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The Constitutionality of Pregnancy Clauses in Living Will Statutes

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NOTE

The Constitutionality of Pregnancy Clauses in Living Will Statutes

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I. A BRIEF HISTORY AND DEFINITION OF LIVING WILLS

In 1976 the New Jersey Supreme Court allowed parents to remove a life support system from the body of their daughter after doctors deemed her vegetative state irreversible.¹ The case, *In re Quinlan*,² received extensive national media attention³ and pitted concerns about the quality of life and personal autonomy against respect for the sanc-

1. *In re Quinlan*, 70 N.J. 10, 355 A.2d 647, cert. denied, 429 U.S. 922 (1976).

2. *Id.*

3. See, e.g., Friedrich, "Into the Hands of the Lord" at Last: Karen Ann Quinlan: 1954-1985, *TIME*, June 24, 1985, at 76; Woodward, *To Live and Let Die*, *NEWSWEEK*, July 7, 1980, at 58.

tity of life. This conflict has intensified as medical technology has progressed so that patients who otherwise would die faster, natural deaths now are sustained indefinitely. Some patients and families see this life support as medical heroism, while others view it as painful, futile prolongation of death.⁴

One solution for those who wish to avoid indefinite life support is the drafting of a living will. A living will is the individual's written directive specifying that if the individual becomes terminally ill or goes into an irreversible vegetative state, the individual's care givers should not use artificial life support procedures. The primary purpose of a living will is to ensure that the individual's wishes are respected.⁵

Proponents of the living will argue that every individual has a right to privacy and autonomy in making medical decisions.⁶ The United States Supreme Court recently recognized this right in holding that a competent person has a liberty interest under the fourteenth amendment due process clause to refuse life-sustaining treatment.⁷

The living will is a statutory creation; the form of the document, the procedure for creating it, and the scope of its effect are provided by statute.⁸ Thus, in states that have not passed enabling legislation, the effect, if any, of a living will is unclear.⁹ In 1976 California passed the first legislation recognizing living wills.¹⁰ At the time of this writing

4. Note, *A Time to Be Born and a Time to Die: A Pregnant Woman's Right to Die with Dignity*, 20 IND. L. REV. 859, 859 (1987). The author emphasizes the *Roe v. Wade* decision, 410 U.S. 113 (1973), which held that the woman's privacy right is paramount until viability, but admits that when the woman is comatose, the justifications for abortion are weaker. In such a case, the woman does not suffer pain or emotional distress because of the continuation of the pregnancy. *See id.* at 872. Further, the author acknowledges the argument that the woman's failure to abort before the onset of the coma suggests that she intended to carry the fetus to term. *Id.*

5. Gelfand, *Living Will Statutes: The First Decade*, 1987 WIS. L. REV. 737, 770.

6. *Id.* at 738.

7. *Cruzan v. Director, Mo. Dep't of Health*, 58 U.S.L.W. 4916 (U.S. June 25, 1990). Nancy Cruzan was left in a persistent vegetative state after an automobile accident. When doctors decided that she had almost no chance of recovering her cognitive faculties, her parents sought a court order to discontinue life support. *Id.* Ms. Cruzan had not executed a living will, but had told a friend that she never would want to be artificially sustained unless she could live "at least half-way normally." *Id.* at 4917. The Missouri Supreme Court refused to allow discontinuation of life support, holding that the family of the incompetent patient must present clear and convincing evidence of the patient's wishes. *Id.* at 4916. The United States Supreme Court held that a competent person has a constitutionally protected liberty interest under the fourteenth amendment in refusing treatment. *Id.* at 4920. The Court also recognized the state's interest in ensuring that withdrawal of life support is the patient's wish. Thus, the Court held that if the patient is incompetent, it is constitutionally permissible for the state to require clear and convincing evidence of the patient's wishes. *Id.* at 4921.

8. Gould, *Right to Die Legislation: The Effect on Physicians' Liability*, 39 MERCER L. REV. 517, 519 (1988).

9. *Id.* at 525.

10. California Natural Death Act, CAL. HEALTH & SAFETY CODE §§ 7185-7195 (West Supp. 1990).

thirty-seven other states and the District of Columbia¹¹ have adopted similar legislation.¹²

Twenty-seven of these statutes contain pregnancy clauses specifying that the terminally ill or comatose patient's living will is suspended if the patient is pregnant.¹³ The majority of these statutes suspend the

11. Alabama Natural Death Act, ALA. CODE §§ 22-8A-1 to 22-8A-10 (1984); Alaska Rights of the Terminally Ill Act, ALASKA STAT. §§ 18.12.010-18.12.100 (1986); Arizona Medical Treatment Decision Act, ARIZ. REV. STAT. ANN. §§ 36-3201 to 36-3210 (1986); Arkansas Rights of the Terminally Ill or Permanently Unconscious Act, ARK. STAT. ANN. §§ 20-17-201 to 20-17-218 (Supp. 1989); Colorado Medical Treatment Decision Act, COLO. REV. STAT. §§ 15-18-101 to 15-18-113 (1987); Connecticut Removal of Life Support Systems Act, CONN. GEN. STAT. §§ 19a-570 to 19a-575 (Supp. 1990); Delaware Death With Dignity Act, DEL. CODE ANN. tit. 16, §§ 2501-2508 (1983); District of Columbia Natural Death Act, D.C. CODE ANN. §§ 6-2421 to 6-2430 (1989); Life-Prolonging Procedure Act of Florida, FLA. STAT. ANN. §§ 765.01-765.15 (West 1986); Georgia Living Wills Act, GA. CODE ANN. §§ 31-32-1 to 31-32-12 (1985 & Supp. 1990); Hawaii Medical Treatment Decisions Act, HAW. REV. STAT. §§ 327D-1 to 327D-27 (1988); Idaho Natural Death Act, IDAHO CODE §§ 39-4501 to 39-4509 (1985 & Supp. 1990); Illinois Living Will Act, ILL. ANN. STAT. ch. 110½, paras. 701-710 (Smith-Hurd Supp. 1990); Indiana Living Wills and Life-Prolonging Procedures Act, IND. CODE ANN. §§ 16-8-11-1 to 16-8-11-22 (Burns 1990); Iowa Life-Sustaining Procedures Act, IOWA CODE ANN. §§ 144A.1-144A.11 (West 1989); Kansas Natural Death Act, KAN. STAT. ANN. §§ 65-28,101 to 65-28,109 (1985); Louisiana Declarations Concerning Life-Sustaining Procedures Act, LA. REV. STAT. ANN. §§ 40:1299.58.1 to 40:1299.58.10 (West Supp. 1990); Maine Living Wills Act, ME. REV. STAT. ANN. tit. 22, §§ 2921-2931 (Supp. 1989); Maryland Life-Sustaining Procedures Act, MD. HEALTH-GEN. CODE ANN. §§ 5-601 to 5-614 (1990); Mississippi Withdrawal of Life-Saving Mechanisms Act, MISS. CODE ANN. §§ 41-41-101 to 41-41-121 (Supp. 1990); Missouri Uniform Rights of the Terminally Ill Act, MO. ANN. STAT. §§ 459.010-459.055 (Vernon Supp. 1990); Montana Living Will Act, MONT. CODE ANN. §§ 50-9-101 to 50-9-111, 50-9-201 to 50-9-206 (1989); Nevada Withholding or Withdrawal of Life-Sustaining Procedures Act, NEV. REV. STAT. §§ 449.540-449.690 (1986 & Supp. 1989); New Hampshire Terminal Care Document, N.H. REV. STAT. ANN. §§ 137-H:1 to 137-H:16 (Supp. 1989); New Mexico Right to Die Act, N.M. STAT. ANN. §§ 24-7-1 to 24-7-10 (1986); North Carolina Right to Natural Death Act, N.C. GEN. STAT. §§ 90-320 to 90-323 (1985); Oklahoma Natural Death Act, OKLA. STAT. ANN. tit. 63, §§ 3101-3111 (West Supp. 1990); Oregon Directive of Physician Act, OR. REV. STAT. §§ 127.605-127.650 (Supp. 1990); South Carolina Death With Dignity Act, S.C. CODE ANN. §§ 44-77-10 to 44-77-160 (Law. Co-op. Supp. 1989); Tennessee Right to Natural Death Act, TENN. CODE ANN. §§ 32-11-101 to 32-11-110 (Supp. 1990); Texas Natural Death Act, TEX. HEALTH & SAFETY CODE ANN. §§ 672.001-672.021 (Vernon 1990); Utah Personal Choice and Living Will Act, UTAH CODE ANN. §§ 75-2-1101 to 75-2-1118 (Supp. 1990); Vermont Terminal Care Document Act, VT. STAT. ANN. tit. 18, §§ 5251-5262 (1987); Virginia Natural Death Act, VA. CODE ANN. §§ 54.1-2981 to 54.1-2992 (1988 & Supp. 1990); Washington Natural Death Act, WASH. REV. CODE ANN. §§ 70.122.010-70.122.905 (Supp. 1990); West Virginia Natural Death Act, W. VA. CODE §§ 16-30-1 to 16-30-10 (1985); Wisconsin Natural Death Act, WIS. STAT. ANN. §§ 154.01-154.15 (West 1989); Wyoming Living Will Act, WYO. STAT. §§ 35-22-101 to 35-22-109 (1988).

12. See generally Gelfand, *supra* note 5, at 739-86. Each state statute varies as to what constitutes a terminal condition or a condition sufficiently hopeless to justify effectuation of the living will. Many of the statutes severely limit the circumstances in which the will can be invoked. For example, half of the current living will statutes require that death be imminent, even with use of life support procedures, before the living will can be executed. *Id.* at 741 & n.9. This requirement almost nullifies any benefit to be obtained by executing a living will. Professor Gelfand's article provides an exhaustive analysis comparing and contrasting current living will statutes.

13. ALA. CODE § 22-8A-4(a) (1984); ALASKA STAT. § 18.12.040(c) (1986); ARIZ. REV. STAT. ANN. § 36-3205(D) (1986); ARK. STAT. ANN. § 20-17-206(c) (Supp. 1989); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1990); COLO. REV. STAT. § 15-18-104(2) (1987); CONN. GEN. STAT. § 19a-574 (Supp.

patient's directive throughout the entire pregnancy,¹⁴ while the remainder suspend it only if the patient is carrying a fetus that could develop to the point of live birth with continued use of life support.¹⁵ Consequently, in many states a terminally ill or irreversibly comatose woman in the early weeks of pregnancy could be forced to endure extensive treatment for nine months against her express wishes. No court yet has faced the issue of whether to give effect to a pregnant woman's duly authorized living will.¹⁶ The issue will arise, however, given the pace of technological advancement and the prevalence of pregnancy and cancer occurring simultaneously.¹⁷

This Note analyzes the legal and policy problems inherent in the suspension of pregnant patients' living wills. Part II addresses federal constitutional privacy issues raised by pregnancy clauses, and Part III addresses state constitutional privacy issues. Part IV offers a less intrusive, more humane proposal for balancing the interests of the terminally ill pregnant patient with the state's interest in protecting fetal

1990); DEL. CODE ANN. tit. 16, § 2503(d) (1983); FLA. STAT. ANN. § 765.08 (West 1986); GA. CODE ANN. § 31-32-3(b) (Supp. 1990); HAW. REV. STAT. § 327D-6 (1988); ILL. ANN. STAT. ch. 110½, para. 703(c) (Smith-Hurd Supp. 1990); IND. CODE ANN. § 16-8-11-11(d) (Burns 1990); IOWA CODE ANN. § 144A.6(2) (West 1989); MD. HEALTH-GEN. CODE ANN. § 5-605(2) (1990); MISS. CODE ANN. § 41-41-107 (Supp. 1990); MO. ANN. STAT. § 459.025 (Vernon Supp. 1990); MONT. CODE ANN. § 50-9-202(3) (1989); NEV. REV. STAT. § 449.610 (1986); N.H. REV. STAT. ANN. § 137-H:14(I) (Supp. 1989); OKLA. STAT. ANN. tit. 63, § 3103(D) (West Supp. 1990); S.C. CODE ANN. § 44-77-70 (Law. Co-op. Supp. 1989); TEX. HEALTH & SAFETY CODE ANN. § 672.019 (Vernon 1990); UTAH CODE ANN. § 75-2-1109 (Supp. 1990); WASH. REV. CODE ANN. § 70.122.030(1) (Supp. 1990); WIS. STAT. ANN. § 154.07(2) (West 1989); WYO. STAT. § 35-22-102(b) (1988).

14. ALA. CODE § 22-8A-4(a) (1984); CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1990); CONN. GEN. STAT. § 19a-574 (Supp. 1990); DEL. CODE ANN. tit. 16, § 2503(d) (1983); FLA. STAT. ANN. § 765.08 (West 1986); GA. CODE ANN. § 31-32-3(b) (Supp. 1990); HAW. REV. STAT. § 327D-6 (1988); IND. CODE ANN. § 16-8-11-11(d) (Burns 1990); MD. HEALTH-GEN. CODE ANN. § 5-605(2) (1990); MISS. CODE ANN. § 41-41-107 (Supp. 1990); MO. ANN. STAT. § 459.025 (Vernon Supp. 1990); NEV. REV. STAT. § 449.610 (1986); N.H. REV. STAT. ANN. § 137-H:14(I) (Supp. 1989); OKLA. STAT. ANN. tit. 63, § 3103(D) (West Supp. 1990); S.C. CODE ANN. § 44-77-70 (Law. Co-op. Supp. 1989); TEX. HEALTH & SAFETY CODE ANN. § 672.019 (Vernon 1990); UTAH CODE ANN. § 75-2-1109 (Supp. 1990); WASH. REV. CODE ANN. § 70.122.030(1) (Supp. 1990); WIS. STAT. ANN. § 154.07(2) (West 1989); WYO. STAT. § 35-22-102(b) (1988).

15. ALASKA STAT. § 18.12.040(c) (1986); ARIZ. REV. STAT. ANN. § 36-3205(D) (1986); ARK. STAT. ANN. § 20-17-206(c) (Supp. 1989); COLO. REV. STAT. § 15-18-104(2) (1987); ILL. ANN. STAT. ch. 110½, para. 703(c) (Smith-Hurd Supp. 1990); IOWA CODE ANN. § 144A.6(2) (West 1989); MONT. CODE ANN. § 50-9-202(3) (1989).

16. The Washington Supreme Court is the only court that has come close to addressing the constitutionality of a pregnancy clause. In *DiNino v. State ex rel. Gorton*, 102 Wash. 2d 327, 684 P.2d 1297 (1984), the plaintiff, Joann DiNino, sought a declaratory judgment that the pregnancy clause in the state living will statute was unconstitutional and void. Ms. DiNino had executed a living will, but was neither pregnant nor terminally ill. The court did not reach the issue of the statute's constitutionality because it held that the plaintiff had not presented a justiciable controversy. *Id.* at 330-32, 684 P.2d at 1300-01.

17. Note, *supra* note 4, at 859 (citing Iochim, *Non-Hodgkin's Lymphoma in Pregnancy*, 109 ARCHIVES PATHOLOGY & LABORATORY MED. 803 (1985)).

life. Part V concludes that states should refine the pregnancy provisions in living will statutes although the scope of reproductive rights guaranteed by the federal constitution remains unclear.

II. THE CONSTITUTIONALITY OF PREGNANCY CLAUSES UNDER *ROE V. WADE* AND *WEBSTER V. REPRODUCTIVE HEALTH SERVICES*

Giving effect to a pregnant woman's living will necessarily requires terminating her pregnancy. Living will statutes that suspend a woman's directive during pregnancy infringe on her right to terminate the pregnancy. These statutes must be analyzed, therefore, in light of *Roe v. Wade*¹⁸ and its progeny.¹⁹ This examination reveals that a statute suspending the woman's directive prior to viability of the fetus violates both the constitutional privacy right and the public policies recognized in the *Roe* decision.

A. *The Constitutional Right to Privacy: The Roe Trimester Framework*

In *Roe* the Supreme Court found a right to privacy implicit in the fourteenth amendment's concept of personal liberty and struck down a Texas statute criminalizing abortion.²⁰ This right, the Court held, encompasses a woman's right to choose whether to bear a child or terminate the pregnancy.²¹ Like any other fundamental privacy right, this right to choose is not absolute. The state may intervene in the woman's decision when it has a compelling interest to protect, provided that it employs the least intrusive means of intervention.²² In *Roe* the Supreme Court identified two state interests: maternal health and the potential life of the fetus.²³

The Court found that the state's interest in maternal health becomes compelling only after the first trimester.²⁴ The state may not interfere with the abortion decision during the first trimester, but may regulate abortion to the extent necessary to protect the woman's health after the end of that period.²⁵ In addition, the Court found that the state's interest in fetal life becomes compelling only upon viability, the

18. 410 U.S. 113 (1973). *Roe* defined the extent to which a state may interfere with the decision to terminate a pregnancy.

19. See *infra* Part II(C).

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

21. *Id.*

22. *Id.* at 154-55.

23. *Id.* at 162.

24. *Id.* at 163. The Court explained, "This is so because of the now-established medical fact . . . that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth." *Id.*

25. *Id.*

point at which the fetus can live outside the woman's uterus.²⁶ Viability, the Court noted, generally occurs at about twenty-eight weeks of pregnancy, or the end of the second trimester.²⁷ At that point, a state can prohibit abortion to protect the fetus.²⁸

When a pregnant woman is terminally ill or comatose, the only state interest that justifies interference with the directives of the living will is the interest in fetal life. Thus, under *Roe*, the state may not prohibit abortion before viability under the guise of a living will statute.²⁹ Yet a statute that suspends the will during the entire course of the pregnancy³⁰ does just that. Moreover, the statutes that suspend the will if the fetus could develop to the point of live birth with continued maintenance of the woman's body³¹ also violate *Roe*'s viability rule because cases obviously will arise in which a nonviable fetus could develop to the point of live birth with enough time. To comply with the constitutional directives of *Roe*, both types of statutes must be amended to suspend the will only upon and after viability. More restrictive statutes unconstitutionally infringe on the pregnant woman's fundamental right to privacy and autonomy.

B. Policy Concerns

The *Roe* opinion focused on policy issues in addition to constitutional law. The Court expressed concern that women who were denied reproductive choice would suffer physical and psychological harm.³² The Court also noted that the birth of an unwanted child, particularly when the family is unable, emotionally or otherwise, to care for the child, could cause distress for all concerned.³³ Although certain of the Court's concerns, such as medical harm to the woman or infliction of a difficult future, are not present in the living will context, others are present and even more compelling.

The risk of psychological harm to the woman's partner and family must be considered when a pregnant woman's body is maintained against her express wishes. Courts should consider, as the *Roe* Court did, the distress of all parties involved when the state forces the birth of children whose parents cannot care for them. Indeed, the problems

26. *Id.*

27. *Id.* at 160. The Court explained that "[v]iability is usually placed at about seven months (28 weeks) but may occur earlier, even at 24 weeks." *Id.*

28. *Id.* at 163-64.

29. *See id.* at 163; *see also supra* text accompanying notes 26-28.

30. *See supra* note 14 and accompanying text.

31. *See supra* note 15 and accompanying text.

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

33. *Id.*

faced by these individuals would be greater because the child's birth would coincide with the mother's death. The woman's survivors would face both distress over the woman's death and the financial and emotional problems of caring for a motherless child. Existing pregnancy clauses in living will statutes are inconsistent with both the policy concerns and the law set forth in *Roe*.

C. *Effect of Webster v. Reproductive Health Services on the Roe Doctrine*

While these pregnancy clauses are unconstitutional under *Roe*, the Supreme Court, in *Webster v. Reproductive Health Services*,³⁴ limited and arguably eviscerated both the holding and trimester framework of *Roe*. The case concerned a constitutional challenge to a Missouri abortion statute.³⁵ In conjunction with the abortion statute, the Missouri legislature enacted a general provision, or a preamble, which states that life begins at conception and that fetuses have protectable interests in life, health, and well-being.³⁶ This preamble requires courts to interpret the laws of Missouri to recognize and protect the fetus's interests, limited only by the Constitution and the constitutional interpretations of the United States Supreme Court.³⁷ The abortion statute requires physicians to perform procedures necessary to determine whether the fetus is viable before performing an abortion if the physician has reason to believe that the fetus is at least twenty weeks old.³⁸

In upholding the statute, the Court did not address the constitutionality of the preamble because the Court found that this provision did not regulate abortion.³⁹ Rather, the Court construed the preamble as merely expressing a value judgment favoring childbirth over abortion and conferring protections in tort and probate law on fetuses, both permissible legislative actions under *Roe*.⁴⁰ In addition, the Court held that state, not federal, courts control the extent to which the preamble may be used to interpret state laws.⁴¹

The Court explicitly recognized that requiring physicians to perform viability-determining procedures on twenty-week-old fetuses directly conflicts with *Roe* because inevitably the requirement would result in the performance of procedures on nonviable second trimester

34. 109 S. Ct. 3040 (1989).

35. Mo. ANN. STAT. §§ 188.010-188.215 (Vernon Supp. 1990) (enacted 1986).

36. *Id.* § 1.205.1(1), (2); see *Webster*, 109 S. Ct. at 3047.

37. Mo. ANN. STAT. § 1.205.2; see *Webster*, 109 S. Ct. at 3047.

38. Mo. ANN. STAT. § 188.029.

39. *Webster*, 109 S. Ct. at 3050.

40. *Id.*

41. *Id.*

fetuses.⁴² Thus, the state would be intervening in the abortion process before viability.⁴³ This intrusion violates *Roe*, which permits previability intervention only to protect maternal health, not to protect the fetus.⁴⁴

In its discussion, the Court openly questioned and criticized the two key elements of the *Roe* framework, trimesters and viability. The Court blamed the impracticability of the trimester framework for the conflict between the framework and the Missouri statutory testing requirements.⁴⁵ Moreover, the Court held that the testing requirements permissibly advance the state's interest in protecting fetuses.⁴⁶ The Court suggested that the state's compelling interest may exist throughout the pregnancy and not, as *Roe* held, only upon and after viability.⁴⁷ Thus, the Court advocated abandonment of the trimester system.⁴⁸

Despite these conclusions, the Court expressly stated that it did not overrule *Roe*.⁴⁹ This determination was based, however, on a narrow reading of the *Roe* decision. The Court characterized *Roe* as a decision to strike down a statute that criminalized all nontherapeutic abortions.⁵⁰ The Court then reasoned that this decision was not overruled directly because the statute involved in *Webster* merely prohibits public funding and expands the procedural protections for fetuses.⁵¹ Through this reasoning, the Court recast *Roe* as a narrow, fact sensitive holding rather than a landmark case establishing broad, fundamental privacy rights. The current Court, therefore, is not bound by the *Roe* trimester limits on state intervention and seems to recognize a broader compelling state interest in the lives of fetuses.

D. Pregnancy Clauses in Light of Webster

Existing pregnancy clauses in living will statutes might survive Supreme Court scrutiny based on three elements of the *Webster* opinion. First, the Court allowed state legislatures to make value judgments

42. *Id.* at 3056-57.

43. *Id.*

44. *See Roe*, 410 U.S. at 163. The state interest involved in carrying out a pregnant woman's living will is limited to protection of fetal life because by definition, the living will comes into play only when maternal health is not at issue.

45. *Webster*, 109 S. Ct. at 3056 (criticizing the trimester framework as "'unsound in principle and unworkable in practice'" (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 546 (1985))).

46. *Id.* at 3057.

47. *Id.*

48. *Id.* at 3056-57; *see also supra* note 45 and accompanying text (discussing the Court's criticism of the trimester framework).

49. *Webster*, 109 S. Ct. at 3058.

50. *Id.*

51. *Id.* at 3050, 3052.

favoring childbirth over abortion and permitted state courts to control the use of these judgments in interpreting the law.⁵² Second, the Court abandoned the trimester system.⁵³ Finally, the Court recognized a broader state interest in protecting fetuses.⁵⁴

Because state legislatures and courts can control the use of interpretive provisions like the one in *Webster*, the lower federal courts and the Supreme Court will address the extent of these statutes' effect only after a state has used its control to restrict citizens' actions in concrete ways.⁵⁵ Therefore, the practical effect of these preambles will remain unclear until the Supreme Court renders a decision. Meanwhile, in Missouri or another state that adopts a preamble, a state court may uphold the pregnancy clause in the living will statute based on the concern for the sanctity of life and the preference for childbirth over abortion set forth in that preamble.⁵⁶

The Supreme Court also could uphold a pregnancy clause based on broad state interests in fetal life because *Webster* abandoned the trimester approach and expanded the scope of the state's interest in fetal life. In allowing state intervention during the second trimester,⁵⁷ *Webster* has paved the way for Court approval of increased state-mandated medical intervention at earlier stages during pregnancy. The decisive factor likely will be how broadly the Court construes the state's compelling interest in the life of the fetus. Because the *Webster* opinion suggests that this interest may exist throughout pregnancy,⁵⁸ the Court might even uphold statutes that suspend the woman's directive during the entire pregnancy. Whether the Court actually would hold that a compelling state interest exists throughout pregnancy cannot be predicted at this point. Because the Court will defer strongly to state legislatures' value judgments and to state courts' statutory interpretations, the contours of privacy rights increasingly will be determined at the state level.

III. VALIDITY OF PREGNANCY CLAUSES UNDER STATE CONSTITUTIONAL PRIVACY PROVISIONS

Even if pregnancy clauses are constitutionally permissible under *Webster's* broad allowance for compelling state interest in fetal life, they may not survive state constitutional scrutiny. Individual states

52. *Id.* at 3050.

53. *Id.* at 3056.

54. *Id.* at 3057.

55. *Id.* at 3050.

56. *Id.*

57. *Id.* at 3057.

58. *Id.*

may include more expansive privacy rights in state constitutions than those conferred by the federal constitution.⁵⁹ Several states whose living will statutes contain pregnancy clauses have explicit privacy rights in their constitutions.⁶⁰

While no court has addressed the issue of whether pregnancy clauses violate state constitutional privacy rights, courts in Florida and California recently have decided cases concerning related constitutional challenges to state statutes.⁶¹ Both Florida and California have living will statutes that suspend the will throughout the entire pregnancy⁶² and have added explicit privacy rights to their constitutions.⁶³ Moreover, courts in both states have held that state constitutional privacy rights encompass both the right to decline life-prolonging treatment⁶⁴ and the right to terminate a pregnancy.⁶⁵ An examination of the recent state constitutional decisions in Florida and California suggests that the broad pregnancy clauses in these states' living will statutes would not survive state constitutional scrutiny.

A. State Constitutional Privacy Rights in Florida

In 1980 an explicit right of privacy was added to the Bill of Rights of the Florida Constitution.⁶⁶ The Supreme Court of Florida consistently has emphasized the breadth of this privacy right.⁶⁷ Invasions of

59. *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980). The Supreme Court upheld the California Supreme Court's decision that the free speech guarantee in the California Constitution conferred on the appellees the right to solicit signatures at a privately-owned shopping mall. *Id.* at 79-80. The Court rejected the owner's claim that this reading of the state constitution violated his federal constitutional property rights. *Id.* at 84-88. The Court emphasized that states are free to use their police powers to establish more expansive individual freedoms than those conferred by the federal constitution. *Id.* at 81.

60. See, e.g., ALASKA CONST. art. I, § 22; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23.

61. See *infra* notes 64-65.

62. CAL. HEALTH & SAFETY CODE § 7188 (West Supp. 1990); FLA. STAT. ANN. § 765.08 (West 1986).

63. CAL. CONST. art. I, § 1; FLA. CONST. art. I, § 23.

64. In *Corbett v. D'Alessandro*, 487 So. 2d 368, 370-71 (Fla. Dist. Ct. 1986), the court held that the privacy right in the Florida Constitution protects the decision to decline treatment. A California court similarly held that both the federal and state constitutions protect the right to refuse life-sustaining treatment. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137, 225 Cal. Rptr. 297, 301 (Ct. App. 1986).

65. *In re T.W.*, 551 So. 2d 1186, 1192 (Fla. 1989), is the first Florida case to base the right to choose abortion expressly on the state constitutional privacy right. In *American Academy of Pediatrics v. Van de Kamp*, 214 Cal. App. 3d 831, 263 Cal. Rptr. 46, 51 (Ct. App. 1989), the court also upheld the right to choose abortion, citing the state constitutional privacy right.

66. "Every natural person has the right to be let alone and free from governmental intrusion into his private life except as otherwise provided herein. This section shall not be construed to limit the public's right of access to public records and meetings as provided by law." FLA. CONST. art. I, § 23.

67. See, e.g., *Public Health Trust v. Wons*, 541 So. 2d 96, 102 (Fla. 1989) (holding that com-

the state constitutional privacy right are scrutinized strictly to ensure that the state's action serves a compelling state interest through the least intrusive means possible.⁶⁸

Two recent cases, *Corbett v. D'Alessandro*⁶⁹ and *In re Guardianship of Browning*,⁷⁰ explicitly held that the state constitutional privacy right protects the decision to discontinue life-prolonging treatment. In *In re Guardianship of Browning*, which examined a guardian's decision to discontinue life support,⁷¹ the Florida District Court of Appeals broadly interpreted the state's privacy right. The court emphasized that the decision whether to withdraw life support turns on the subjective wishes of the patient, rather than on public opinion, state or familial preferences, or any objective test.⁷²

Yet, Florida's living will statute interferes with this right to forego treatment by suspending the will throughout pregnancy.⁷³ Whether the statute survives strict scrutiny depends on the scope of the state's compelling interest in protecting fetal life. The Florida Supreme Court recently defined the scope of that interest in a post-*Webster* decision concerning a statute requiring parental consent for abortions performed on a minor.⁷⁴

petent patients' rights of privacy and religious freedom allow refusal of life-saving blood transfusions); *Rasmussen v. South Fla. Blood Serv.*, 500 So. 2d 533, 538 (Fla. 1987) (holding that state constitutional privacy rights of blood donors prevent AIDS victims from using subpoenas to obtain donors' names and addresses); *Winfield v. Division of Pari-Mutuel Wagering*, 477 So. 2d 544, 548 (Fla. 1985) (stating that "Article I, section 23, was intentionally phrased in strong terms," and that "[t]he drafters of the amendment rejected the use of the words 'unreasonable' or 'unwarranted' before the phrase 'governmental intrusion' in order to make the privacy right as strong as possible").

68. *Shaktman v. State*, 529 So. 2d 711, 717 (Fla. Dist. Ct. App. 1988), *aff'd*, 553 So. 2d 148 (Fla. 1989). *Shaktman* claimed that the warrantless use of pen registers to record numbers dialed from home telephones violated the state constitutional privacy right. 529 So. 2d at 714. The court recognized that the privacy right was implicated and reasoned that only a compelling state interest implemented by the least intrusive means could justify the intrusion. *Id.* at 717. The court found that the state had a compelling interest in investigating large-scale crimes and that pen registers were among the least intrusive ways to investigate. *Id.* at 717-18.

69. 487 So. 2d at 368.

70. 543 So. 2d 258 (Fla. Dist. Ct. App. 1989).

71. Because Mrs. Browning's living will was unclear, the court focused on the process of the guardian's decision on her behalf. *Id.* at 272.

72. *Id.* at 273. While the court cautioned the guardian to choose continued treatment if in doubt about the patient's wishes, *id.* at 273, the court also stated that one "does not exercise another's right of self-determination or fulfill that person's right of privacy by making a decision which the state, the family, or public opinion would prefer." *Id.* at 269.

73. FLA. STAT. ANN. § 765.08 (West 1986).

74. *In re T.W.*, 551 So. 2d at 1186. The statute provides that before performing an abortion on an unmarried woman under 18, the physician must obtain the written consent of the woman's parent, custodian, or guardian, or the physician can rely on a circuit court order. FLA. STAT. ANN. § 390.001(4)(a) (West Supp. 1988). The minor can bypass the consent requirement upon a showing of good cause, such as, *inter alia*, fear of abuse by the parent if the parent were asked to consent.

In *In re T.W.*⁷⁵ a minor sought a waiver of the requirement for parental consent to have an abortion. The court began its analysis by stating that although *Webster* had impugned the trimester framework and even the basic holding of *Roe*, *Roe* remains valid law.⁷⁶ The court did not address specifically the statute's constitutionality under *Roe* or *Webster*, however, because it found that the statute did not survive strict scrutiny under the state constitutional privacy right.⁷⁷

The court reasoned that the state's interest in maternal health arises only at the end of the first trimester.⁷⁸ Thus, the decision to terminate a pregnancy before the end of the first trimester belongs solely to the woman. As for the state's interest in protecting fetal life, the court held that it becomes compelling only upon viability.⁷⁹ The court found, based on medical evidence, that viability occurs at the end of the second trimester and will not be pushed back further in the foreseeable future.⁸⁰ The court concluded that the parental consent statute, which interfered with the woman's privacy right from the moment of conception, was overbroad and not supported by a compelling state interest.⁸¹

In light of *In re Guardianship of Browning*⁸² and *In re T.W.*,⁸³ which emphatically recognize individuals' rights to autonomy and privacy in death and child-bearing decisions, Florida's living will statute would not survive state constitutional scrutiny. The statute, which suspends the will during the entire pregnancy, is overbroad and fails to use the least intrusive means to protect the state's interest in fetal life.⁸⁴ To

In re T.W., 551 So. 2d at 1188-89.

75. 551 So. 2d at 1189. Although the district court had declared the statute invalid and T.W. already had obtained a legal abortion, the Supreme Court of Florida took jurisdiction because of the important public policy implications of the privacy right issues. *Id.*

76. *Id.* at 1190.

77. *Id.* at 1196.

78. *Id.* at 1193-94.

79. *Id.* at 1194. Before viability, the court reasoned, the interests of the woman and the fetus are indistinguishable, *id.* at 1193, and the state has no compelling interest in the life of the fetus. *Id.* at 1193-94.

80. *Id.* at 1194. The court relied on Justice Harry Blackmun's *Webster* dissent for the assertion that the viability threshold has remained stable. *Id.*; see also *Webster v. Reproductive Health Servs.*, 109 S. Ct. 3040, 3067-79 (1989) (Blackmun, J., concurring in part, dissenting in part). Justice Blackmun, in turn, based his statement on a New York State Task Force report that found that "no technology exists to bridge the development gap between the three-day embryo culture and the 24th week of gestation." *Webster*, 109 S. Ct. at 3075 n.9 (Blackmun, J., concurring in part, dissenting in part) (quoting Fetal Extrauterine Survivability, Report to the New York State Task Force on Life and Law 10 (1988)).

81. *In re T.W.*, 551 So. 2d at 1194.

82. 543 So. 2d at 258.

83. 551 So. 2d at 1186.

84. See generally Note, *Pregnancy Clauses in Living Will Statutes*, 87 COLUM. L. REV. 1280 (1987) (arguing that state laws which limit the right of a pregnant woman to terminate her pregnancy are unconstitutional).

survive a constitutional challenge in Florida, the living will statute can suspend the woman's directive only if she is carrying a viable fetus.

B. State Constitutional Privacy Rights in California

In 1972 the word "privacy" was added to the list of inalienable rights contained in article I, section 1 of the California Constitution.⁸⁵ Since then California courts have held that this privacy right protects both the decision to decline life-prolonging treatment⁸⁶ and the decision to terminate a pregnancy.⁸⁷ As in Florida, state action can infringe on this privacy right only if it serves a compelling state interest and uses the least intrusive means possible.⁸⁸ Two California decisions concerning abortion restrictions, one pre- and one post-*Webster*, illustrate the broad scope of women's privacy rights under the state constitution and the narrow scope of the state's interest in fetal life.

In *Committee to Defend Reproductive Rights v. Myers*⁸⁹ the California Supreme Court addressed whether state budget acts denying indigent women public funds for elective abortions violated the state constitutional right of privacy and procreative choice. The court focused on state, rather than federal, constitutional issues⁹⁰ and declined to follow precedent set by the United States Supreme Court.⁹¹

In strictly scrutinizing the funding denial, the court concluded that the denial was an infringement on poor women's constitutional rights of privacy and procreative choice.⁹² For this analysis, the court adopted the three part test set forth in *Bagley v. Washington Township Hospi-*

85. Unlike the Florida legislature, which created a freestanding privacy right, the California legislature simply added the word "privacy" to the list of inalienable rights in the state constitution. CAL. CONST. art. I, § 1.

86. *Bouvia v. Superior Court*, 179 Cal. App. 3d 1127, 1137-38, 225 Cal. Rptr. 297, 300-01 (Ct. App. 1986).

87. *Committee to Defend Reproductive Rights v. Myers*, 29 Cal. 3d 252, 284, 625 P.2d 779, 798, 172 Cal. Rptr. 866, 885 (1981).

88. *Id.* at 257, 625 P.2d at 78, 172 Cal. Rptr. at 868; see also *supra* note 68 and accompanying text (discussing Florida case law). The court used the strict scrutiny test within the framework of the three part test set out in *Bagley v. Washington Township Hosp. Dist.*, 65 Cal. App. 2d 499, 421 P.2d 409, 55 Cal. Rptr. 401 (Ct. App. 1966).

89. 29 Cal. 3d at 252, 625 P.2d at 779, 172 Cal. Rptr. at 866.

90. *Id.* at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868.

91. The court refused to follow the Supreme Court decision in *Harris v. McRae*, 448 U.S. 297 (1980). *Myers*, 29 Cal. 3d at 257, 625 P.2d at 781, 172 Cal. Rptr. at 868. In *Harris* the Supreme Court upheld similar restrictions on federal Medicaid funding of abortions, reasoning that the government's refusal to fund abortion did not interfere impermissibly with constitutional rights of women. *Harris*, 448 U.S. at 321-26.

92. *Myers*, 29 Cal. 3d at 270, 625 P.2d at 789, 172 Cal. Rptr. at 876. More specifically, the court believed that the government, through state Medicaid funding decisions, was attempting to deny women their government benefits solely because they exercised their constitutional right to choose abortion. *Id.*

tal District.⁹³ To justify restrictions of constitutional rights, the state must show: (1) that the restrictions relate to the aims of the statute conferring the benefit or privilege, (2) that the benefit or utility of the restrictions clearly outweighs the impairment of constitutional rights, and (3) that no less offensive or intrusive means for achieving the state's purpose exist.⁹⁴ The court reasoned that the state's funding of childbirth, but not abortion, did not pass the *Bagley* test because: first, the denial of funding for abortion did not relate to the state Medicaid program's purpose of providing indigent women access to medical care comparable to that enjoyed by nonindigent women; second, the woman's right to procreative choice was not outweighed by the lesser interest of the state in protecting nonviable fetuses; and third, the denial of funds was not the least offensive means of protecting indigent women.⁹⁵

In *American Academy of Pediatrics v. Van de Kamp*,⁹⁶ a post-*Webster* case, the California Court of Appeals for the First District applied the *Bagley* three part test in addressing a constitutional challenge to a statute requiring minors to obtain parental or judicial consent for an abortion. The court reasoned that while parental consent laws do not concern government funding, they do concern the government's decision to confer a benefit—the right to choose abortion without parental interference—and thus, should be subject to the *Bagley* test.⁹⁷

In addition to analyzing abortion rights under the *Bagley* test, the court emphasized that the question of whether women have a right to procreative choice was settled by *People v. Belous*,⁹⁸ a California decision predating *Roe*.⁹⁹ Moreover, the court cited *Myers* in concluding that state constitutional privacy rights are more extensive than federal rights.¹⁰⁰ This reliance on *Belous* and *Myers* suggests that California

93. 65 Cal. App. 2d at 499, 421 P.2d at 409, 55 Cal. Rptr. at 401. In *Bagley* the state government allegedly had fired an employee because she exercised her first amendment right to free expression. *Id.*

94. *Myers*, 29 Cal. 3d at 270, 625 P.2d at 789, 172 Cal. Rptr. at 876.

95. The court also noted that even if the purpose of the program were to protect fetal life, the restrictions would be vastly underinclusive because nonindigent women could have abortions, and thus, the restrictions would protect only indigent fetuses. *Id.* at 281, 625 P.2d at 796, 172 Cal. Rptr. at 883.

96. 214 Cal. App. 3d 831, 263 Cal. Rptr. 46 (Ct. App. 1989). The issue before the court was whether a lower court had abused its discretion in finding that the plaintiffs were likely to prevail and granting a preliminary injunction preventing enforcement of the statute. 263 Cal. Rptr. at 47.

97. 263 Cal. Rptr. at 55.

98. 71 Cal. 2d 954, 458 P.2d 194, 80 Cal. Rptr. 354 (1969).

99. *Van de Kamp*, 263 Cal. Rptr. at 47. The pregnancy clause in California's living will statute seems even more inconsistent with the state constitution because the California courts recognized the right to a safe, legal abortion four years before the Supreme Court did so. *See Belous*, 71 Cal. 2d at 954, 458 P.2d at 194, 80 Cal. Rptr. at 354.

100. *Van de Kamp*, 263 Cal. Rptr. at 52.

courts still adhere to the limits on governmental intrusion into the abortion decision before viability set forth in those cases.

The *Van de Kamp* decision also suggests that state restrictions on abortion are governed by California, not federal, law.¹⁰¹ California's living will statute must be evaluated, therefore, in light of the California Constitution and case law. The living will statute should be analyzed under the *Bagley* test because, through the statute, the government confers the benefit of specifying that an individual's wishes about medical treatment be followed. This analysis suggests that California's pregnancy clause would not withstand strict scrutiny.

The main purpose of California's living will statute is to allow individuals to forego life-prolonging treatment by exercising privacy, self-determination, and personal autonomy rights over their own bodies.¹⁰² The pregnancy restriction in California's statute, which suspends the living will throughout the pregnancy, not only does not relate to the purpose of the statute, but directly thwarts it. Thus, the restriction fails the first part of the *Bagley* test.¹⁰³

The restriction also appears to fail the second requirement that the benefit or utility of the restriction manifestly outweigh the invasion of privacy. The obvious benefit of suspending the living will during pregnancy is protection of fetal life from the moment of conception. As the *Myers* and *Van de Kamp* decisions make clear, however, the state's interest is not compelling, nor the benefit prevailing, until viability.¹⁰⁴

Because viability cannot occur before the twenty-third or twenty-fourth week of pregnancy,¹⁰⁵ the California statute would interfere with the pregnant woman's privacy and autonomy rights for up to twenty-four weeks with no countervailing benefit to the state. Further, just as the funding restrictions in *Myers* were underinclusive in protecting only indigent fetuses, the pregnancy restriction in the living will statute is underinclusive in protecting only the fetuses of terminally ill or comatose women.

Finally, the pregnancy clause does not serve the state's interests in protecting the woman's privacy and the fetus's life in the least intrusive manner possible. Because the state's interest in the fetus arises only at

101. *See id.*

102. *See Gelfand, supra note 5, at 738. See generally id.* (comparing and contrasting current living will statutes).

103. The first requirement is that the restriction "relate to the purposes of the legislation which confers the benefit." *Myers*, 29 Cal. 3d at 271, 625 P.2d at 790, 172 Cal. Rptr. at 877 (quoting *Bagley*, 65 Cal. App. 2d at 505-06, 421 P.2d at 414, 55 Cal. Rptr. at 406).

104. The *Myers* court candidly stated that "the California Legislature has not embraced a general policy of encouraging unwanted children." *Id.* at 278, 625 P.2d at 795, 172 Cal. Rptr. at 882.

105. *Roe*, 410 U.S. at 160; *see also supra note 27.*

viability, suspending the woman's directive throughout the entire pregnancy is unnecessarily intrusive. The state could protect its interest by suspending the living will directive only after viability.

IV. LEGISLATIVE PROPOSAL

Any solution to the problem of the terminally ill or comatose pregnant woman must take into account the following interests: (1) the interest of the woman in privacy and personal autonomy; (2) the interest of the woman's family and partner, or the father of the child, in deciding whether to assume responsibility for raising the child after the woman's death; and (3) the interest of the state in protecting potential life. Two major problems with current living will statutes are their sweeping infringement on women's privacy and autonomy and their failure to account for the wishes of the woman's partner and family. These problems could be addressed with a two-tiered pregnancy clause.

First, automatic suspension of the living will once the fetus has reached viability, which for the foreseeable future remains at twenty-three and one-half weeks of gestation, would serve the state's interest in protecting the fetus.¹⁰⁶ Second, the statute should provide that before viability the woman may specify in her living will her desire that the will be effectuated, or that her body be maintained until birth, or that her partner or other family member act as her proxy in deciding whether to carry the pregnancy to term. This second provision would take into account a broad range of views on abortion and bodily integrity. The option also would provide an alternative for the woman who believes that the decision whether to terminate life support and pregnancy should be made by those who ultimately would be responsible for raising the child.

V. CONCLUSION

The suspension of a pregnant woman's living will, particularly without regard to the stage of pregnancy, directly contravenes the woman's express wish for privacy and personal autonomy. Under the *Roe* trimester system, evaluation of the constitutionality of these infringements was fairly simple and led to the conclusion that all current pregnancy clauses would violate fourteenth amendment privacy rights because they operate to prohibit abortion before viability, the point at which the state has a compelling interest in the life of the fetus.

In light of *Webster*, however, the status of current pregnancy clauses is unclear. This status depends on how far the current Supreme

106. *In re T.W.*, 551 So. 2d 1186, 1194 (Fla. 1989).

Court would go in sanctioning previability prohibitions on abortion. The *Webster* decision did establish that the Court recognizes broader state interests in protecting fetuses, thus giving states broader discretion to interfere with the personal decisions of pregnant women. Regardless of whether the Court in the future gives states sweeping power to prohibit abortion, some state legislatures will be restrained by their own constitutions and court decisions.

While the suggested proposal is more complex than the simple suspension of the will during pregnancy, it merely reflects the diverse interests at odds in such cases. Current living will legislation serves the state's interest in protecting the fetus by sacrificing completely the interests of the woman and her survivors. In addition, constitutional concerns aside, the current statutes are unwise from a policy standpoint because they operate to force unwanted children on fathers and families who may be unable, emotionally or financially, to care for the children. The suggested proposal would be constitutional and would avoid these policy problems.

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