ELDER LAW IN FEDERAL AND FLORIDA CONSTITUTIONAL LAW COURSES

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I. INTRODUCTION

I rather doubt that there is one generally accepted definition of "elder law." Therefore, *for the purposes of these comments,* I will use the following: Interpretations of federal and Florida constitutional provisions in such a way as to bear on the concerns of people who may be described as elderly, even though those constitutional provisions make no direct reference to the elderly.

In the Federal Constitution, I identified and will discuss the following instances that I believe meet the definition above. It is not my intention that the list necessarily be in order of importance.

1. Those instances in which governmental classifications based on age have been challenged as violating the Equal Protection Clause of the Fourteenth Amendment or the Court-created legal fiction of the equal protection component of the Fifth Amendment Due Process Clause;

2. Those instances in which government-imposed limitations on the decision to remove feeding or hydration tubes or other life-sustaining measures from a person who is suffering from a terminal illness or injury are challenged as violating the substantive aspect of the Due Process Clauses of the Fifth or Fourteenth Amendments, generally described as the right to refuse medical treatment;

3. The concern expressed by some that the increasing ease with which even a late term pregnancy may be terminated constitutionally by abortion, may impact on the respect (or lack thereof) accorded by government to such things as physician-assisted suicide at the other end of life's continuum; and

4. The constitutional fate of legislative attempts to provide for visitation rights with grandchildren by people who are often elderly.

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In the Florida Constitution, I identified and will discuss the following instances that I believe meet the definition of "elder law" provided above. As with those involving the Federal Constitution, the list is not necessarily in order of importance.

1. The question of state interference with the removal of life-prolonging medical devices challenged as violating the privacy protected by Article I, Section 23 of the Florida Constitution;

2. The same concern expressed in item three from federal constitutional law, to the extent that abortions and physician-assisted suicide are treated differently under the Florida Constitution;

3. Article I, Section 2 of the Florida Constitution, which prohibits discrimination based on physical disability, a condition suffered in disproportionate numbers among the elderly; and

4. The same concern expressed in item four from federal constitutional law considered under the privacy provision of the Florida Constitution.

II. ELDER LAW CONCERNS AND THE FEDERAL CONSTITUTION

A. Classifications Based on Age

The United States Supreme Court has heard three cases that challenged governmental classifications based on age. The cases are *Massachusetts Board of Retirement v. Murgia*,[1] *Vance v. Bradley*,[2] and *Gregory v. Ashcroft*.[3]

The Court faced the issue first in *Murgia*.[4] This case involved the forced retirement of uniformed officers when they reached the age of fifty,[5] hardly an age normally considered elderly.[6] However, the Court pointed out that, even if only the elderly had been

1. 427 U.S. 307 (1976).
2. 440 U.S. 93 (1979).
3. 501 U.S. 452 (1991).
4. 427 U.S. at 308.
5. *Id.*
6. *Id.* at 313. "The class subject to the compulsory retirement feature of the Massachusetts statute consists of uniformed state police officers over the age of 50. It cannot be said to discriminate only against the elderly. Rather, it draws the line at a certain age in middle life." *Id.*

discriminated against, the result would have been no different.[7] So, since the elderly, as a group, are deserving of no more heightened judicial protection than those in middle age, it can be assumed that what the Court had to say in *Murgia* about those who are middle-aged applies to the elderly as well. Age, then, is not the same type of classification as those considered to be "suspect," because "a suspect class is one 'saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or regulated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'"[8] This was so despite the fact that the Court recognized that "the treatment of the aged in this Nation has not been wholly free of discrimination . . . ."[9] Therefore, this was not an occasion for applying the strict scrutiny provided by the compelling governmental interest test.[10] The balancing test used in the absence of some higher level of judicial scrutiny is known as the rational basis test.[11] To survive this test, the government interest or purpose need only be *not unconstitutional*, and any means that will achieve the interest or purpose to any appreciable degree will suffice.[12]

Applying this minimal level of scrutiny to the forced retirement of uniformed police officers at the age of fifty, the Court opined,

> [T]he State's classification rationally furthers the purpose identified by the State: Through mandatory retirement at age

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7. *Id.* "But even old age does not define a 'discrete and insular' group in need of 'extraordinary protection from the majoritarian political process.'" *Id.* (quoting *U.S. v. Carolene Prods. Co.*, 304 U.S. 144, 152–153 n. 4 (1938)) (citation omitted). This is the well-known comment by Justice Harlan Fiske Stone for which *United States v. Carolene Products Company* is remembered. In pertinent part, it reads, "Nor need we enquire . . . whether prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." *Carolene Prods. Co.*, 304 U.S. at 152–153 n. 4 (citations omitted).

8. *Murgia*, 427 U.S. at 313 (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

9. *Id.*

10. *Id.* at 314. The compelling governmental interest test requires the existence of a compelling governmental interest or purpose, and the means the government selects to achieve it must be necessary in the sense that no other means exist that will achieve it at less cost to the constitutional protection at issue. *E.g. Shapiro v. Thompson*, 394 U.S. 618, 634–635 (1969).

11. *Murgia*, 427 U.S. at 314. The rational basis test requires only that the government show a rational relationship between the regulation and its objectives. *Shapiro*, 394 U.S. at 634.

12. *Shapiro*, 394 U.S. at 634, 638.

> 50, the legislature seeks to protect the public by assuring physical preparedness of its uniformed police. Since physical ability generally declines with age, mandatory retirement at 50 serves to remove from police service those whose fitness for uniformed work presumptively has diminished with age. This clearly is rationally related to the State's objective. There is no indication that § 26 (3) (a) has the effect of excluding from service so few officers who are in fact unqualified as to render age 50 a criterion wholly unrelated to the objective of the statute.
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> That the State chooses not to determine fitness more precisely through individualized testing after age 50 is not to say that the objective of assuring physical fitness is not rationally furthered by a maximum-age limitation. It is only to say that with regard to the interest of all concerned, the State perhaps has not chosen the best means to accomplish this purpose. But where rationality is the test, a State "does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect."[13]

Even though the Court did not downplay the impact that forced early retirement undoubtedly would have on some people,[14] it refused to decide that the government "best fulfills the relevant social and economic objectives that [the government] might ideally espouse, or that a more just and humane system could not be devised."[15] The Court said that it was not deciding that what the government did was "'wise,'" only that it satisfied the rational basis test.[16]

This approach is not likely to change. The voting power of the elderly rather clearly indicates that they are not now, and never have been, the kind of group that deserves heightened protection. The age classification does resemble the gender one. Both are based on physical characteristics that cannot change. However, women were clearly, in the past, subject to the kind of bias never suffered

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13. *Murgia*, 427 U.S. at 314–316 (quoting *Dandridge v. Williams*, 397 U.S. 471, 485 (1970)) (citation and footnotes omitted).

14. *Id.* at 316–317. "We do not make light of the substantial economic and psychological effects premature and compulsory retirement can have on an individual; nor do we denigrate the ability of elderly citizens to continue to contribute to society. The problems of retirement have been well documented and are beyond serious dispute." *Id.* (footnote omitted).

15. *Id.* at 317 (quoting *Dandridge*, 397 U.S. at 487).

16. *Id.* at 316–317 (quoting *Dandridge*, 397 U.S. at 487).

by the elderly. Thus, a gender classification is subject to a much higher level of scrutiny than one based on age.[17] In the future, classifications based on age will, in all likelihood, present the Court with the opportunity to profess that it is not in the business of substituting its judgment for that of the legislature.[18] The next two cases certainly bear out this thought.

In *Gregory*, two judges challenged a provision of the Missouri Constitution that set the retirement age for judges at seventy.[19] Those complaining about the judicial limitation conceded that it should be measured by the rational basis test.[20] It was argued that the line between sixty-nine and seventy made "two irrational distinctions: between judges who have reached age 70 and younger judges, and between judges 70 and over and other state employees of the same age who are not subject to mandatory retirement."[21] The court explained the rational bases for the age classification as follows:

> "The statute draws a line at a certain age which attempts to uphold the high competency for judicial posts and which fulfills a societal demand for the highest caliber of judges in the system"; "the statute . . . draws a legitimate line to avoid the tedious and often perplexing decisions to determine which judges after a certain age are physically and mentally qualified and those who are not"; "mandatory retirement increases the opportunity for qualified persons . . . to share in the judiciary and permits an orderly attrition through retirement"; "such a mandatory provision also assures predictability and ease in establishing and administering judges' pension plans."[22]

The Court found that any of the above justifications were sufficient to satisfy the rational basis test.[23]

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17. *E.g. Schlesinger v. Ballard*, 419 U.S. 498, 508–510 (1975) (reasoning that when men and women are "*not* similarly situated," the government may treat them differently without violating the Due Process Clause (emphasis in original)).

18. *Murgia*, 427 U.S. at 314.

19. 501 U.S. at 455–456 (citing Article V, Section 26 of the Missouri Constitution).

20. *Id.* at 470; *supra* n. 11 (describing the rational basis test).

21. *Gregory*, 501 U.S. at 470.

22. *Id.* at 471 (quoting *O'Neil v. Baine*, 568 S.W.2d 761, 766–767 (Mo. 1978), in which the Missouri Supreme Court upheld a statutory age limit of seventy on certain types of judges) (alterations in original).

23. *Id.* at 471–472. "Any one of these explanations is sufficient to rebut the claim that 'the varying treatment of different groups or persons [in § 26] is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the [people's]

The other claim, that the irrationality of prohibiting judges over the age of seventy while permitting other state employees to work beyond age seventy, was defeated by the Court's recognition that "'[j]udges' general lack of accountability" differs from "other state employees, in whom deterioration in performance is more readily discernible and who are more easily removed."[24]

Nothing, then, had changed from the Court's 1976 *Murgia* decision to the *Gregory* decision in 1991. The rational basis test continued to be applied to classifications based on age. "This Court has said repeatedly that age is not a suspect classification under the Equal Protection Clause."[25] Nor, obviously, does such a classification trigger any level of intermediate scrutiny.

Vance, the third case in the age classification trilogy, occurred in time between the other two.[26] I have considered it last because, unlike *Murgia* and *Gregory*, it involved an age classification in an act of Congress.[27] Thus, the Equal Protection Clause of the Fourteenth Amendment could not be applied to it directly.[28] Instead, the Court decided the case based on a legal fiction, the "equal protection component of the Fifth Amendment's Due Process Clause."[29]

In 1946 Congress lowered the retirement age to sixty for those "federal employees covered by the Foreign Service retirement and disability system but not those covered by the Civil Service retirement and disability system."[30] This classification was challenged for violating the equal protection provided by the Fifth Amendment Due Process Clause.[31] The Court applied the rational basis test just as it had in *Murgia* and *Gregory*.[32] Under that test, the Court stated that it would not overturn a classification whose constitutionality is measured by the rational basis test "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational."[33]

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actions were irrational.'" *Id.* (quoting *Vance*, 440 U.S. at 97) (alterations in original).

24. *Id.* at 473.

25. *Id.* at 470.

26. 440 U.S. at 93 (decided in 1979).

27. *Id.* at 94–95.

28. The Equal Protection Clause of the Fourteenth Amendment applies to the states, not to the United States Congress. U.S. Const. amend. XIV, § 1; *Vance*, 440 U.S. at 94–95 n. 1.

29. *Vance*, 440 U.S. at 94 (footnote omitted).

30. *Id.* at 94–95.

31. *Id.* at 94, 94–95 n. 1.

32. *Id.* at 97 (citing *Murgia*, 427 U.S. at 312).

33. *Id.*

The Court described the government's first purpose as follows:

> In arguing that § 632 easily satisfies this standard, the appellants submit that one of their legitimate and substantial goals is to recruit and train and to assure the professional competence, as well as the mental and physical reliability, of the corps of public servants who hold positions critical to our foreign relations, who more often than not serve overseas, frequently under difficult and demanding conditions, and who must be ready for such assignments at any time. Neither the District Court nor appellees dispute the validity of this goal.[34]

The government argued that the age sixty classification furthered that purpose by creating "predictable promotion opportunities" that enhance morale and "stimulate superior performance," and by retiring those who "may be less equipped or less ready than younger persons to face the rigors of overseas duty in the Foreign Service."[35]

The Court accepted the age limitation as a rational means to accomplish the government's legitimate purpose and found that the district court erred when it rejected the age-based limit.[36]

Thus, within the topic of elder law across the curriculum, it can be said that, as a matter of constitutional law,[37] age classifications, whether they involve those who are middle-aged or those who are elderly, will be measured by the Court with its least rigorous scrutiny, the rational basis test.

B. The Right to Refuse Medical Treatment

Chief Justice William H. Rehnquist delivered the opinion of the Court in *Cruzan v. Director, Missouri Department of Health*.[38]

> Petitioner Nancy Beth Cruzan was rendered incompetent as a result of severe injuries sustained during an automobile accident. Copetitioners Lester and Joyce Cruzan, Nancy's parents and coguardians, sought a court order directing the withdrawal of their daughter's artificial feeding and hydration

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34. *Id.*
35. *Id.* at 98.
36. *Id.*
37. In *Gregory*, the age classification also was challenged as a violation of the Age Discrimination in Employment Act, but the challenge failed. 501 U.S. at 455, 470.
38. 497 U.S. 261 (1990).

> equipment after it became apparent that she had virtually no chance of recovering her cognitive faculties. The Supreme Court of Missouri held that because there was no clear and convincing evidence of Nancy's desire to have life-sustaining treatment withdrawn under such circumstances, her parents lacked authority to effectuate such a request. We granted certiorari and now affirm.[39]

Thus began and, to some extent summarized, a decision that is important, amply justified, and more than a little confusing. The decision can be described in one sentence: Missouri did not violate the Due Process Clause of the Fourteenth Amendment by requiring clear and convincing evidence that Cruzan, then in a persistent vegetative state, would have desired, had she been able to speak, the removal of feeding and hydration tubes.[40] Although Cruzan was a young person injured in an automobile accident,[41] it is unnecessary to cite authority for the proposition that many, if not most, such cases involving these issues concern much older individuals, many of them elderly.

Many lower courts had assumed that a right to refuse medical treatment would be included within the expanding privacy component of the word "liberty" in the Fifth and Fourteenth Amendment Due Process Clauses.[42] Although the Supreme Court recognized this assumption, it refused to go that far, finding instead that, while there was a constitutional right to refuse medical treatment based on liberty interests protected by the Due Process Clauses, it was not within those highly protected interests deemed to be part of due process privacy.[43]

The various aspects of privacy, with the exception of abortion,[44] are protected by the compelling governmental interest test.[45] The great mystery of the *Cruzan* decision is that, while the Court

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39. *Id.* at 265 (citation omitted).
40. *Id.* at 280, 282, 284.
41. *Id.* at 266.
42. *Id.* at 279 n. 7.
43. *Id.*
44. *See Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 875–879 (1992) (holding that the undue burden test applies when the state's interest is reconciled with a woman's liberty interest in a pregnancy termination dispute).
45. *See Roe v. Wade*, 410 U.S. 113, 152–155 (1973) (discussing privacy interests and the application of the compelling governmental interest test when the government seeks to limit privacy interests).

described the right to refuse medical treatment as nonabsolute,[46] thus requiring that it be balanced against the competing governmental interests[47] that wished to limit it, the Court never clearly enunciated any specific balancing test.[48] It is only barely conceivable that the Court would allow such an important issue to be decided by the rational basis test.[49] Therefore, assuming that it thought Missouri's caution, evidenced by its use of the clear and convincing evidence standard, was important, the Court must have believed the means were at least reasonable.[50] Thus, I describe this case to my classes as some sort of amorphous "reasonable test." It is difficult to extract more than this out of the case.

C. Respect for Life, Physician-Assisted Suicide, and Euthanasia

Even though it is possible for governments to regulate ancillary aspects of overall abortion procedure,[51] as a result of *Planned Parenthood of Southeastern Pennsylvania v. Casey*[52] and *Stenberg v. Carhart*,[53] it now may be nearly impossible to prevent *any* abortion.[54] These two cases apparently extinguish the possibility presented by *Roe v. Wade*[55] that late-term abortions could be banned in most situations in the furtherance of the government's interest in potential life.[56] This subject, as it relates to elder law, is not about

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46. 497 U.S. at 270, 278–279.

47. *Id.* at 278–279 (citing *Youngberg v. Romero*, 457 U.S. 307, 321 (1982)).

48. At least I have been unable to pick one out of the opinion. Justice William J. Brennan, Jr., in dissent, describes the Court's holding as tentative. *Id.* at 302 (Brennan, Marshall & Blackmun, JJ., dissenting).

49. "[T]he dramatic consequences involved in refusal of such treatment would inform the inquiry as to whether the deprivation of that interest is constitutionally permissible." *Id.* at 279.

50. The Court never uses the term "reasonable" to describe Missouri's requirement of clear and convincing evidence in a case like Cruzan's. It does, however, describe the use of such an evidentiary test as permissible. *Id.* at 282. It seems that, given the gravity of what that standard of proof would decide, the Court is ascribing more than the mere rationality of the rational basis test. It is describing something that is reasonable.

51. *See e.g. Casey*, 505 U.S. at 881–887 (finding that Pennsylvania's requirement of informed consent prior to an abortion did not violate the Constitution).

52. 505 U.S. 833 (1992).

53. 530 U.S. 914 (2000).

54. *Id.* at 1009 (Thomas & Scalia, JJ. & Rehnquist, C.J., dissenting). "The rule set forth by the majority and JUSTICE O'CONNOR dramatically expands on our prior abortion cases and threatens to undo *any* state regulation of abortion procedures." *Id.* (emphasis in original).

55. 410 U.S. 113 (1973).

56. *Id.* at 163–164. "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." *Id.* "The Court's holding contradicts *Casey's* assurance that

abortion per se, but rather about the potential effect that disrespect for the life of an unborn child will have on sick and infirm elderly persons at the other end of life's continuum.

Therefore, to summarize the abortion situation briefly, *Roe* found that the pregnant woman's right to choose was protected by substantive due process.[57] As such, it became an element of privacy[58] under the Due Process Clauses,[59] and any regulation that got in the way of this freedom of choice, in any significant way, was subjected to strict scrutiny through application of the compelling governmental interest test.[60] *Casey* changed the rules in a seemingly very significant way.[61] There, the Court clearly demoted abortion to the status of a "limited fundamental right"[62] to be measured, not by strict scrutiny, but rather by asking whether any governmental regulation of abortion posed an undue burden on the right to choose.[63] *Stenberg* closely approached the point at which no abortion, not even the procedure described as a "partial birth" abortion,[64] could be prohibited if an "abortionist"[65] determined in his or her apparently unfettered judgment that the procedure was necessary

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the State's constitutional position in the realm of promoting respect for life is more than marginal." *Stenberg*, 530 U.S. at 964 (Kennedy, J. & Rehnquist, C.J., dissenting).

57. 410 U.S. at 153 (discussing the basis for privacy rights as follows: "This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, . . . is broad enough to encompass a woman's decision . . . .").

58. *Id.* at 152–153.

59. There are identical Due Process Clauses in the Fifth and Fourteenth Amendments. U.S. Const. amend. V; *id.* amend. XIV.

60. *Roe*, 410 U.S. at 155. As somewhat uniquely described in *Roe*, the test required a "compelling state interest," and the means had to be "narrowly drawn to express only the legitimate state interests at stake." *Id.*

61. 505 U.S. at 877.

62. The term "limited fundamental right" does not actually appear in *Casey*; however, it clearly conveys the sense of what happened. The court of appeals in *Casey* referred to Justice Sandra Day O'Connor's dissent in *City of Akron v. Akron Center for Reproductive Health, Incorporated*, 462 U.S. 416 (1983), as the source of the "limited fundamental right" concept. *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d 682, 688, 689–690 (3d Cir. 1991) (citing *City of Akron*, 462 U.S. at 465 n. 10 (O'Connor, White & Rehnquist, JJ., dissenting), *aff'd in part, rev'd in part*, 505 U.S. 833 (1992)).

63. *Casey*, 505 U.S. at 876–879.

64. 530 U.S. at 953 (Scalia, J., dissenting); *id.* at 957 (Kennedy, J. & Rehnquist, C.J., dissenting).

65. *Id.* at 953 (Scalia, J., dissenting); *id.* at 957 (Kennedy, J. & Rehnquist, C.J., dissenting).

to protect the life or health of the pregnant woman.[66] One can argue, with great force, that the partial birth abortion procedure is never necessary to protect a pregnant woman's life or health.[67] Because this argument apparently was rejected by the Court, one also can argue that there was, among the *Stenberg* majority, little or no respect for the life of an unborn child, not even one within minutes, if not seconds, of actually being born.[68]

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66. *Id.* at 972 (Kennedy, J. & Rehnquist, C.J., dissenting).

> JUSTICE O'CONNOR assures the people of Nebraska they are free to redraft the law to include an exception permitting the [partial birth abortion] to be performed when "the procedure, in appropriate medical judgment, is necessary to preserve the health of the mother." The assurance is meaningless. She has joined an opinion which accepts that Dr. Carhart exercises "appropriate medical judgment" in using the [partial birth abortion procedure] for every patient in every procedure, regardless of indications, after 15 weeks' gestation. A ban which depends on the "appropriate medical judgment" of Dr. Carhart is no ban at all. He will be unaffected by any new legislation. This, of course, is the vice of a health exception resting in the physician's discretion.

Id. (citations omitted).

67. *Id.* at 964–965.

> Demonstrating a further and basic misunderstanding of *Casey*, the Court holds the ban on the [partial birth abortion] procedure fails because it does not include an exception permitting an abortionist to perform [the procedure] whenever he believes it will best preserve the health of the woman. Casting aside the views of distinguished physicians and the statements of leading medical organizations, the Court awards each physician a veto power over the State's judgment that the procedures should not be performed. Dr. Carhart has made the medical judgment to use the [partial birth abortion] procedure in every case, regardless of indications, after 15 weeks gestation. Requiring Nebraska to defer to Dr. Carhart's judgment is no different than forbidding Nebraska from enacting a ban at all; for it is now Dr. Leroy Carhart who sets abortion policy for the State of Nebraska, not the legislature or the people.

Id. (citation omitted). For additional discussion of this issue, see Justice Clarence Thomas's dissent, in which he was joined by Chief Justice Rehnquist and Justice Antonin Scalia. *Id.* at 1009–1013 (Thomas & Scalia, JJ. & Rehnquist, C.J., dissenting).

68. *Id.* at 953 (Scalia, J., dissenting).

> I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*. The method of killing a human child — one cannot even accurately say an entirely unborn human child — proscribed by this statute is so horrible that the most clinical description of it evokes a shudder of revulsion. And the Court must know (as most state legislatures banning this procedure have concluded) that demanding a "health exception" — which requires the abortionist to assure himself that, in his expert medical judgment, this method is, in the case at hand, marginally safer than others (how can one prove the contrary beyond a reasonable doubt?) — is to give live-birth abortion free rein. The notion that the Constitution of the United States, designed, among other things, "to establish Justice, insure domestic Tranquility, . . . and secure the Blessings of Liberty to ourselves and our Posterity," prohibits the States from simply banning this visibly brutal means of eliminating our half-born posterity is quite simply absurd.

Id. (referring to *Korematsu v. U.S.*, 323 U.S. 214 (1944), and *Dred Scott v. Sandford*, 60 U.S.

At the other end of life's continuum, the Supreme Court has held that the government may outlaw physician-assisted suicide, because such a ban is rationally related to the governmental interest in generally protecting the sanctity of life.[69] In *Washington v. Glucksberg*,[70] the Court held that physician-assisted suicide was not a fundamental right.[71] Thus, presumably, it was not within the ambit of "privacy" found within the meaning of the word "liberty" in the Due Process Clause of the Fourteenth Amendment.[72] That being the case, Washington's prohibition of this practice was measured by the rational basis test, which the State easily satisfied.[73] Along similar lines, in *Vacco v. Quill*,[74] the Court, building on its *Glucksberg* decision, found that a New York classification that allowed the right to refuse medical treatment but proscribed physician-assisted suicide also was measured by the rational basis test, which, once again, the State easily satisfied.[75]

In spite of the current difference in the Supreme Court's decisions regarding the sanctity of the life of an unborn child and the sanctity of the lives of old, sick people, many advocates have expressed concern that the ease with which the Court allows the life of the unborn to be snuffed out could ultimately lead it to view the lives of some old people as unworthy of preservation. This undoubtedly would be done by expanding the right to refuse medical treatment to create some sort of liberty interest in a person's right to end his or her life, with a physician's help, when that life is, in effect, no longer worth living. This probably would begin with the terminally ill, but who can tell how far it might extend beyond that? If there is a constitutionally protected right for a pregnant woman to terminate the life of the child she is carrying for whatever reason, is it not possible for the Court to say that a person suffering from a terminal illness has, on balance, a much stronger case for ending his or her life than a parent has for ending the life of an unborn child who, otherwise, would have a whole future to look forward to?

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393 (1856), and quoting the Preamble to the United States Constitution) (alteration in original).

69. *Wash. v. Glucksberg*, 521 U.S. 702, 728–729 (1997).

70. 521 U.S. 702 (1997).

71. *Id.* at 728.

72. *Id.* at 719–720; *Roe*, 410 U.S. at 152–153 (discussing privacy rights derived from the Fourteenth Amendment).

73. *Glucksberg*, 521 U.S. at 728.

74. 521 U.S. 793 (1997).

75. *Id.* at 807–808.

Consider the following statement by the Roman Catholic Bishops of New Jersey:[76]

> We recognize in *abortion* the tip of an iceberg which is now bringing about the acceptance of *euthanasia*, passive and assisted suicide, *genetic manipulation, the commercialization and depersonalization of human conception and the undermining of the human family itself.*[77]

This statement gives emphasis to the following comment by Most Reverend John C. Reiss: "The call to defend the poor and the helpless is the most basic duty of Christians. If the life of a child in his mother's womb is threatened, no one is safe. Our faith calls us to witness this truth by our action — All human life is sacred!"[78]

D. Grandparent Visitation Rights

The mix of what one might call "parental privacy" and the Florida legislature's rather heavy-handed attempt to impose visitation rights by grandparents on that privacy, has caused considerable litigation.[79] At the federal level, a state's attempt to impose such visitation rights has now reached the Supreme Court.[80] Unlike the Florida cases, which were decided under the Florida Constitution, the Supreme Court of Washington held that the Washington statute violated the Due Process Clause of the Fourteenth Amendment.[81] The case reached the United States Supreme Court as *Troxel v. Granville*.[82] The Court, perhaps not surprisingly, affirmed the Washington Supreme Court without any majority opinion.[83] Justice Sandra Day O'Connor wrote an opinion and was joined by three other Justices.[84] Two Justices concurred only in the judgment and three Justices dissented.[85]

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76. Catholic Bishops of N.J., *Choose Life: A Statement of Principle* <http://www.priestsforlife.org/magisterium/newjerseybishops.htm> (last updated Apr. 1, 2001).

77. *Id.* (emphasis in original changed from bold to italics).

78. *Id.* (emphasis omitted).

79. For a discussion of grandparents visitation rights litigation in Florida, see *infra* notes 144 to 175 and accompanying text.

80. *Troxel v. Granville*, 530 U.S. 57 (2000).

81. *In re Custody of Smith*, 969 P.2d 21, 27–28, 31 (Wash. 1998).

82. 530 U.S. 57 (2000).

83. *Id.* at 59.

84. *Id.* at 60.

85. *Id.* at 59.

The Washington Supreme Court held the statute facially invalid for two reasons.[86] First, it did *not* require what the Constitution requires, namely that the right of parents to raise their children can be interfered with by the State only "to prevent harm or potential harm to a child."[87] Second, the statute would have allowed fit parents to be second-guessed by a court employing the "best interest of the child" standard.[88] Justice O'Connor's somewhat long and rambling opinion for the plurality found that the flaws identified by the Washington Supreme Court made the statute, "as applied," unconstitutional under the facts of this case.[89] Thus, the Supreme Court did not need to find the statute unconstitutional on its face, and therefore issued a more narrow ruling.[90]

In what can be described only as a somewhat unusual opinion, Justice David H. Souter concurred in the judgment of the O'Connor plurality, but not its opinion.[91] The opinion is unusual because Justice Souter simply would have affirmed the judgment of the Washington Supreme Court, which had declared the statute invalid on its face, and would "[have said] no more," but then he said quite a bit more.[92] The essence of his opinion was that the

> repeatedly recognized right of upbringing [one's children] would be a sham if it failed to encompass the right to be free of judicially compelled visitation by "any party" at "any time" a judge believed he "could make a 'better' decision" than the objecting parent had done.[93]

Justice Souter's approach might have been different if the Washington statute had been written to apply only to grandparents. However, given his strong defense of parental rights, this potential difference is not a certainty. After agreeing with the Washington Supreme Court's finding that the statute was unconstitutional on its

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86. *Id.* at 63.

87. *Id.*

88. *Id.* The Washington Supreme Court also found the statute constitutionally defective, because it permitted "any person" to petition for visitation rights at "any time" if the visitation was in the child's best interest. *Id.*

89. *Id.* at 73.

90. *Id.*

91. *Id.* at 75 (Souter, J., concurring in the judgment).

92. *Id.* Justice Souter reasoned that an "as applied" application of the statute was not before the Court and thus did "not call for turning any fresh furrows in the 'treacherous field' of substantive due process." *Id.* at 75–76 (quoting *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977)).

93. *Id.* at 78 (footnote omitted).

face because of the "any person, any time" problem, Justice Souter withheld judgment on the question of whether harm to the child caused by lack of visitation was required.[94] Nor did he "consider the precise scope of the parent's right or its necessary protections."[95]

Justice Clarence Thomas's opinion concurring only in the judgment also could be described as unusual.[96] Because the issue was not before the Court, he declined to become involved in the question of whether the Court's "substantive due process cases were wrongly decided and [whether] the original understanding of the Due Process Clause precludes judicial enforcement of unenumerated rights under that constitutional provision."[97] Although there exists a strong possibility that he might have dissented on the substantive due process question had it been before him, the fact that it was not allowed him to concur in the Court's judgment on the basis of the "Court's recognition of a fundamental right of parents to direct the upbringing of their children."[98]

Justice John Paul Stevens dissented because he believed, first, that as a matter of federal substantive due process the Court could not say that there was not any person in any situation who could overcome the admittedly strong privacy interests of a parent.[99] Second, he believed that the "harm to the child" standard for overriding parental objections to visitation rights by others essentially gave the parent too much control[100] — especially in view of the fact that the child might have substantive due process rights of his or her own militating in some cases toward visitation.[101] While it is interesting to note that he put no special emphasis on the interests of grandparents, his opinion appears to have left the door to their interests more than just ajar.[102]

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94. *Id.* at 76–77.

95. *Id.* at 77.

96. *Id.* at 80 (Thomas, J., concurring in the judgment).

97. *Id.*

98. *Id.* Having gone that far, he "would apply strict scrutiny" because of the fundamental right involved. *Id.* He went on to opine that "Washington lacks even a legitimate governmental interest — to say nothing of a compelling one — in second-guessing a fit parent's decision regarding visitation with third parties." *Id.*

99. *Id.* at 85 (Stevens, J., dissenting).

100. *Id.* at 85–86.

101. *Id.* at 86.

102. *Id.* at 85.

> Under the Washington statute, there are plainly any number of cases — indeed, one suspects, the most common to arise — in which the "person" among "any" seeking visitation is a once-custodial caregiver, an intimate relation, or even a genetic parent. Even the Court would seem to agree that in many circumstances, it would be

Justice Antonin Scalia, although he could strongly support parental rights in certain venues,[103] believed that the Constitution was not one of them.[104] Thus, he would have reversed the judgment of the Washington Supreme Court, because it had decided the case on the basis of a federal constitutional principle that does not exist.[105] According to Justice Scalia, the fate of grandparents' visitation interests should be left to the political process.[106]

Justice Anthony M. Kennedy, in dissent, determined that the Washington Supreme Court's assertion, that the "harm to the child" standard was the only constitutional way to abrogate parental rights found in the concept of substantive due process, was simply too narrow.[107]

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constitutionally permissible for a court to award some visitation of a child to a parent or previous caregiver in cases of parental separation or divorce, cases of disputed custody, cases involving temporary foster care or guardianship, and so forth.

Id.

103. Among these were "legislative chambers or . . . electoral campaigns." *Id.* at 92 (Scalia, J., dissenting).

104. *Id.* at 92–93.

> Judicial vindication of "parental rights" under a Constitution that does not even mention them requires . . . not only a judicially crafted definition of parents, but also — unless, as no one believes, the parental rights are to be absolute — judicially approved assessments of "harm to the child" and judicially defined gradations of other persons (grandparents, extended family, adoptive family in an adoption later found to be invalid, long-term guardians, etc.) who may have some claim against the wishes of the parents. If we embrace this unenumerated right, I think . . . that we will be ushering in a new regime of judicially prescribed, and federally prescribed, family law. I have no reason to believe that federal judges will be better at this than state legislatures; and state legislatures have the great advantages of doing harm in a more circumscribed area, of being able to correct their mistakes in a flash, and of being removable by the people.

Id. (footnote omitted).

105. *Id.* at 93.

106. *Id.*

107. *Id.* at 101–102 (Kennedy, J., dissenting). His view is summed up in these words concluding his opinion,

> It should suffice in this case to reverse the holding of the State Supreme Court that the application of the best interests of the child standard is always unconstitutional in third-party visitation cases. Whether, under the circumstances of this case, the order requiring visitation over the objection of this fit parent violated the Constitution ought to be reserved for further proceedings. Because of its sweeping ruling requiring the harm to the child standard, the Supreme Court of Washington did not have the occasion to address the specific visitation order the Troxels obtained. More specific guidance should await a case in which a State's highest court has considered all of the facts in the course of elaborating the protection afforded to parents by the laws of the State and by the Constitution itself. Furthermore, in my view, we need not address whether, under the correct constitutional standards, the Washington statute can be invalidated on its face. This question, too, ought to be addressed by the state court in

III. ELDER LAW CONCERNS AND THE FLORIDA CONSTITUTION

A. Article I, Section 23 Privacy and the Right to Refuse Medical Treatment

The Florida judiciary recognized that Article I, Section 23 of the Florida Constitution, a far-reaching guarantee of privacy,[108] has a profound effect on the right to refuse medical treatment.[109] Essentially, the generally recognized state interests in regulating when life support can be stopped or feeding or hydration tubes can be removed are pitted against the privacy interest of the terminally ill patient who either directly or vicariously wants to let the terminal illness or injury run its natural course.[110] Of course, a competent

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the first instance.

In my view the judgment under review should be vacated and the case remanded for further proceedings.

Id.

108. In the first case to interpret Article I, Section 23, *Winfield v. Division of Pari-Mutuel Wagering*, the Florida Supreme Court found that it was both far-reaching and very important. 477 S.2d 544, 547–548 (Fla. 1985). As to the first point, the Court opined,

> The citizens of Florida opted for more protection from governmental intrusion [than that provided by the Federal Constitution] when they approved article I, section 23, of the Florida Constitution. This amendment is an independent, freestanding constitutional provision which declares the fundamental right to privacy. Article I, section 23, was intentionally phrased in strong terms. The 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. Since the people of this state exercised their prerogative and enacted an amendment to the Florida Constitution which expressly and succinctly provides for a strong right of privacy not found in the United States Constitution, it can only be concluded that the right is much broader in scope than that of the Federal Constitution.

Id. at 548.

Regarding the second point, the Court said,

> The right of privacy is a fundamental right which we believe demands the compelling state interest standard. This test shifts the burden of proof to the state to justify an intrusion on privacy. The burden can be met by demonstrating that the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means.

Id. at 547.

109. The seminal case on the right to refuse medical treatment as protected by Florida's constitutional privacy provision is *In re Guardianship of Browning*, 568 S.2d 4 (Fla. 1990).

110. *Id.* at 14.

patient can express such wishes for himself directly.[111] A once-competent patient who is no longer competent may have made his feelings clear while still competent, something the patient who was never competent obviously could not have done. If the once-competent patient did not indicate what his desires would be regarding life-prolonging procedures in the event of terminal illness or injury, then his situation is really no different from that of the patient who has never been competent. At least in the case of the once-competent patient, the somewhat contrived concept of substituted judgment comes into play.[112]

In any case, when a patient directly or by "substituted" judgment expresses a desire to end life-prolonging procedures, the protection of Article I, Section 23 is triggered.[113] This protection is not to be taken lightly. Before the state can interfere, it must show that interference is necessary to save an interest of the highest importance, usually described as "compelling."[114]

Four state interests generally have been recognized although they are not compelling under every circumstance. They are 1) the sanctity of life, sometimes described as the state interest in preserving life; 2) the best interest of others who may be affected by the decision; 3) the integrity of the medical profession; and 4) the prevention of suicide.[115]

Although the state interest in preserving life surely is compelling when the patient's short-term condition is not terminal, it loses

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111. *Id.* at 10. "A competent individual has the constitutional right to refuse medical treatment regardless of his or her medical condition." *Id.* (citing *Pub. Health Trust v. Wons*, 541 S.2d 96 (Fla. 1989), and *Cruzan*, 497 U.S. at 279). See *supra* notes 39 to 51 and accompanying text for a discussion of *Cruzan*. It is doubtful that this right, even for a competent person, is as absolute as the quote above suggests. Sometimes the government can satisfy the strict scrutiny by which government intrusions into privacy are measured. *Winfield*, 477 S.2d at 547.

112. *Browning*, 568 S.2d at 13 (noting that "[i]n this state, we have adopted a concept of 'substituted judgment.' 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. The surrogate decisionmaker must be confident that he or she can and is voicing the *patient's* decision." (emphasis in original) (citation omitted)). It is not clear from the *Browning* opinion whether substituted judgment would be appropriate for the never competent patient and it probably should not be clear, because the court did not have that issue before it. Mrs. Browning had once been competent. *Id.* at 8. It would make a difference if the patient, when competent, had indicated in some way what his desire would be if he were to become terminally ill and no longer competent and was being kept alive by some sort of life support. *Id.* at 13.

113. *Id.*

114. *Id.* at 13–14.

115. *Id.* at 14.

its compelling nature when the opposite is true.[116] The best interest of others comes into play when the natural death that follows the cessation of life-prolonging procedures has a harmful effect on others, such as a spouse and young children.[117] Such a concern obviously loses its compelling nature when the patient is elderly and will die shortly, even with the life-prolonging procedures, especially if there is no one who depends on him or her.[118] The Florida courts have found that the integrity of the medical profession is not an issue and that, since the patient does not commit suicide but dies of natural causes, the prevention of suicide is not an issue.[119]

The only issue left, and certainly the most difficult one, is to determine the wishes of the short-term terminally ill patient who, when competent, either did or did not express his wishes in some form. The safeguards surrounding the application of the patient's expressed wishes or the procedure for substituted judgment are discussed at length in *In re Guardianship of Browning*.[120] The *Browning* decision provides a useful discussion of issues pertinent to elder law practitioners. Its inclusion in a Florida constitutional law course will prepare students to serve future elderly clients, their families, and surrogates who are faced with difficult medical, emotional, and legal issues involving the right to refuse life-prolonging medical treatment.

B. Respect for Life, Physician-Assisted Suicide, and Euthanasia — the Florida Version

The Florida Supreme Court addressed the abortion issue in *In re T.W.*[121] There, the court adopted the *Roe* trimester analytical framework as part of the Florida law on abortion under the State's constitutional privacy guarantee.[122] Putting aside for a moment the effect *Casey*[123] and *Stenberg*[124] may have had on *In re T.W.*, the

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116. *Id.*

117. *See e.g. In re Matter of Dubreuil*, 629 S.2d 819, 824–829 (Fla. 1993) (discussing the State's interest in protecting innocent third parties).

118. *Browning*, 568 S.2d at 8, 14 (noting that third-party interests were not at issue because there were no third parties dependent upon Mrs. Browning).

119. *Id.* at 14.

120. 568 S.2d 4, 12–17 (Fla. 1990).

121. 551 S.2d 1186 (Fla. 1989).

122. *Id.* at 1193–1194 (citing *Roe*, 410 U.S. at 160, 163).

123. In my opinion, under the Florida Constitution, the third trimester approach to viability adopted in *In re T.W.* will not be affected by the United States Supreme Court's abandonment of the trimester framework in favor of *Casey*'s undue burden test. *See* 505 U.S.

argument that I made earlier[125] (under the federal constitution) regarding the effect of an extensive constitutionally protected right to abort on the value we place on life itself, loses only a little of its force. In my opinion, the slight loss of force is based on the twin assumptions that may now have been overtaken by *Stenberg*. First, under *In re T.W.*, Florida could ban all third-trimester abortions unless such abortions were necessary to protect the life and health of the pregnant woman,[126] and second, the Florida Supreme Court would never have ruled the way the majority ruled in *Stenberg*. *Stenberg* itself would now make such a holding by the Florida Supreme Court well nigh impossible.[127] To put it differently, *In re T.W.* is a very significant devaluation of life. *Stenberg*, by preventing any attempt by Florida to ban at least partial birth abortions or even third-trimester abortions devalues life to an even greater extent than *In re T.W.*

Like the United State Supreme Court,[128] Florida has held the line in the case of physician-assisted suicide.[129] The Florida case that accomplished this was *Krischer v. McIver*.[130] There, the Florida Supreme Court held that the Florida assisted suicide statute[131] did not violate the United States Constitution.[132] Nor did the statute run afoul of Article I, Section 23, the Florida Constitution's privacy provision.[133] Given the stance taken in *In re T.W.* and consider-

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at 872–873, 876–879. This is so because that abandonment pushed the viability threshold into the end of the second trimester. *Id.* at 860. Thus, Florida's adherence to the third trimester as the beginning of viability would be less of an intrusion on the abortion right than would the current federal approach with respect to viability.

124. Of course, if *Stenberg* means what the dissenters think it means, the question of when viability begins is, for all practical purposes, irrelevant. 530 U.S. at 1009 (Thomas & Scalia, JJ. & Rehnquist, C.J., dissenting).

125. *Supra* pt. II(C).

126. 551 S.2d at 1193–1194. Compare the Florida court's willingness to permit some restriction on abortion with the United States Supreme Court's refusal to ban partial birth abortion. *Supra* nn. 64–68 (discussing the refusal to ban partial birth abortion).

127. 530 U.S. at 921–922; *In re T.W.*, 551 S.2d at 1194.

128. *Supra* nn. 69–75 and accompanying text.

129. *Krischer v. McIver*, 697 S.2d 97, 104 (Fla. 1997).

130. 697 S.2d 97 (Fla. 1997).

131. Fla. Stat. § 782.08 (2001).

132. *Krischer*, 697 S.2d at 100 (citing *Vacco*, 521 U.S. at 793, and *Glucksberg*, 521 U.S. at 702).

133. *Id.* The Court found that Florida's various interests in preventing assisted suicide satisfied the strict scrutiny standard used whenever Article I, Section 23 privacy is involved. *Id.* at 100–104.

ing the probable impact of *Stenberg* on *In re T.W.*,[134] how long will *Krischer* remain the law?[135]

C. The Florida Constitutional Prohibition Preventing Discrimination against the Physically Disabled

There is very little that can be said about the part of Article I, Section 2 of the Florida Constitution, which in pertinent part reads, "No person shall be deprived of any right because of . . . physical disability."[136] What can be said is limited to a few sentences: First, this constitutional guarantee obviously would impact the elderly, many of whom are physically infirm or suffer physical disabilities. Second, the Florida Supreme Court held in *Schreiner v. McKenzie Tank Lines, Incorporated*[137] that this provision would apply only to state actors.[138] Third, unless this prohibition is absolute, which is highly unlikely, what balancing test should apply? Some provisions of the Florida Declaration of Rights follow the federal model and find that the interest involved dictates the appropriate balancing test.[139] Equal protection is an example.[140] Others have been tied directly to the federal model.[141] Still others use strict scrutiny.[142]

D. Grandparent Visitation Laws and Parental Privacy Rights

Chapter 752 of the Florida Statutes is entitled "Grandparental Visitation Rights." Section 752.001 defines "grandparents" to include great-grandparents.[143] Section 752.01 is the heart of the statute and reads as follows:

> **752.01 Action by grandparent for right of visitation; when petition shall be granted.—**
>
> (1) The court shall, upon petition filed by a grandparent of a minor child, award reasonable rights of visitation to the

134. *Supra* nn. 126–127 and accompanying text.
135. *Supra* nn. 69–78 and accompanying text.
136. Fla. Const. art. I, § 2.
137. 432 S.2d 567 (Fla. 1983).
138. *Id.* at 568.
139. *E.g. Shriners Hosp. for Crippled Children v. Zrillic*, 563 S.2d 64, 69–70, 70 n. 6 (Fla. 1990).
140. *Id.*
141. Fla. Const. art. I, § 12.
142. *Winfield*, 477 S.2d at 547.
143. Fla. Stat. § 752.001 (1997).

> grandparent with respect to the child when it is in the best interest of the minor child if:
>
> (a) One or both parents of the child are deceased;
>
> (b) The marriage of the parents of the child has been dissolved;
>
> (c) A parent of the child has deserted the child;
>
> (d) The minor child was born out of wedlock and not later determined to be a child born within wedlock as provided in s. 742.091; or
>
> (e) The minor is living with both natural parents who are still married to each other whether or not there is a broken relationship between either or both parents of the minor child and the grandparents, and either or both parents have used their parental authority to prohibit a relationship between the minor child and the grandparents.[144]

The Florida Supreme Court first analyzed the impact of this statute in *Beagle v. Beagle*.[145] At issue was Section 752.01(e), because, "[a]t the time of the grandparents' petition [under Section 752.01], the parents were living together with the child as an intact family."[146] The parents opposed the petition on the basis of parental privacy rights under Article I, Section 23 of the Florida Constitution.[147] The court recognized that, in the first case in which it had interpreted the constitutional privacy provision, it had concluded that any governmental interference with protected privacy would have to satisfy the strict scrutiny of the compelling governmental interest test.[148] This test is met when "the challenged regulation serves a compelling state interest and accomplishes its goal through the use of the least intrusive means."[149] The court found that the state's interest would be found "compelling" only when the state could show that harm to the child would result from

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144. Fla. Stat. § 752.01(1)(a)–(e) (1999).

145. 678 S.2d 1271 (Fla. 1996).

146. *Id.* at 1273.

147. *Id.* at 1273–1274. Article I, Section 23 of the Florida Constitution provides in pertinent part, "Every natural person has the right to be let alone and free from governmental intrusion into the person's private life . . . ." Fla. Const. art. I, § 23.

148. *Beagle*, 678 S.2d at 1276 (citing *Winfield*, 477 S.2d at 547).

149. *Id.* (quoting *Winfield*, 477 S.2d at 547).

a refusal to allow grandparents to visit.[150] The ultimate holding was quite narrow.[151] "[W]e only address whether the State may constitutionally impose grandparental visitation upon an intact family after at least one parent has objected to such visitation. We find that it cannot without first demonstrating a harm to the child."[152] Thus, Section 752.01(e) was "stricken as facially unconstitutional."[153]

Subsequent to *Beagle*, Section 752.01(a) suffered the same fate.[154] *Von Eiff v. Azicri*[155] involved a situation in which the original intact family of husband, wife, and child was destroyed when the wife died.[156] The husband subsequently remarried and his new wife adopted the child.[157] It was the parents of the deceased wife, the child's maternal grandparents, who petitioned for visitation rights.[158] Section 752.01(a) applied because it dealt with the situation in which "one or both parents are deceased."[159] The court found that Section 752.01(a) lacked a requirement for a finding of harm to the child, the same deficiency found in Section 752.01(e), which was declared facially invalid in *Beagle*.[160] The court refused to do the one thing that would have saved Section 752.01(a) from the same fate as Section 752.01(e) and did not find that harm to the child would occur when one parent died and the surviving parent refused to allow grandparent visitation.[161] "Finding that the death of one of the child's biological parents gives rise to a compelling state interest would inappropriately expand the types of harm to children that have traditionally warranted government intervention in parental decision-making."[162] Thus, Section 752.01(a) was found to be facially unconstitutional.[163]

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150. *Id.*
151. *Id.*
152. *Id.* at 1277.
153. *Id.* at 1272.
154. *Von Eiff v. Azicri*, 720 S.2d 510, 510–511 (Fla. 1998).
155. 720 S.2d 510 (Fla. 1998).
156. *Id.* at 511.
157. *Id.*
158. *Id.* at 512.
159. Fla. Stat. § 752.01(a); *Von Eiff*, 720 S.2d at 511.
160. *Von Eiff*, 720 S.2d at 514 (citing *Beagle*, 678 S.2d at 1275–1276).
161. *Id.* at 515.
162. *Id.*
163. *Id.* at 517. In *Lonon v. Ferrell*, the Second District Court of Appeal, relying on *Beagle*, *Von Eiff*, and *Brunetti v. Saul*, 724 S.2d 142 (Fla. Dist. App. 4th 1998), *aff'd*, 753 S.2d 26 (Fla. 2000), held that Florida Statutes Section 752.01(b) was facially invalid, leaving only Section 752.01(c) as a valid provision. 739 S.2d 650, 651–653 (Fla. Dist. App. 2d 1999).

In *Saul v. Brunetti*,[164] grandparents sought to distinguish *Beagle* and *Von Eiff*, "because . . . the . . . case involve[d] an out-of-wedlock child whose primary caretakers were his biological mother and maternal grandparents."[165] The mother, together with the child, lived with her parents while the father lived with his parents.[166] As a result of a paternity suit, the father paid child support and was an active participant in the child's life.[167] Then, the mother died in a traffic accident, at which point the father took the child to live with him and his parents.[168] A dispute arose regarding the visitation rights of the maternal grandparents, and litigation under Section 752.01(d) ensued.[169]

The court recognized that both subsections 752.01(a) and (d) applied, because one of the child's parents was deceased and the child was born out of wedlock.[170] Of course, Section 752.01(a) had already been declared facially invalid in *Von Eiff*.[171] That left Section 752.01(d), concerning children born out of wedlock, which also was declared facially invalid.[172]

> We agree with the Fourth District [Court of Appeal] that for the purposes of analyzing the constitutionality of subsection (d), the fact that the parents of the child . . . were never married should not change this Court's analysis of the constitutionality of this statute.[173]

It should be pointed out that the court has not been blind to the interests of grandparents. Justice Barbara J. Pariente's comment in *Von Eiff* illustrates this concern.

> We recognize that it must hurt deeply for the grandparents to have lost a daughter and then be denied time alone with their granddaughter. We are not insensitive to their plight. However, familial privacy is grounded on the right of parents to

164. 753 S.2d 26 (Fla. 2000).
165. *Id.* at 28.
166. *Id.* at 27.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 27–28.
171. 720 S.2d at 517.
172. *Brunetti*, 753 S.2d at 28–29.
173. *Id.* at 28.

rear their children without unwarranted governmental interference.[174]

IV. CONCLUSION

Clearly, many aspects of both federal and state constitutional law are relevant to students who plan to practice in the field of elder law. In the federal arena, age discrimination challenges based upon the protections provided by the Equal Protection Clause and the equal protection component of the Fifth Amendment Due Process Clause are a potential source of litigation. The elderly client also may require assistance if he or she desires to end life-prolonging medical treatment under substantive due process principles founded on the Fifth and Fourteenth Amendments. Elder law practitioners also must guard against threats posed by euthanasia and physician-assisted suicide, practices that seem increasingly likely when one considers the ease with which the Court has dismissed "sanctity of life" concerns expressed by opponents of abortion, in particular, partial birth abortion. Recent attempts to assert grandparents' rights also illustrate elder law's emergence as a topic relevant to the study of the Constitution.

At the state level, Florida's constitutional privacy protections provide an added dimension to topics suggested for a federal constitutional law course. State interference with either the right to terminate medical treatment or parental rights to prohibit visitation by grandparents are issues pertinent to the study of Florida constitutional law. The Florida Constitution's prohibition against discrimination against the disabled also is an important issue for students who hope to represent elderly clients.

The integration of these elder law topics into existing constitutional law courses will better prepare future attorneys to represent a segment of society that is growing rapidly, both in size and in its need for legal representation.

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174. 720 S.2d at 516.