Evangelium vitae and Constitutional Law

Richard S. Myers[*]

ABSTRACT: This paper explores the linkage between Pope John Paul II's encyclical *Evangelium vitae* and the constitutional law of the United States dealing with the life issues. *Evangelium vitae* contains a profound critique of two concepts that have greatly influenced the constitutional law of the United States: (1) the extreme autonomy perspective most infamously articulated in the Supreme Court's decision in *Planned Parenthood v. Casey* and (2) the Court's rejection of the inviolability of all human life. Although the constitutional law in the United States on abortion and assisted suicide has been relatively stable for decades, the issues are still subject to debate. The debate will likely continue for many years. As the debate continues, we would do well to seriously consider the views articulated in *Evangelium vitae*.

THIS PAPER EXPLORES the linkage between *Evangelium vitae*[1] and the constitutional law of the United States dealing with the life issues.[2] That topic might seem surprising. There is certainly a tension between Pope

[*] *Richard S. Myers* is Professor of Law at Ave Maria School of Law. He is a graduate of Kenyon College and Notre Dame Law School. He taught at Case Western Reserve University School of Law and the University of Detroit Mercy School of Law before moving to Ann Arbor, Michigan to help start Ave Maria School of Law. He has also taught as a visitor at Notre Dame Law School. His courses have included Constitutional Law and First Amendment, in addition to Civil Procedure and Conflict of Laws. He has published extensively on constitutional law in the law reviews of Catholic University, Case Western Reserve University, Notre Dame University, and Washington and Lee University. Professor Myers is the co-editor of *St. Thomas Aquinas and the Natural Law Tradition: Contemporary Perspectives* (2004). He is also the co-editor of the *Encyclopedia of Catholic Social Thought, Social Science, and Social Policy* (original two volumes, 2007; 3rd volume 2012). He was the President of University Faculty for Life (2004-2011) and is now its Vice-President. He is the Executive Secretary of the Society of Catholic Social Scientists. Professor Myers is married to Mollie Murphy, who is also on the Ave Maria faculty. They are the proud parents of six children: Michael, Patrick, Clare, Kathleen, Matthew, and Andrew.

[1] Pope John Paul II, *Evangelium vitae* (March 25, 1995), http://www.vatican.va/content/john-paul-ii/en/encyclicals/documents/ hf_jp-ii_enc_25031995_evangelium-vitae.html.

[2] I will primarily limit my discussion to abortion and euthanasia, which are two of the issues that University Faculty for Life addresses in the scholarly activities it promotes.

John Paul II's condemnation of abortion and the nearly unlimited right to abortion that the U.S. Supreme Court has protected since the Court's 1973 decision in *Roe v. Wade.*[3] *Evangelium vitae* does not, of course, specifically comment on the constitutional law of the United States. But, in significant respects, the encyclical critiques the cultural views that undergird the right to abortion. In particular, the Supreme Court's abortion decisions reflect an understanding of freedom that was specifically critiqued in *Evangelium vitae*. In addition, the Court's decisions also reject the inviolability of human life. *Evangelium vitae*, in contrast, is based upon a spirited defense of the sanctity and dignity of all human life. In my estimation, *Evangelium vitae* provides a valuable perspec-tive on the cultural views that support the Court's abortion decisions. As the Court continues to wrestle with abortion and assisted suicide, the Court would do well to consider the perspective offered by *Evangelium vitae*. That perspective provides a more secure foundation to protect human dignity than the perspective that the Court has accepted in certain decisions.[4]

I. *Abortion*

A. *Abortion and the constitutional law of the United States*

The linkage between *Evangelium vitae* and the constitutional law of the United States is most apparent in the area of substantive due process,[5] the legal doctrine that provides constitutional support for the right to abortion. The doctrine of substantive due process has long been controversial.[6] Substantive

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

[4] I have explored these themes in earlier articles. See, e.g., Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," 6 *Ave Maria Law Review* 61 (2007); Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching," 72 *University of Detroit Mercy Law Review* 771 (1995).

[5] Although the due process clause sounds procedural, the Court has long used the doctrine of substantive due process to hold unconstitutional laws that violate a "liberty" interest the Court believes is protected by the clause, regardless of the manner in which the deprivation occurs. The doctrine has long afforded constitutional protection to individual rights without a clear textual warrant.

[6] For detailed analysis of substantive due process, see Richard S. Myers, "*Obergefell* and the Future of Substantive Due Process," 14 *Ave Maria Law Review* 54 (2016); Richard S. Myers, "*Obergefell*, Substantive Due Process, and the Constitutionality of Laws Banning Assisted Suicide" in *Life & Learning XXVI: The Proceedings of the Twenty-Sixth University Faculty for life Conference*, ed. Joseph W.

due process is the legal doctrine that supported the decisions of the U.S. Supreme Court in the *Lochner* era.[7] During that era, the Court gave significant protection to economic rights (e.g., liberty of contract).[8] (The Court did also give protection to non-economic rights, as we see in cases such as *Meyer*[9] and *Pierce*.[10]) During the *Lochner* era, the Court used the due process clause in a conservative manner. The Court's decisions reflected support for a classical liberal view of individual freedom.[11]

The *Lochner* era was largely over by the late 1930s.[12] In 1963, a majority of the Supreme Court rejected the doctrine of substantive due process entirely.[13] But that abandonment of substantive due process was short-lived. In 1965, in *Griswold v. Connecticut,*[14] the Court launched the modern era of substantive due process. Within a decade, the doctrine of substantive due process was the basis for the Court's decision in *Roe v. Wade*.[15]

The theoretical basis for the non-economic rights the Court protects in the modern era of substantive due process has long been obscure. *Lochner* had a

---

Koterski (Bronx NY: UFL, 2016), pp. 75-93; Richard S. Myers, "The End of Substantive Due Process?," 45 *Washington & Lee Law Review* 557 (1988).

[7] *Lochner v. New York*, 198 U. S. 45 (1905).

[8] Ibid. In *Lochner*, the Court found that a New York law that made it illegal for bakery employees to work more than sixty hours a week or ten hours a day was unconstitutional because it interfered with the liberty of contract protected by the due process clause.

[9] In *Meyer v. Nebraska*, 262 U. S. 390 (1923), the Court held unconstitutional a Nebraska statute that made it illegal to teach a subject in a language other than English in any school, private or public. The Court found that the statute violated the due process clause because it unreasonably interfered with the rights of the teacher to pursue his occupation and the rights of parents to control the education of their children.

[10] In *Pierce v. Society of Sisters*, 268 U. S. 510 (1925), the Court held unconstitutional an Oregon statute that required children between eight and sixteen to attend public schools. The Court found that the statute violated the due process clause because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control." Ibid. at 534-35.

[11] See generally David E. Bernstein, *Rehabilitating Lochner: Defending Individual Rights against Progressive Reform* (Chicago IL: Univ. of Chicago Press, 2011).

[12] See Richard S. Myers, "*Obergefell* and the Future of Substantive Due Process," 14 *Ave Maria Law Review* 54, 55-56 (2016).

[13] *Ferguson v. Skrupa*, 372 U. S. 726 (1963).

[14] 381 U. S. 479 (1965).

[15] 410 U. S. 113 (1973).

conservative cast.[16] In contrast, in the modern cases (beginning with *Griswold*), the Court seems intent on getting on the right side of history.[17] The Court has, on certain occasions in the modern era, made a nod to history but that traditional approach has less and less appeal to the modern Court.

In *Roe v. Wade,*[18] the Court unsuccessfully tried to make a historical argument for the right to an abortion.[19] The Court avoided an appeal to expansive notions of individual freedom or to women's rights. In *Roe*, the right to abortion was almost more about the rights of the doctor than the liberty interest of the woman seeking an abortion.[20] In other contexts, even in the post-*Griswold* era, the Court has appealed to a traditional understanding in trying to limit the scope of substantive due process. As a consequence, the Court's substantive due process decisions in the Burger Court era seemed inconsistent to many observers. In *Bowers v. Hardwick,*[21] for example, the Court gave a limited scope to substantive due process in a decision rejecting the argument that there was a fundamental right to homosexual sodomy. The Court's methodology in *Bowers* was almost entirely historical and it seemed clear that such an approach would have led to a different result in the context of abortion.[22] In the late 1980s and early 1990s, it seemed that a more conservative Court might even overrule *Roe v. Wade*.[23]

But in 1992 in *Planned Parenthood v. Casey,*[24] a deeply divided Court reaffirmed the right to an abortion. The joint opinion's treatment of substantive due process was more expansively framed than the views set forth in earlier decisions. The Court made it clear that in deciding what liberty interest to

---

[16] Richard S. Myers, "*Obergefell*, Substantive Due Process, and the Constitutionality of Laws Banning Assisted Suicide" in *Life & Learning XXVI: Proceedings of the Twenty-Sixth University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2016), pp. 77-78.

[17] Ibid. at 78.

[18] 410 U. S. 113(91973). For a critique of *Roe*, see Richard S. Myers, "Re-Reading *Roe v. Wade*," 71 *Washington & Lee Law Review* 1025 (2014).

[19] Ibid. at 1030 (noting errors with *Roe*'s account of abortion history).

[20] Ibid. at 1032-33.

[21] 478 U. S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U. S. 558 (2003).

[22] Myers, supra note 16, at 79.

[23] See Richard S. Myers, "Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*" in *Life & Learning XII: Proceedings of the Twenty-Second University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), p. 57.

[24] 505 U. S. 833 (1992).

protect that it would not be confined to a textual or historical analysis. Instead, the Justices would engage in "reasoned judgment."[25] The joint opinion went on to state its understanding of the liberty protected by the doctrine of substantive due process. In so doing, the joint opinion drew more from modern conceptions of autonomy and self-determination than classical ideas of ordered liberty. The Court stated:

> [M]atters involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity an autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[26]

The emphasis in the joint opinion in *Casey* was on individual autonomy and self-determination. One commentator noted that "the typical focus on the mechanics of *Casey* and *Roe* has unfortunately overshadowed the fact that a very conservative Supreme Court has strongly re-affirmed the principle that moral autonomy is the philosophical basis for the constitutional privacy right."[27] And this commentator concluded that the Court had accepted the view that moral relativism is a constitutional command.[28]

The Court made it clear that its approach to substantive due process reflected an emphasis on individual choice and not the content of that choice. Accordingly, the Court did not think that the state's interest in protecting the life of the unborn was sufficient to outweigh the liberty interests of the pregnant mother. The Court's decisions essentially allowed abortion on demand.

The broad scope of the Court;s abortion decisions was clear from the time of *Roe v. Wade*. In *Roe v. Wade*, the Court set forth the trimester framework. The Court did acknowledge that the state had an important interest in the health of the pregnant woman and "another important and legitimate interest in protecting the potentiality of human life"[29] and that at some point during

---

[25] Ibid. at 849.

[26] 505 U. S. at 851.

[27] Steven G. Gey, "Is Moral Relativism a Constitutional Command?", 70 *Indiana Law Journal* 331, 363 (1995).

[28] Ibid. at 368.

[29] Roe, 410 U. S. at 162.

pregnancy "each becomes 'compelling.'"[30] *Roe*'s trimester framework gave states the ability to regulate abortion after the first trimester "in ways that are reasonably related to maternal health."[31] Under *Roe*, the state had the ability to proscribe abortion after viability, but the Court added the proviso "except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."[32] In discussing the physician's medical judgment, the Court in *Doe v. Bolton* explained that this would be "exercised in the light of all factors – physical, emotional, psychological, familial, and the woman's age – relevant to the well-being of the patient." The Court noted that "all these factors relate to health."[33] Although there is some ambiguity here, the conclusion seems inescapable that the Court thought these factors would inform the interpretation of the "health" exception that *Roe* stated was required by the Constitution.[34] The Court made it clear that the state interest in the life of the unborn could not outweigh the mother's interest in obtaining an abortion. The Court ominously noted that the unborn have never been regarded as persons in the whole sense[35] and that the state's interest was in meaningful life.[36] The Court, it seemed clear, was valuing the lives worthy of protection.[37]

This expansive view of the right to abortion continued through the Court's decision in *Casey*. Even though it acknowledged that it had not given enough weight to the state's interest in life, the *Casey* Court still did not permit legislatures to prohibit abortion. After *Casey*, states had somewhat greater freedom to regulate abortion. But *Casey* did not allow states to prohibit abortion even after viability.[38]

---

[30] Ibid. at 163.

[31] Ibid. at 164.

[32] Ibid. at 165.

[33] *Doe v. Bolton,* 410 U. S. 179, 192 (1973).

[34] Richard S. Myers, "The Constitutionality of Laws Banning Sex-Selection Abortion" in *Life & Learning XXVIII: Proceedings of the Twenty-Eighth University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), p. 67.

[35] *Roe*, 410 U. S. at 162.

[36] Ibid. at 163.

[37] See Myers, supra note 18, at 1036; Richard S. Myers, "An Analysis of the Constitutionality of Laws Banning Assisted Suicide from the Perspective of Catholic Moral Teaching," 72 *University of Detroit Mercy Law Review* 782-783 (1995).

[38] See Richard S. Myers, "Reflections on the Twentieth Anniversary of *Planned Parenthood v. Casey*" in *Life & Learning XXII: Proceedings of the Twenty-Second University Faculty for life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2018), pp. 53-68.

At the time of the *Casey* decision in 1992, the Court's substantive due process decisions relating to abortion were based on two key points. The first was that the Court defined liberty in an expansive way. The Court defined liberty in a way that reflected modern ideas of individual autonomy. This understanding was untethered to traditional ideas of ordered liberty. The second and related point was that the Court did not view its understanding of liberty as constrained by traditional governmental interests such as life or public morals. Importantly, the Court was not willing to acknowledge the importance of the state's interest in protecting the life of the unborn.

B. *Evangelium vitae and abortion*

It was precisely these cultural understandings that Pope John Paul II critiqued in *Evangelium vitae*. The development of the encyclical occurred at the very same time as the Court's decisions in abortion cases leading to the 1992 decision in *Casey*. In April 1991, an Extraordinary Consistory of Cardinals on threats to human life that led eventually to the issuance of *Evangelium vitae* featured an important address by then Cardinal Ratzinger.[39] In identifying the threats to human life, Cardinal Ratzinger focused on the relativistic approach to morality that is so widespread in contemporary society. Cardinal Ratzinger stated: "Often, a merely formal idea of conscience is joined to an individualistic view of freedom, understood as the absolute right to self-determination on the basis of one's own convictions."[40] This view of freedom, which was not linked to a "classical conception of the moral conscience,"[41] is unconstrained by any sense of objective morality. Cardinal Ratzinger also emphasized the lack of respect for all human life that is common in modern society. The only life that is protected, it seems, is the life that the majority deigns to protect. This places the weak and voiceless in jeopardy:

> One understands, then, how a state which arrogates to itself the prerogative of defining which human beings are or are not the subject of rights and which consequently grants

[39] Joseph Cardinal Ratzinger, "The Problem of Threats to Human Life" (April 8, 1991), https://www.catholicculture.org/culture/ library/view.cfm?recnum=187; see John J. Conley, "Benedict XVI: Prolegomena to a Magisterium for Life" in *Life & Learning XV: Proceedings of the Fifteenth University Faculty for Life Conference*, ed. Joseph W. Koterski (Washington DC: UFL, 2006), pp. 181-88, exploring the importance of Cardinal Ratzinger's speech.

[40] Ratzinger, supra n39, at IV:2.

[41] Ibid.

to some the power to violate others' fundamental right to life, contradicts the democratic ideal to which it continues to appeal and undermines the very foundations on which it is built. By allowing the rights of the weakest to be violated, the state also allows the law of force to prevail over the force of law. One sees, then, that the idea of an absolute tolerance of freedom of choice for some destroys the very foundation of a just life for men together. The separation of politics from any natural content of right, which is its inalienable patrimony of everyone's moral conscience, deprives social life of its ethical substance and leaves it defenseless before the will of the strongest.[42]

The 1991 consistory called for Pope John Paul to write an encyclical on the life issues. That encyclical was not issued until 1995. But between 1991 and 1995, Pope John Paul issued *Veritatis splendor,*[43] his great encyclical on moral theology. Pope John Paul II had announced his intention to publish an encyclical on moral theology in 1987. The encyclical was not published until 1993, in part because Pope John Paul thought it appropriate to wait until the publication of the *Catechism* (which occurred in 1992). The *Catechism* "contains a complete and systematic exposition of Christian moral teaching.*"*[44] *Veritatis splendor* deals with the fundamental principles of the Church's moral teaching and specifically addresses "the presuppositions and consequences" of the widespread dissent from that teaching.[45]

A principal purpose of *Veritatis splendor* was to reflect upon the idea of human freedom and in so doing to critique the modern idea of freedom. It is quite clear that the encyclical is a sustained critique of the understanding of freedom reflected in *Casey*'s mystery passage. *Veritatis splendor* rejects the extreme idea of moral autonomy set forth in *Casey*. In contrast to the subjectivism of modern thought, *Veritatis splendor* affirms that there are exceptionless moral norms, such as the moral illicitness of "kill[ing] an innocent human being."[46] Or, put another way, *Veritatis splendor* affirms that there is an objective morality that is understood by linking freedom and truth.[47]

In a key passage from *Veritatis splendor*, which sounds as if he is directly

---

[42] Ibid. at IV:1.

[43] Pope John Paul II, *Veritatis splendor* (August 6, 1993), http://www.vatican.va/content/john-paul-ii/en/encyclicals/ documents/hf_jp-ii_enc_06081993_veritatis-splendor.html.

[44] Ibid. at 5.

[45] Ibid.

[46] Ibid. at 50.

[47] Ibid. at 34.

addressing the *Casey* opinion, Pope John Paul stated:

> Certain currents of modern thought have gone so far as to exalt freedom to such an extent that it becomes an absolute, which would then be the source of values. This is the direction taken by doctrines which have lost the sense of the transcendent or which are explicitly atheistic. The individual conscience is accorded the status of a supreme tribunal of moral judgment which hands down categorical and infallible decisions about good and evil. To the affirmation that one has a duty to follow one's conscience is unduly added the affirmation that one's moral judgment is true merely by the fact that it has its origins in the conscience. But in this way the inescapable claims of truth disappear, yielding their place to a criterion of sincerity, authenticity and "being at peace with oneself," so much so that some have come to adopt a radically subjectivist conception of moral judgment. As is immediately evident, the crisis of truth is not unconnected with this development. Once the idea of a universal truth about the good, knowable by human reason, is lost, inevitably the notion of conscience also changes. Conscience is no longer considered in its primordial reality as an act of a person's intelligence, the function of which is to apply the universal knowledge of the good in a specific situation and thus to express a judgment about the right conduct to be chosen here and now. Instead, there is a tendency to grant to the individual conscience the prerogative of independently determining the criteria of good and evil and then acting accordingly. Such an outlook is quite congenial to an individualistic ethic, wherein each individual is faced with his own truth, different from the truth of others. Taken to its extreme consequences, this individualism leads to the denial of the very idea of human nature.[48]

The encyclical later explored the grave threats of this way of thinking in a way that underscored the serious consequences of the modern trends in moral theology:

> Totalitarianism arises out of a denial of truth in the objective sense. If there is no transcendent truth, in obedience to which man achieves his full identity, then there is no sure principle for guaranteeing just relations between people. Their self-interest as a class, group or nation would inevitably set them in opposition to one another. If one does not acknowledge transcendent truth, then the force of power takes over, and each person tends to make full use of the means at his disposal in order to impose his own interests or his own opinion, with no regard for the rights of others.... Thus, the root of modern totalitarianism is to be found in the denial of the transcendent dignity of the human person who, as the visible image of the invisible God, is therefore by his very

[48] Ibid. at 32.

nature the subject of rights which no one may violate -- no individual, group, class, nation or State. Not even the majority of a social body may violate these rights, by going against the minority, by isolating, oppressing, or exploiting it, or by attempting to annihilate it.[49]

Evangelium vitae was issued in 1995. In a sense, *Evangelium vitae* is simply an application of the moral theology set forth in *Veritatis splendor* to the life issues.[50] *Evangelium vitae* presents the same sort of critique of the modern idea of freedom that is the foundation of *Veritatis splendor*. It is quite clear then that *Evangelium vitae* critiqued a way of thinking, an understanding of freedom, that had manifested itself in the decisions of the U.S. Supreme Court. As *Evangelium vitae* put it: "[W]hen freedom is detached from objective truth it becomes impossible to establish personal rights on a firm rational basis; and the ground is laid for society to be at the mercy of the unrestrained will of individuals or the oppressive totalitarianism of public authority."[51]

The main focus of *Evangelium vitae*, though, is to affirm the "value and inviolability of human life."[52] In *Evangelium vitae* John Paul states: "I confirm that the direct and voluntary killing of an innocent human being is always gravely immoral."[53] Importantly, Pope John Paul II emphasized that this principle extends to all:

As far as the right to life is concerned, every innocent human being is absolutely equal to all others. This equality is the basis of all authentic social relationships, which, to be truly such, can only be founded on truth and justice, recognizing and protecting every man and woman as a person and not as an object to be used. Before the moral norm which prohibits the direct taking of the life of an innocent human being there are no privileges or exceptions for anyone. It makes no difference whether one is the master of the world or the "poorest of the poor" on the face of the earth. Before the demands of morality we are all absolutely equal."[54]

---

[49] Ibid. at 99 (quoting Pope John Paul II, *Centesimus annus* (May 1, 1991) at 44).

[50] Kevin Miller has explored the relationship between *Veritatis splendor and Evangelium vitae*. Miller stated that *Evangelium vitae* "could be said to constitute the second volume of a two-volume work." Kevin E. Miller, "The Politics of a Culture of Life" in *Life & Learning VI: Proceedings of the Sixth University Faculty for Life Conference*, ed. Joseph W. Koterski (Washington, D.C.: UFL, 1997), p. 245.

[51] *Evangelium vitae*, supra note 1, at 96.

[52] See Miller, supra note 50, at 245.

[53] *Evangelium vitae*, supra note 1, at 57.

[54] Ibid. at 57.

This principle, John Paul then made clear, extends to abortion. The Pope stated: "I declare that direct abortion, that is, abortion willed as an end or as a means, always constitutes a grave moral disorder, since it is the deliberate killing of an innocent human being."[55]

Evangelium vitae re-affirmed *Veritatis splendor*'s critique of an understanding of freedom that is severed from truth and goes to great lengths to emphasize the value of all human life. In addition, *Evangelium vitae* emphasized the great harms that result from limiting the right to life to certain human beings. In particular, it explained how the denial of the right to life for all presents grave risks to the weak and the vulnerable.

C. Later Developments

Not much has changed in the area of abortion since the Court's *Casey* decision in 1992. In 2007, in *Gonzales v. Carhart,*[56] the Supreme Court did affirm the constitutionality of the federal Partial Birth Abortion Act of 2003. This move away from its 2000 decision in *Stenberg v. Carhart*[57] was a welcome development. But it is important to understand the limits of *Gonzales v. Carhart.*[58] The Court still treated *Casey* as setting forth the controlling legal standard. And, importantly, the basis for the Court's holding prohibiting one abortion method was that other legal methods continued to be available. Justice Kennedy, for a majority, concluded that the law was "not invalid on its face where there is uncertainty over whether the barred procedure is ever necessary to preserve a woman's health, given the availability of other abortion procedures that are considered to be safe alternatives."[59] As Justice Ginsburg noted in her dissent in *Gonzales v. Carhart*, the federal Partial Birth Abortion Act "saves not a single fetus from destruction, for it targets only a method of performing abortion."[60]

After *Gonzales v. Carhart*, states still have had very little power to

---

[55] Ibid. at 62.

[56] 550 U. S. 124 (2007).

[57] 530 U. S. 914 (2000).

[58] Richard S. Myers, "The Supreme Court and Abortion: The Implications of *Gonzales v. Carhart* (2007)" in *Life & Learning XVII: The Proceedings of the Seventeenth University Faculty for Life Conference*, ed. Joseph W. Koterski (Bronx NY: UFL, 2008), pp. 103-28.

[59] 550 U.S. at 166-167.

[60] 550 U.S. at 181 (Ginsburg, J., dissenting).

prohibit abortion at any point during pregnancy. Later decisions, such as the 2016 decision in *Whole Woman's Health v. Hellerstedt*[61] and the 2020 decision in *June Medical Services v. Russo,*[62] make it clear that *Casey*'s undue burden standard is still the governing legal framework. There is considerable debate about the meaning of the undue burden standard, as the opinions in *June Medical Services v. Russo* indicate.[63] But the basic structure of the legal framework has been controlled by *Casey* for quite some time. Under this approach, although they have somewhat greater freedom to regulate abortion than they did prior to *Casey*, states have no authority to prohibit abortions.[64]

This has been demonstrated in recent cases involving state laws that have banned abortions for discriminatory reasons such as the race, sex, or disability of the unborn child. For example, the Seventh Circuit struck down Indiana's "Sex Selective and Disability Abortion Ban."[65] In June 2019, in *Box v. Planned Parenthood*, the U.S. Supreme Court refused to hear the issue.[66] Justice Thomas's concurrence expressed the view that the Court will need to consider the constitutionality of laws such as Indiana's. Justice Thomas stated:

> Given the potential for abortion to become a tool of eugenic manipulation, the Court will soon need to confront the constitutionality of laws like Indiana's. But because further percolation may assist our review of this issue of first impression, I join the Court in declining to take up the issue now.[67]

Justice Thomas signaled how he will rule on the issue when he stated: "this law and other laws like it promote a State's compelling interest in preventing abortion from becoming a tool of modern-day eugenics."[68] The Court may have an opportunity to address the issue in the near future. Ohio's ban on abortions due to a diagnosis of Down Syndrome was invalidated by a divided panel of

[61] 136 S.Ct. 2292 (2016).

[62] 207 L.Ed. 2d 566 (2020).

[63] For commentary on *June Medical*, see Erika Bachiochi, "What Does Justice Roberts's Ruling Mean for the Pro-Life Cause?", *Public Discourse* (July 2, 2020), https://www.thepublicdiscourse .com/2020/ 07/66511/.

[64] See Myers, supra note 38.

[65] *PPINK v. Commissioner*, 888 F. 3d 300 (7th Cir. 2018).

[66] 139 S. Ct. 1780 (2019). In Box, the Court did uphold the constitutionality of the Indiana law requiring the humane disposal of human remains. The Court denied certiorari on the constitutionality of the Sex Selective and Disability Abortion ban.

[67] Ibid. at 1784 (Thomas, J., concurring).

[68] Ibid. at 1783 (Thomas, J., concurring).

the Sixth Circuit.[69] The dissent echoed many of the themes of Justice Thomas's concurrence in *Box*.[70] The Sixth Circuit is rehearing the case en banc.[71]

In sum, the *Casey* approach is still the law of the land. *Casey* rests on two key points: the modern notion of freedom that leads to subjectivism and a disregard for the inviolability of human life. These views pose grave threats to the weak and the vulnerable, as the Sixth Circuit case dealing with Down Syndrome abortions reveals. But, as I will explore below, the right to abortion is still highly contested. As this debate about abortion continues, *Evangelium vitae*'s perspective has much to offer.

II. *Assisted Suicide*

A. *Assisted Suicide and the constitutional law of the United States.*

The sharp tension between the constitutional law of the United States and the moral teaching of the Catholic Church on abortion does not exist with respect to assisted suicide. The Supreme Court has rejected the idea that there is a fundamental right to assisted suicide and has, accordingly, permitted states either to prohibit or to allow assisted suicide. *Evangelium vitae* rejects the idea of assisted suicide in very strong terms and views the legalization of assisted suicide as a grave wrong. The legal situation in the United States, though, is in a state of flux and there are some ominous signs suggesting that we are moving to a more widespread recognition of the permissibility of assisted suicide.

Assisted suicide has largely been illegal in the United States for many years. Supporters of the right to die movement have in recent decades argued that these longstanding prohibitions violate the constitutional rights of those seeking to terminate their lives. In the years immediately after *Casey*, some lower courts read the mystery passage as support for a constitutional right to assisted suicide.[72] These opinions ignored the opposition to assisted suicide in our history and tradition and appealed to *Casey*'s abstract rhetoric. These opinions regarded the broad language as "highly instructive"[73] and "almost

---

[69] *Preterm-Cleveland v. Himes*, 940 F. 3d 318 (6th Cir. 2019).

[70] Ibid. at 325-328 (Batchelder, J., dissenting).

[71] See http://www.uffl.org/blog/2020/03/12/sixth-circuit-hears-arguments-indown-syndrome-abortion-case/.

[72] Myers, supra note 12, at 57-58.

[73] *Compassion in Dying v. Washington*, 850 F. Supp. 1454, 1459-60 (W. D. Wash. 1994).

prescriptive"[74] in resolving the assisted suicide issue. According to this view, "the right to die with dignity accords with American values of self-determination and privacy regarding personal decisions."[75] According to one state court judge,

> Liberty in the context of our constitution merits the freedom of an individual to determine matters about himself for himself and not have others, even if they are in the majority and thus comprise the government, force their will upon the individual. The basic concept of self-determination and personal autonomy is the central point of our constitutional structure. In matters that relate solely to ourselves, we alone are free to decide our personal fate and neither the mob nor the government may take that away from us.[76]

But when the issue reached the Supreme Court in *Washington v. Glucksberg*[77] and *Vacco v. Quill*[78] in 1997, the Court rejected the argument that there was a fundamental right to assisted suicide. The Court explained the need for caution in considering whether to expand the category of fundamental rights, "lest the liberty protected by the Due Process Clause be subtly transformed into the policy preferences of the members of this Court."[79] The Court emphasized two key points:

> First, we have regularly observed that the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, "deeply rooted in this Nation's history and tradition," and "implicit in the concept of ordered liberty," such that "neither liberty nor justice would exist if they were sacrificed." Second, we have required in substantive-due-process cases a "careful description" of the asserted fundamental liberty interest."[80]

The *Glucksberg* Court almost completely ignored *Casey*'s expansive approach and adopted a narrow, historically grounded approach to substantive due

---

[74] Ibid.

[75] *Compassion in Dying v. Washington*, 49 F. 3d 585, 596 (9th Cir. 1995).

[76] *Hobbins v. Attorney General*, 518 N. W. 2d 487, 498 (Mich. Ct. App.), rev'd, 527 N. W. 2d 714 (Mich. 1994), cert. denied, 514 U. S. 1083 (1995).

[77] 521 U.S. 702 (1997).

[78] 521 U.S. 793 (1997).

[79] *Glucksberg*, 521 U.S. at 720.

[80] Ibid. at 720-21 (citations omitted).

process.[81]

The *Glucksberg* Court adopted a posture of judicial restraint. The Court stated that to accept the challenge to the state laws in question would require the Court to reject a long and largely persisting history of opposition to assisted suicide.[82] Unlike the Court's action in *Roe*, in *Glucksberg* the Court was unwilling to constitutionalize another area of social life.[83]

The Court's opinion was a huge success for defenders of the sanctity of life ethic. The Court's decisions permit states to ban assisted suicide, although the decisions do not require states to do so. The 1997 decisions remitted the profound issue of assisted suicide to the democratic process. But the key point is that the decisions allow those who oppose assisted suicide an opportunity to present their views without having to overcome a constitutional hurdle.[84]

B. *Evangelium vitae and assisted suicide*.

Evangelium vitae's teaching on assisted suicide and euthanasia is straightforward. *Evangelium vitae* begins by noting the threats to human life posed by exaggerated notions of individual autonomy and by a rejection of the idea that all human life (even the weak and vulnerable) is worthy of protection by the norm that prohibits the intentional killing if all innocent human life. The encyclical explores the risks created by the idea of moral autonomy, the "notion of freedom which exalts the isolated individual in an absolute way, and gives no place to solidarity, to openness to others and service of them."[85] *Evangelium vitae* admits that

> the taking of life...in its final stages is sometimes marked by a mistaken sense of altruism and human compassion, [but then states that] it cannot be denied that such a culture of death, taken as a whole, betrays a completely individualistic concept of freedom, which ends up becoming the freedom of "the strong" against the weak who have no choice but to submit.[86]

---

[81] Myers, supra note 12, at 59.

[82] See Richard S. Myers, "The Constitutionality of Laws Banning Physician Assisted Suicide," 31 *Brigham Young University Journal of Public Law* 395, 397 (2017).

[83] Myers, supra note 18, at 1043.

[84] Myers, supra note 82, at 408.

[85] *Evangelium vitae*, supra note 1, at 19.

[86] Ibid.

The encyclical continually expresses concern for the weak. In a particularly strong passage, John Paul states:

> We must also mention the mentality which tends to equate personal dignity with the capacity for verbal and explicit, or at least perceptible, communication. It is clear that on the basis of these presuppositions there is no place in the world for anyone who, like the...dying, is a weak element in the social structure, or for anyone who appears completely at the mercy of others and is radically dependent on them, and can only communicate through the silent language of a profound sharing of affection. In this case it is force which becomes the criterion for choice and action in interpersonal relations and in social life. But this is the exact opposite of what a State ruled by law, as a community in which the "reasons of force" are replaced by the "force of reason," historically intended to affirm.[87]

The encyclical's treatment of end of life issues follows its emphasis on the inviolability and value of all human life, even a human life that some may regard as "no longer meaningful."[88] *Evangelium vitae* defines euthanasia as "an action or omission which of itself and by intention causes death, with the purpose of eliminating all suffering."[89] Such acts are condemned in the strongest terms: "I confirm [Pope John Paul II stated] that euthanasia is a grave violation of the law of God, since it is the deliberate and morally unacceptable killing of a human person."[90]

C. *Later Developments*.

The Supreme Court decisions in *Washington v. Glucksberg* and *Vacco v. Quill* moved the debate about the legality of assisted suicide to the state courts and to the democratic process. There were important benefits to the Court's exercise of judicial humility.[91] The continuing debate about the legality of assisted suicide could proceed without the distorting effects of a constitutional intervention by the U.S. Supreme Court. As a result, the ongoing debate could be informed by the experiences in jurisdictions where assisted suicide has been

---

[87] Ibid.

[88] Ibid. at 64.

[89] Ibid. at 65.

[90] Ibid.

[91] See Richard S. Myers, "The Virtue of Judicial Humility," 13 *Ave Maria Law Review* 207 (2015).

legalized.[92]

Interestingly, *Glucksberg* and *Quill* have been influential in leading most state courts to reject state constitutional challenges to state laws banning assisted suicide. This was the case in decisions from Florida and Alaska shortly after the Court's 1997 decisions.[93] And, the Court's 1997 decisions have continued to be influential, as more recent decisions from state courts in New York and New Mexico indicate.[94] The constitutional arguments in support of a right to assisted suicide have not met with any significant success.

The legalization effort, though, has had considerable success in state legislatures and in the initiative and referendum process. Physician assisted suicide is now legal in California, Colorado, Hawaii, Maine, Montana, New Jersey, Oregon, Vermont, Washington, and the District of Columbia.[95] But this has happened without the distorting effect of a constitutional decision by the U.S. Supreme Court. Supporters of prohibitions on assisted suicide are able to participate in the democratic debate without having to face constitutional obstacles, as is the case with democratic debates about abortion.

D. *Summary*

The constitutional law of the United States does not currently support a fundamental right to assisted suicide. The U.S. Supreme Court has not extended the extreme autonomy perspective to the issue of assisted suicide, and this posture of judicial restraint has permitted states to ban assisted suicide. The Court has accepted the constitutional legitimacy of the traditional moral teaching position against assisted suicide that has informed the law for many years. The Court has not, however, required states to prohibit assisted suicide. The Court has, moreover, rather weakly defended the state's interest in protecting human life and there are some troubling signs that suggest that the Court might be willing to change its view on this issue.

III. *Troubling Developments*

At the moment, the constitutional law in the United States dealing with abortion and assisted suicide is relatively stable. The Court has continued to protect a nearly unlimited right to abortion while at the same time rejecting a

---

[92] Richard S. Myers, Book Review, 18 *Ave Maria Law Review* 35, 39 (2020).
[93] Ibid. at 38(discussing the Alaska and Florida cases).
[94] Ibid. at 38-39 (discussing the New Mexico and New York cases).
[95] Ibid. at 36.

fundamental right to assisted suicide. But there is still considerable debate about both issues. As the debate continues, the Court's more recent use of *Casey*'s approach to substantive due process may be of critical importance.

The Supreme Court seemed to bury the extreme autonomy approach in *Glucksberg*, which came just five years after *Casey.*[96] In 2003, however, the Court revived the broad methodology in *Lawrence v. Texas.*[97] In *Lawrence*, the Court invalidated a Texas law proscribing "deviate sexual intercourse" between persons of the same sex.[98] The majority opinion by Justice Kennedy is almost a complete disaster in terms of judicial craftsmanship.[99] In that respect, the opinion shares much in common with Justice Blackmun's opinion in *Roe*.[100] The *Lawrence* opinion is perhaps most notable for reviving the "mystery passage" in *Casey*. It also extolled the extreme moral autonomy approach: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[101] The Court rejected the idea that Texas could condemn homosexual conduct as immoral. As the Court stated, "[t]he issue is whether the majority may use the power of the State to enforce these [moral] views on the whole society through operation of the criminal law. 'Our obligation is to define the liberty of all, not to mandate our own moral code.'"[102] This effort to impose morality was particularly troublesome because the Court viewed Texas as trying "to define the meaning of the relationship [between two consenting adults] or to set its boundaries absent injury to a person or abuse of an institution the law protects."[103]

Justice Kennedy's opinion made it clear that the Court was not trying to do a textual or historical analysis. As commentators have noted, the majority did not so much as cite *Glucksberg*, which seemed to set forth the governing analytical framework for substantive due process cases.[104] The *Lawrence* Court argued that "'[h]istory and tradition are the starting point but not in all cases the

---

[96] See Myers, supra note 16, at 79-82.

[97] 539 U. S. 558 (2003).

[98] Ibid. at 563.

[99] See Richard S. Myers, "Pope John Paul II, Freedom, and Constitutional Law," 6 *Ave Maria Law Review* 61, 70 (2007).

[100] Ibid.

[101] Lawrence, 539 U.S. at 562.

[102] Ibid. at 571 (quoting *Casey*, 505 U. S. at 850).

[103] *Lawrence*, 539 U.S. at 567.

[104] Myers, supra n. 16, at 81.

ending point of the substantive due process inquiry.'"[105] The key for the Court was its own assessment of contemporary trends and understandings about the nature of liberty. The Court emphasized that its analysis of recent history demonstrated "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."[106] The Court closed with this passage:

> Had those who drew and ratified the Due Process Clauses of the Fifth Amendment or the Fourteenth Amendment known the components of liberty in its manifold possibilities, they might have been more specific. They did not presume to have this insight. They knew times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress. As the Constitution endures, persons in every generation can invoke its principles in their own search for greater freedom.[107]

Despite *Lawrence*, *Glucksberg* seemed to remain the dominant approach to substantive due process. Several years after *Lawrence*, Professor Calabresi noted that *Lawrence* "is itself an outlier that neither the Supreme Court nor the lower federal and state courts are following."[108] Interestingly, a Ninth Circuit opinion in 2015 rejected a substantive due process argument by relying on *Glucksberg.*[109] The court did not even cite *Lawrence*.

But the Supreme Court's decision in *Obergefell v. Hodges*[110] seems to change all of this. In 2015, in *Obergefell*, the Supreme Court found, as it framed the issue, that "the Fourteenth Amendment requires a State to license a marriage between two people of the same sex."[111] The Court's holding principally relied on the doctrine of substantive due process. The Court explained that in applying this doctrine it would "exercise reasoned judgment in identifying interests of the person so fundamental that the State accord them its respect."[112] In applying "reasoned judgment,"[113] the Court stated that

---

[105] Ibid. at 81 n. 38.
[106] *Lawrence*, 539 U.S. at 572.
[107] Ibid. at 578-579.
[108] Myers, supra n. 16, at 82 n. 47.
[109] Ibid. at 82 n. 48.
[110] 135 S. Ct. 2584 (2015).
[111] Ibid. at 2593.
[112] Ibid. at 2598.
[113] Ibid.

"history and tradition guide and discipline this inquiry but do not set its outer boundaries.... That method respects our history and learns from it without allowing the past alone to rule the present."[114] Echoing *Lawrence*, the Court stated:

> The nature of injustice is that we may not always see it in our own times. The generations that wrote and ratified the Bill of Rights and the Fourteenth Amendment did not presume to know the extent of freedom in all of its dimensions, and so they entrusted to future generations a charter protecting the right of all persons to enjoy liberty as we learn its meaning. When new insight reveals discord between the Constitution's central protections and a received legal structure, a claim to liberty must be addressed.[115]

The Court tried to situate its holding as following from earlier cases that had recognized a fundamental right to marry. The Court, however, seemed to realize that something new was at stake, and ultimately concluded that the right to marry should be extended to same-sex couples. The Court's principal reason for so doing was that this was necessary to respect individual autonomy and self-determination and choice, at least when the conduct involved "the rights of two consenting adults whose marriages would pose no risk of harm to themselves or third parties."[116] The Court admitted that marriage had been traditionally understood to involve a union of a man and a woman: "The limitation of marriage to opposite-sex couples may long have seemed natural and just, but its inconsistency with the central meaning of the fundamental right to marry is now manifest."[117]

In reaching this conclusion, the Court did not rely on national or international trends, as it did in *Lawrence*. The Court did not rely on the "careful description" analysis from *Glucksberg*. The Court stated: "Yet while that approach may have been appropriate for the asserted right there involved (physician-assisted suicide), it is inconsistent with the approach this Court has used in discussing other fundamental rights, including marriage and intimacy."[118] The *Obergefell* Court also abandoned the other key feature of *Glucksberg* – its emphasis on history and tradition. Fundamental rights, the

[114] Ibid. (citations omitted).
[115] Ibid. at 2598.
[116] Ibid. at 2607.
[117] Ibid. at 2602.
[118] Ibid. at 2602.

Court explained, are not limited to those protected by history and tradition: "They rise, too, from a better informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era."[119]

Given the critique of the extreme ideas of moral autonomy in *Veritatis splendor* and *Evangelium vitae*, it is no surprise that Pope John Paul took a very different approach to the issues presented in *Lawrence* and *Obergefell.*[120] For purposes of this paper, the more important issue is whether *Obergefell* will lead to judicial recognition of a right to assisted suicide. Some have speculated that *Obergefell* might lead to the overruling of *Glucksberg*, although that is far from certain.[121]

After *Casey*, a number of judges read the mystery passage as supporting the right to assisted suicide.[122] One of the judges who took this view was Judge Reinhardt of the Ninth Circuit, who was a cultural bellwether of sorts during his long tenure as an appellate court judge.[123] Judge Reinhardt's opinion was rejected by the Supreme Court in *Glucksberg*. The autonomy view has, however, now been re-affirmed in *Lawrence* and in *Obergefell*. And *Obergefell* explicitly rejected *Glucksberg*'s methodology.

If the Court again considered the constitutionality of laws banning assisted suicide, it would find that the legal landscape has changed. There is a slow but discernible trend in favor of accepting the legality of assisted suicide.

After *Glucksberg*, the landscape on assisted suicide was fairly stable. For the most part, public opinion on the issue remained the same. In the last few years, however, the "right to die" movement has gained some momentum. There have been increasing efforts to legalize assisted suicide in state legislatures. Although many such efforts have been defeated, physician assisted suicide is now legal in nine states (including California) and the District of Columbia. Moreover, public opinion has moved in favor of assisted suicide in the last few years.[124]

---

[119] Ibid. at 2602.

[120] See, e.g., Thomas J. Paprocki, "Marriage, Same-Sex Relationships, and the Catholic Church," 38 *Loyola University of Chicago Law Journal* 247 (2007)(discussing Pope John Paul's views on these issues).

[121] See Myers, supra n. 16; Richard S. Myers, "The Constitutionality of Laws Banning Physician Assisted Suicide," 31 *Brigham Young University Journal of Public Law* 395 (2017).

[122] See Myers, supra n. 12, at 57-58.

[123] See Myers, supra n. 16, at 87; Myers, supra note 91, at 208-09.

[124] https://news.gallup.com/poll/312209/prevalence-living-wills-slightly.aspx.

It is noteworthy that most of the legal developments with respect to assisted suicide have taken place outside the courts. That is true even though *Obergefell* seemed to strengthen the constitutional case against the constitutionality of laws banning assisted suicide. In the last several years, there have only been two states – New York and New Mexico – where there has been significant litigation about assisted suicide. One opinion in the New Mexico litigation did rely on the autonomy perspective in concluding that New Mexico's ban on assisted suicide was unconstitutional.[125] But that opinion was a dissent in the intermediate appellate court and the New Mexico Supreme Court ultimately rejected the constitutional challenge.[126] The New York Court of Appeals also reached the same result.[127]

These state court decisions are important. I doubt, though, whether these decisions tell us a great deal about how the U.S. Supreme Court will approach the issue in the future. I think that we are witnessing here the same sort of reaction from lower courts that followed *Casey* and *Lawrence*. The state courts seem to be cautious in reading *Obergefell*. The state courts have acknowledged the complexity of the issues and the ongoing societal debate about assisted suicide and have, in an all-too-rare exercises of judicial humility, decided to let that debate continue. These courts seem to be waiting for the U.S. Supreme Court to extend the reasoning of *Obergefell*.

I think that the U.S. Supreme Court will be all too willing to take this step. The broader social trends in favor of assisted suicide are slow but discernible. Despite the recent rulings by the New Mexico and New York courts, *Obergefell* gives a significant boost to court challenges to laws banning assisted suicide. Although much will depend on the composition of the Court when the issue is next under review, it seems possible that the Supreme Court will overrule *Glucksberg*. A Court that followed *Casey* and *Obergefell* would likely emphasize the "autonomy of self" philosophy and conclude that ending one's life is the ultimate act of self-determination. Such a Court would also likely reject the state's interest in preserving life because it would likely conclude that it violates autonomy to second-guess an individual's own subjective assessment of the value of her life.[128]

---

[125] See Myers, supra n. 12, at 67.

[126] *Morris v. Brandenburg*, 376 P. 3d 836 (N.M 2016).

[127] *Myers v. Schneiderman*, 85 N. E. 3d 57 (N.Y. 2017).

[128] Myers, supra note 16, at 91.

IV. *Future Prospects*

The constitutional law in the United States with respect to abortion has been relatively stable for decades. *Roe* and *Casey* have been repeatedly reaffirmed. But the right to abortion is still in play. *Roe* and *Casey* continue to be challenged in various venues. The decisions continue to be challenged by Justices on the Supreme Court,[129] in the scholarly literature,[130] by legislatures,[131] and, intriguingly, by lower court judges.[132]

The constitutional law in the United States with respect to assisted suicide has also been relatively stable for decades. Most of the legalization efforts have been through the democratic process and not the courts. There is though a slow but clear trend in favor of accepting the legality of assisted suicide.

It is clear that the legal and moral debate about abortion and assisted suicide will continue in the coming years. *Evangelium vitae* offers compelling arguments on both issues. The encyclical's critique of the extreme autonomy view and its defense of the sanctity of life ethic are particularly strong. The cultural views reflected in *Casey* and in the legalization of assisted suicide pose grave dangers to the rights of us all, particularly the weakest and most vulnerable among us. As the debates continue, *Evangelium vitae* has much to contribute.

V. *Conclusion*

The constitutional and broader public debate about abortion and assisted suicide will likely continue for quite some time. *Evangelium vitae*'s powerful critique of the extreme autonomy view and its vigorous defense of the inviolability of all human life should play a role in this discussion. In my estimation, *Evangelium vitae*'s perspective is a valuable corrective to what has gone wrong with much of our constitutional law.

---

[129] Richard S. Myers, "Lower Court 'Dissent' from *Roe* and *Casey*," 18 *Ave Maria Law Review* 1, at 5-6. In *June Medical*, Justice Thomas stated: "But...[our prior] decisions created the right to abortion out of whole cloth, without a shred of support from the Constitution's text. Our abortion precedents are grievously wrong and should be overruled." *June Medical*, 207 L. Ed. 2d at 608 (Thomas, J., dissenting).

[130] Myers, supra note 129, at 6.

[131] Ibid.

[132] Ibid.