case if the fetus constituted human life.[51]

Justice Clark's article refutes the idea that the Court, rather than the people through their legislatures, should define the existence and quality of life. The article asserts that society does not regard destruction of life prior to "formation" as homicide. True, but it is society's call. Simply because society, as reflected by its representatives, has made the call one way or the other, does not somehow mean that the Court is free to substitute its judgment for that of the people, or to constitutionalize whichever choice the people made.

Additionally, despite Justice Clark's assertion that the law does not deal in obscurity, it is not exactly clear what the Justice means when he states that a fertilized egg assumes human proportions, but does not constitute human life. The very ambiguity of that distinction says something about the Court's ability, on a constitutional basis, to handle questions concerning the existence or quality of life at different points of gestation.

Justice Douglas concedes that "[t]he protection of the fetus when it has acquired life is a legitimate concern of the State."[52] The

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[50] *Id.* at 217 (Douglas, J., concurring) (quoting Tom C. Clark, *Religion, Morality, and Abortion: A Constitutional Appraisal*, 2 LOY. L.A. L. REV. 1, 9-10 (1969)).

[51] *Roe*, 410 U.S. at 217-18 (Douglas, J., concurring).

[52] *Id.* at 220 (Douglas, J., concurring).

Justice then espouses that "Georgia's law makes no rational, discernible decision on that score."[53] This assertion is disingenuous at best. Certainly Georgia's decision is discernible; everyone knew what its law said.

Justice Douglas can only find the law irrational because he disagrees with Georgia's choice. It is precisely this kind of judicial substitution of value choices that Justice Douglas has warned about in another context:

> Our recent decisions make plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy it expresses offends the public welfare. . . . [I]f our recent cases mean anything, they leave debatable issues as respects business, economic, and social affairs to legislative decisions.[54]

Justice White, in a dissent joined by Justice Rehnquist, emphasizes that "the people and the legislatures of the 50 states are constitutionally disentitled to weigh the relative importance of the continued existence and development of the fetus, on the one hand, against a spectrum of possible impacts on the mother, on the other hand."[55] Justice White characterizes the majority's analysis as "an exercise of raw judicial power,"[56] pursuant to which "[t]he Court apparently values the convenience of the pregnant mother more than the continued existence and development of the life or potential life that she carries."[57] Justice White concludes that he can find no constitutional justification for the particular "marshaling of values"[58] engaged in by the majority.

Justice White accurately describes what the majority did in *Roe*, would continue to do in later abortion cases, and what a certain bloc of the Court would do in the *Cruzan* case. The constant theme of these cases is that the Court, or at least certain Justices, makes and imposes (or tries to impose) personal value judgments about the existence and quality of life that have no constitutional basis.

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53 *Id.* (footnote omitted).

54 Day-Brite Lighting v. Missouri, 342 U.S. 421, 423, 425 (1952). The *Day-Brite* opinion was authored by Justice Douglas.

55 *Roe*, 410 U.S. at 222 (White, J., dissenting).

56 *Id.* Somewhat ironically, Justice Marshall makes this same observation in Payne v. Tennessee, 111 S. Ct. 2597 (1991), a case in which the Court upheld the admissibility of "victim-impact" evidence at a capital sentencing proceeding. Justice Marshall articulates: "Power, not reason, is the new currency of this Court's decision-making." *Id.* at 2619 (Marshall, J., dissenting).

57 *Roe*, 410 U.S. at 222 (White, J., dissenting).

58 *Id.*

B. Akron v. Akron Center for Reproductive Health

A decade after *Roe*, the Court decided another abortion case that revealed the trimester framework to be a judicial creation rather than a constitutional mandate. In *Akron v. Akron Center for Reproductive Health*,[59] the Court reviewed a number of provisions enacted by Akron, Ohio to regulate abortions.[60] Justice Powell, writing for the Court,[61] invalidated five provisions dealing with hospitalization for first trimester abortions, parental consent, informed consent, waiting period, and disposal of fetal remains.[62]

After reaffirming that the "right of privacy . . . founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy,"[63] the Court discusses the state interests that would justify restriction on a woman's access to abortion.[64]

The Court first reiterates that a state does have an " 'important and legitimate interest in protecting the potentiality of human life,' "[65] and that this interest exists "throughout the course of the woman's pregnancy."[66] The Court then repeats the rule from *Roe* — that this state interest "becomes compelling only at viability."[67]

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59 462 U.S. 416 (1983).

60 The provisions of the "Regulation of Abortion" which were challenged include:

(i) Section 1870.03 requires that all abortions performed after the first trimester of pregnancy be performed in a hospital.

(ii) Section 1870.05 sets forth requirements for notification of and consent by parents before abortions may be performed on unmarried minors.

(iii) Section 1870.06 requires that the attending physician make certain specified statements to the patient "to insure that the consent for an abortion is truly informed consent."

(iv) Section 1870.07 requires a 24-hour waiting period between the time the woman signs a consent form and the time the abortion is performed.

(v) Section 1870.16 requires that fetal remains be "disposed of in a humane and sanitary manner."

Id. at 422-24.

61 Justice Powell's opinion was joined by Chief Justice Burger, and Justices Brennan, Marshall, Blackmun, and Stevens. Justice O'Connor dissented, joined by Justices White and Rehnquist.

62 *Akron*, 462 U.S. at 431-52.

63 *Id.* at 426 (quoting Roe v. Wade, 410 U.S. 113, 153 (1973)).

64 *Id.* at 427-34.

65 *Id.* at 428 (quoting *Roe*, 410 U.S. at 162).

66 *Id.* (quoting Beal v. Doe, 432 U.S. 438, 446 (1977)).

67 *Id.*

The *Akron* Court then asserts that the state also has an interest in the health of the pregnant woman, but that under *Roe* this interest only becomes compelling at "approximately the end of the first trimester of pregnancy."[68]

At this point in the majority's opinion, Justice Powell drops a footnote that reveals the trimester framework for what it really is — a judicial fabrication. Justice Powell states:

> *Roe* identified the end of the first trimester as the compelling point because until that time - according to the medical literature available in 1973 - "mortality in abortion may be less than mortality in normal childbirth." There is substantial evidence that developments in the past decade, particularly the development of a much safer method for performing second trimester abortions have extended the period in which abortions are safer than childbirth.
>
> We think it *prudent*, however, to retain *Roe's* identification of the beginning of the second trimester as the approximate time at which the State's interest in maternal health becomes sufficiently compelling to justify significant regulation of abortion.
>
> The *Roe* trimester standard thus continues to provide a *reasonable* legal framework for limiting a State's authority to regulate abortions.[69]

Although proffered as a defense for retaining the trimester framework, Justice Powell's footnote actually exposes the nonconstitutional basis for the *Roe* framework. The Court declares it "prudent" to retain the trimester framework because it provides a "reasonable" construct in which to analyze abortion laws. Maybe, but Justice Powell's footnote can be interpreted to mean simply that the Court thinks it is a good idea to retain the *Roe* framework, even though it does not work anymore due to the changes in medical technology since 1973.[70] However "prudent" or "reasonable" a

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[68] *Id.* (quoting *Roe*, 410 U.S. at 163).

[69] *Id.* at 429 n.11 (emphasis added) (citations omitted).

[70] One commentator has argued that the fact that technological advances permit abortions to be safer later in pregnancy and viability to occur earlier should not undermine the "spirit" of *Roe*. Nancy K. Rhoden, *Trimesters and Technology: Revamping Roe v. Wade*, 95 YALE L.J. 639 (1986) [hereinafter *Trimesters and Technology*]. To achieve this goal, the author proposes that: "(1) viability as a normative dividing line in pregnancy represents not merely technological survivability but also late gestation; and (2) there is a time in pregnancy that is 'too early to be late,' such that, despite technological changes, abortions should not be restricted before this time." *Id.* at 643. *See also* June J. Earll, *Supreme Court Review-City of Akron v. Akron Center for Reproductive Health, Inc.: A Weakening of the Trimester Approach to Abortion Regulation*, 11 OHIO N.U. L. REV. 181 (1984).

course that might be, it does not necessarily become a constitutionally required, or even acceptable, option.[71]

In other areas of constitutional law, such as Article III standing, the term "prudential" is a term of art that connotes something other than a constitutional requirement.[72] Prudential barriers to justiciability,[73] for instance, are invoked to avoid ruling on constitutional questions,[74] to maintain a manageable caseload,[75] or to prevent unnecessary friction between the federal government and

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71 *See* Michael Buckley, Note, *Current Technology Affecting Supreme Court Abortion Jurisprudence*, 27 N.Y.U. L. REV. 1221, 1228-29 (1982).

72 *See* Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring) ("The Court developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."); Warth v. Seldin, 422 U.S. 490, 498 (1975) (standing issue is a "threshold question" in every case). *See also* Lee A. Albert, *Justiciability and Theories of Judicial Review: A Remote Relationship*, 50 S. CAL. L. REV. 1139 (1977); Henry P. Monahan, *Constitutional Adjudication: The Who and When*, 82 YALE L. J. 1363 (1973); Kenneth E. Scott, *Standing in the Supreme Court - A Functional Analysis*, 86 HARV. L. REV. 645 (1973); Mark V. Tushnut, *The New Law of Standing: A Plea for Abandonment*, 62 CORNELL L. REV. 663 (1977).

73 *See Ashwander*, 297 U.S. at 341 (Brandeis, J., concurring). Justice Brandeis notes the following barriers: "1. The Court will not pass upon the constitutionality of legislation in a friendly, non-adversary proceeding. . . ." *Id.* at 346; "2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it." *Id.* at 346-47 (quoting Liverpool, New York and Philadelphia Steamship Co. v. Commissioners of Emigration, 113 U.S. 33, 39 (1985)); "3. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied." *Id.* at 347 (quoting *Liverpool*, 113 U.S. at 39); "4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of." *Id.*; "5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation." *Id.* (footnote omitted); "6. The Court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." *Id.* at 348 (footnote omitted); "7. 'When the validity of an act of Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.' " *Id.* (quoting Cromwell v. Benson, 285 U.S. 22, 62 (1932)).

74 *Id.*

75 *See Warth*, 422 U.S. at 499 (no general citizen standing); Barrows v. Jackson, 346 U.S. 249, 255 (1953) (In discussing third party standing, the Court stated that, "[a]part from the jurisdictional requirement, the Court has developed a complementary rule of self-restraint . . . which ordinarily precludes a person from challenging the constitutionality of state action by invoking the rights of others."); Massachusetts v. Mellon, 262 U.S. 447 (1923) (for a taxpayer to invoke the Court's jurisdiction the injury complained of must be direct and not abstract). *See also* Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest for the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984). *But see* Tidewater Oil Co. v. United States, 409 U.S. 151, 175-76 (1972) (Douglas, J., dissenting) ("The load of work so far as processing cases is concerned has increased. That

the states.[76] It is novel, if not anomalous, for the Court to invoke a prudentially-based construct to limit or to enhance a state's ability to assert its own interest in a law regulating abortion. Even Justice Blackmun, writing for the Court in *Roe*, concedes that the state's interests exist throughout pregnancy.[77] Once the Court concedes that point, as it must,[78] considerations of prudence or reason should be left to the people, acting through state legislatures, not arrogated to the federal courts to invoke under the guise of constitutional interpretation.

It is worth reemphasizing that the *Roe* framework necessarily, albeit implicitly, imposes a theory of life, even though it may do so under the guise of the Court's interpreting and valuing the state's interest in "potential human life" at different points in pregnancy. Asserting, as a constitutional rule, that a state's interest in fetal life is "compelling" at a certain point in pregnancy can only be justified by the Court's underlying value judgment that, at and after that point, the state has an interest worth protecting. The putative constitutional basis for the *Roe* framework is nothing more than a linguistic gloss placed on a series of value judgments made by certain members of the Court. This, as we shall see, is precisely what some Justices argue for in the right-to-die cases.[79]

Justice O'Connor, dissenting in *Akron*,[80] takes direct aim at the trimester framework of *Roe*:

> [I]t is apparent . . . that neither sound constitutional theory nor our need to decide cases based on the application of neutral principles can accommodate an analytical framework that varies according to the "stages" of pregnancy, where those

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work is important; and in many ways it is the most important work we do. . . .[However,] [w]e are if anything, underworked, not overworked.").

[76] *See* Younger v. Harris, 401 U.S. 37 (1971); Railroad Comm'n of Texas v. Pullman Co., 312 U.S. 496 (1941).

[77] *See supra* notes 42-43 and accompanying text.

[78] *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1348-49 (2nd ed. 1988) [hereinafter TRIBE]. Professor Tribe writes:

> [O]ne [cannot] get anywhere on this issue by debating whether "fetal life" is "human life": what other form or species of life could it be? There is simply no intellectually honest way of getting around the fact that the interest in preserving the life of a fetus is significant. Therefore, holding that the woman's right to decide whether to give birth is a fundamental aspect of her liberty does not preclude the possibility that the state's interest in saving the fetus might override the woman's claim.

Id. (footnotes omitted).

[79] *See infra* notes 228-89 and accompanying text for discussion of the dissenting opinions in *Cruzan*.

[80] Justice O'Connor's dissent was joined by Justices Rehnquist and White.

> stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state regulation occurs.[81]

In apparent response to Justice Powell's footnote advocating the prudence of retaining the trimester framework,[82] Justice O'Connor counters:

> Irrespective of what we may believe is wise or prudent policy in this particular area, "the Constitution does not constitute us as 'Platonic Guardians' nor does it vest in this Court the authority to strike down laws because they do not meet our standards of desirable social policy, 'wisdom,' or 'common sense.' "[83]

Justice O'Connor is simply pointing out the difference between what is constitutionally forbidden or required, and what might strike certain Justices as desirable social policy if they were acting as legislators instead of judges.[84] Chastising the majority for its assumption of power to make the value judgments which underlie the trimester framework, Justice O'Connor argues:

> It is even more difficult to believe that this Court, without the resources available to those bodies entrusted with making legislative choices, believes itself competent to make these inquiries and to revise these standards every time the American College of Obstetricians and Gynecologists (ACOG) or similar group revises its views about what is and what is not appropriate medical procedure in this area.[85]

Once again, this comment rings as true in the *Cruzan* right-to-die situation as it does in the abortion area.[86] The Court is simply not competent to make what are essentially medical, ethical, or spiritual decisions. Instead, the Court's role is simply to state what the law is,[87] not what it thinks the law should be.[88] Reevaluation of the

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81 *Akron v. Akron Center for Reproductive Health*, 462 U.S. 416, 452 (1983) (O'Connor, J., dissenting).

82 *See supra* note 69 and accompanying text for Justice Powell's footnote.

83 *Akron*, 462 U.S. at 453 (O'Connor, J., dissenting) (citation omitted).

84 Justice O'Connor states: "Irrespective of the difficulty of the task, legislatures, with their superior fact-finding capabilities, are certainly better able to make the necessary judgments than are courts." *Id.* at 456 n.4 (O'Connor, J., dissenting).

85 *Id.* at 456 (O'Connor, J., dissenting).

86 *See infra* notes 226-27, 234-36 and accompanying text.

87 *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (The Supreme Court took for itself the power to interpret the Constitution.).

88 ROBERT H. BORK, THE TEMPTING OF AMERICA 1 (1990) [hereinafter BORK]. Judge Bork declares:

> In law, the moment of temptation is the moment of choice, when a judge realizes that in the case before him his strongly held view of

Court's track record in the abortion cases is important as a context in which to evaluate its opinions in the *Cruzan* case.

Justice O'Connor, asserting that "[t]he *Roe* framework . . . is clearly on a collision course with itself,"[89] rejects the framework as "having no justification in law or logic . . .,"[90] and asserts that it is "clearly an unworkable means of balancing the fundamental right and the compelling state interests that are indisputably implicated."[91] The Justice concedes that a state has compelling interests in maternal health or life and potential human life, but asserts that these interests exist "*throughout* pregnancy."[92]

Justice O'Connor has an especially easy time with the question of when the state's interest in fetal life becomes compelling. In fact, Justice O'Connor goes after Justice Blackmun literally on his own terms. In *Roe*, Justice Blackmun describes the state's interest in the fetus as the "interest in potential life."[93] Justice O'Connor asserts that "*potential* life is no less potential in the first weeks of pregnancy than it is at viability or afterward."[94] She derides as "arbitrary"[95] the choice of viability as the point at which the government's interest in potential human life becomes compelling.[96]

Justice O'Connor is clearly correct on this point. "Potential" has been defined as "existing in possibility: capable of development into actuality."[97] It must follow, then, that a fertilized egg, irrespective of implantation, is "potential" human life. Perhaps that is not what Justice Blackmun intended, but it certainly is what he said.

> justice, his political and moral imperative, is not embodied in a statute or in any provision of the Constitution. He must then choose between his version of justice and abiding by the American form of government. Yet the desire to do justice, whose nature seems to him obvious, is compelling, while the concept of constitutional process is abstract, rather arid, and the abstinence it counsels unsatisfying. To give in to temptation, this one time, solves an urgent human problem, and a faint crack appears in the American foundation. A judge has begun to rule where a legislator should.

Id.

89 *Akron*, 462 U.S. at 458 (O'Connor, J., dissenting).

90 *Id.* at 459 (O'Connor, J., dissenting).

91 *Id.*

92 *Id.* Justice O'Connor, however, does not make it clear when pregnancy begins - conception or implantation of the fertilized egg in the uterine wall. This distinction is critical. *See Special Project, Legal Rights and Issues Surrounding Conception, Pregnancy, and Birth*, 39 VAND. L. REV. 597 (1986).

93 Roe v. Wade, 420 U.S. 113, 163 (1973).

94 *Akron*, 462 U.S. at 461 (O'Connor, J., dissenting) (emphasis in original).

95 *Id.*

96 *Id.*

97 WEBSTER'S NEW COLLEGIATE DICTIONARY 893 (8th ed. 1981).

This part of Justice O'Connor's dissent in *Akron* takes the *Roe* majority to task for its creation and justifications of the trimester framework as a method of analyzing laws that restrict a woman's access to abortion. Justice O'Connor scores some direct hits on the trimester analysis, and, as we shall see,[98] her arguments are equally compelling at all stages of the *Cruzan* "right-to-die" analysis.

C. Thornburgh v. American College of Obstetricians and Gynecologists

In *Thornburgh v. American College of Obstetricians and Gynecologists*,[99] the Court invalidates a number of Pennsylvania provisions that restricted a woman's access to abortion. Justice Blackmun, writing for the Court,[100] strikes down provisions involving informed consent,[101] reporting requirements,[102] the standard of care for aborting a viable fetus,[103] and a second-physician requirement.[104] While the majority opinion is a rather straightforward application of the principles of *Roe*, there is an interesting clash of viewpoints between Justices Stevens and White in their separate opinions. Their dispute sheds some light on the constitutional legitimacy of the *Roe* framework and its counterpart in *Cruzan*.

Justice White, starting from the premise that "in *Roe* [the Court] essentially created something out of nothing,"[105] contends that the Court, in its abortion rulings, has gone "further and further afield in the 13 years since that decision was handed down."[106] If Justice White is correct, and he most assuredly is in regard to the *Roe* framework, it is in large part because of the misguided construction of the framework in the first place.[107] A sound analytical framework will stand the test of time and new

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98 *See infra* notes 289-302 and accompanying text.

99 476 U.S. 747 (1986).

100 Justice Blackmun wrote the majority opinion in *Thornburgh*, joined by Justices Brennan, Marshall, Powell, and Stevens. Justice Stevens wrote a separate concurring opinion. Chief Justice Burger wrote a dissenting opinion. Justice White wrote a dissenting opinion joined by Justice Rehnquist. Justice O'Connor also wrote a dissenting opinion joined by Justice Rehnquist.

101 *Id.* at 759-65.

102 *Id.* at 765-68.

103 *Id.* at 768-71.

104 *Id.*

105 *Id.* at 813-14 (White, J., dissenting).

106 *Id.* at 786 (White, J., dissenting).

107 *See Trimesters and Technology*, *supra* note 70, at 639 (The viability determination presents difficulties because it has not advanced with medical technology.). *See also supra* text accompanying notes 95-96.

(albeit totally foreseen) circumstances.[108] An intrinsically flawed construct will tumble under its own weight.[109] The *Roe* framework is clearly in the second category.

Discussing the role of the Court in constitutional adjudication, Justice White asserts:

> Because the Constitution itself is ordained and established by the people of the United States, constitutional adjudication by this Court does not, in theory at any rate, frustrate the authority of the people to govern themselves through institutions of their own devising and in accordance with principles of their own choosing. But decisions that find in the Constitution principles or values that cannot fairly be read into that document usurp the people's authority, for such decisions represent choices that the people have never made and that they cannot disavow through corrective legislation.[110]

This comment not only describes the *Roe* framework, but also the judicially created theory of life that we see in some opinions in the *Cruzan* case.[111]

After recounting what the *Roe* decision held in terms of a fundamental right to decide whether or not to terminate a pregnancy, and the state interests that become compelling at different points of gestation,[112] Justice White concludes that "[a] reader of the Constitution might be surprised to find that it encompassed these detailed rules."[113] Justice White makes that point even though he also articulates the following:

> [The] Court does not subscribe to the simplistic view that constitutional interpretation can possibly be limited to the "plain meaning" of the Constitution's text or to the subjective intention of the Framers. The Constitution is not a deed setting forth the precise metes and bounds of its subject matter; rather, it is a document announcing fundamental principles in value-laden terms that leave ample scope for the exercise of normative judgment by those charged with interpreting and applying it.[114]

Recognizing the somewhat organic nature of the Constitu-

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108 *Id.* at 673 (recommending that the Court abandon the distinction between first and second trimesters and consider a lower survivability point such as proposed in *Akron*).

109 *Id.*

110 *Thornburgh*, 476 U.S. at 787.

111 *See infra* notes 229-302 and accompanying text.

112 *Thornburgh*, 476 U.S. at 788-89 (White, J., dissenting).

113 *Id.* at 789 (White, J., dissenting).

114 *Id.*

tion,[115] Justice White cautions against judicial overreaching, especially regarding unenumerated rights. He warns that the Court should avoid even the appearance of "impos[ing] its own controversial choices of value upon the people."[116] This advice also applies directly to the judicial imposition of values in the "right-to-die" context.

In attacking what he considers to be the arbitrary, unprincipled nature of the Court's decision in *Roe*, Justice White accuses the Court of engaging "not in constitutional interpretation, but in the unrestrained imposition of its own, extraconstitutional value preferences."[117]

Justice Stevens differs on this point in his concurrence. The Justice counters:

> [N]o individual should be compelled to surrender the freedom to make that decision for herself simply because her "value preferences" are not shared by the majority. In a sense, the basic question is whether the "abortion decision" should be made by the individual or by the majority "in the unrestrained imposition of its own, extraconstitutional value preferences." But surely Justice White is quite wrong in suggesting that the Court is imposing value preferences on anyone else.[118]

Justice White responds that he "cannot conceive of a definition of the phrase 'imposing value preferences' that does not encompass the Court's action."[119] He also asserts that "a legislature, unlike a court, has the inherent power to [restrict the availability of abortion] unless its choices are constitutionally *forbidden*, which, in my view, is not the case here."[120] Justice White clearly has the better of this

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115 Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703, 709 (1975). Professor Grey states that where the Constitution is silent on a specific issue:

> the text is not invoked as the source of the values or principles that rule the case. Rather the broad textual provisions are seen as sources of legitimacy for judicial development and explication of basic shared national values. These values may be seen as permanent and universal features of human social arrangements - natural law principles - as they typically are today. Our characteristic contemporary metaphor is "the living Constitution" - a constitution with provisions suggesting restraints on government in the name of basic rights, yet sufficiently unspecific to permit the judiciary to elucidate the development and change in the content of those rights over times.

Id.

116 *Thornburgh*, 476 U.S. at 790 (White, J., dissenting).

117 *Id.* at 794 (White, J., dissenting) (footnote omitted).

118 *Id.* at 777-78 (Stevens, J., concurring) (citation and footnote omitted).

119 *Id.* at 794 n.3 (White, J., dissenting).

120 *Id.*

argument. As a presumptive matter, it is within the power of a state legislature to impose values - values which reflect the will of the people.[121] A state's imposition of values is not extraconstitutional. To the contrary, it is at the heart of a representative state government's function.[122] Indeed, equating the propriety and legitimacy of a court's ability to impose value preferences with that of a legislature is, at best, disingenuous.

Justice White next turns his attention to the trimester framework that the Court crafted in *Roe*. Referring to the "detailed set of rules governing state restrictions on abortion that the Court first articulated in *Roe* and has since refined and elaborated,"[123] Justice White argues that, in a constitutional sense:

> [T]he substantiality of [a] state's interest in potential human life is in no way dependent on the probability that the fetus may be capable of surviving outside the womb at any given point in its development, as the possibility of fetal survival is contingent on the state of medical practice and technology, factors that are in essence morally and constitutionally irrelevant.[124]

Justice White concludes that "[t]he State's interest is in the fetus as an entity in itself, and the character of this entity does not change at the point of viability under conventional medical wisdom. Accordingly, the State's interest, if compelling after viability, is equally compelling before viability."[125]

Justice Stevens attempts to rebut Justice White's arguments. In so doing, Justice Stevens reveals the true nature of his own position: There is a certain theory of life, discernible at least to Justice Stevens, that is a constitutional imperative. This, coincidently, is exactly what Justice Stevens argues for in *Cruzan*.[126]

Justice Stevens asserts that "Justice White is also surely wrong

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121 *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 875 (1987) ("Public law theory cannot be divorced from a conception of the representative process. The constitutional structure of separation of powers can be traced to the Madisonian effort to mediate the problem of faction - the influence of interest groups in the political process."). *See also* JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 4 (1980) ("Reconciling judicial review with American representative democracy has been the subject of powerful debate since the early days of the Republic.").

122 BORK, *supra* note 88, at 345 (1990) (arguing that where the "Constitution is silent" on a particular matter, it is the people who should decide the issue through their elected officials).

123 *Thornburgh*, 476 U.S. at 794 (White, J., dissenting).

124 *Id.* at 795 (White, J., dissenting).

125 *Id.* (footnote omitted).

126 *See infra* notes 264-89 and accompanying text.

in suggesting that the governmental interest in protecting fetal life is equally compelling during the entire period from the moment of conception until the moment of birth."[127] Why is that true, according to Justice Stevens? He answers that question in terms that apply, word-for-word, to his theory of life in the *Cruzan* case:

> I should think it obvious that the State's interest in the protection of an embryo - even if that interest is defined as "protecting those who will be citizens," - increases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings increases day by day. The development of a fetus - and pregnancy itself - are not static conditions, and the assertion that the government's interest is static simply ignores this reality.[128]

This comment encapsulates Justice Stevens's theory of life as applied in the abortion context. Consider a hypothetical counterpart to this argument in the right-to-die context. Instead of a developing fetus, this imaginary opinion would refer to an adult who, having suffered a severely debilitating accident, is in an apparently irreversible persistent vegetative state.

> I should think it obvious that the State's interest in the protection of a person in a persistent vegetative state - even if that interest is defined as 'protecting those who are still technically citizens' - decreases progressively and dramatically as the organism's capacity to feel pain, to experience pleasure, to survive, and to react to its surroundings decreases day by day. The deterioration of a person in a persistent vegetative state - and the persistent vegetative state itself - are not static conditions, and the assertion that the government's interest is static simply ignores this reality.

This hypothetical opinion is the mirror image of Justice Stevens's theory of life in the abortion cases. It is a perfect image of his theory of life in *Cruzan*. Before this article turns to *Cruzan*, however, it is necessary to analyze the Justices' opinions in the *Webster* abortion case.

D. Webster v. Reproductive Health Services

In *Webster v. Reproductive Health Services*,[129] the Court, in reviewing various provisions of a Missouri law restricting a woman's access to abortion, engages in serious discussion and

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127 *Thornburgh*, 476 U.S. at 778 (Stevens, J., concurring).
128 *Id.* (citation omitted).
129 492 U.S. 490 (1989).

debate about a state's constitutional ability to define life. The opinions in *Webster* summarize a great deal of the discussion from the abortion cases and serve as a springboard to the issues raised in *Cruzan*.

The Court in *Webster* addressed four sections of the Missouri law restricting abortion: 1) the preamble to the law,[130] 2) a prohibition on the use of public facilities or employees to perform abortions,[131] 3) a prohibition on public funding of abortion counseling,[132] and 4) a requirement that physicians perform viability tests prior to performing abortions.[133]

The different Justices' treatment of the preamble to the Missouri law is most enlightening for purposes of whether a state is able to define life as it pertains to an embryo or fetus. Chief Justice Rehnquist, writing for the majority in *Webster*,[134] rules that no ripe controversy exists in regard to the preamble because it "does not by its terms regulate abortion or any other aspect of . . . medical practice."[135] The constitutionality of the preamble, then, is not properly before the Court for review.[136]

The preamble to the Missouri law, however, starkly presents the question of whether a state may define life in the case of an embryo or fetus. The preamble sets forth various findings of the Missouri legislature concerning the unborn. For example, the preamble states that the life of each human being begins at conception, that unborn children have protectable interests in life, health, and well-being, and that the natural parents of the unborn have protectable interests in the life, health and well-being of their unborn child.[137] The Missouri law goes on to require that the laws of Missouri be interpreted to provide the unborn child, at every stage of development, with all the rights of any other person.[138] The Act makes it clear that an "unborn child" under the law means all unborn children from the moment of conception until birth, at every stage of biological development.[139]

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130 *Id.* at 504-07.
131 *Id.* at 507-11.
132 *Id.* at 511-13.
133 *Id.* at 513-21.
134 Part IIA of Chief Justice Rehnquist's opinion, dealing with the preamble to the Missouri law, was joined by Justices White, O'Connor, Scalia, and Kennedy.
135 *Id.* at 506.
136 *Id.* at 507.
137 MO. REV. STAT. § 1.205.1(1) (1986).
138 *Id.* at § 1.205.2.
139 *Id.* at § 1.205.3. Justice Blackmun, joined by Justices Brennan and Marshall,

In deciding that the challenge to the preamble does not involve a ripe controversy, Chief Justice Rehnquist refers to the Court's dictum in *Akron v. Akron Center for Reproductive Health*,[140] and reads that case for the proposition that "a State could not 'justify' an abortion regulation otherwise invalid under *Roe v. Wade* on the ground that it embodies that State's view about when life begins."[141] According to the *Webster* Court, Missouri's preamble does not regulate either abortion or any aspect of medical practice,[142] but simply reflects the state's value judgment favoring childbirth over abortion.[143]

Conversely, Justice Stevens's concurrence addresses the constitutionality of the preamble and declares it invalid for two reasons. First, he declares the preamble unconstitutional because it may have a substantial impact on a woman's freedom to use certain contraceptive procedures, such as the intrauterine device or the morning-after pill.[144] Secondly, Justice Stevens contends that the preamble violates the Establishment Clause of the First Amendment[145] because it incorporates what is essentially a religious theory of life.[146] Justice Stevens's arguments on the abortion context are worth close analysis to determine how they parallel arguments in the right-to-die context.

Justice Stevens's first argument is that Missouri's definition of conception as " 'the fertilization of the ovum of a female by a sperm of a male' " contradicts "standard medical texts" that

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concurred in part and dissented in part. Justice Blackmun takes direct aim on the preambulary language asserting that life begins at conception:

> In this case, moreover, because the preamble defines fetal life as beginning upon "the fertilization of the ovum of a female by a sperm of a male," § 188.015(3), the provision also unconstitutionally burdens the use of contraceptive devices, such as the IUD and the "morning after" pill, which may operate to prevent pregnancy only after conception as defined in the statute.

Webster, 492 U.S. at 539 n.1 (Blackmun, J., concurring in part and dissenting in part).

140 462 U.S. 416 (1983).

141 *Webster*, 492 U.S. at 506. Chief Justice Rehnquist alludes to the following language from *Akron*: "Subsection (3) requires the physician to inform his patient that 'the unborn child is a human life from the moment of conception,' a requirement inconsistent with the Court's holding in Roe v. Wade that a state may not adopt one theory of when life begins to justify its regulation of abortions." *Akron*, 462 U.S. at 444.

142 *Webster*, 492 U.S. at 506.

143 *Id.* at 563 (Stevens, J., concurring in part and dissenting in part).

144 *Id.*

145 *Id.* at 566-68 (Stevens, J., concurring in part and dissenting in part).

146 *Id.* at 566 n.9 (Stevens, J., concurring in part and dissenting in part).

equate conception with the implantation of a fertilized ovum in the uterus, which occurs six days after fertilization.[147] Missouri's definition of conception, then, would allow a state to regulate certain contraceptive devices or methods, such as the intrauterine device or the morning-after pill[148] - a result that Justice Stevens finds flatly impermissible under the Court's holding in *Griswold v. Connecticut*.[149]

Justice Stevens conflates the *Griswold* privacy argument with the Establishment Clause argument by asserting that there is no secular basis to distinguish between devices that prevent fertilization and those that prevent implantation.[150] Justice Stevens views the Missouri statute's preamble as invalid under *Griswold* precisely because the only basis for the preamble's position on the beginning of life is a theological one,[151] thus invalidating the preamble under both *Griswold* and the Establishment Clause.

After flatly stating that "the absence of any secular purpose for the legislative declarations that life begins at conception and that conception occurs at fertilization makes the relevant portion of the preamble invalid under the Establishment Clause,"[152] Justice Stevens contends that this conclusion does not rest on the coincidence of the preambulary language with the tenets of certain religions,[153] or on the religious motivations of some of the legislators who voted for it.[154] Rather, Justice Stevens asserts that the preamble violates the Constitution because it is "an unequivocal endorsement of a religious tenet of some but by no means all Christian faiths,"[155] and analogizes the Missouri preamble to a hypothetical law adopting St. Thomas Aquinas's views on male life beginning at 40 days after conception and female life beginning at 80 days after conception.[156]

Toward the end of his opinion, Justice Stevens makes a comment that is unintentionally very ironic. While chastising Missouri for "inject[ing] its endorsement of a particular religious

147 *Id.* at 563 (Stevens, J., concurring in part and dissenting in part).

148 *Id.*

149 *Id.* at 565 (Stevens, J., concurring in part and dissenting in part). *See* Griswold v. Connecticut, 381 U.S. 479 (1964).

150 *Webster*, 492 U.S. at 566 (Stevens, J., concurring in part and dissenting in part).

151 *Id.* at 566 n.9 (Stevens, J., concurring in part and dissenting in part).

152 *Id.* at 566 (Stevens, J., concurring in part and dissenting in part).

153 *Id.*

154 *Id.*

155 *Id.* (footnote omitted).

156 *Id.* at 567-68 (Stevens, J., concurring in part and dissenting in part).

tradition into this debate,"[157] Justice Stevens says that " '[t]he Establishment Clause does not allow public bodies to foment such disagreement.' "[158] Although it is obviously true that a state legislature could not base a law on the tenets of a given religion because it would create political divisiveness along religious lines, that same comment could be made of Justices who attempt to inject their own theories of life into the abortion or right-to-die cases.

One should also take issue with Justice Stevens for his essentially revisionist theory of jurisprudence that has, as its central component, the imposition of his view of morality, including his definition of life, on society. Indeed, Justice Stevens appears to be incorrect throughout his argument.

First, Justice Stevens seems to equate morality with theology. He argues that the Missouri preamble at issue in *Webster* is simply the state attempting to base its laws on a certain theological principle. Morality, however, is not always the same as religion or theology for constitutional purposes.[159] While it would obviously violate the Constitution for a state to enact into law the precepts of a certain religion,[160] thousands of laws exist that reflect the morality of the majority of citizens in different jurisdictions. Criminal laws, divorce laws, and laws against burglary or adultery are simply a few examples of secular laws that reflect the moral choices of the people who enacted them. It would be foolish to assert that laws reflecting morality are all to be struck down as violative of the Establishment Clause or due process analysis. As Chief Justice Rehnquist asserted recently:

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157 *Id.* at 571 (Stevens, J., concurring in part and dissenting in part) (footnote omitted).

158 *Id.* (citation omitted).

159 *See* Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456 (1991) (nude dancing); K-Mart Corp. v. Cartier, Inc., 485 U.S. 176 (1988) (importation of "gray-market" goods); Federal Communications Comm'n v. Pacifica Foundation, 438 U.S. 726 (1978) (regulation of indecent radio broadcast); Carey v. Population Services Int'l, 431 U.S. 678 (1977) (distribution and advertisement of contraceptives); Cohen v. California, 403 U.S. 15 (1971) (disturbing the peace); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963) (regulation of books "tending to the corruption of the youth").

160 *See* Edwards v. Aguillard, 482 U.S. 578 (1987); Grand Rapids School Dist. v. Ball, 473 U.S. 373 (1985); Thornton v. Caldor, Inc., 472 U.S. 703 (1985); Wallace v. Jaffree, 472 U.S. 38 (1985); Larson v. Valente, 456 U.S. 228 (1982); McDaniel v. Paty, 435 U.S. 618 (1978). *Compare* Employment Division v. Smith, 494 U.S. 872 (1990); Hernandez v. Commissioner, 490 U.S. 680 (1989); Witters v. Washington Dep't of Services for the Blind, 474 U.S. 481 (1986); Lyng v. Northwest Indian Cemetery Protective Ass'n, 485 U.S. 439 (1988); Mueller v. Allen, 463 U.S. 388 (1983); United States v. Lee, 455 U.S. 252 (1982).

> "The law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed."[161]

Even the rhetoric of Justice Stevens's argument is deceiving in the way that he conflates morality and theology. The proper distinction between the two is reflected in a footnote to Justice Stevens's *Cruzan* opinion. Arguing that legislatures, rather than courts, are more able to decide right-to-die questions, the Missouri Supreme Court enunciated: "[Representative assemblies] have vast fact and opinion gathering and synthesizing powers unavailable to courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, *morality*, philosophy, theology and law."[162]

The Missouri Supreme Court obviously considered morality and theology to be different concepts. This distinction seems to escape Justice Stevens, who insists on merging the two ideas to enable himself to focus on the theological component of his hybrid, thus invalidating the law on the basis of improper purpose. This is just one more trick in the bag of a Justice who is bound on imposing his vision of morality under the guise of constitutional principles.

Judge Robert Bork has discussed the linguistic and substantive techniques of judges who use the Constitution to read their value preferences into law. Judge Bork first asserts that "[a] judge inserting new principles into the Constitution tells us their origin only in a rhetorical, never an analytical style."[163] The absence of real analysis is, for Judge Bork, inevitable because the arguments of the revisionist judge reflect nothing more than the imposition of the moral choices and values of that judge. Judge Bork states:

> It is a commonplace that moral views vary both regionally within the United States and between socio-economic classes. It is similarly a commonplace that the morality of certain elites may count for more in the operations of government than that morality which might command the allegiance of a majority of the people. In no part of government is this more true than in the courts. An elite moral or political view may never be able to win an election or command the votes of a majority of a

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161 Barnes v. Glen Theatre, Inc., 111 S. Ct. 2456, 2462 (1991) (quoting Bowers v. Hardwick, 478 U.S. 186, 196 (1986)).

162 Cruzan v. Director, Missouri Department of Health, 110 S. Ct. 2841, 2889 n.23 (1990) (quoting Cruzan v. Harmon, 760 S.W.2d 408, 426 (Mo. 1988) (emphasis added)).

163 BORK, *supra* note 88, at 16.

> legislature, but it may nonetheless influence judges and gain the force of law in that way.[164]

Judge Bork's argument explains, to some extent, the attractiveness to some people (the losers in the democratic process) of arguments such as Justice Stevens's in *Webster* and *Cruzan*. Because the Justice's view of morality did not prevail at the ballot box, his theory of life or death can only be imposed as an *ipse dixit* in a judicial opinion.[165]

Once again, Judge Bork is quick to point out the problems with a judge creating and imposing a personal moral viewpoint as if it were really a constitutional imperative. The first problem, according to Judge Bork, is that "[t]here is no satisfactory explanation of why the judge has the authority to impose his morality upon us."[166] Judge Bork, of course, is not able to discern any principled justification for such an imposition, and concludes that "the explanations amount to little more than the assertion that judges have admirable capacities that we and our elected representatives lack."[167]

Judge Bork then discusses another, perhaps more basic "difficulty with a constitutional jurisprudence based on judicial moral philosophizing."[168] Judge Bork explains:

> In order to gain the assent of the public, the judges' explanation of why they are entitled to displace our moral choices with theirs would require that the judges be able to articulate a system of morality upon which all persons of good will and adequate intelligence must agree. If the basic institution of our Republic, representative democracy, is to be replaced by the rule of a judicial oligarchy, then, at the very least, we must be persuaded that there is available to the oligarchy a systematic moral philosophy with which we cannot honestly disagree. But if the people can be educated to understand and to accept a superior moral philosophy, there would no need for constitutional judges since legislation would embody the principles of that morality. It may be thought that moral-constitutional judging would still be required because legislators might misunderstand the application of the philosophy to particular issues. In that case, however, there would be no reason for courts to invalidate the legislation; they need only issue an opinion explaining the matter, and the legislation will be amended to conform. The courts need use coercion only if

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164 *Id.* at 16-17.

165 Justice Scalia has warned: "[H]e who lives by the *ipse dixit* dies by the *ipse dixit*." Morrison v. Olson, 487 U.S. 654, 726 (1988) (Scalia, J., dissenting).

166 BORK, *supra* note 88, at 252.

167 *Id.*

168 *Id.* at 253.

their moral philosophy is not in fact demonstrably superior.[169]

Because we do not all agree on a given moral system in general, or on the abortion or right-to-die issues in particular, Judge Bork was obviously correct - there is no universal (or even widespread) agreement on these matters, and there probably never will be.[170] Consequently, the question is whether these issues should be dealt with by judges or by legislatures. The choice should be obvious; legislators are more capable than judges of the in-depth fact-finding and study that is necessary to adequately consider and decide these questions. Although this proposition is clear, it is certainly not heeded by some Justices in the right-to-die context.

III. CRUZAN V. DIRECTOR, MISSOURI DEPARTMENT OF HEALTH

In *Cruzan v. Director, Missouri Department of Health*,[171] the Supreme Court ruled that Nancy Cruzan's parents had no authority to authorize or force the removal of artificial feeding and hydration equipment from their daughter because, as required by state law, there was no clear and convincing evidence of Nancy Cruzan's desire to have life-support systems removed under such circumstances.[172]

In 1983, twenty-five-year-old Nancy Cruzan was in a serious automobile accident that left her without respiratory or cardiac functions.[173] After revival, the state hospital detected that she suffered from anoxia for approximately 12 to 14 minutes, and that she also suffered cerebral contusions.[174] As a result, Cruzan remained in a coma for three weeks before "slipping into" a persistent vegetative state - that is, "a condition in which a person exhibits motor reflexes but evinces no indications of significant cognitive functions."[175] More specifically, all of Nancy Cruzan's

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169 *Id.*

170 The claim that moral philosophy cannot create primary rules, or major premises, that everyone will come to accept may be supported in two ways. The first reason to doubt that moral philosophy can ever arrive at a universally accepted system is simply that it never has. Or, at least, philosophers have never agreed on one. The revisionist theorists of the law schools are merely semi-skilled moral philosophers, and it seems all the more unlikely that they will succeed where for centuries philosophers of genius have failed. *Id.* at 254.

171 110 S. Ct. 2841 (1990).

172 *Id.* at 2845.

173 *Id.*

174 *Id.* Permanent brain damage usually occurs within 6 minutes after oxygen to the brain ceases. *Id.*

175 *Id.* Dr. Fred Plum, inventor of this term, defines this state as follows:

> Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains

limbs were "severely contracted; her fingernails cut into her wrists. [S]he [was] incontinent of bowel and bladder, [and] [t]he most intimate aspects of her existence [were] exposed to and controlled by strangers."[176] Although she was able to ingest food orally, the doctors nonetheless implanted a gastrostomy feeding and hydration tube to ease feeding.[177] Nancy was neither dead nor terminally ill, and it was established that she could have lived another thirty years on life support systems.[178] Due to the lack of revival or progress for six years, however, her parents sought a declaratory judgment to force the state-run hospital to terminate her life.[179]

The trial court ordered the withdrawal of artificial nutrition and hydration tubes. In doing so, the trial court determined that Cruzan had a fundamental right to terminate life support by "withdrawal of 'death prolonging procedures,' " and that her "quality of life" must be taken into account.[180] Furthermore, a housemate testified that Cruzan had stated she would not want to live in a vegetative state.[181] The United States Supreme Court

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> heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

Id. at 2845 n.1.

176 *Id.* at 2869 n.10 (Brennan, J., dissenting) (citation and footnote omitted).

177 *Id.* at 2845.

178 Cruzan v. Harmon, 760 S.W.2d 408, 411 (Mo. 1988).

179 *Cruzan*, 110 S. Ct. at 2846. Ironically, the State of Missouri withdrew its interest in the case. One commentator wrote:

> We can observe that the State of Missouri never had Nancy Cruzan's interests at heart only its own anti-abortion agenda. When it became clear to Missouri Attorney General William Webster, for example, that most people could distinguish an adult in a permanent coma from an embryo or fetus, he dropped his opposition to the Cruzan family. He announced on national television the day of the oral arguments before the U.S. Supreme Court that he agreed Nancy's parents should be able to make the decision about her medical treatment themselves. So when the parents went back to court, the State of Missouri had abandoned its hypocritical "unqualified" interest in Nancy's life.

George J. Annas, 19 LAW, MEDICAL & HEALTH CARE 56 (1991). Nancy Cruzan subsequently died on December 26, 1990, two weeks after the Probate Court, at this second hearing, permitted the removal of life support systems. This time, there was testimony from three co-workers that she did not want to "live like a vegetable." WILLIAM B. LOCKHART, ET AL., CONSTITUTIONAL LAW 558 n.1 (7th ed. 1991).

180 *Cruzan*, 110 S. Ct. at 2846. Additionally, the trial court held "that no state interest outweighed Nancy's 'right to liberty' and that to deny Nancy's co-guardians authority to act under these circumstances would deprive Nancy of equal protection of the law." *Cruzan*, 760 S.W.2d at 411.

181 *Cruzan*, 110 S. Ct. at 2874 n.19 (Brennan, J., dissenting).

agreed with the Supreme Court of Missouri's decision not to terminate Cruzan's life because there was neither a living will nor clear and convincing evidence that Cruzan would have wanted the life sustaining mechanisms removed.[182]

Cruzan involves a narrow issue. Indeed, the Court's grant of certiorari was limited to "whether [Nancy] Cruzan has a right under the United States Constitution which would require the hospital to withdraw life-sustaining treatment from her under these circumstances."[183] It should be emphasized that "[t]he majority in *Cruzan* did not establish a right to die."[184] As Professors Rotunda and Nowak have described it:

> Chief Justice Rehnquist only assumed that such a right existed for purposes of deciding the case. The opinions of four dissenting Justices, and the concurring opinion of Justice O'Connor, indicate that at least five Justices believed that there was a right of a mentally competent adult to refuse life-saving medical treatment or lifesaving nutrition. However, this was no majority opinion or ruling regarding the issue of whether a competent adult has a "right to die."[185]

It should also be pointed out that the *Cruzan* case is not simply that of a competent adult who chooses to forego artificial life-sup-

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[182] The Supreme Court of Missouri reversed the trial court for the following reasons:

> The court recognized a right to refuse treatment embodied in the common-law doctrine of informed consent, but expressed skepticism about the application of that doctrine in the circumstances of this case. The court also declined to read a broad right of privacy into the State Constitution which would "support the right of a person to refuse medical treatment in every circumstance," and expressed doubt as to whether such a right existed under the United States Constitution.

Id. at 2846 (quoting Cruzan v. Harmon, 760 S.W.2d 408, 416-18 (Mo. 1988) (en banc) (footnote and citation omitted). Moreover, the Missouri Supreme Court annunciated:

> [A] focus on prognosis as a basis for permitting the right-to-refuse treatment choice is problematic. Where the patient is not terminally ill, as here, the profoundly diminished capacity of the patient and the near certainty that the condition will not change leads inevitably to quality of life considerations. The argument made here, that Nancy will not recover, is but a thinly veiled statement that her life in its present form is not worth living. Yet a diminished quality of life does not support a decision to cause death.

Cruzan v. Harmon, 760 S.W.2d 408, 422 (Mo. 1988) (en banc).

[183] *Cruzan*, 110 S. Ct. at 2846.

[184] JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 18.30 (4th ed. 1991) [hereinafter NOWAK & ROTUNDA].

[185] *Id.* at 225-26 (footnotes omitted).

port systems.[186] Rather, it is a case involving the procedures that are constitutionally permitted or required when one is to decide whether to withdraw the life support systems of another. Professor Kamisar has argued that such a case "could be termed a 'right to kill' case as easily as it could be treated as 'right to die' case."[187]

Within this factual and legal context, it is critical to examine what the various Justices have articulated about the definition of life, both under the Missouri statutes involved and the Constitution. At this point, it is worth reemphasizing that *Cruzan* required the Court to deal with questions of life at the opposite end of the spectrum from the abortion context. We must try to determine if *Roe* and its progeny inform (or even dictate) the analysis in a case like *Cruzan*. Moreover, we must ultimately ask whether there is a spectrum involved at all, or whether the abortion and right-to-die issues involve only one question regarding the definition of life as it applies throughout the existence of a human being, from conception to death.

Chief Justice Rehnquist, writing for the majority,[188] first traces the common law doctrine of informed consent,[189] concluding that "[t]he logical corollary of the doctrines of informed consent is that the patient generally possesses the right not to consent, that is, to refuse treatment."[190] Even if there is a constitutionally-based right of a competent adult to refuse treatment, that right is not absolute.[191] As with any other constitutional right, whether it be fundamental or socio-economic,[192] abridgement may be justified by the assertion of a sufficiently important government interest - in this case, the state's interest in protecting life.

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186 *See* Yale Kamisar, *When Is There A Constitutional "Right to Die"? When Is There* No *Constitutional "Right to Live"?* 25 GA. L. REV. 1203 (1991); John A. Robertson, Cruzan *and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139 (1991).

187 NOWAK & ROTUNDA, *supra* note 184 at 222.

188 Chief Justice Rehnquist, writing for the Court, was joined by Justices White, O'Connor, Scalia, and Kennedy. Justices O'Connor and Scalia filed concurring opinions. Justice Brennan was joined by Justices Marshall and Blackmun, dissenting. Justice Stevens filed a dissenting opinion.

189 Cruzan by Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841, 2846-47 (1990).

190 *Id.* at 2847.

191 But "determining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests." *Id.* at 2851-52.

192 *See* Thomas W. Mayo, *Constitionalizing the "Right to Die,"* 49 MD. L. REV. 103, 126-28 (1990) [hereinafter Mayo].

Chief Justice Rehnquist then discusses the *Quinlan* case.[193] In that case, Karen Quinlan, having suffered severe brain damage as a result of anoxia, was also in a persistent vegetative state.[194] Her father sought court approval to remove her respirator, and the New Jersey Supreme Court granted his request.[195] In granting Mr. Quinlan the relief he sought, the New Jersey Supreme Court first recognized that Karen Quinlan had a federal constitutional right to refuse treatment,[196] but that her right had to be balanced against any countervailing state interest. The New Jersey Supreme Court ruled that the State's interest in preserving life " 'weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims.' "[197]

This judicially-announced calculus warrants close scrutiny, specifically in regard to the assertion that the state's interest diminishes as the patient's condition and prognosis deteriorate.[198] The assumption here is that the state's interest in preserving life changes because the life itself changes.[199] The life changes because it will not last very long, or because normal attributes of cognition, awareness, and responsiveness are severely diminished or nonexistent.

Even if that argument is true,[200] it produces two questions: Who should make that decision; and how should it be made? It is one thing for a state legislature, after conducting whatever fact finding is appropriate, to reach such a decision to reflect the legal, moral, cultural, and social wishes of its citizens.[201] It is an entirely

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193 In re Quinlan, 70 N.J. 10, 355 A.2d 647 (1976), *cert. denied sub nom.*, Garger v. New Jersey, 429 U.S. 922 (1976).

194 *Cruzan*, 110 S. Ct. at 2847.

195 *Id.*

196 *Id.* (citing *In re Quinlan*, 70 N.J. at 38-42, 355 A.2d at 662-64).

197 *Id.* (citing *In re Quinlan*, 70 N.J. at 41, 355 A.2d at 624).

198 *See* Philip G. Peters, Jr., *The State's Interest in the Preservation of Life: From* Quinlan *to* Cruzan, 50 OHIO ST. L.J. 891, 894-905 (1989) [hereinafter *Preservation of Life*].

199 *Quinlan*, 70 N.J. at 41, 355 A.2d at 664.

200 *Preservation of Life*, *supra* note 198, at 910-26.

201 For example, there are many areas in which the state exercises its police powers to maintain the health, safety, and welfare of its citizens. *See* Gary M. Bowman, *Judicial Ordering of Intergovernmental Roles in Hazardous Materials Transportation*, 18 TRANS. L. J. 31, 36-37 (1989) (listing those states which regulate the transportation of hazardous waste); John C. Fox and Bernadette M. Davison, *Smoking in the Workplace: Accommodating Diversity*, 25 CAL. W. L. REV. 215, 228 nn.69-81 (1989) (state bans on smoking in private workplaces); Neil V. McKittrick, *The Homeless: Judicial Intervention on Behalf of a Politically Powerless Group*, 16 FORDHAM URB. L.J., 389, 403-04, n.92 (1988) (states that have mandatory requirements to care for the needy); Janice K. O'Grady, *Minnesota's Seat Belt Evidence Gag Rule: Antiquated and Unfair in Crashworthiness Cases*, 15 WM. MITCHELL L. REV. 353, 375-78 (1989) (mandatory seat belt use laws); Kerry A. Trytek, *Physician Dispensing of Drugs Usurping the Pharmacist's Role*, 9 J. LEGAL MEDICINE 637, 637 n.1 (1988) (state regulations of board notice

different matter for a court, especially an unelected, life-tenured federal court to assert and impose such a definition of life as a constitutional requirement on the states. This notion, relied on by the New Jersey Supreme Court in *Quinlan*, creates the question of whether it is constitutionally permissible, or even possible, for a court to define life in such terms. This position forms the basis of the arguments of Justices Brennan and Stevens in the *Cruzan* case.[202]

The argument that the state's interest in the preservation of life decreases as the prognosis dims is central to another case cited by Chief Justice Rehnquist in *Cruzan*. In *Superintendent of Belchertown State School v. Saikewicz*,[203] the Supreme Judicial Court of Massachusetts allowed the withholding of chemotherapy from a profoundly retarded 67-year-old man suffering from leukemia.[204] Declaring the state's interest in the preservation of human life to be of paramount importance, the Massachusetts court asserted that this interest "was greatest when an affliction was curable, 'as opposed to the State interest where, as here, the issue is not whether, but when, for how long, and at what cost to the individual [a] life may be briefly extended.' "[205]

How does a court know this? Has the state declared that its interest does, in fact, decline as the quality and length of life decrease? Or has the court simply stated, as a policy matter or as a constitutional rule, that the state's interest so diminishes? If a court were to state this as a policy matter, it would clearly be overstepping its bounds.[206] If a court instead relies on the Constitution, it must state where that rule is based in the Constitution, and what princi-

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and approval, continuing education, disciplinary actions, access to prescriptions, and drug labelling); Jennifer Woodward, *Turning Down the Heat: What United States Laws Can Do to Help Ease Global Warming*, 39 AM. U.L. REV. 203, 218 n.123 (1989) (states that have implemented "the federal government's environmental impact review procedures" and those states that "use portions of environmental impact assessment techniques"); Thomas B. Griffen, Note, *Zoning Away the Evils of Alcohol*, 61 S. CAL. L. REV. 1373, 1409 n.230 (1988) (states that have a licensing process for zoning the place of alcohol sales); Thomas N. Osran, Legislative Note, *Illinois' Drug Induced Homicide Statute: A Tough State Just Got Tougher*, 9 N. ILL. U.L. REV. 537, 538 nn.5-8 (1989) (states that apply homicide laws to persons who sell drugs that cause death).

202 Cruzan by Cruzan v. Missouri Dep't of Health, 110 S. Ct. 2841, 2863 (Brennan, J., dissenting); *id.* at 2878 (Stevens, J., dissenting).

203 370 N.E.2d 417 (1977).

204 *Cruzan*, 110 S. Ct. at 2847 (Brennan, J., dissenting) (citing *Saikewicz*, 370 N.E.2d at 424).

205 *Cruzan*, 110 S. Ct. at 2847-48 (Brennan, J., dissenting) (citing *Saikewicz*, 370 N.E.2d at 426).

206 *See generally* TRIBE, *supra* note 78, at 23-208. *See also* Christopher A. Crain, *Judicial Restraint and the Non-Decision in* Webster v. Reproductive Health Services, 13

pled method of application is discernible from the Constitution. As Justice Scalia argues so persuasively in *Cruzan*,[207] neither the source nor the methodology for such a rule can be found in the Constitution. What the Massachusetts court did, and what some Justices argue for in *Cruzan*,[208] is simply to assert this variable state interest and proceed to apply it. As with the trimester framework in the abortion area, what we are left with is the judiciary arrogating to itself the power to declare and define a state's interest in human life and its preservation.

After canvassing state cases dealing with the issue of when artificial support systems may be terminated,[209] Chief Justice Rehnquist states that the question before the Court is simply "whether the United States Constitution prohibits Missouri from choosing the rule of decision which it did."[210] Conceding that the case does present the Court with the issue of whether there is a federal constitutional "right to die,"[211] Chief Justice Rehnquist reasserts the principle that "in deciding 'a question of such magnitude and importance . . . it is the [better] part of wisdom not to attempt, by any general statement, to cover every possible phase of the subject.' "[212] Having posited that rule of decision, the Chief Justice proceeds to the constitutional analysis of the issues before the Court.

For purposes of the *Cruzan* case, Chief Justice Rehnquist assumes that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition."[213] The Chief Justice then proceeds to analyze the competing governmental interest in the "protection and preservation of human life."[214]

Chief Justice Rehnquist first asserts the obvious - that "the Due Process Clause protects an interest in life."[215] He then makes a point that is clearly reminiscent of the abortion cases, namely, that there are some cases in which no family member will speak for or defend the right of the person in a persistent vegetative state (or the

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HARV. J.L. & PUB. POL'Y 263, 300 (1990) (proposing a "post-activist" model of judicial restraint "whereby the Court should return to a more limited role").

207 *Cruzan*, 110 S. Ct. at 2859 (Scalia, J., concurring).

208 *Id.* at 2863 (Brennan, J., dissenting); *id.* at 2878 (Stevens, J., dissenting).

209 *Id.* at 2847-51.

210 *Id.* at 2851.

211 *Id.*

212 *Id.* (citing Twin City Bank v. Nebeker, 167 U.S. 196, 202 (1897)).

213 *Id.* at 2852.

214 *Id.*

215 *Id.* at 2853.

fetus).[216] In those cases, or in cases in which no family member is even present, the Chief Justice opined that the state "is entitled to guard against potential abuses in such situations."[217]

As a method of avoiding abuses of a person's right to life in a *Cruzan* situation, Chief Justice Rehnquist asserts that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual."[218]

Chief Justice Rehnquist simply opines that it is up to a state, not a court, to assert the preservation and protection of life as a governmental interest, and that nothing in the Constitution requires a state (or allows a court) to calibrate the importance of a particular life as a function of the length or enjoyability of that life. Indeed, this is the same position taken by Justice O'Connor and Chief Justice Rehnquist in the abortion area.[219] Specifically, Justice O'Connor and the Chief Justice posit that the Constitution leaves it to a state to assert and define its interest in protecting and preserving life, even if it is "potential" life. Chief Justice Rehnquist's position on this point comports perfectly with the state's ability to assert its interest in potential human life as existent throughout pregnancy.[220] Moreover, this position acknowledges and respects the different fact-finding and decision-making roles of legislatures and courts.[221]

Chief Justice Rehnquist goes on to argue that Missouri's legitimate assertion of an unqualified interest in the life of a person such as Nancy Cruzan allows it to "place an increased risk of an erroneous decision on those seeking to terminate an incompetent individual's life-sustaining treatment"[222] by imposing the clear and convincing evidentiary requirement on those who wish to disconnect life support systems.[223]

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216 *Id.*

217 *Id.*

218 *Id.*

219 *See supra* notes 80-85, 134-39 and accompanying text.

220 *See supra* note 85 (Justice Rehnquist joining Justice O'Connor's dissent in *Akron*); notes 134-37 (implied through Justice Rehnquist's refusal to adjudicate the constitutionality of the Act's preamble in *Webster*).

221 *See* Robert E. Crawford, *Neurologic Syndromes and Prolonged Survival: When Can Artificial Nutrition and Hydration be Forgone?* 19 LAW, MEDICINE & HEALTH CARE 13, 14-15 (1991) (chart demonstrating the differences and similarities of major neurologic syndromes).

222 *Cruzan*, 110 S. Ct. at 2854.

223 *Id.* Justice Rehnquist espoused: "In sum, we conclude that a State may apply a clear and convincing evidence standard in proceedings where a guardian seeks to

In a concurring opinion, Justice Scalia emphasizes that the opinions of certain Justices in *Cruzan* resonate strongly with some of the Court's abortion decisions.[224] Justice Scalia articulates that "[t]he federal courts have no business in this field,"[225] and that

> the point at which life becomes "worthless," and the point at which the means necessary to preserve it become "extraordinary" or "inappropriate," are neither set forth in the Constitution nor known to the nine Justices of this Court any better than they are known to nine people picked at random from the Kansas City telephone directory.[226]

Justice Scalia contends that it is up to the citizens of Missouri, through their elected representatives, to decide life-and-death matters. Justice Scalia specifically disclaims any special knowledge or insight of judges to make these determinations.[227] Other Justices, however, suffer no such compunctions.

In separate dissents, Justice Brennan[228] and Justice Stevens make some compelling, even eloquent, arguments regarding the quality of life at different stages of deterioration in the persistent vegetative state.[229] The problem is that these arguments are not constitutional imperatives, but merely policy choices or philosophical positions which states may adopt or reject.[230] It must be remembered that the question is not whether these definitions of life at varying stages are accurate or even desirable as social policy; the question is who should make these decisions — the state, as a

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discontinue nutrition and hydration of a person diagnosed to be in a persistent vegetative state." *Id.*

224 *Id.* at 2859 (Scalia, J., concurring). Justice Scalia opines:

> I am concerned, from the tenor of today's opinions, that we are poised to confuse that enterprise as successfully as we have confused the enterprise of legislating concerning abortion — requiring it to be conducted against a background of federal constitutional imperatives that are unknown because they are being newly crafted from Term to Term. That would be a great misfortune.

Id.

225 *Id.*

226 *Id.*

227 *Id.* The Justice states: "It is quite impossible (because the Constitution says nothing about the matter) that those citizens will decide upon a line less lawful than the one we would choose; and it is unlikely (because we know no more about 'life-and-death' than they do) that they will decide upon a line less reasonable." *Id.*

228 Justice Brennan's opinion was joined by Justices Marshall and Blackmun.

229 *See infra* notes 232-89 and accompanying text.

230 Addressing the dissenting opinions, Justice Scalia posits: "The dissents of Justices Brennan and Stevens make a plausible case for our intervention here only by embracing — the latter explicitly and the former by implication — a political principle that the States are free to adopt, but that is demonstrably not imposed by the Constitution." *Cruzan*, 110 S. Ct. at 2862 (Scalia, J., concurring).

representative of its people, or a court. To choose the latter, two important constitutional decisions must be made. First, a state must, as a constitutional matter, be precluded from making these decisions. Second, the court must, as a constitutional matter, be required to make them. Neither argument is tenable under the Constitution.

It is worthwhile to examine the arguments of Justices Brennan and Stevens to see their methodologies for what they really are — an attempted judicial imposition of a theory of life that is not based in the Constitution. One should also consider the similarities between the approach espoused here and the analysis of the *Roe* trimester framework.[231] This similarity of approach is not coincidental. It reflects, rather, an attempt by certain Justices to constitutionalize their visions of desirable social policy.

Justice Brennan begins his dissent with a compelling quote from a state case: "Medical technology has effectively created a twilight zone of suspended animation where death commences while life, in some form, continues."[232] Although this proposition is undoubtedly true, it does not support the position that an unelected federal judiciary, with its limited fact-finding resources,[233] is either capable or constitutionally authorized to enter the twilight zone and try to decipher the signposts lurking therein. If the state of existence inside a persistent vegetative state can be plumbed, it is clear that this is a medical or moral activity, not a judicial one.

Indeed, the Court's competence in the right-to-die cases is at an even lower level than it is in the abortion area. At least in the abortion cases, the gestational process is relatively uniform, the physical and neurological attributes of a fetus can be discerned with relative specificity,[234] and a case is limited to the possible length of a preg-

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231 *See supra* at page 69.

232 Cruzan, 110 S. Ct. at 2863 (Brennan, J., dissenting) (quoting Rasmussen v. Fleming, 741 P.2d 674, 678 (1987) (en banc)).

233 *See* David L. Faigman, *"Normative Constitutional Fact-Finding": Exploring the Empirical Component of Constitutional Interpretation*, 139 U. PA. L. REV. 541, 581 (1991) ("When empirical research is available but contradictory, the Court misconstrues or rejects it in order to follow its own predilections. When empirical research is unavailable, the Court still follows its own predilections, although sometimes expressing regret that no data exist to assist it.").

234 *See* Jed Rubenfeld, *On the Legal Status of the Proposition that "Life Begins at Conception,"* 43 STAN. L. REV. 599, 617-20 (1991) (describing the formation of life). *See also* Ronald E. Cranford & David Randolph Smith, *Consciousness: The Most Critical (Constitutional) Standard for Human Personhood*, 13 AM. J. L. & MED., 233, 239 (1987) [hereinafter *Consciousness*]. Cranford and Smith state:

> We believe there are more similarities relating to consciousness between the end of life and the beginning of life than previously appre-

nancy. Persistent vegetative states, however, are not as uniform,[235] and create almost intractable problems of diagnosis and prognosis.[236] Common sense counsels that a committee of nine lawyers, five of whom can carry the day in any given case or area, should not enter an area in which they are neither trained nor capable of any more insight or wisdom than any other person who is not proficient in medicine or ethics. Justices Brennan and Stevens, however, do not share the reticence.

> ciated. If this is the case, the arguments concerning when human personhood ends will have significant impact on when human personhood begins during gestation. One important potential legal implication of this view could be that the most critical constitutional threshold during pregnancy for recognizing fetus rights over maternal rights is the point at which the fetus develops consciousness, albeit minimal, and the capacity to experience pain and suffering, rather than at the point of viability or birth. *Roe v. Wade* should have focused more on consciousness, not viability, as the more crucial threshold for the balance between maternal and fetus rights.

Id. (footnotes omitted).

235 *See* Charles H. Baron, *Why Withdrawal of Life-Support for PVS Patients Is Not a Family Decision*, 19 LAW, MED. & HEALTH CARE 73 (1991) (Medical experts are "current[ly] [unable] to diagnose irreversible PVS with the same degree of certainty with which it can currently diagnose irreversible brain stem dysfunction or irreversible cardio-pulmonary arrest."); *Consciousness*, *supra* note 234, at 237-39. The three types of "permanently unconscious patients" include: First, those in a persistent vegetative state. Classic symptoms of this prototype include "eyes-open unconsciousness" and apparent sleep/wake cycles. Second, those patients in a "true coma" state, meaning that they are "terminally ill." These patients experience "eyes-open unconsciousness, gag and cough reflexes and impaired respiration." And third, are anencephalic infants which are infants without "cerebral hemispheres" but with a "functioning brain stem." Often times these infants are diagnosed with "eyes-open unconsciousness." *Id. See also Persistent Vegetative State and the Decision to Withdraw or Withhold Life Support*, 263 JAMA 426, 427-28 (1990) (discussing clinical criteria and differential diagnosis); *Position of the American Academy of Neurology on Certain Aspects of the Care and Management of the Persistent Vegetative State Patient*, 39 NEUROLOGY 297 (1989) (criteria for PVS patients adopted by the American Academy of Neurology).

236 Consider the following quote by Professor Mayo, writing just before *Cruzan* was decided:

> [M]y suggestion that the Court not federalize the "right to die" actually is consistent with the Courts intervention on the abortion front. In its abortion case, the Court has attempted to eliminate efforts by the states - efforts both crude (criminalization) and subtle (regulation) - to override evolving standards of medical practice and medical ethics with respect to abortion. The Court has done this by, among other things, protecting independent, professional judgment from excessive interference by the states. In this regard, the Court can be seen as protecting the primary right to choose an abortion by freeing the sphere of medical judgment and medical practice from unduly restrictive governmental interference.

Mayo, *supra* note 193, at 151 (footnote omitted).

After passionately and eloquently describing the plight and condition of a person in a persistent vegetative state,[237] Justice Brennan turns to the asserted state interest in the *Cruzan* case. Justice Brennan starts (and ends) with the proposition that "no State interest could outweigh the rights of an individual in Nancy Cruzan's position."[238] This is true, according to Justice Brennan, because "[t]he only state interest asserted here is a general interest in the preservation of life. But the State has no legitimate general interest in someone's life, completely abstracted from the interest of the person living that life, that could outweigh the person's choices to avoid medical treatment."[239]

Justice Brennan is defining the state's interest derivatively; the state's interest in the preservation and protection of life is a function of the quality of life of the individual involved in the case. An individual's quality of life, once defined, determines the nature and importance of the state's interest. Once Justice Brennan decides that Nancy Cruzan's life is not worth living, it must follow that there is no significant state interest in preserving that life. The logic is sound, albeit circular, but the premise is faulty. There is no constitutional reason why a Court should make the first determination — that of the intrinsic worth or worthlessness of a certain person's life. If the Court cannot make that initial determination, it cannot define and calibrate the state's interest in the preservation or protection of life.

The fatal flaw in Justice Brennan's argument is the arrogation to the Court of the ability to define the quality of Nancy Cruzan's life. Despite protestations to the contrary,[240] that is precisely what Justices Brennan and Stevens do in *Cruzan*. To compound their er-

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237 *Cruzan*, 110 S. Ct. at 2868 (Brennan, J., dissenting). Justice Brennan avers:

> Dying is personal. And it is profound. For many, the thought of an ignoble end, steeped in decay, is abhorrent. A quiet, proud death, bodily integrity intact, is a matter of extreme consequence. "In certain, thankfully rare, circumstances the burden of maintaining the corporeal existence degrades the very humanity it meant to serve." Brophy v. New England Sinai Hospital, Inc., 398 Mass. 417, 434, 497 N.E.2d 626, 635-636 (1986) (finding the subject of the proceeding "in a condition which [he] has indicated he would consider to be degrading and without human dignity" and holding that "[t]he duty of the State to preserve life must encompass a recognition of an individual's right to avoid circumstances in which the individual himself would feel that efforts to sustain life demean or degrade his humanity.").

Cruzan, 110 S. Ct. at 2868 (Brennan, J., dissenting).

238 *Id.* at 2869 (Brennan, J., dissenting).

239 *Id.* at 2870 (Brennan, J., dissenting) (footnote omitted).

240 *See supra* notes 229-33 and accompanying text.

ror, they then use their own evaluation of the quality of Nancy Cruzan's life to ascribe constitutional weight to the professed state interest. Justice Rehnquist has referred to a "cascade of presumptions" in another context,[241] and that phrase seems especially apt here.

Justice Brennan asserts that "[t]here is simply nothing legitimately within the State's purview to be gained by superseding [Nancy Cruzan's] decision. Moreover, there may be considerable danger that Missouri's rule of decision would impair rather than serve any interest the State does have in sustaining life."[242]

Justice Brennan's fear is that, because of the extreme difficulty in withdrawing life-support systems once a patient has been hooked up, health care professionals might be reluctant to start the life-support systems in the first place.[243] Although this may be true in some cases,[244] the possibility of abuse reflects nothing about the existence or importance of the state's interest, or the constitutional propriety of the state being able to speak for itself in this area. It simply does not follow that, because of the possibility of problems in the implementation of a life-support system, the underlying state interest is of less or no constitutional significance.

Justice Brennan concedes that the state may have a legitimate interest in a case like *Cruzan*. Once again rejecting the asserted unqualified state interest in preserving life,[245] Justice Brennan asserts that "if and when it is determined that Nancy Cruzan would want to continue treatment, the State may legitimately assert an interest in providing that treatment."[246] Until her wishes have been determined, however, the only state interest that may be asserted is the "*parens patriae* interest in providing Nancy Cruzan, now incompetent, with as accurate as possible a determination of how she would exercise her rights under these circumstances."[247]

Justice Brennan's argument reduces the state's role to that of a

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241 *See* Dayton Board of Education v. Brinkman, 443 U.S. 526, 542 (1979) (Rehnquist, J., dissenting) (referring to the majority's presumption in finding segregation within the schools).

242 *Cruzan*, 110 S. Ct. at 2870 (Brennan, J., dissenting).

243 *Id.*

244 *See id.* (quoting PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICINE AND BIOMEDICAL BEHAVIOR RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 75 (1983)).

245 Justice Brennan opines: "Missouri has no legitimate interest in providing Nancy with treatment until it is established that this represents her choice." *Id.* at 2872 (Brennan, J., dissenting).

246 *Id.* at 2871 (Brennan, J., dissenting).

247 *Id.*

procedural caretaker whose only function is to provide an accurate framework in which to try to ascertain the wishes of Nancy Cruzan. This conception of the state's role disallows it from asserting any independent, substantive interest of its own, such as the right to life of its citizens.[248] This is an extremely narrow view of a state's police powers,[249] and it effectively removes a state as an independent party in the process of administering life-support systems to its disabled citizens.

Justice Brennan simply cannot be correct when he asserts that "Missouri has no legitimate interest in providing Nancy with treatment until it is established that this represents her choice."[250] Both ethical standards of the medical profession[251] and common sense mandate that a state has an interest, if not an obligation,[252] to put

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248 *See* Thomas A. Eaton & Edward J. Larson, *Experimenting with the "Right to Die" in the Laboratory of the States*, 25 GA. L. REV. 1253, 1298 n.243 (1991) (42 states have living will statutes). *See also* M. Rose Gasner, *The Unconstitutional Treatment of Nancy Cruzan*, 7 N.Y.L. SCH. J. HUM. RTS. 1, 17 n.82 (1990) (states that have not enacted "Living Will" statutes have a durable power of attorney provision).

249 *See* Louise A. Halper, *Christopher G. Tiedeman, 'Laissez-Faire Constitutionalism' and the Dilemmas of Small-Scale Property in the Gilded Age*, 51 OHIO ST. L.J. 1349, 1360 (1990) ("The idea of a *limited* police power made room for the new doctrines of substantive due process and liberty of contract to serve as the underlying rationales of limitation."); David J. Zampa, Note, *The Supreme Court's Abortion Jurisprudence: Will the Supreme Court Pass the "Albatross" Back to the States?*, 65 NOTRE DAME L. REV. 731, 732 n.6 (1990) (discussing the battle between the states and the Court in the context of abortion). *See also* TRIBE, *supra* note 78, at 380-83 (discussing dual sovereignty).

250 *Cruzan*, 110 S. Ct. at 2872 (Brennan, J., dissenting).

251 *See* Gregory A. Jaffe, *Institutional Ethics Committees: Legitimate and Impartial Review of Ethical Health Care Decisions*, 10 J. LEGAL MED. 393 (1989); Irene P. Loftus, Note, *I Have a Conscience, Too: The Plight of Medical Personnel Confronting the Right to Die*, 65 NOTRE DAME L. REV. 699 (1990); Stephen G. Potts, *Looking For the Exit Door: Killing and Caring in Modern Medicine*, 25 HOUS. L. REV. 493 (1988).

252 For example, 42 U.S.C.A. § 1395dd (West Supp. 1992) provides:

> (a) Medical screening requirement:
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> In the case of a hospital that has a hospital emergency department, if any individual (whether or not eligible for benefits under this subchapter) comes to the emergency department and a request is made on the individual's behalf for examination or treatment for a medical condition, the hospital must provide for an appropriate medical screening examination within the capability of the hospital's emergency department, including ancillary services routinely available to the emergency department, to determine whether or not an emergency medical condition (within the meaning of subsection (e)(1) of this section exists.
>
> (b) Necessary stabilizing treatment for emergency medical conditions and labor
>
> (1) In general
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> If any individual (whether or not eligible for benefits under this subchapter) comes to a hospital and the hospital determines that

life-support systems in place for a person who has been in an accident, has not expressed her wishes, and has no family member or other surrogate available to aid in that decision. The claim that a state has "no legitimate interest" in providing treatment, over and above that of providing a fair procedure, cannot be taken seriously.

Justice Brennan attempts to deal with this argument by asserting that "a State generally must either repose the choice with the person whom the patient himself would most likely have chosen as proxy or leave the decision to the patient's family."[253] The Justice asserts that, where it is impossible to tell what choice an incompetent person would make, the state simply does not have a *parens patriae* interest in making the choice itself.[254]

Again Justice Brennan overargues. The Constitution itself provides a right to life in the Fifth and Fourteenth Amendments.[255] The presumption from the text must be that life exists and must be maintained, and that a state has the burden of justification in terminating it.[256] Justice Brennan turns this argument on its head. Under Justice Brennan's approach, a state may not even assert an independent constitutional interest in the life of one of its citizens. In view of the Fifth and Fourteenth Amendments, this approach is, at best, an anomaly.

When Justice Brennan challenges the constitutionality of Missouri's clear and convincing evidence standard, the Justice again tips his hand regarding his attempted imposition of a theory of life, including value judgments about the quality of that life.[257] The *Cruzan*

> the individual has an emergency medical condition, the hospital must provide either -
> (A) within the staff and facilities available at the hospital, for such further medical examination and such treatment as may be required to stabilize the medical condition, or
> (B) for transfer of the individual to another medical facility in accordance with subsection (c) of this section.

Id.

See also Judith Waxman and Stan Dorn, *States Take the Lead in Preventing Patient Dumping*, 22 CLEARINGHOUSE REV. 136 (1988); Ellen Covner Weiss, *The Effect of the Treatment Setting on the Decision-Making Process: Acute Care Hospitals and Emergency Service*, 19 LAW, MED. & HEALTH CARE 66 (1991).

253 *Cruzan*, 110 S. Ct. at 2877 (Brennan, J., dissenting) (footnotes omitted).

254 *Id.*

255 U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."); U.S. CONST. amend. XIV, § 1 (No state "shall deprive any person of life, liberty, or property, without due process of law. . . .").

256 *See* James Bopp, Jr. & Thomas J. Marzen, *Cruzan: Facing the Inevitable*, 19 LAW, MED. & HEALTH CARE 37 (1991).

257 *Cruzan*, 110 S. Ct. at 2872-74 (Brennan, J., dissenting).

majority upholds the heightened evidentiary standard as an appropriate allocation of the risk of error.[258] According to the majority, a requirement of clear and convincing evidence is appropriate because an erroneous decision to terminate life-support systems is irrevocable — the patient dies.[259] According to Justice Brennan, however, an erroneous decision in the other direction is also irrevocable, despite the result that the patient remains alive. To Justice Brennan, "remaining alive" is not enough if maintaining the life-support system "robs a patient of the very qualities protected by the right to avoid unwanted medical treatment. [The patient's] own degraded existence is perpetuated; his family's suffering is protracted; the memory he leaves behind becomes more and more distorted."[260]

Although these observations are frequently accurate in some contexts, they are inappropriate here. Where in the Constitution are federal judges given the power to define life based on their perception of its quality? Justice Brennan makes compelling, eloquent arguments about the emotional and psychological legacy of a loved one left to linger too long on machines. These arguments, however, are not properly within the judicial province. The people of the states, as well as the legislators who represent them, also think and feel these emotions.[261] The commonality, or even universality, of an idea or emotion does not transform that idea or emotion into a constitutional imperative. It may very well, however, transform the idea or emotion into legislation reflecting the will of all those people

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258 *Id.* at 2854.

259 *Id.*

260 *Id.* at 2873 (Brennan, J., dissenting).

261 *See* LOCKHART, *supra* note 179, at 356 n.2 (quoting West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) ("The Legislature was entitled to adopt measures to reduce the evils of the 'sweating system' the exploiting of workers at wages so low as to be insufficient to meet the bare cost of living, thus making their very helplessness the occasion of a most injurious competition. [Even] if the wisdom of the policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment."). *Compare* Ben A. Rich, *The Assault on Privacy in Health Care Decisionmaking*, 68 DENV. U. L. REV. 1 (1991). Professor Rich states:

> Behind [the] principle of a democratic government is the basic concept that the individual, not the State, ought to be the supreme judge of his own best interests. This is an essential aspect of self-determination. The "moral fact" that a person belongs to himself and not to the state is undermined by a routine balancing of state interests in an effort to determine whether a patient's refusal of consent to medical treatment should be upheld.

Id. at 32 (footnotes omitted).

who share the position in question.[262] What Justice Brennan's argument ultimately boils down to the quality of life experienced by a person such as Nancy Cruzan. This, once more, is not a judicial call, but a legislative one.

Justice Stevens also dissents in *Cruzan*, and many of the Justice's arguments reveal his bias towards a particular theory of life. Many of his positions also shed a great deal of light on the Court's analysis of the abortion cases, and suggest that perhaps certain Justices have a unified theory of life that they apply irrespective of the stage of human existence.[263] It is perfectly clear from Justice Stevens's opinion, however, that he is unabashedly advocating a particular definition of life.

Early in his opinion, Justice Stevens asserts that "the constitutional protection for the human body is surely inseparable from concern for the mind and spirit that dwell within."[264] Is Justice Stevens suggesting that judges are capable of discerning the nature of the mind and spirit within us, and engaging in the calculus of which of the three entities - mind, spirit, body - is in the ascendance or

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262 *See* Michael H. v. Gerald D., 491 U.S. 110 (1989). In *Michael H.*, Justice Scalia articulates:

> That the Court has ample precedent for the creation of new constitutional rights should not lead it to repeat the process at will. The Judiciary, including this Court, is the most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or even the design of the Constitution. Realizing that the present construction of the Due Process Clause represents a major judicial gloss on its terms, as well as on the anticipation of the Framers . . . the Court should be extremely reluctant to breathe still further substantive content into the Due Process Clause so as to strike down legislation adopted by a State or city to promote its welfare. Whenever the Judiciary does so, it unavoidably pre-empts for itself another part of the governance of the country without express constitutional authority.

Id. at 122 (quoting Moore v. City of East Cleveland, 431 U.S. 494, 544 (1977) (White, J., dissenting)).

263 Professor Tribe has made this argument:

> The logic of the right-to-die controversy will not necessarily have any close encounter with the logic of the abortion debate. Yet much like arguments over abortion, right-to-die disputes may, in the end, pit the value of preserving life against the value of avoiding grotesque technological intrusions. At bottom there is a similarity between the state's decision to lay hands on the intimate and delicate matter of life's reproduction and the state's decision to have the last word on the personal and subtle matter of life's termination. A woman's right to decide if and how to give birth thus shares a common root with the right to avoid the demeaning tangle of state-mandated technology that has become death's least human face.

LAURENCE H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES 231 (1990).

264 *Cruzan*, 110 S. Ct. at 2885 (Stevens, J., dissenting).

descendance? This seems to be an overly ambitious perception of the role and abilities of judges.

At this point, as at others in Justice Stevens's opinion, it is useful to ask whether his comments apply to the abortion context as well. Does the trimester framework of *Roe* presuppose, as a constitutional matter, that the state's interest in potential human life depends on the variable and relative developments of the mind, spirit, and body of the fetus? If so, what neutral constitutional principle allows a court to proclaim what the state's interest is at a certain point of gestation? Obviously, there is none. Justice Stevens's comment in *Cruzan* bespeaks a sympathy toward a certain theory of life that he simply tries to dress up in constitutional garb and apply in the abortion or right-to-die context.

The extraconstitutional nature of Justice Stevens's approach is evidenced by another argument. First, Justice Stevens very eloquently asserts that "[w]e may also, however, justly assume that death is not life's simple opposite, or its necessary termination, but rather its completion."[265] At this point, Justice Stevens drops a footnote that is very revealing:

> Many philosophies and religions have, for example, long venerated the idea that there is a "life after death" and that the human soul endures even after the human body has perished. Surely Missouri would not wish to define its interest in life in a way antithetical to this tradition.[266]

Is Justice Stevens saying that Missouri must define its interest in life to conform with the philosophical and religious view that the human soul survives the body? Certainly that cannot be a constitutional requirement. Indeed, it may very well create Establishment Clause violations if a state were to base a law on those principles.[267] In any event, it simply cannot be that a judge or court is capable of or empowered to make such judgments, even if those judgments are dressed up as assertions about the interest of a state in life or potential human life.

A major part of Justice Stevens's opinion is devoted to chastising the state of Missouri for what the Justice calls its "effort to define life, rather than to protect it."[268] After conceding that "Nancy Cruzan is obviously *'alive'* in a physiological sense,"[269] Justice Stevens complains that "[t]he State's unflagging determination to per-

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265 *Id.* (footnote omitted).
266 *Id.* at 2885 n.15 (Stevens, J., dissenting).
267 *See supra* notes 150-58.
268 *Cruzan*, 110 S. Ct. at 2886 (Stevens, J., dissenting).
269 *Id.* (emphasis in original).

petuate Nancy Cruzan's physical existence is comprehensible only as an effort to define life's meaning, not as an attempt to preserve its sanctity."[270]

Assuming that is true, there is nothing constitutionally improper about a state attempting to define life in these circumstances.[271] Justice Stevens asserts: "[F]or patients like Nancy Cruzan, who have no consciousness and no chance of recovery, there is a serious question as to whether the mere persistence of their bodies is 'life' as that word is commonly understood, or as it is used in both the Constitution and the Declaration of Independence."[272] Although this is indeed a serious question, one important issue still remains: Who should answer the question, courts or legislatures? As between those two, legislatures are clearly the more competent body to decide the question of the definition of life. Legislatures possess the fact-finding resources that courts do not, and legislatures, under their police power,[273] are charged with protecting their citizens' lives.

Justice Stevens, or Justice Brennan for that matter, would respond that positing the two possible decision-makers as the state or a court creates a false choice.[274] A third party who might make the decision, of course, is Nancy Cruzan herself. This sounds like a reasonable option, but it is too simplistic. Nancy Cruzan, after all, is not able to make any choice because of her condition. In this kind of case, someone else must decide — but it should not be a court. Any decision made, for example by a surrogate decisionmaker, must be made against the backdrop of a state's definition of life. To argue otherwise would allow each person, free from state interference, to define life (and death) strictly on a personal basis, thus al-

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270 *Id.*

271 Justice Scalia makes the same point from a different perspective: "American law has always accorded the State the power to prevent, by force if necessary, suicide - including suicide by refusing to take appropriate measures necessary to preserve one's life." *Id.* at 2859 (Scalia, J., concurring).

272 *Id.* at 2886 (Stevens, J., dissenting) (emphasis in original) (footnote omitted).

273 *See* WILLIAM N. ESKRIDGE, JR. & PHILIP P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988).

274 Justice Brennan states: "The rule that the Missouri court adopted and that this Court upholds, skews the result away from a determination that as accurately as possible reflects the individual's own preferences and beliefs. It is a rule that transforms human beings into passive subjects of medical technology." *Cruzan*, 110 S. Ct. at 2876 (Brennan, J., dissenting). Furthermore, Justice Brennan opines: "[I]n these unfortunate situations, the bodies and preferences and memories of the victims do not escheat to the State; nor does our Constitution permit the State or any other government to commandeer them. No singularity of feeling exists upon which such a government might confidently rely as *parens patriae*." *Id.* at 2878 (Brennan, J., dissenting).

lowing suicide, assisted suicide, or euthanasia in any variety of circumstances.[275]

Justice Scalia responds to this argument by tracing the development of the common law prohibiting suicide and assisted suicide.[276] After positing that " 'there is no significant support for the claim that a right to suicide is so rooted in our tradition that it may be deemed "fundamental" or "implicit in the concept of ordered liberty,' "[277] Justice Scalia concludes that "the power of the state to prohibit suicide is unquestionable."[278]

Justice Stevens forthrightly responds to Justice Scalia's concern by arguing the following:

> Choices about death touch the core of liberty. Our duty, and the concomitant freedom, to come to terms with the conditions of our own mortality are undoubtedly "so rooted in the tradition and conscience of our people as to be ranked as fundamental," and indeed are essential incidents of the unalienable rights to life and liberty endowed us by our Creator.[279]

A natural law right to suicide? This is a strange argument to make when attempting to illuminate the contours of life, as opposed to attempting to define it. One thing is clear from Justice Stevens's argument: The Justice is not as upset about Missouri's attempt to define life as he is with the definition Missouri chose. Justice Stevens would not complain if Missouri's substantive definition of life was based on his definition of life, including the fundamental right of an individual to make choices about death. It is disingenuous to attack the legitimacy of a state's definition of life and then to substitute another, court-created definition.

After referring to the "oddity"[280] of Missouri's definition of life, Justice Stevens discusses various common meanings of the term "life." According to Justice Stevens, the "shared thread" among these opinions is that "life is an activity which is at once the matrix for and an integration of a person's interests."[281] Justice Stevens

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275 *See* Edward R. Grant & Cathleen A. Cleaver, *A Line Less Reasonable: Cruzan and the Loom? Debate Over Active Euthanasia*, 12 MD. J. CONTEMP. LEGAL ISSUES 99 (1991); Yale Kamisar, *Some Non-Religious Views Against Proposed "Mercy-Killing" Legislation*, 42 MINN. L. REV. 969 (1958); Eric Harrison, *'Dr. Death' Keeps Low Profile After 2 Women's Deaths*, L.A. TIMES, Oct. 25, 1991, at 4, Pt. A Col. 2; Elisabeth Rosenthal, *In Matters of Life and Death, The Dying Take Control*, N.Y. TIMES, Aug. 18, 1991, § 4, at 1.

276 *Cruzan*, 110 S. Ct. at 2860-63 (Scalia, J., concurring).

277 *Id.* at 2860 (Scalia, J., concurring) (citation omitted).

278 *Id.* at 2863 (Scalia, J., concurring).

279 *Id.* at 2885 (Stevens, J., dissenting) (citation omitted).

280 *Id.* at 2886 (Stevens, J., dissenting).

281 *Id.* at 2887 (Stevens, J., dissenting).

concludes that "the idea of life is not conceived separately from the idea of a living person."[282] The Justice then asserts that such a separation is precisely what Missouri has done, and that "[t]he resulting definition is uncommon indeed."[283] Uncommonness, however, does not equal unconstitutionality. It is clear that Justice Stevens disagrees strongly with Missouri's attempt to define life, or at least to protect it in the manner chosen by the state, but it is not clear why that disagreement necessarily leads to the conclusion that the Missouri law is unconstitutional.

Focusing on Nancy Cruzan's own interest in her life as it exists while she is in a persistent vegetative state, Justice Stevens confidently asserts that "[t]here is no reasonable ground for believing that Nancy Beth Cruzan has any *personal* interest in the perpetuation of what the State has decided is her life."[284] At what point in a person's comatose or persistent vegetative state can that be said?[285] There are cases in which people have recovered from apparently irreversible persistent vegetative states.[286] Justice Stevens appears willing to equate the federal courts with boards of medicine and medical ethics which are qualified to make these decisions. This is not only a bad idea, but a patently illegitimate one as well.

The non-constitutional basis of Justice Stevens's analysis is revealed when he attempts to strike what he considers to be the required constitutional balance: "[T]he best interests of the individual, especially when buttressed by the interests of all related third parties, must prevail over any general state policy that simply ignores those interests."[287] Justice Stevens then adds a footnote that implies a judicial creation and imposition of a theory of life:

> Although my reasoning entails the conclusion that the best interests of the incompetent patient must be respected even when the patient is conscious, rather than in a vegetative state, considerations pertaining to the "quality of life," in addition to considerations about the definition of life, might then be

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282 *Id.*

283 *Id.* Justice Stevens also asserts that "Missouri's protection of life in a form abstracted from the living is not commonplace; it is aberrant." *Id.*

284 *Id.* at 2989 (Stevens, J., dissenting) (emphasis in original).

285 *See* Paul Dillon, *Injured Man Awakens from 8-year Coma*, DETROIT NEWS, March 10, 1991, at 6A.

286 *See Cruzan*, 110 S. Ct. at 2868 n.8 (Brennan, J., dissenting); PRESIDENT'S COMMISSION FOR THE STUDY OF ETHICAL PROBLEMS IN MEDICAL AND BIOMEDICAL BEHAVIOR RESEARCH, DECIDING TO FOREGO LIFE-SUSTAINING TREATMENT 181-82 (1983) (Only a few cases of recovery have been reported thus far. Additionally, these patients are severely disabled when they regain consciousness.).

287 *Cruzan*, 110 S. Ct. at 2889 (Stevens, J., dissenting) (footnote omitted).

> relevant. The State's interest in protecting the life, and thereby the interests, of the incompetent patient would accordingly be more forceful, and the constitutional questions would be correspondingly complicated.[288]

Justice Stevens appears to state that because the quality of life of a conscious patient is different from that of a patient in a persistent vegetative state, the conscious patient's life is more valuable, and the state's interest in protecting that life would be more compelling. Justice Stevens would then be more willing to accept the proffered state interest in protecting life, precisely because the state's evaluation of the importance of that life would then coincide with his own.

Justice Stevens attempts to apply a veneer of neutrality to his arguments by suggesting that *Cruzan* could be used to uphold state action that "might favor a policy designed to ensure quick and comfortable deaths by denying treatment to categories of marginally hopeless cases."[289] This argument is somewhat specious. The Constitution specifically protects life from deprivation without due process. The presumption favors life; simply because a state such as Missouri acts to protect that interest does not mean that the state may, by the same token, act to derogate that interest. Justice Stevens overreads *Cruzan* to allow for an unfettered, bi-directional state power to do what it pleases when life or death is implicated. *Cruzan* does not stand for that proposition; it simply permits a state to assert a general interest in the preservation of life and to take appropriate procedural steps to protect that interest.

IV. CONCLUSION

The similarity between the arguments of Justices Brennan and Stevens in *Cruzan* and the Court's arguments in *Roe v. Wade* is striking. In drawing these comparisons, it is valuable to keep in mind the graph that posits the identity of the arguments used by some Justices in the abortion and right-to-die cases.[290]

Justices Brennan and Stevens both argue that a state, at least in a right-to-die case involving a patient such as Nancy Cruzan, cannot assert a general, unqualified interest in life that always outweighs a patient's right to refuse medical treatment.[291] The premise of this argument is that the idea of life cannot be con-

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288 *Id.* at 2889 n.22 (Stevens, J., dissenting).
289 *Id.* at 2891 (Stevens, J., dissenting).
290 *See supra* at page 69.
291 *See supra* notes 239-42, 268-71 and accompanying text.

ceived separately from the person living it.[292] This argument parallels what the Court has said in the abortion cases — the idea of life cannot be conceived separately from the fetus living it.[293] According to *Roe*, a state may not assert a general, unqualified interest in life that is of constant constitutional value at all stages of pregnancy.[294]

The majority in *Roe* and Justices Brennan and Stevens in *Cruzan* make this argument because the Justices do not value a state's interest in pre-viability fetal life or post-persistent vegetative state life. These opinions indicate that the state's asserted interest in life is constitutionally devalued because certain Justices devalue the life of the fetus or of the persistent vegetative state patient. Both constitutional pronouncements are nothing more than judicial commentary about the quality of life as the Justices perceive it.

Justice Brennan makes an interesting statement concerning the proper role of states and courts in protecting the rights of a patient in a persistent vegetative state. The Justice claims that the state's only interest, absent a patient's wishes becoming known, is to provide a fair and accurate procedural system in which to determine the wishes of the patient in a persistent vegetative state.[295] Once a state has implemented such a procedural system, Justice Brennan sees the role of a reviewing court as "confined to defining that framework, delineating the ways in which government may and may not participate in such decisions."[296]

Although Justice Brennan's remark may sound fairly benign, and may reflect a limited, procedural role for the Court, nothing could be further from the truth. Indeed, this is *Roe v. Wade* revisited, both linguistically and substantively. The *Roe* framework, as well as any right-to-die framework that Justice Brennan would approve, ultimately is based on the Court's assessment of the value of life at a given point in gestation or post-debilitating event existence. In both cases, certain Justices' evaluations of the importance of life lead them to accept or reject a proffered state interest in preserving human life. Neither the Court nor the country, however, needs another judicially-created framework by

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292 *See supra* notes 239-40 and accompanying text.

293 *See Closing the Circle*, *supra* note 10, at 1679-84.

294 *Roe v. Wade*, 410 U.S. 113, 162-64 (1973).

295 *See supra* note 208.

296 *Cruzan*, 110 S. Ct. at 2864 (Brennan, J., dissenting).

which to evaluate a state's asserted interest in life.[297]

Justice Brennan's argument that medical technology creates a twilight zone in which life and death are not easily definable or distinguishable[298] also parallels arguments in the abortion area. Justice White warned long ago that the Court should not become the country's "ex officio medical board"[299] to decide abortion cases. The same is true in the right-to-die area. If a medically-created twilight zone does exist in this area, which is so fraught with medical, moral and cultural complexities,[300] then the Court is not equipped to divine the boundaries. This kind of analysis is quintessentially legislative, not judicial. Justices Brennan and Stevens, however, seem eager to jump into this thicket just as they did in the abortion cases.

Certain Justices in *Cruzan* clearly attempt to replicate the abortion jurisprudence of *Roe v. Wade* in the right-to-die context. The dissenters in *Cruzan* treat the life of a persistent vegetative state patient precisely the way they treat the life of a pre-viability fetus. Neither a vegetative patient nor a pre-viability fetus is capable "of meaningful life outside the mother's womb."[301] For the fetus, it is an actual womb; for the persistent vegetative state patient, the womb is the artificially created support system which keeps the person alive. In both cases, the fetus and the persistent vegetative state patient are helpless without the assistance of another. In fact, in many cases both the fetus and the patient would die without such assistance.

Both these cases are fraught with complex, perhaps intractable, problems of morality, medicine, religion, family, and culture. There simply are no constitutional guideposts available to lead a court to a better, more principled decision than could be arrived at by the people of the various states acting through their legislatures. The decision should remain with the legislature, lest we wind up with another area in which a judicially-created theory of life sets the rules for all of us in yet another critical area — the right to refuse medical treatment, or the right to die.

Finally, it is appropriate to return to the first page of Justice

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297 Justice Scalia articulates that the debate has raged since the decision in *Roe*: "This Court need not, and has no authority to, inject itself into every field of human activity where irrationality and oppression may theoretically occur, and if it tries to do so it will destroy itself." *Id.* at 2863 (Scalia, J., concurring).

298 *See supra* note 232 and accompanying text.

299 Planned Parenthood v. Danforth, 428 U.S. 52, 99 (1976).

300 *See, e.g.*, Mayo, *supra* note 192, at 133-53.

301 Roe v. Wade, 410 U.S. 113, 163 (1973).

Blackmun's opinion in *Roe*. Discussing the subjective influences involved in dealing with abortion, Justice Blackmun observed:

> One's philosophy, one's experiences, one's exposure to the raw edges of human existence, one's religious training, one's attitudes toward life and family and their values, and the moral standards one establishes and seeks to observe, are all likely to influence and to color one's thinking and conclusions about abortion.[302]

The same can be said of one's thinking and conclusions about the meaning and quality of life. Accordingly, those issues should be left to the democratic process, not entrusted to an unelected judiciary, whose members have the power to impose their views on all of society.

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302 *Id.* at 116.