ROE v. WADE—THE ABORTION DECISION—AN ANALYSIS AND ITS IMPLICATIONS

In January of 1973, in two companion cases,[1] the Supreme Court invalidated abortion statutes that were typical of the legislation in effect in most of the country.[2] Without addressing the pros and cons of abortion per se, this comment will examine the substantive due process and the right to privacy analysis employed by the court in *Roe v. Wade* and consider the implications of the decision in related areas.

Background of Substantive Due Process

There have been two lines of cases in the development of substantive due process.[3] One line of cases was concerned primarily with economic and social welfare legislation.[4] In the early part of the century, the Supreme Court frequently struck down such legislation, primarily because of its disagreement with the ends the legislatures sought to achieve.[5] However, beginning in 1934 with *Nebbia v. New York*,[6] the Court changed its approach and began upholding socio-economic legislation. The Court adopted a deferential attitude towards possible legislative purposes and the existence of a rational relationship of the statute to the end being sought by the legislature.[7] Insofar as socio-economic legislation is concerned, this attitude still prevails on the court. At the same time, a second line of cases developed in which substantive due process was utilized in upholding individual and private rights against infringement by the state.[8] The early cases were typified

1. Roe v. Wade, 93 S. Ct. 705 (1973). Doe v. Bolton, 93 S. Ct. 739 (1973).
2. Roe v. Wade, 93 S. Ct. 705, 709, 720 (1973).
3. Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L. Rev. 219, 223 (1965).
4. *Id.*
5. *E.g.*, Lochner v. New York, 198 U.S. 45 (1905).
6. 291 U.S. 502 (1934).
7. *Id.*
8. Emerson, *Nine Justices in Search of a Doctrine*, 64 Mich. L.Rev. 219, 223 (1965).

by *Meyer v. Nebraska*,[9] in which the Court invalidated a state statute that prohibited the teaching of a foreign language to pupils who had not passed the eighth grade, and by *Pierce v. Society of Sisters*,[10] in which a statute that prevented the operation of private schools was ruled unconstitutional. A recent example was the *Griswold v. Connecticut* case,[11] in which a state law that prohibited the use of contraceptives by married persons was struck down as violative of a constitutionally protected right to marital privacy. While only one justice among the majority chose to ground his decision explicitly in due process terms,[12] the opinions of five of the majority exemplify the substantive due process approach.[13] In these private "fundamental" rights cases, the Court shows far less deference towards the legislative purpose than it does in the socio-economic legislation cases. In the former, the statute must not only bear a rational relation to the purpose, but the state interest must be "compelling" enough to outweigh any infringement upon the "fundamental" rights.[14]

THE ABORTION DECISION

In *Doe v. Bolton*,[15] the Supreme Court invalidated a statute that was patterned after the American Law Institute's Model Penal Code, which served as a model for recent legislation in about one-fourth of the states.[16] Certain of the procedural requirements for obtaining an abortion were ruled in violation of procedural due process, and a residency requirement was held to be in violation of the privileges and immunities clause.

This comment, however, is concerned primarily with the *Wade* decision. *Wade* involved the Texas criminal abortion statute[17] which prohibited all abortions except those that were performed to save the life of the mother.[18] The Court held that the statute was

9. 262 U.S. 390 (1923).
10. 268 U.S. 510 (1925).
11. 381 U.S. 479 (1965).
12. *Id.* at 502 (White, J., concurring).
13. Note, *Unenumerated Rights—Substantive Due Process, The Ninth Amendment, and John Stuart Mill*, 1971 WIS. L. REV. 922, 926.
14. *E.g.*, Reed v. Reed, 404 U.S. 71 (1971). While this is an equal protection case, the same "weighing" process is utilized.
15. 93 S. Ct. 739 (1973).
16. Roe v. Wade, 93 S. Ct. 705, n.37 (1973).
17. 93 S. Ct. 705 at n.1.
18. This type of statute is in effect in the majority of the states. For a listing of the states see 93 S. Ct. 705 at n.2.

unconstitutional because it violated a pregnant woman's right of privacy as founded in the fourteenth amendment's due process clause. This right of privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[19]

The court acknowledged that there were two legitimate legislative purposes involved that might justify such a statute.[20] One is to protect the health of the mother by prohibiting a dangerous medical procedure; the other is to protect the fetus's right to life.[21] The court found that, because abortion is now safer than childbirth through the first trimester of pregnancy, there is no rational relation between prohibiting abortions and protecting the mother's health. Consequently, no regulation of abortions, other than the usual regulation of medical services, is permissible during this period. Beyond that time, as the danger of abortion increases relative to childbirth, the state interest in and justification for regulation of abortions increases.

The court held that the second state purpose, that of protecting the fetus's right to life, is not "compelling" until the point of viability is reached.[22] Only after this time is the legislative purpose strong enough to permit proscription of all abortions. Even after viability, the state must except the situation where abortion is necessary to preserve the life or health of the mother.[23]

Analysis of the Majority Opinion

The majority[24] unhesitatingly based their decision on a substantive due process test and rationale. The classic substantive due process test is whether there is a rational relationship between the law and a valid legislative objective.[25]

> [T]he law shall not be unreasonable, arbitrary, or capricious, and . . . the means selected shall have a real and substantial relation to the object sought to be attained.[26]

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19. 93 S. Ct. at 727.
20. 93 S. Ct. at 724, 725.
21. A third possible justification, to discourage illicit sexual conduct, was not advanced by the state. 93 S. Ct. at 724.
22. 93 S. Ct. at 732. The court described viability as the point in time when the fetus presumably has the capability of meaningful life outside the mother's womb.
23. 93 S. Ct. at 732.
24. Blackmun, J., wrote the opinion in which Burger, C.J., and Douglas, Brennan, Stewart, Marshall and Powell joined. Burger, C.J., and Douglas and Stewart, JJ., filed concurring opinions. White, J. filed a dissenting opinion in which Rehnquist, J., joined, and Rehnquist, J., filed a dissenting opinion.
25. Williamson v. Lee Optical of Oklahoma, 348 U.S. 483, 491 (1955).
26. Nebbia v. New York, 291 U.S. 502, 525 (1934).

Where legislation burdens "fundamental" individual rights, there must be a "compelling state interest" to outweigh the burden before the statute will be validated.[27] Where there is a rational relationship between the statute and the legislative purpose, and when the burden upon individual rights is outweighed by the state interest, the statute will stand.

Legislative Purpose of Protecting the Mother's Health

In *Wade*, the Court found that the state's concern for the mother's health was a legitimate objective of the abortion statute.[28] However, subsequent to the enactment of the statute, abortion techniques had improved to the point that an abortion performed in the first trimester of pregnancy was safer than childbirth.[29] As a result of this development, there was no longer a rational relation between the statute and the purpose of protecting the mother's health. The rational relation is not reestablished until about the end of the third month of pregnancy when the respective mortality rates equalize. The Court held, therefore, that during the first trimester the abortion decision must be left strictly to the pregnant woman and her physician.[30] Only after the first three months may the legislature regulate abortions in furtherance of protecting the mother's health.[31]

It would apparently follow from the reasoning in *Wade* that further changes in medical techniques could constitutionally disable legislatures from prohibiting abortions in furtherance of a legislative purpose of protecting a mother's health. This would be so if abortion performed at *any* stage involved less risk to the mother

27. Kramer v. Union Free School District, 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 642 (1969) (right of interstate travel); Loving v. Virginia, 388 U.S. 1 (1967) (freedom to marry); Griswold v. Connecticut, 381 U.S. 503 (1965) (right to marital privacy); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957) (denial of right to take Bar Exam for arbitrary reasons); Skinner v. Oklahoma, 316 U.S. 535 (1942) (sterilization of "habitual criminals"); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (right of parents to direct the education of their children, right to carry on a business); Meyer v. Nebraska, 262 U.S. 390 (1923) (right to teach or learn a foreign language).
28. 93 S. Ct. at 725.
29. *Id.*
30. 93 S. Ct. at 732.
31. *Id.*

than does childbirth. In such a situation, there would no longer be a rational relationship between this legislative purpose and a statute prohibiting abortions. Conversely, if the mortality rate of mothers in childbirth decreases so that childbirth is safer than abortions performed at any stage of pregnancy, then the rational relationship would exist. Thus, the practical effect of the Court's analysis of this legislative purpose is to render this aspect of the constitutional test of abortion statutes a function of a potentially variable technological standard. The abortion statute that is constitutional today may become unconstitutional tomorrow as a result of changes in medical techniques.[32]

Legislative Purpose of Protecting the Fetus's Right to Life

The second legislative purpose the court acknowledged as legitimate was the protection of the fetus's right to life.[33] Obviously, there is a high degree of correlation between the statute and this purpose. The life of the fetus is best protected by prohibiting its intentional destruction. Only the exception to prevent jeopardizing the mother's life prevents reaching a 100% correlation.

Due process further requires that the legislative purpose outweigh the burden imposed upon any disfavored class.[34] In the case of abortion statutes, the burden falls upon pregnant women in that they are denied the right to terminate a pregnancy and thus exercise a certain amount of control over their own bodies.

The decision facing the Court was, therefore, whether the fetus's right to life outweighed the mother's right to control her body, *i.e.*, whether the right to life outweighs the right to privacy. It seems improbable that any would deny that it does. However, the Supreme Court did hold the abortion law to be an unconstitutional infringement upon the woman's right to privacy.

Since there is a rational relation between the statute and the legislative purpose, and assuming that the court did not mean to say that the right to privacy outweighs the right to life, the Court must have based its holding upon an analysis of the legislative purpose per se. The correctness of the legislature's characterization of its purpose as protecting the fetus's right to life depends upon its decision that human life begins at conception. This question of when human life begins is an abstract, discretionary question in the

32. *See* Werthheimer, *Understanding the Abortion Argument*, 1 PHILOSOPHY AND PUBLIC AFFAIRS 67, 82 (1971).
33. 93 S.Ct. at 725.
34. *See* note 27 *supra*.

sense that it is not something that is empirically measurable, but is primarily a function of how one defines human life. Whether one defines human life as beginning at conception, at viability, or at birth depends ultimately upon a value preference.

> [W]here the goal is such that the choice/goal relation depends ultimately not upon an empirical claim but upon a value preference, legislative satisfaction with the relation will ordinarily be deferred to, by calling the judgment discretionary.[35]

> [The courts] will intervene when the factual claim, on which the relation between choice and goal necessarily depends, is outside the realm of empirical plausibility.[36]

In the context of this case, the judicial inquiry should have been whether there was any way that the legislature could have rationally concluded, as a basis for the abortion legislation, that human life begins at conception and is therefore worthy of protection from that point in time. The Court seemed to recognize this analytic principle when it stated:

> 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.[37]

However, in the very next sentence, the court said:

> 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.[38]

Thereafter, the court referred to the legislative purpose as protection of the *potentiality* of human life. By describing the fetus as only *potential* life, the court implicitly rejected the legislature's value judgment that human life, at conception, is *actual*, and not merely potential.

While the court said they did not need to "resolve the difficult question of when life begins",[39] they appear to have done that very thing when they held that:

> With respect to the State's important and legitimate interest in potential life, the "compelling" point is at viability. This is so

35. Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1241 (1970).
36. *Id.*
37. 93 S. Ct. at 725.
38. *Id.*
39. 93 S. Ct. at 730.

> because the fetus then presumably has the capability of meaningful life outside the mother's womb. . . . If the State is interested in protecting fetal life after viability, it may go so far as to proscribe abortion during that period except when it is necessary to preserve the life or health of the mother.[40]

It appears that the court has not only rejected the legislative value judgment but has substituted one of its own. The court has, in effect, said that at viability potential human life becomes *so* potential that it overrides the woman's right to terminate her pregnancy, which is another way of saying that human life begins at viability.

The difficulty with the *Wade* decision lies in determining upon what rationale or method of analysis the Court based its decision as to the beginning of human life. It has been suggested elsewhere "that the courts have sometimes admitted the (necessary) rationality of statutes, but have used various doctrines and devices to avoid the conclusion that the statute is therefore constitutional under the rationality test. . . ."[41] These devices can best be described as (1) ignoring a legislative purpose, (2) manipulating the level of abstraction at which the purpose is defined, and (3) evaluating the purpose as a unit rather than as a mix of policies.[42] These devices are in contrast to what would seem to be a desirable method of analysis; that is, to evaluate the legislative goal that is suggested by the statutory terms.[43] In *Wade*, the Court appears to have utilized a combination of these devices. The state asserted, and the statutory terms do not contradict the assertion, that the legislative goal was to protect human life itself,[44] yet without explaining why, the Court apparently redefined the goal to be the protection of *potential* life, thereby avoiding upholding a rational statute. It is, of course, possible that the Court's redefinition of the legislative goal was based on a belief that the legislative decision that human life begins at conception is irrational per se. This is hardly a supportable position for the Court to take, however, and, indeed, the Court did not advance any reasoning in support of such a position.

What the Court does seem to have said is that the question of when life begins is an extremely unsettled and controversial issue,

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40. 93 S. Ct. at 732.
41. Note, *Legislative Purpose, Rationality and Equal Protection*, 82 YALE L.J. 123, 132 (1972).
42. *Id.*
43. *Id.*
44. TEXAS PENAL CODE § 1191 (Vernon 1961) states: "By "abortion" is meant that the *life* of the fetus or embryo shall be destroyed in the woman's womb. . . ." (emphasis added).

and for that reason alone, any legislative purpose that is based on a purported resolution of the issue is irrational.

> Texas urges that life begins at conception. . . . We need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus, the judiciary . . . is not in a position to speculate as to the answer.[45]

The Court then discussed the divergent views on the issue and continued:

> In view of all this, we do not agree that, by adopting one theory of life, Texas may override the rights of the pregnant woman that are at stake.[46]

If the court has indeed held that the legislative purpose is irrational because it is controversial, then in any case the state would have the burden of justifying its statute by demonstrating a lack of controversy over its legislative decision rather than by merely advancing a rational basis for it. This is an extremely strict requirement that affords the judiciary a powerful weapon to use against legislation that it finds offensive in some manner, for few issues that reach the Supreme Court are demonstrably non-controversial.

IMPLICATIONS OF A "CONTROVERSIAL PURPOSE TEST"

Abortion

In the *Wade* decision, the Court said that "[f]or 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."[47] Elsewhere, however, the Court spoke in terms of the right to privacy as being broad enough to include the woman's decision whether or not to terminate her pregnancy, stressing such factors as psychological harm to the mother, the distress associated with an unwanted child, and the stigma of unwed motherhood.[48] Realistically then, since such social factors (as oppposed to strictly medical factors) may be a basis for an abortion, the actual abortion decision is one that must

45. 93 S. Ct. at 730.
46. 93 S. Ct. at 731.
47. 93 S. Ct. at 732.
48. 93 S. Ct. at 727.

be resolved according to the dictates of the individual mother's conscience.

Because the definition of human life is so controversial that the abortion decision during the first three months is one that must be left to one's conscience, free of interference by the state,[49] it might follow that one who opposes abortion as murder should be able to act affirmatively and forcefully to prevent abortions from being effectuated. It would seem that by constitutionally disabling the legislatures from regulating an area because it is controversial and should be left to the dictates of one's conscience, the Supreme Court has painted itself into an anarchical corner. Obviously, such a result (the allowing of anti-abortionists to forcefully prevent abortions by others) will not be sanctioned by the Court, but to avoid it, at least insofar as the right to defend the lives of others is concerned, would require reasoning inconsistent with the "controversial issue" test.

Euthanasia and Suicide

Euthanasia and suicide are similar to abortion in the issues raised and the current controversy[50] surrounding the topics.[51] The context in which euthanasia is usually debated is where a patient is in the terminal stage of a fatal illness and voluntarily requests another person to end the patient's life. It is often indistinguishable from suicide except that an "accomplice" is involved. An even more controversial situation is where the patient is unconscious or for some other reason mentally incapable of requesting or giving his consent to being killed. In both voluntary and involuntary euthanasia, the killing may be accomplished by an act of omission, such as failing to continue medication, or an act of commission, such as giving a fatal overdose of a drug.

Voluntary euthanasia and suicide are similar in the issues raised and the illegality accompanying the act.[52] It seems likely

49. 93 S. Ct. at 732.

50. Time Magazine, March 5, 1973 at 70.

51. Williams, *Euthanasia and Abortion*, 38 U. COL. L.R. 178 (1966). *See also* Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 IND. L.J. 539 (1969); Louisell, *Abortion, the Practice of Medicine and the Due Process of Law*, 16 UCLA L. REV. 233 (1969); Morris, *Voluntary Euthanasia*, 45 WASH. L. REV. 239 (1970); Comment, *Legal Aspects of Euthanasia*, 36 ALBANY L. REV. 674 (1972); Comment, *The Right to Die*, 7 HOUSTON L. REV. 654 (1970); Note, *Euthanasia, The Individual's Right to Freedom of Choice*, 5 SUFFOLK U. L. REV. 190 (1972).

52. Gurney, *Is There a Right to Die?—A Study of the Law of Euthanasia*, 3 CUMBERLAND-SAMFORD L. REV. 235, 238 (1972).

that both could be constitutionally protected from state interference under the due process rationale of the *Wade* decision. The right to be protected in both instances is the patient's right of privacy to control his own body, including the right to decide whether or not to continue living in it, *i.e.*, the right not to be forced to continue living against one's will. The legislative purpose in preventing euthanasia and suicide could be described as the implementation of society's concern for the security and preservation of human life.[53]

The key to the overriding right of privacy in the abortion decision was the Court's conclusion that a legislature cannot rationally find a fetus to be human life deserving of protection because the issue is unsettled and controversial. The Court spoke of a protectible fetus in terms of a "meaningful life".[54] It seems equally controversial whether a life of pain, with an expectation of an agonizing death, or a life of unbearable mental torment is "meaningful". It would appear that a legislative purpose of protecting such a life would be as "irrational" as was the legislative decision to protect all fetal life irregardless of its stage of development. In addition, the countervailing "fundamental" right to control one's own body, in the ultimate sense of controlling one's life or death, must be at least as protectible as the right to decide whether to continue with or terminate a pregnancy. By the *Wade* analysis, it appears likely that state interference with voluntary euthanasia or suicide is an impermissible violation of the right to privacy.

A more difficult question is presented in involuntary euthanasia cases. While many commentators favor voluntary euthanasia, few favor involuntary euthanasia.[55] In voluntary euthanasia cases, the conflict between the legislative goal and the individual's right to privacy involves but one person. In involuntary euthanasia, however, the respective interests are those of separate persons. For that reason, the legislative goal in preventing involuntary euthanasia could be said to be two-fold: (1) implementation of society's concern for the security and preservation of human life in general

53. Kutner, *Due Process of Euthanasia: The Living Will, A Proposal*, 44 IND. L.J. 539, 545 (1969).
54. 93 S. Ct. at 732.
55. Note, *Euthanasia—The Individual's Right to Freedom of Choice*, 5 SUFFOLK U.L. REV. 190 (1972).

and (2) protection of the life of the particular person threatened by involuntary euthanasia, *i.e.*, those unable to protect themselves.

In the context of involuntary euthanasia, as in the abortion context, the right to privacy to be protected is that of a third person who is charged with the care of the potential victim. In the abortion case, the right of privacy is the mother's. In the involuntary euthanasia case, the right of privacy is that of the spouse of a terminally ill cancer patient, or the parent of a monsterously deformed or retarded infant, or the children of an aging and badly suffering parent. The right, however, may not be as strong in the involuntary euthanasia case as in abortion, for it does not involve control over one's own body in a physical sense. Rather, it involves a more general right of privacy, freedom from the psychological and physical stress imposed upon one charged with the care of the incapacitated person. The *Wade* opinion, however, indiscussing the detriment imposed upon a pregnant woman by denying her an abortion, stressed these very factors.[56] Furthermore, as mentioned above, the Court spoke of a protectible fetus in terms of a "meaningful life". While it is unclear exactly what the Court meant by this, the explanation could lie in the only ascertainable difference between a viable and non-viable fetus, that is, the ability to survive outside of the mother's body. Once the non-viable fetus is removed from the mother, it has no further expectation of life. In the same sense, it could be said that one who is in an acute and terminal stage of an illness with no real hope of recovery has no further expectation of life. If that is so, then that person's life could be said to be lacking in the "meaningful" qualities that renders a viable fetus protectible.

Just as consent of the fetus was irrelevant in the abortion rationale, consent of the patient may very well be irrelevant in an involuntary euthanasia case. On the other hand, the Court might choose to recognize that the patient has a right to privacy or a right to life such that without the patient's consent, the state could not demonstrate a compelling interest in allowing the killing of the patient merely by showing the burden that would be imposed upon another by allowing the patient to live. Disregarding such complications, though, the question, as in the abortion case, is whether the legislature can rationally decide to protect the life of the patient, and in so doing, infringe upon a right of privacy of another. Since the "meaningfulness" of the patient's life is analogous to the non-viable fetus's life, and the issue is highly controversial, the legislative purpose may well be "irrational".

56. 93 S. Ct. at 727.

A SIDE ISSUE IN THE ABORTION CASE

In arriving at its conclusions, the Court discussed an issue collateral to the central issue in the case, *i.e.*, whether the legislature could rationally conclude that the fetus is a human life. The Court considered whether or not a fetus is a "person" in the constitutional sense, such as to be deserving of equal protection from the state under the fourteenth amendment.[57] The opinion referred to various places in the constitution where the word "person" was used,[58] *e.g.*, in the apportionment clause, and concluded that, in those usages, the word had only post-natal application. The Court decided, therefore, that within the meaning of the fourteenth amendment, the word "person" does not include the unborn.

The Court's argument on this issue apparently assumes that, for example, because a fetus is not counted in a census for the purpose of determining the number of "persons" for apportionment reasons, that a fetus should also be excluded from the meaning of the word "person" in determining to whom the protection of the fourteenth amendment extends. The Court seems to be saying that, because a word is narrowly defined in the context of a practical application (census taking) due to the impracticability or susceptibility to large error of including fetuses within the meaning of the term, that it should also be narrowly defined, to the exclusion of an entire class of potential "persons", when determining what persons are deserving of constitutional protection of the right to life.

The meaning of "person" in the fourteenth amendment would be determinative if an abortion statute were being attacked by a representative of unborn children as a deprivation of life without due process of law and a denial of equal protection in violation of the fourteenth amendment.[59] But where, as in *Wade*, a restrictive abortion statute is attacked as violative of the mother's right to privacy, the decision does not turn on whether abortion is a denial of due process to the fetus. If abortion is a violation of the fetus's fourteenth amendment rights, then an anti-abortion statute

57. 93 S. Ct. at 728-730.
58. *Id.*
59. *See, e.g.*, Byrn v. N.Y. City Health & Hospital Corp., 31 N.Y.2d 194, 286 N.E.2d 887, 335 N.Y.S.2d 390 (1972), *motion to expedite consideration denied*, 409 U.S. 821.

would, of course, be constitutional. But even if such a statute is not compelled by the fourteenth amendment, it might still be valid, depending upon the rationality of the legislative definition of the concept of human life.

Conclusion

In its analysis of the abortion issue, the *Wade* decision considered the legislative purposes of protecting the mother's health and protecting the fetus's right to life and weighed these purposes against the infringement upon the mother's right to the privacy of controlling her own body. Insofar as the purpose of protecting the mother's health was deemed irrational so long as abortion is safer than childbirth, the rationality of this legislative purpose varies with changes in the respective mortality rates of abortion and childbirth. The purpose of protecting the life of a fetus, which rests upon a legislative definition of human life as beginning at conception, appears to be irrational because the correctness of that definition is a controversial and highly debatable issue. The Court, in effect, redefined protectible human life as beginning at viability, because apparently, in the mind of the Supreme Court, this is a less controversial definition. An extrapolation of this principle, that a legislative purpose is irrational because it is controversial, to the context of euthanasia and suicide indicates the possibility that legislative prohibition of the killing of humans in those contexts may well be constitutionally impermissible as violative of substantive due process rights of privacy. While this would be a highly unsatisfactory result, it is arguably consistent with the analysis in *Wade*.

Tom Riggs