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**ARE THE SIMILARITIES BETWEEN
A WOMAN'S RIGHT TO CHOOSE
AN ABORTION AND THE ALLEGED
RIGHT TO ASSISTED SUICIDE
REALLY COMPELLING?†**

Marc Spindelman *

In this Article, Marc Spindelman examines the relationship between abortion and assisted suicide. He begins his discussion with the constitutional framework within which courts should consider the assertion that the Due Process Clause of the Fourteenth Amendment protects an individual's decision to commit assisted suicide. The Author then considers and, based on relevant Supreme Court doctrine, rejects the conception of personal autonomy that undergirds the claimed constitutional right to assisted suicide. Finally, the Author points out some legal and cultural distinctions between abortion and assisted suicide, arguing that these distinctions offer courts good reasons for holding that the Fourteenth Amendment's promise of liberty does not include the liberty to commit assisted suicide. In addition, the Author makes a few observations about recent assisted-suicide cases decided by the Ninth and Second Circuits.

In examining whether a liberty interest exists in determining the time and manner of one's death, we begin with the compelling similarities between right-to-die cases and the abortion cases.

—*Compassion in Dying v. Washington*,
79 F.3d 790, 800 (9th Cir. 1996).

The recent spate of court challenges to state laws prohibiting assisted suicide¹ has drawn renewed attention to

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* B.A. 1990, Johns Hopkins University; J.D. 1995, University of Michigan Law School. Friends far too numerous to mention deserve rounds of thanks for various forms of assistance in the preparation of this work. My professors at the University of Michigan Law School, as well, have their due for their patience and encouragement during the course of this project.

1. See, e.g., *Compassion in Dying v. Washington*, 850 F. Supp. 1454 (W.D. Wash. 1994), *rev'd*, 49 F.3d 586 (9th Cir. 1996) (finding that the U.S. Constitution

the ongoing debate over the "right to die."² Not surprisingly, terms derived from the discourse over other social policy questions have infused the debate over the right to die.³ For example, drawing on the language used in the abortion

grants no right to commit assisted suicide), *aff'd*, 79 F.3d 790 (9th Cir. 1996) (en banc), *reh'g denied*, 85 F.3d 1440 (9th Cir. 1996); *Quill v. Koppell*, 870 F. Supp. 78 (S.D.N.Y. 1995) (same), *rev'd sub nom. Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996); *State v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994) (same), *cert. denied*, 115 S. Ct. 1795 (1995). *See also* *Lee v. Oregon*, 891 F. Supp. 1429 (D. Or. 1995) (challenging the Oregon referendum permitting physician-assisted suicide on the grounds that it violates the Equal Protection Clause of the Fourteenth Amendment); *Donaldson v. Van de Kamp*, 4 Cal. Rptr. 2d 59 (Cal. Ct. App. 1992) (finding no constitutional right to assisted suicide). Currently, two cases involving a constitutional right to physician-assisted suicide are pending. *See Kevorkian v. Arnett*, No. CV 94-6089 (C.D. Cal. filed April 26, 1995); *McIver v. Krischer*, No. CL 96-1504 (Fla. Cir. Ct. filed Feb. 16, 1996).

2. The debate over the right to die has generated a considerable degree of lexical confusion. Those who support a right to die have declared invalid the words traditionally used to describe the act of ending one's life. For example, they have contended that when a terminally ill individual ends her life, she does not commit "suicide." *See* Robert A. Sedler, *The Constitution and Hastening Inevitable Death*, 23 HASTINGS CENTER REP., Sept.-Oct. 1993, at 20, 22 [hereinafter Sedler, *Hastening Inevitable Death*]. *See also* *Compassion in Dying*, 79 F.3d at 824 ("[W]e are doubtful that deaths resulting from terminally ill patients taking medication prescribed by their doctors should be classified as 'suicide.'"); *Kevorkian*, 527 N.W.2d at 728 (stating that the choice to discontinue life-sustaining treatment is "not, in effect, committing suicide," whereas an affirmative act to hasten death is suicide). Proponents of the right to die have created a new vocabulary to describe individuals and practices involved in the ending of life. Jack Kevorkian and others, for example, call those doctors who help their patients to end their lives "obitiatrists," and call the medical practice of physicians helping their patients to end life the practice of "medicide." JACK KEVORKIAN, *PRESCRIPTION: MEDICIDE* 202-03 (1991).

3. Professor Yale Kamisar has identified four different meanings encompassed by the phrase "right to die." Yale Kamisar, *Physician-Assisted Suicide: The Last Bridge to Active Voluntary Euthanasia*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL AND LEGAL PERSPECTIVES* 225, 225 (John Keown ed. 1995). They include: (1) The right to passive or negative euthanasia. This right was ostensibly at issue in the Supreme Court's only decision yet to address the right to die, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990). Passive euthanasia involves an individual's decision to refuse or to terminate unwanted medical treatment without which the individual would not continue to live; (2) The right to suicide. Suicide involves an individual's decision to end her life by herself; (3) The right to assisted suicide, or the right to physician-assisted suicide. Assisted suicide involves an individual's decision to end her life with the assistance of another. This Article, chiefly concerned with this right, uses the terms "assisted suicide" and "physician-assisted suicide" interchangeably; and (4) The right to active voluntary euthanasia. Active voluntary euthanasia involves an individual's decision to have another person end her life, e.g., by lethal injection. It differs from assisted suicide in that the individual whose life is to be ended does not perform the last act causing death. Suicide, assisted suicide, and active voluntary euthanasia have all been described as forms of active, as opposed to passive, euthanasia. *See id.*

debate, assisted suicide activists often assert that the right to assisted suicide is a right to "self-determination."⁴

But what does the concept of "self-determination" mean in the context of an individual's decision to commit assisted suicide? What, for example, is self-determining in the case of a woman who decides that because a terminal illness may keep her from living a life in relation to others (for example, as a daughter, a sister, a wife, or a mother) she would rather die than live? Why would we think of this woman's decision to commit assisted suicide as an act of "self-determination" when the rest of her life, in large measure, has been shaped (if not determined) for her by society? Why does "self-determination" become such an important concept when this woman is about to end her life, but not before? Those who spearhead the legal fight for recognition of the right to assisted suicide do not address, much less answer, these questions. They do contend, however, that there is a *constitutional* basis for their position.

Proponents of assisted suicide have built their constitutional argument on twin pillars. The first is the reasoning of *Cruzan v. Director, Missouri Department of Health*,⁵ which recognized a constitutionally protected "liberty interest" in

4. See, e.g., Robert A. Sedler, *Are Absolute Bans on Assisted Suicide Constitutional? I Say No*, 72 U. DET. MERCY L. REV. 725 (1995) [hereinafter Sedler, *I Say No*]; Robert A. Sedler, *Constitutional Challenges to Bans on "Assisted Suicide": The View From Without and Within*, 21 HASTINGS CONST. L.Q. 777, 792-93 (1994) [hereinafter Sedler, *Without and Within*]; Sedler, *Hastening Inevitable Death*, *supra* note 2, at 22. Cf. Todd D. Robichaud, Note, *Toward a More Perfect Union: A Federal Cause of Action for Physician Aid-in-Dying*, 27 U. MICH. J.L. REF. 521, 534 (1994) (noting that it is "the freedom from state compulsion which most directly concerns physician aid-in-dying").

Professor John Robertson has noted that a right to assisted suicide, or at least physician-assisted suicide, is consistent with the constitutional right to abortion. John A. Robertson, *Cruzan and the Constitutional Status of Nontreatment Decisions for Incompetent Patients*, 25 GA. L. REV. 1139, 1176-77, 1188 (1991) (suggesting that the logic of *Cruzan* extends to active euthanasia and is consistent with the right to abortion in terms of "choice, bodily integrity or other interests of a permanently comatose patient").

The terms "bodily integrity," "personal autonomy," and "self-determination" are often used interchangeably in literature on the right to die. Undoubtedly, these terms overlap to a considerable degree. But the lack of precision with which they are used by commentators and courts alike suggests that the terms may have lost their separate meanings, except insofar as they reflect the principle contained in Justice Brandeis' oft-quoted remark that the "right to be let alone [is] the most comprehensive of rights and the right most valued by civilized men." *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

5. 497 U.S. 261 (1989).

refusing unwanted medical treatment.⁶ The second is the reasoning of the Supreme Court's abortion jurisprudence, and within that body of law, the Court's most significant abortion opinions: *Roe v. Wade*⁷ and *Planned Parenthood of Southeastern Pennsylvania v. Casey*.⁸ Opponents of assisted suicide

6. *Id.* at 278–79. The argument that the reasoning of *Cruzan* requires recognition of a constitutional right to physician-assisted suicide can be reduced neatly to the following syllogism: (1) *Cruzan* recognized that the Constitution protects an individual's decision to refuse unwanted medical treatment, even when that decision will result in death. (2) There is no logical distinction between refusing life-saving medical treatment and physician-assisted suicide because in both cases an individual's actions set in motion a course of events resulting in death. Therefore, (3) if the Constitution protects an individual's decision to end her life by refusing medical treatment, it must also protect an individual's decision to end her life by committing suicide with a doctor's aid.

For comparisons between passive and active euthanasia, see RONALD DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA AND INDIVIDUAL FREEDOM* 184 (1993) (calling the distinction between passive and active euthanasia "cruelly abstract" and suggesting that it leads to "apparently irrational" results); Helga Kuhse, *The Alleged Peril of Active Voluntary Euthanasia: A Reply to Alexander Morgan Capron*, 2 *EUTHANASIA REV.* 60, 62 (1987) (arguing for both passive and active euthanasia based on the equal importance of the principle of patient autonomy in both circumstances); James Rachels, *Active and Passive Euthanasia*, 292 *NEW ENG. J. MED.* 78 (1975) (arguing that the practices are morally indistinguishable). *But see* Alexander Morgan Capron, *The Right to Die: Progress and Peril*, 2 *EUTHANASIA REV.* 41, 53–59 (1987) (arguing that the logical similarities between passive and active euthanasia, specifically physician-assisted killing, do not justify extending the right to include assisted suicide).

7. 410 U.S. 113 (1973).

8. 505 U.S. 833 (1992). The argument from the Supreme Court's abortion jurisprudence has appeared in one of two incarnations. Right-to-die proponents have argued that a woman's decision to terminate an unwanted pregnancy is analogous to a terminally ill person's decision to commit physician-assisted suicide. They contend that if a pregnant woman has a constitutional right to make life-and-death decisions for what is arguably a separate life—that of the fetus—then that same woman at a later stage in her life must also have a right to make life and death decisions for herself. *See* Sedler, *I Say No*, *supra* note 4, at 729.

Alternatively, right-to-die proponents have maintained that if a woman's decision to terminate an unwanted pregnancy receives special constitutional protection because of the importance of that decision in a woman's life, an individual's decision to end her life, which is certainly no less important than the decision whether to carry a pregnancy to term, must also receive constitutional protection. *See, e.g.*, Sedler, *Hastening Inevitable Death*, *supra* note 2, at 23; Sedler, *I Say No*, *supra* note 4, at 729; Sedler, *Without and Within*, *supra* note 4, at 787.

The analogy between abortion and assisted suicide works in reverse, too. Less than a year after *Roe*, opponents of abortion highlighted the analogy between abortion and euthanasia as an indictment of the perceived constitutional error in *Roe*. *See, e.g.*, Robert M. Byrn, *Wade and Bolton: Fundamental Legal Errors and Dangerous Implications*, 19 *CATH. LAW.* 243, 249–50 (1973), *cited in* JOHN T. NOONAN, JR., *A PRIVATE CHOICE* 32 n.51 (1979).

Assisted suicide advocates press the analogy between abortion and assisted suicide as if the only comparison could be the one between the relatively broader right to abortion during the earlier stages of pregnancy and assisted suicide. There is, however,

have thoroughly considered and rejected the assertion that constitutional recognition of a right to refuse unwanted medical treatment means that there is also a constitutional right to physician-assisted suicide. By comparison, the impact of Supreme Court abortion jurisprudence has not received much attention at all.⁹

This Article evaluates the comparisons between abortion and assisted suicide advanced in the recent discourse surrounding the right to die. It argues that the Supreme Court's jurisprudence, particularly its abortion jurisprudence, does not establish a constitutional right to physician-assisted suicide. Part I notes that there has been serious confusion about how to characterize the right to physician-assisted suicide, and attempts to explain why assisted suicide is a "fundamental" right or merely a "constitutionally protected liberty interest." Part I concludes by providing a framework, consistent with current Supreme Court doctrine, within which to analyze the claimed right to assisted suicide. Part II considers the legal arguments in support of the right to physician-assisted suicide. It explores the scope of the model of "personal autonomy" that assisted suicide proponents advance, and criticizes this model as being both overbroad and discredited by current constitutional doctrine. Part III explains a number of distinctions between abortion and assisted suicide. It concludes that, based upon these distinctions, courts should reject the claim

no a priori reason why this must be so. If abortion and assisted suicide are to be analogized at all one could defensibly adhere to the position that the proper analogy between the two practices is the one between the relatively narrow right to abortion during the later stages of pregnancy and assisted suicide.

9. In fact, until now only one commentator has devoted a law review article exclusively to the relationship between abortion and assisted suicide. See Seth F. Kreimer, *Does Pro-Choice Mean Pro-Kevorkian? An Essay on Roe and Casey and the Right to Die*, 44 AM. U. L. REV. 803 (1995). A number of articles, however, mention the analogy between the two rights, both in support of the analogy, see, e.g., Sedler, *Hastening Inevitable Death*, supra note 2, at 23; Sedler, *I Say No*, supra note 4, at 729; Sedler, *Without and Within*, supra note 4, at 786-87; and against, see, e.g., Yale Kamisar, *Against Assisted Suicide—Even a Very Limited Form*, 72 U. DET. MERCY L. REV. 735, 760-68 (1995); Thomas J. Marzen, "Out, Out Brief Candle": *Constitutionally Prescribed Suicide for the Terminally Ill*, 21 HASTINGS CONST. L.Q. 799, 805, 822-23 (1994); Willard C. Shih, Note, *Assisted Suicide, the Due Process Clause and "Fidelity in Translation"*, 63 FORDHAM L. REV. 1245, 1260 (1995) (explaining that the history of the right to abortion differs from that of assisted suicide and distinguishing assisted suicide from abortion on the grounds that (a) assisted suicide falls outside the category of fundamental rights the Supreme Court found to be protected by the right to privacy and (b) that assisted suicide, unlike abortion, involves termination of a person's life).

that the federal Constitution protects a right to physician-assisted suicide, even where the terminally ill are concerned. The Conclusion offers some final remarks.

I. THE CONSTITUTIONAL FRAMEWORK

This Part sets out to provide the proper framework within which courts should consider the question whether the federal Constitution protects a right to assisted suicide. The discussion is divided into three subsections. Part I.A considers the different ways in which proponents of the right to assisted suicide have characterized that right, and attributes such inconsistency to the shifting ground of the Supreme Court's substantive due process jurisprudence. Part I.A concludes by suggesting that, if the right to assisted suicide is protected by the Fourteenth Amendment's Due Process Clause at all, the right can only plausibly be termed a constitutionally protected "liberty interest." Part I.B lays out the framework within which courts should analyze the right to assisted suicide. Part I.C proposes some tentative answers to a few questions raised in the preceding discussion. It concludes by identifying the central issue considered in the remainder of the Article.

A. *The Uncertain State of Non-Textually-Based Constitutional "Liberty"*

Because the right to assisted suicide is not expressly mentioned in the text of the Constitution, proponents of that right have had to rely on arguments based on existing Supreme Court doctrine to explain why it is a right of constitutional dimensions. The most common and colorable argument made to date is that state laws banning assisted suicide impermissibly infringe upon the "liberty" guaranteed by the Fourteenth Amendment's Due Process Clause.¹⁰

10. See *supra* notes 5–6 and accompanying text. Some commentators advance a First Amendment argument in proposing a constitutional right to commit assisted suicide. See, e.g., Matthew P. Previn, *Assisted Suicide and Religion: Conflicting Conceptions of the Sanctity of Human Life*, 84 GEO. L.J. 589 (1996).

Those who invoke the Constitution's liberty guarantee, however, have not been able to agree on the nature of the asserted liberty. In its various forms, the right to assisted suicide has been defined as a "fundamental" right,¹¹ a "liberty interest,"¹² an aspect of "liberty,"¹³ and an aspect of the "right to privacy."¹⁴ If, as assisted suicide advocates evidently believe, it is clear that the Constitution protects the right to assisted suicide, it is difficult to understand why that right has not been defined with a greater degree of consistency.¹⁵ In all fairness to those who cannot agree on the proper constitutional term with which to refer to the right to assisted suicide, the Supreme Court's substantive due process jurisprudence has been anything but a model of clarity.

Once upon a time, the theory of Fourteenth Amendment substantive due process rights was a simple matter. For the quarter century between the Supreme Court's first modern substantive due process decision, *Griswold v. Connecticut*,¹⁶ and the Court's decision in *Webster v. Reproductive Health Services*,¹⁷ in order to assert that a certain decision an individual might make was an aspect of the liberty safeguarded by the Due Process Clause, one argued that the decision was fundamental and, therefore, protected by the right to privacy.¹⁸

Accordingly, during the heyday of "fundamental-rights-think," when two of our country's most well-respected constitutional law scholars, Professors Laurence Tribe and Kathleen

11. See, e.g., Sedler, *Without and Within*, *supra* note 4, at 780-90 (describing "the choice to hasten inevitable death" as a "fundamental right").

12. See, e.g., Sedler, *Hastening Inevitable Death*, *supra* note 2, at 20 (claiming that "an absolute ban on the use of physician-prescribed medications by a terminally ill person to hasten that person's inevitable death . . . is an 'undue burden' on the person's [protected] 'liberty' interest").

13. See, e.g., Sedler, *I Say No*, *supra* note 4, at 728 (describing the right as embodied in the "liberty" protected by the Fourteenth Amendment's Due Process Clause).

14. See, e.g., Sedler, *Without and Within*, *supra* note 4, at 788-89 (arguing that the right to assisted suicide is "fundamental" and protected as an aspect of the constitutional right to privacy).

15. For a description of the Rehnquist Court's treatment of the right to privacy and its substitution of constitutionally protected liberty interests, see Mark A. Racanelli, Note, *Reversals: Privacy and the Rehnquist Court*, 81 GA. L. REV. 443, 470-72, 473 (1992).

16. 381 U.S. 479 (1965) (recognizing a constitutional right to privacy).

17. 492 U.S. 490 (1989).

18. Cf. David M. Smolin, *The Jurisprudence of Privacy in a Splintered Supreme Court*, 75 MARQ. L. REV. 975, 976 (1992) (using the terms "substantive due process" and "right of privacy" interchangeably).

Sullivan, argued in *Bowers v. Hardwick*¹⁹ that the Due Process Clause of the Fourteenth Amendment protected the decision of two adult men to engage in consensual sodomy, they based their argument on the theory that the decision was fundamental and protected by the right to privacy.²⁰

Were Tribe and Sullivan to argue *Hardwick* today, they would have to navigate a considerably more difficult constitutional terrain.²¹ Gone are the days when one could argue by analogy to the Court's earlier right-to-privacy cases that to engage in consensual same-sex sodomy was a fundamental right encompassed by the right to privacy. Several years after it decided *Hardwick*, beginning with *Webster*,²² the Supreme Court embraced a notion of substantive due process rights that, in some very important respects, looked considerably unlike the right to privacy.

Delivering a plurality opinion in *Webster*,²³ Chief Justice Rehnquist launched a frontal assault on the right to privacy and the protection it offered a woman's right to abortion. Harkening back to the Court's experience of applying *Roe v. Wade*,²⁴ the Chief Justice explained:

Justice Blackmun takes us to task for our failure to join in a "great issues" debate as to whether the Constitution includes an "unenumerated" general right to privacy as recognized in such cases as *Griswold v. Connecticut* . . . and *Roe*. But *Griswold v. Connecticut*, unlike *Roe*, did not purport to adopt a whole framework, complete with detailed rules and distinctions, to govern the cases in which the asserted liberty interest would apply. As such, it was far different from the opinion, if not the holding, of *Roe v.*

19. 478 U.S. 186 (1986).

20. See *id.* at 190 (noting with disapproval that *Hardwick* and the respondents and the United States Court of Appeals for the Eleventh Circuit took the position that the "[Supreme] Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy").

21. Shortly before this Article was published, the Supreme Court struck down an amendment to the Colorado Constitution that prohibited local or state governmental action designed to protect lesbians, gay men, or bisexuals. *Romer v. Evans*, 116 S. Ct. 1620 (1996). The Court did not mention its ruling in *Bowers v. Hardwick*, 478 U.S. 186 (1986). Although *Romer* restricts the reach and relevance of *Hardwick*, nothing in *Romer* suggests that *Hardwick*'s central holding has lost its force as a matter of constitutional law.

22. 492 U.S. 490 (1989).

23. *Id.*

24. 410 U.S. 113 (1973).

Wade, which sought to establish a constitutional framework for judging state regulation of abortion during the entire term of pregnancy. . . . *The experience of the Court in applying Roe v. Wade in later cases . . . suggests to us that there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a "fundamental right" to abortion . . . a "limited fundamental constitutional right," . . . or a liberty interest protected by the Due Process Clause, which we believe it to be.*²⁵

The Chief Justice's theory²⁶ that the right to abortion should be considered a "liberty interest protected by the due process clause" rather than a "fundamental" constitutional right, rocked the seemingly well-established and secure foundations of the Court's abortion jurisprudence.²⁷ Several Supreme Court Terms passed before a majority of the Court addressed the argument made by the Chief Justice, and adoption of the Chief Justice's theory did not come without a fight.

25. *Webster*, 492 U.S. at 520 (plurality opinion) (citations omitted) (emphasis added).

26. The Chief Justice's theory did not capture a majority of the Court; the Chief Justice spoke only for himself and Justices White and Kennedy in this regard. See Peggy S. McClard, *The Freedom of Choice Act: Will the Constitution Allow It?*, 30 HOUS. L. REV. 2041, 2048-49 (1994).

27. The Chief Justice remarked: "There is no doubt that our holding today will allow some governmental regulation of abortion that would have been prohibited under the language of such cases as *Coluatti v. Franklin* and *Akron v. Akron Center for Reproductive Health, Inc.*" *Webster*, 492 U.S. at 520-21 (citations omitted).

For further discussion of the impact of the *Webster* plurality, see Colin Meeder, *Recent Publication*, 31 HARV. C.R.-C.L. L. REV. 273, 280 (1996) (reviewing JAMES F. SIMON, *THE CENTER HOLDS: THE POWER STRUGGLE INSIDE THE REHNQUIST COURT* (1995)) (describing *Webster* as "the first serious threat to *Roe*"); Mark H. Woltz, *A Bold Reaffirmation? Planned Parenthood v. Casey Opens the Door for States to Enact New Laws to Discourage Abortion*, 71 N.C. L. REV. 1787, 1803 (1993) (calling *Webster* "a turning point" in the Court's treatment of abortion cases); Natalie Wright, *State Abortion Law After Casey: Finding "Adequate and Independent" Grounds for Choice in Ohio*, 54 OHIO ST. L.J. 891, 896 (1993) (calling the Chief Justice's view that the abortion right should be defined as a constitutionally protected "liberty interest" a "significant" change from prior Supreme Court jurisprudence); Calvin R. Massey, *The Locust of Sovereignty: Judicial Review, Legislative Supremacy and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229, 1274 (taking the view that *Webster* "heralds a new era"); LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 23 (1992) (suggesting that although *Webster* was joined only by a plurality it represents "an open invitation to state legislation" to test the limits of permissible regulations). *But see* Daniel A. Farber & John E. Nowak, *Beyond the Roe Debate: Judicial Experience with the 1980s "Reasonableness" Test*, 76 VA. L. REV. 519, 533-38 (1990) (discussing what the authors deem "the Irrelevance of the Fundamental Rights Debate").

From one end of the ideological spectrum, Justice Scalia, in a separate concurrence in *Webster*, took aim at the Chief Justice's opinion for not going far enough.²⁸ Justice Scalia remarked that the majority's contrivance to avoid overturning *Roe* explicitly once and for all was a far worse possibility than leaving *Roe* to languish, or to "be disassembled doorjamb by doorjamb."²⁹

From the opposite end of the spectrum, Justice Blackmun, in his opinion, passionately defended *Roe* and the abortion right,³⁰ yet Justice Blackmun made no explicit mention of the Chief Justice's attempt to reclassify the abortion right as a liberty interest protected by the Due Process Clause. "Today," he wrote, "*Roe v. Wade* . . . and *the fundamental constitutional right of women to decide whether to terminate a pregnancy*, survive but are not secure."³¹ Elsewhere in his opinion, Justice Blackmun referred to the abortion choice as "*a limited fundamental constitutional right to decide whether to terminate a pregnancy*."³²

Justice Blackmun's failure to register expressly his disagreement with the Chief Justice's definition of the abortion right as a "liberty interest protected by the Due Process Clause" is puzzling.³³ After all, Chief Justice Rehnquist's opinion flat-footedly rejected Justice Blackmun's characterization of the right to abortion as *either* a "fundamental constitutional right," *or* "a limited fundamental constitutional right."³⁴

Less than a year after the Court decided *Webster*, it again divided on whether it was wiser to avoid elaborating the abstract differences between "fundamental" rights, "limited fundamental" rights, and constitutionally protected "liberty interests." In that case, *Cruzan v. Director, Missouri Department of Health*,³⁵ Chief Justice Rehnquist, again writing for the majority, assumed without deciding that "the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and

28. *Webster*, 492 U.S. at 532 (Scalia, J., concurring in part and concurring in the judgment).

29. *See id.* at 537.

30. *Id.* (Blackmun, J., concurring in part and dissenting in part).

31. *Id.* (citation omitted) (emphasis added).

32. *Id.* at 555 (emphasis added).

33. *Id.* at 520.

34. *Id.*

35. 497 U.S. 261 (1989).

nutrition."³⁶ The opinion observed that "[a]lthough many state courts have held that a right to refuse treatment is encompassed by a generalized constitutional right of privacy, we have never so held. We believe this issue is more properly analyzed in terms of a Fourteenth Amendment liberty interest."³⁷

Dissenting in that case, Justice Brennan wrote that if *Cruzan* had the constitutional right the Court assumed she had—for the reasons the Court assumed she had it—then that right had to be fundamental. Using the word "fundamental" no fewer than fourteen times, Justice Brennan argued that "if a competent person has a liberty interest to be free of unwanted medical treatment, as both the majority and Justice O'Connor concede, *it must be fundamental*."³⁸ Although Justice Brennan's observation would have had force a decade, or even a few years earlier,³⁹ after *Webster* the chord struck by the observation began to ring out of tune.

It was not until the Supreme Court made its most recent pronouncement on the right to abortion in *Planned Parenthood of Southeastern Pennsylvania v. Casey*⁴⁰ that the Supreme Court finally abandoned the "fundamental rights" language of its earlier privacy and abortion jurisprudence in favor of the "liberty interest" language of the *Webster* plurality. Nowhere in the joint opinion that carried the day in *Casey*, for example, did the authors describe the abortion right—or any other privacy rights—in their own words as "fundamental."⁴¹ Specifically, as to the abortion right, it is carefully called a "liberty,"⁴² or an aspect of "bodily integrity,"⁴³ or an exercise of "personal autonomy."⁴⁴

36. *Id.* at 279.

37. *Id.* at 279 n.7 (citing *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986)). Although *Hardwick*, a case decided on privacy grounds, is arguably irrelevant to a discussion of a Fourteenth Amendment liberty interest in physician-assisted suicide, the *Cruzan* Court's reference to *Hardwick* illustrates why such a view is mistaken.

38. *Id.* at 304 (Brennan, J., dissenting) (emphasis added).

39. As the *Cruzan* majority seemed to concede, the right at issue in *Cruzan* could have been analyzed as a "fundamental right" protected by the right to privacy rather than as a Fourteenth Amendment liberty interest. *Id.* at 279 n.7. See *supra* note 37 and accompanying text.

40. 505 U.S. 833 (1992).

41. *Id.* (plurality opinion). See also McClard, *supra* note 26, at 2050 & n.68.

42. See, e.g., *Casey*, 505 U.S. at 852 ("Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law.").

43. *Id.* at 857.

44. *Id.* ("Roe, however, may be seen not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity. . . ."). Even Justice Blackmun's separate opinion in *Casey* demonstrated

Casey's teaching, however subject to conjecture it might otherwise be, is not open to doubt on one point: the three Justices who authored the joint opinion were not alone in taking the view that the right to abortion was now to be considered a Fourteenth Amendment "liberty interest," and not an aspect of the "fundamental" right to privacy. In total, seven Justices approved of this characterization of the right to abortion.⁴⁵

That the Supreme Court no longer considers the right to abortion to be a "fundamental," "very fundamental," or "limited fundamental" right, and that the Court never considered the decision to refuse unwanted medical treatment to be such a right, provide an important lesson where the right to assisted suicide is concerned. Because assisted suicide enthusiasts rest their constitutional claims on *Casey* and *Cruzan*, any right to assisted suicide cannot be correctly characterized as a "fundamental" right—at least if one is speaking of the right in constitutional terms.⁴⁶ Like the rights involved in *Cruzan* and *Casey*, the most that could be said of any right to assisted suicide is that it is a Fourteenth Amendment "liberty interest."

inconsistency, characterizing the abortion right alternatively as an aspect of the "rights of privacy and bodily integrity," *id.* at 926 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part), an example of "bodily integrity," *id.* at 927, a "liberty right," *id.* at 940, and a "fundamental liberty," *id.* at 943.

45. The seven include the authors of the *Casey* joint opinion—Justices O'Connor, Kennedy, and Souter—as well as Chief Justice Rehnquist, and Justices White, Scalia, and Thomas. See McClard, *supra* note 26, at 2050.

46. Undoubtedly, talk of fundamental rights will be appropriate outside the abortion context. Even after *Casey*, courts may consider as fundamental those rights contained in the Bill of Rights that have been applied to the states through the Fourteenth Amendment's Due Process Clause. It is less certain, however, whether other rights will be judged similarly in light of *Casey*. See *Casey*, 505 U.S. at 950–53 (Rehnquist, C.J., concurring and dissenting) (asserting that the right to an abortion is not "fundamental"). Cf. Racanelli, *supra* note 15, at 468 (implying that if a right can be found in the text of the Constitution or in the history of our country, it may be fundamental). Thus, the question remains whether the *Casey* Court's refusal to speak about abortion as a "fundamental right" will require the Court to redefine as "Fourteenth Amendment liberty interests" all other privacy rights previously protected as fundamental.

*B. The Framework for Analyzing Fourteenth
Amendment "Liberty Interest" Cases*

The irreducible minimum of a substantive due process challenge requires that a litigant overcome two hurdles. First, he must establish that a challenged law touches on some "liberty interest" protected by the Due Process Clause.⁴⁷ Second, he must show that the challenged law impermissibly infringes the asserted "liberty interest." For the moment, this Article addresses initially the second hurdle.

In determining whether a law adequately accommodates a constitutionally protected "liberty interest," courts engage in a form of constitutional balancing, pitting the individual's protected "liberty interest" against the state's justification for passing the challenged law.⁴⁸

The *Casey* joint opinion, however, filled in the details about how courts are to balance an individual's liberty interest against a state's interests in order to determine whether an individual's due process liberty interest has been violated by state law.⁴⁹ *Casey* explained that not every law that imposes a burden on an individual's constitutionally protected rights is, by definition, unconstitutional.⁵⁰ A state may restrict the exercise of a Fourteenth Amendment "liberty interest" if the restriction—whether designed to do so or not—does not place an undue burden on the right. The *Casey* opinion adopted this "undue burden" standard and explained it as follows:

The fact that a law which serves a valid purpose, one not designed to strike at the right itself, has the incidental effect of making it more difficult or more expensive to procure an abortion cannot be enough to invalidate it.

47. This assertion will be discussed later in the Article. See *infra* notes 65–71 and accompanying text.

48. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (citing *Youngberg v. Romeo*, 457 U.S. 307, 321 (1982), and *Mills v. Rogers*, 457 U.S. 291, 299 (1982)).

49. *Casey*, 505 U.S. at 979–80 (Scalia, J., concurring and dissenting) (opining that a woman's power to have an abortion is not a constitutional liberty interest). The law will survive constitutional attack so long as it is rationally related to a legitimate governmental purpose. *Id.* at 981.

50. See *Casey*, 505 U.S. at 873 (explaining that "not every law which makes a right more difficult to exercise is, *ipso facto*, an infringement of that right").

Only where the state regulation imposes an undue burden on a woman's ability to make this decision does the power of the state reach into the heart of the liberty protected by the Due Process Clause.⁵¹

Because the joint opinion elaborated upon the undue burden standard in the context of ruling on state-imposed restrictions on the abortion decision,⁵² some judicial opinions have taken the position that that standard does not apply outside of that context.⁵³ There is nothing inherently self-limiting about the "undue burden" standard, however, to preclude its application to Fourteenth Amendment liberty interests generally.⁵⁴

The question is not, as some courts seem to have assumed, whether the undue burden standard will apply (or already does) outside of the abortion context, but rather, it is whether a majority of the Court will adopt it as *the* standard by which state laws circumscribing the exercise of constitutional liberty interests will be measured.⁵⁵ Whatever action a majority of

51. *Id.*

52. *Id.* at 874-76. The joint opinion summarized the meaning of "undue burden" in this context: "A finding of an undue burden is a shorthand for the conclusion that a state regulation has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877. A statute that placed an "undue burden" on the right to abortion would be invalid, the joint opinion explained, "because the means chosen by the State to further the interest in potential life must be calculated to inform the woman's free choice, not hinder it." *Id.*

53. In particular it is noteworthy that some courts that have considered whether there is a constitutional due process right to commit assisted suicide have not adhered to *Casey's* framework, including its undue burden standard, at all. *See* *Compassion in Dying v. Washington*, 79 F.3d 790, 798-99 (9th Cir. 1996) (adopting a balancing test to measure the constitutionality of Washington's ban on assisted suicide).

54. As Professor Sheldon Gelman explains, "The *Casey* Court . . . did not explicitly confine the undue burden test to peripheral applications of *Roe* or to questions about the scope of abortion rights." *See* Sheldon Gelman, "Life" and "Liberty": Their Original Meaning, Historical Antecedents, and Current Significance in the Debate Over Abortion Rights, 78 MINN. L. REV. 585, 609 (1994).

55. The undue burden standard announced in *Casey* did not capture a majority of the Court. *See Casey*, 505 U.S. at 930 (Blackmun, J., concurring in part and dissenting in part) (explaining that no Court majority has ever agreed upon a standard of review different from strict scrutiny where state limitations on reproductive choice are concerned). *Id.* at 964 (Rehnquist, C.J., concurring in part and dissenting in part) (same); McClard, *supra* note 26, at 2051 ("The portion of the *Casey* opinion outlining the new [undue burden] standard of review was joined only by the two co-authors."). It is doubtful that the rational basis test favored by Chief Justice Rehnquist and other Justices will prevail. A majority of the Court consistently has favored a standard of review that is at least as rigorous as the undue

the Court ultimately takes on the undue burden standard, it is currently prevailing doctrine.⁵⁶ Courts must then determine whether an undue burden has been placed on a protected liberty interest where a state law has the purpose or effect of placing a "substantial obstacle" in the path of an individual who wishes to exercise such an interest.⁵⁷ Where a state law does not place an undue burden on a protected liberty interest, the law must be upheld, provided that the legislature had a rational basis for enacting it.⁵⁸

The finding that a state law does place an undue burden on a protected liberty interest will not always demand that the law be declared unconstitutional. Such a conclusion will depend upon the strength of the state's interests in enacting or maintaining the law. If the state's interest is only "legitimate," the law must fall.⁵⁹ If, however, the state can demonstrate "compelling" reasons to support the law, the law must be upheld.⁶⁰ Indeed, where a state's interests supporting the law are compelling, the state may go so far as to ban the exercise of the liberty interest altogether—so long as the law does not reach farther than necessary to serve the state's interest.⁶¹

burden standard. See G. Sidney Buchanan, *A Very Rational Court*, 30 HOUS. L. REV. 1509, 1570 (1993) (arguing that the Court will not adopt a standard of review less strict than the undue burden standard).

56. See *City of Lakewood v. Plain Dealer Pub. Co.*, 486 U.S. 750, 764 n.9 (1988) (announcing that settled Supreme Court jurisprudence holds that "when no single rationale commands a majority, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgment on the narrowest grounds'" (quoting *Marks v. United States*, 430 U.S. 188, 193 (1977))). See also Robert D. Goldstein, *Reading Casey: Structuring the Woman's Decisionmaking Process*, 4 WM. & MARY BILL OF RTS. J. 787, 789 & n.6 (1966) (noting that the *Casey* joint opinion establishes current doctrine).

57. See *Casey*, 505 U.S. at 877-78; *supra* note 52 and accompanying text.

58. See *Casey*, 505 U.S. at 878 (ruling that unless a law has the effect of placing an undue burden on the right to abortion, "a state measure designed to persuade [a woman] to choose childbirth over abortion will be upheld if reasonably related to that goal.").

59. See *id.*

60. See *Casey*, 505 U.S. at 932 (Blackmun, J., concurring in part and dissenting in part).

61. Though bans on abortion constitute a burden on the right to abortion, they are constitutional where a state has a compelling interest. As the *Casey* joint opinion observed:

We also affirm *Roe's* holding that "subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."

Casey, 505 U.S. at 879 (quoting *Roe v. Wade*, 410 U.S. 113, 164-65 (1973)).

Under the undue burden standard a state may ban the exercise of a constitutionally protected liberty interest, so long as the state has a compelling interest in

With this framework in mind, this Article now returns to the first hurdle that a litigant maintaining a substantive due process challenge must clear, namely, establishing that an asserted liberty interest is constitutionally protected. At the outset of the following brief discussion, it bears mentioning that it is well beyond the scope of this Article to survey the numerous sources of judgment that may properly be thought to play a role in deciding that a certain liberty interest is (or is not) one of constitutional dimensions.⁶²

Broadly speaking, there are two sorts of Fourteenth Amendment liberty interests. On the one hand, liberty interests based on state-created law are defined ultimately with reference to the law, rule, ordinance, contract, or regulation that established them.⁶³ On the other hand are liberty interests grounded in the Constitution itself. Within this category, one can count the liberty interest in abortion and the liberty

enacting the law, the law furthers the state's interest, and the law is drawn narrowly to serve that interest. See *Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 828 (1986) (O'Connor, J., dissenting) (applying strict scrutiny for abortion restrictions that do place an undue burden on the right to abortion and applying rational basis scrutiny for restrictions that do not), *overruled by Casey*, 505 U.S. 833. This is simple enough: If a law survives strict scrutiny, it will always pass constitutional muster. Whether a law blotting out a constitutionally protected liberty interest can survive constitutional challenge *only* if it passes strict scrutiny is still something of an open question. For example, the Court might uphold such a law if a state's interest is less than compelling, or it might uphold the law even if it is not tailored narrowly to serve the state's interest, or both. Professor Robertson thought that "any reasonable state interest, or at least one which does not impose an 'undue burden,' would justify state interference with [a Fourteenth Amendment] liberty." See Robertson, *supra* note 4, at 1174 n.132. Since Robertson wrote those words, however, the constitutional landscape has changed enough so that the context in which he is correct has begun to come more clearly into focus: *Casey* and other cases flesh out when a reasonable or legitimate state interest will be enough to outweigh a Fourteenth Amendment liberty interest and when it probably will not.

62. For discussion of the theory of judicial review, see Terrance Sandalow, *Constitutional Interpretation*, 79 MICH. L. REV. 1033 (1981), and JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

63. See, e.g., *Sandin v. Conner*, 115 S. Ct. 2293, 2300 (1995) (recognizing that "States may under certain circumstances create liberty interests which are protected by the Due Process Clause," but holding that

these interests will be generally limited to freedom from restraint which, while not exceeding the sentence in such an unexpected manner as to give rise to protection by the Due Process Clause of its own force . . . nonetheless imposes atypical and significant hardship on the inmate in relation to the ordinary incidents of prison life).

interest in refusing unwanted medical treatment. If a liberty interest in committing assisted suicide does exist, it will be (like abortion and refusal of medical treatment) grounded in the Constitution itself.⁶⁴

Courts may consider a number of factors in determining whether a certain decision constitutes a liberty interest protected by the Fourteenth Amendment. Courts may look, for example, to the common law to determine whether a decision has been recognized historically as within the realm of individual choice.⁶⁵ If it has, then the decision may be a liberty interest of constitutional dimensions. Thus, when the Supreme Court, in *Cruzan*, assumed that the Constitution protected an individual's decision to refuse lifesaving medical treatment, it relied heavily on the fact that the decision's "logical corollary," the right to informed consent,⁶⁶ was well

64. See *Compassion in Dying v. Washington*, 79 F.3d 790, 793-94, 838 (9th Cir. 1996) (en banc) (holding that the Fourteenth Amendment's Due Process Clause includes a liberty interest to choose the time and manner of one's own death). *But see* *Quill v. Vacco*, 80 F.3d 716, 723-25 (2d Cir. 1996) (rejecting the claim that there is a due process liberty interest in committing assisted suicide).

65. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1989) (taking account of the common law of informed consent to establish the constitutional pedigree of a right to refuse unwanted medical treatment). A related inquiry might be made into the number of states outlawing the conduct claimed to be constitutionally protected at the time the court decides. Or, instead, courts may look to the number of states that prohibited the conduct in question at the time of the adoption of the Fourteenth Amendment.

66. *Cruzan*, 497 U.S. at 270. The Chief Justice's majority opinion in *Cruzan* ignored the fact that the history of informed consent, and, indeed, the right of a competent adult to refuse unwanted lifesaving medical treatment, even if constitutionally protected, did not (without more) justify the conclusion that Nancy Cruzan enjoyed and could exercise such rights. Nancy Cruzan was not a competent adult—at least not at any time when her case was moving its way through the courts. For the Court to conclude that Nancy Cruzan had a right when she was competent to decide the future course of her life, including a time when she might no longer be competent, required a considerable leap in constitutional terms.

This opinion seems at odds with the views expressed a year earlier by Justice Scalia in *Michael H. v. Gerald D.*, 491 U.S. 110 (1988), which the Chief Justice purported to embrace. The now-famous footnote six in *Michael H.* explained that the Court should define a substantive due process right at "the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified." *Id.* at 127-28 n.6.

Because Chief Justice Rehnquist parted company from Justice Scalia in *Cruzan* on the question of how to define the right at issue in that case, one wonders which Justice was faithful to footnote six. Justice Scalia's approach to the right involved in *Cruzan* seems to have adhered more closely to footnote six because the common law provided no right to refuse unwanted medical treatment but undoubtedly prohibited suicide. See *Cruzan*, 497 U.S. at 294 (Scalia, J., concurring).

established at common law.⁶⁷

Courts may also look to existing case law to determine whether a judicial consensus has emerged about whether a particular decision is constitutionally protected. In ruling as it did, the majority in *Cruzan* took judicial notice that a substantial number of lower courts had held that competent individuals had a protected common law or constitutional right to refuse unwanted medical treatment.⁶⁸

Finally, courts may use the common law method of constitutional adjudication, or "reasoned judgment," to decide whether a certain decision is constitutionally protected.⁶⁹ This

67. Note, however, that even the *Cruzan* Court, which assumed that the right to passive euthanasia was a constitutionally protected liberty interest did not suggest that the right to passive euthanasia was either "implicit in the concept of ordered liberty," *Palko v. Connecticut*, 302 U.S. 319, 326 (1937), *overruled by* *Benton v. Maryland*, 395 U.S. 784, 793 (1969), or "so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934). By avoiding such language, the Court did not have to address whether the liberty interest in refusing passive euthanasia was fundamental.

Significantly, by avoiding the fundamental rights language of its previous cases, the *Cruzan* Court cast doubt on the continuing vitality of the old touchstones for defining substantive due process rights. Indeed, given the reasons offered by the Chief Justice in *Webster* for not elaborating the abstract differences between fundamental and other categories of rights, *see supra* text accompanying notes 26-34, one wonders why the Court would continue to adhere to the tests for determining fundamental rights set forth in *Palko* and *Snyder*.

In light of his stance in *Webster*, the Chief Justice's suggestion that the *Palko* and *Snyder* tests are still valid is somewhat confusing. *Casey*, 505 U.S. at 951 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). As the Chief Justice explained, the tests of *Palko* and *Snyder* "are admittedly not precise, but our decisions implementing this notion of 'fundamental' rights do not afford any more elaborate basis on which to base such a classification." *Id.* Reconciling such a statement with the thrust of his plurality opinion in *Webster*, *see supra* text accompanying note 25, is difficult.

68. *See Cruzan*, 497 U.S. at 271-77. The *Cruzan* Court cites the following cases: *Gray v. Romeo*, 697 F. Supp. 580 (D.R.I. 1988); *Conservatorship of Drabick*, 245 Cal. Rptr. 840 (Cal. Ct. App.), *cert. denied*, 488 U.S. 958 (1988); *Bouvia v. Superior Ct.*, 225 Cal. Rptr. 297 (Cal. Ct. App. 1986); *Barber v. Superior Ct.*, 195 Cal. Rptr. 484 (Cal. Ct. App. 1983); *McConnell v. Beverly Enterprises-Conn., Inc.*, 553 A.2d 596 (Conn. 1989); *Corbett v. D'Alessandro*, 487 So. 2d 368 (Fla. Dist. Ct. App. 1986); *In re Estate of Longeway*, 549 N.E.2d 292 (Ill. 1987); *Brophy v. New England Sinai Hosp., Inc.*, 497 N.E. 2d 626 (Mass. 1986); *Superintendent of Belchertown State Sch. v. Saikewicz*, 370 N.E.2d 417 (Mass. 1977); *In re Gardner*, 534 A.2d 947 (Me. 1987); *In re Farrell*, 529 A.2d 404 (N.J. 1987); *In re Jobes*, 529 A.2d 434 (N.J. 1987); *In re Peter*, 529 A.2d 419 (N.J. 1987); *In re Conroy*, 486 A.2d 1209 (N.J. 1985); *In re Quinlan*, 355 A.2d 647 (N.J. 1967); *In re Winchester County Med. Ctr.*, 531 N.E.2d 607 (N.Y. 1988); *In re Storar*, 420 N.E.2d 64 (N.Y. 1981); *Schloendorff v. Society of N.Y. Hosp.*, 105 N.E.2d 92 (N.Y. 1914), *overruled by* *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957); *In re Grant*, 747 P.2d 445 (Wash. 1987).

69. *See Poe v. Ullman*, 367 U.S. 497, 542-45 (1961) (Harlan, J., dissenting) (endorsing *Poe* judgment as a guide to determining whether a certain decision

method requires courts to apply the principle derived from a line of constitutional cases to the next case that presents itself. The majority in *Cruzan* employed a common law approach when it announced that “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment *may be inferred from our prior decisions.*”⁷⁰

By no means an exhaustive list, these sources of judgment provide courts with a useful starting point to decide whether a claimed “liberty interest” is protected by the substantive component of the Fourteenth Amendment’s Due Process Clause. Certainly, because the Supreme Court drew from these sources of judgment in the two cases upon which assisted suicide proponents chiefly rely, *Cruzan* and *Casey*, a court faced with a constitutional challenge to a state law banning assisted suicide should not stray too far afield if it faithfully renders its judgment after undertaking a similar sort of judicial review.⁷¹

C. Some Final Observations About Substantive Due Process Jurisprudence

This Part concludes by proposing some tentative answers to a few questions that arise in light of the preceding discussion. What impact did *Casey* have on the Court’s privacy cases other than *Roe*? Can they no longer be understood as cases involving the right to privacy? Do such cases no longer involve fundamental rights? Is privacy doctrine dead, or has it been subsumed by Fourteenth Amendment liberty interest doctrine? What is the relationship between the privacy cases already decided and new liberty interest cases as they arise?

is protected by the right to privacy); *Casey*, 505 U.S. at 849–50 (endorsing reasoned judgment as a legitimate test to determine whether a right or liberty interest is constitutionally protected). For a description of the meaning of reasoned judgment in constitutional interpretation, see ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 26 (1975). For a recent account of the common law method in constitutional adjudication, see David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. CHI. L. REV. 877 (1996).

70. *Cruzan*, 497 U.S. at 278 (emphasis added).

71. *Casey*, 505 U.S. at 860–61 (relying on common law and existing case law); *Cruzan*, 497 U.S. at 277 (same).

If *Webster* and *Casey* did, indeed, redefine the constitutional category within which the right to abortion falls, then it may be appropriate to assume that *Casey's* gloss on the right to abortion applies with equal force to the privacy cases other than *Roe*. Because *Roe* was the last in a line of major Supreme Court cases to recognize and to apply the constitutional right to privacy, it follows as a matter of principle that as *Roe* goes, so goes the rest of the Court's privacy jurisprudence.

The *Casey* joint opinion provides some evidence of having redefined the rights involved in the Court's pre-*Roe* privacy cases as, like the right to abortion, Fourteenth Amendment liberty interests. This evidence is found in the joint opinion's silence. Although marriage, procreation, family relationships, child rearing, and education had long been considered fundamental rights, protected by the right to privacy,⁷² the *Casey* joint opinion noticeably failed to characterize such rights *either* as fundamental *or* as being protected by the right to privacy.⁷³

To be sure, the joint opinion's silence is a thin reed on which to rest what would amount to a radical departure from well-established doctrine. Then again, however, *Casey's* failure to characterize the rights involved in the Court's earlier privacy cases as involving fundamental rights or the right to privacy was itself a radical departure from Supreme Court precedent.

That said, however, it is by no means a foregone conclusion that *Casey* redefined the pre-*Roe* privacy rights as Fourteenth Amendment liberty interests. In a future case, the Court could cut the string binding *Roe* to its foundation in the Court's earlier privacy jurisprudence, leaving the earlier

72. See *Loving v. Virginia*, 388 U.S. 1 (1967) (marriage); *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (procreation); *Prince v. Massachusetts*, 321 U.S. 158 (1944) (family relationships); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (child rearing and education). See also *Bowers v. Hardwick*, 478 U.S. 186, 190-91 (1986).

73. The *Casey* joint opinion only cited cases pre-dating *Webster* stating that the rights in those cases were protected because they were fundamental. For example, in explaining that "[o]ur law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education," *Casey*, 505 U.S. at 851 (citing *Carey v. Population Serv. Int'l*, 431 U.S. 678, 685 (1977)), the joint opinion observed that "[o]ur cases recognize 'the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so *fundamentally* affecting a person as the decision whether to bear or beget a child.'" *Id.* (emphasis added) (quoting *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972)).

privacy cases to stand as they have since they were decided, and *Roe*, as modified by *Casey*, to stand on its own.

If the Court were inclined to release *Roe* from the cases to which it has been tied, it would have a number of arguments at its disposal. First, the Court might say that because *Roe* involves the termination of human "life" it is inherently different from the Court's earlier privacy cases.⁷⁴ Second, the Court could note that, unlike some of the earlier cases, *Roe* does not involve a form of contraception.⁷⁵ And third, the Court could find that, unlike the rights involved in some of the earlier privacy cases, our nation has no long-standing history or tradition recognizing the right to abortion.⁷⁶ Of course, the Court could have adopted any of these distinctions, or others, as a means of severing *Roe* from the Court's privacy jurisprudence.⁷⁷ But it did not.

Such distinctions beg the question whether the right to abortion is really distinguishable from family, marriage, procreation, child rearing, and education. That question, in turn, begs others: even if the right to abortion could be distinguished along these lines from the earlier privacy rights, will the Court ever say so? Could the right to abortion stand on its own doctrinal footing as a substantive due process right?

Before the Supreme Court resolves such thorny questions as these, lower courts will be faced with the task of sorting out the doctrinal confusion created by *Casey*. In the midst of this confusion, only one thing seems certain: any attempt to

74. See Brief for the Southern Center for Law & Ethics at 2-3, *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992) (Nos. 91-744 and 91-902). Those who make this claim find support in the Court's abortion jurisprudence. See, e.g., *Harris v. McRae*, 448 U.S. 297, 324-25 (1980); *Roe v. Wade*, 410 U.S. 113, 159 (1973). The *Casey* joint opinion sounded the same note, observing that abortion is a unique act. *Casey*, 505 U.S. at 852. The *Casey* joint opinion, however, did not comment upon the uniqueness of the abortion decision as a termination of the fetus' life. Rather, it stated that abortion is unique "because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law." *Id.*

75. Compare *Griswold v. Connecticut*, 381 U.S. 479, 485 (1965) (finding that limitations on contraception conflict with fundamental human rights) with *Casey*, 505 U.S. at 869 (finding that a woman has a limited constitutional liberty to terminate her pregnancy).

76. See, e.g., *Racanelli*, *supra* note 15, at 468, 469 & n.123 (noting that Rehnquist suggested that the historical recognition of the rights involved in the Court's privacy jurisprudence makes *Roe* distinguishable from the earlier right-to-privacy cases and referring to *Bowers v. Hardwick*, 478 U.S. 186 (1986), which was distinguished on similar grounds).

77. For a discussion of a possible sex equality distinction between the right to abortion and the Supreme Court's earlier privacy cases, see *infra* Part III.B.

extend the category of non-textually-based Fourteenth Amendment liberty interests—indeed, any attempt to extend the category of substantive rights protected by the Due Process Clause—must take account of *Casey* and the other Fourteenth Amendment liberty interest cases.⁷⁸

This observation should not be misunderstood as implying that the Court's privacy cases (if any remain) are irrelevant or inapposite where the argument is that a certain decision is protected as a Fourteenth Amendment liberty interest.⁷⁹ Nor should it be misunderstood as implying, conversely, that the Court's Fourteenth Amendment liberty interest cases are irrelevant or inapposite where the argument is that a certain decision is protected by a fundamental right to privacy. Still, one might argue that there is (or should be) some sort of doctrinal breakwall separating the Court's privacy (or fundamental rights) cases from its Fourteenth Amendment liberty interest cases. Such an argument, however, is far too grudging and categorical, failing as it does to take account of the fact that all substantive due process liberties derive from the same constitutional source: the Due Process Clause's liberty guarantee. More importantly, such an argument lacks a doctrinal foundation. The Supreme Court, for example, has cited privacy cases as authority in its liberty interest decisions.⁸⁰ Arguably, then, if the Court were presented with a new privacy case, it would consider itself equally free to draw on its liberty interest decisions in reaching and justifying its conclusions.

78. Nevertheless, proponents of assisted suicide, as well as some courts, continue to argue that the decision to commit physician-assisted suicide, at least where the terminally ill are concerned, is fundamental. Two judicial opinions issued recently on the question of the constitutionality of laws banning assisted suicide, for example, have employed fundamental rights language. See *Quill v. Koppell*, 870 F. Supp. 78, 83 (S.D.N.Y. 1995) (explaining that plaintiffs argued that "*Roe* and *Casey* are broad enough to establish that there is a fundamental right on the part of the terminally ill patient to decide to end his life, and to do so with the type of assistance described in this case"); *State v. Kevorkian*, 527 N.W.2d 714, 729–30 (Mich. 1994) (stating that *Casey* does not stand for the proposition that the Due Process Clause protects a fundamental right to assisted suicide). *But see* *Compassion in Dying v. Washington*, 79 F.3d 790, 816 (9th Cir. 1996) (en banc) (holding that an individual has a "due process liberty interest in controlling the time and manner of one's death").

79. See *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 279 n.7 (1989) (citing *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986)); *Casey*, 505 U.S. at 834 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

80. See, e.g., *Casey*, 505 U.S. at 849 (citing *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Roe v. Wade*, 410 U.S. 113 (1973); *Carey v. Population Serv. Int'l*, 431 U.S. 678 (1977)).

This Part has explained that proponents of a right to assisted suicide use various constitutional terms to describe the right. This Part has argued that the inconsistencies in their description can be attributed in part to the changes that have taken place in the Supreme Court's substantive due process jurisprudence. It reasoned that because the right to abortion and the right to refuse unwanted but lifesaving medical treatment are both considered Fourteenth Amendment liberty interests, any right to assisted suicide must be similarly described. This Part also sets forth the framework within which courts should analyze the claim that there is a Fourteenth Amendment "liberty interest" in committing assisted suicide. In light of this discussion, the remainder of this Article deals with a very narrow question: Is there a Fourteenth Amendment "liberty interest" in committing suicide with a physician's assistance?⁸¹ This Article suggests that for a variety of reasons the answer is "no."

II. EXISTENCE OF A "LIBERTY INTEREST" IN PHYSICIAN-ASSISTED SUICIDE

This Part of the Article scrutinizes assisted suicide advocates' contention that the Due Process Clause of the Fourteenth Amendment broadly protects an individual's right to self-determination or personal autonomy, including a terminally ill person's decision to commit physician-assisted suicide. This Part lays out the model of personal autonomy contained in assisted suicide advocates' contention. It then criticizes this model on the ground that it is broader than any conception of self-determination or personal autonomy the Supreme Court has ever recognized. It concludes by arguing that, consonant with current Supreme Court doctrine, courts should reject the model of personal autonomy

81. Applying this framework, extracted from existing Supreme Court doctrine, to the claimed constitutionally protected liberty interest to commit assisted suicide, several questions arise. First, does the Constitution protect the decision to commit physician-assisted suicide as a Fourteenth Amendment liberty interest? Second, if so, does an absolute ban on assisted suicide amount to an "undue burden" on the right? Third, if the answer to either the first or second question is "no," does the state have any legitimate reason for enacting the ban? Finally, if the answer to the first two questions is "yes," are the state's interests in enacting such a prohibition sufficiently important to justify the burden?

on which the liberty interest in committing assisted suicide is based, as well as the liberty interest in committing assisted suicide itself.

A. *Problem of Principles: The Imperfect
Model of Personal Autonomy*

1. *The "Personal Autonomy Model"*—Advocates of the right to assisted suicide maintain that *because* the Due Process Clause of the Fourteenth Amendment protects a woman's decision to terminate her pregnancy, *then it must also protect* the decision of one who is terminally ill to commit physician-assisted suicide.⁸² The theoretical foundation of this argument is a very broad reading of the Supreme Court's explication of the right to bodily integrity or personal autonomy in *Roe* and *Casey*. This Article refers to such a reading of Supreme Court doctrine as the "personal autonomy model." The model can be summarized as follows.

The Constitution protects a woman's right to have an abortion, despite the unmistakable effect of the exercise of that right on the potential life of a fetus, because the Due Process Clause safeguards liberty and because the essence of liberty is personal autonomy.⁸³ As assisted suicide activist Professor Robert Sedler has argued, "This means that a person has the right to bodily integrity, to control his or her own body, and to define his or her own existence."⁸⁴ Accordingly, the protection afforded the right to abortion indicates that one has a constitutional right to make "self-defining" decisions that result in the termination of life.⁸⁵

If so, right-to-die advocates argue that this right cannot be limited to a pregnant woman's decision to obtain an

82. See, e.g., Sedler, *Hastening Inevitable Death*, *supra* note 2, at 23; Sedler, *I Say No*, *supra* note 4, at 728; Sedler, *Without and Within*, *supra* note 4, at 786–87. See also *Compassion in Dying v. Washington*, 49 F.3d 586 (9th Cir. 1996), *aff'd*, 79 F.3d 790 (9th Cir. 1996) (en banc); *State v. Kevorkian*, 527 N.W.2d 714 (Mich. 1994), *cert. denied*, 115 S. Ct. 1795 (1995).

83. See, e.g., Sedler, *I Say No*, *supra* note 4, at 729; Sedler, *Without and Within*, *supra* note 4, at 784.

84. Sedler, *Hastening Inevitable Death*, *supra* note 2, at 23.

85. *Id.*

abortion.⁸⁶ A terminally ill individual⁸⁷ has a right to personal autonomy that guarantees her, like a pregnant woman, the right to control her own body and to make important decisions defining her own existence, including how and when to die. Sedler reasons:

Surely, if a woman's right to control over her own body includes the right to have an abortion, when that same woman at a later stage of her life becomes terminally ill, her right to control her own body must include her right to make decisions about the voluntary termination of her own life during the end stages of her terminal illness.⁸⁸

According to this argument, the right to personal autonomy protects a terminally ill individual's decision to commit physician-assisted suicide.⁸⁹ Indeed, a terminally ill individual may have a stronger due process argument for a right to die than a pregnant woman has for a right to abortion; after all, the body- and destiny-controlling decision of a terminally ill individual directly affects only the decision maker and not, as with abortion, a third party.

2. *Problems with the Personal Autonomy Model*—The personal autonomy model proves too much. The model rests on a far-reaching constitutional principle that an individual has a constitutionally protected "liberty" to do with her body as she wishes and to shape her destiny as she pleases, especially where that decision neither results in the death of a third party or otherwise clearly and directly harms a third person. Unfortunately for those who adhere to such a view,

86. *See id.*

87. This Article uses the example of the terminally ill individual here because it is the example assisted suicide proponents presently give. *But see* Kamisar, *supra* note 3, at 234–40; Marzen, *supra* note 9, at 802–03 (arguing that the right to assisted suicide, once established, cannot long be limited to the terminally ill, in part because of the difficulty in defining "terminally ill").

Recent evidence of this proposition surfaced in the litigation over the constitutionality of Oregon's referendum, Measure 16, which legalized the practice of physician-assisted suicide under certain circumstances. In defending the referendum, assisted suicide proponents explained that "Measure 16 is only the first step toward legalizing physician assisted suicide for others who consent." *Lee v. Oregon*, 891 F. Supp. 1429, 1432 (D. Or. 1995) (footnote omitted).

88. Sedler, *I Say No*, *supra* note 4, at 729.

89. *See id.*

the Fourteenth Amendment did not enact John Stuart Mill's Harm Principle.⁹⁰

If the Constitution protected every right supported by the principle contained in the personal autonomy model, states could not regulate a broad range of conduct currently thought

90. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973) (explaining that the Constitution does not enact Mill's political theory), *cert. denied*, 418 U.S. 939 (1974); *Quill v. Vacco*, 80 F.3d 716, 740 (2d Cir. 1996) (Calabresi, J., concurring) ("In other words, our Constitution does not enact the bodily equivalent of Herbert Spencer's Social Statics.") (internal citation omitted).

There are similarities between the principle contained in the personal autonomy model and the "Harm Principle" first suggested by John Stuart Mill. JOHN STUART MILL, *ON LIBERTY* (David Spitz ed., 1975). Even if the Constitution were thought to enact John Stuart Mill's "Harm Principle," there is substantial support for the view that Mill's theory of liberty would not include the liberty to end one's life.

Professor David Spitz has argued that "what Mill sought to protect was man's permanent freedom of voluntary choice. . . ." David Spitz, *Freedom and Individuality in Mill's Liberty in Retrospect*, in MILL, *supra*, at 229. This argument led Professor Spitz to conclude that if, as Mill believed, one does not have the liberty to sell oneself into slavery, a fortiori one cannot have the liberty to commit suicide. *Id.* Nor could it support the argument that one has a right to commit assisted suicide.

Consider Mill's treatment of the relationship between liberty and slavery and the reasons he gives for rejecting the claim that one has the liberty to sell oneself into slavery. Mill begins his discussion of this topic by noting that in most civilized countries one cannot sell oneself into slavery. Mill observes that ordinarily the reason for not interfering with one's voluntary acts is "consideration for [an individual's] liberty." MILL, *supra*, at 95. In the case of selling oneself into slavery, however, one's "voluntary act" amounts to an abdication of liberty itself; by doing so, one "foregoes any future use of [liberty] beyond that single act." *Id.* One who sells oneself into slavery "therefore defeats, in his own case, the very purpose which is the justification of allowing [him] to dispose of himself." *Id.* Thus, Mill concludes, "The principle of freedom *cannot* require that he should be free not to be free. It is not freedom to be allowed to alienate his freedom." *Id.*

Mill did not intend that his argument against slavery would be limited to that single case: "These reasons, the force of which is so conspicuous in this peculiar case [of slavery], are evidently of far wider application. . . ." *Id.* Suicide and assisted suicide, and for that matter, active voluntary euthanasia, are as good examples of the application of Mill's limiting principle as any other. Suicide, assisted suicide, and active voluntary euthanasia, no less than the sale of oneself into slavery, are acts that abdicate liberty in a way that foregoes any future use of liberty beyond the single act involved. Suicide, assisted suicide, and active voluntary euthanasia are the alienation of freedom. Thus, if Mill's "Harm Principle" cannot include the liberty to sell oneself into slavery, so, too, it cannot include one's decision to engage in an act of active euthanasia.

One might respond by claiming that it is the social nature of the agreement to sell oneself into slavery that excludes this act from Mill's conception of liberty. However, the reasons he provides to explain why slavery is inimical to liberty have more to do with the concept of liberty—its scope and definition—than with the nature of the act of agreeing to enslave oneself. See Marzen, *supra* note 9, at 807 (discussing the parallels between assisted suicide and slavery).

The constitutional prohibition on slavery embodied in the Thirteenth Amendment, U.S. CONST. amend. XIII, serves as a poignant reminder that liberty is not absolute. Cf. Andrew Koppelman, *Legal Theory: Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480 (1990) (arguing that laws regulating abortion may constitute a violation of the Thirteenth Amendment).

to be within the scope of legislative discretion.⁹¹ The list of such conduct is familiar: prostitution,⁹² incest,⁹³ drug use,⁹⁴ self-mutilation,⁹⁵ sale of one's body parts,⁹⁶ and active voluntary euthanasia.⁹⁷ The personal autonomy model's principle would insulate all these activities from regulation were it engrafted onto the Fourteenth Amendment. It might even render laws requiring motor vehicle passengers to wear seat belts or laws requiring motorcycle riders to wear safety helmets beyond the reach of the state's police powers.⁹⁸ If the Constitution embraced a theory of personal autonomy broad enough to include the liberty of the terminally ill to end their lives with a doctor's aid, it would be hard to see why it would, or how it could, end there.⁹⁹

91. Of course, the state interests in these cases may be different than those involved in the case of assisted suicide. It is important, however, to keep distinct the two aspects of the constitutional inquiry: (1) is there a liberty to engage in the conduct; and (2) what is the scope of the individual liberty after balancing it against the state's interests. Some sliding between the two aspects of the constitutional inquiry is perhaps inevitable because the two aspects are conceptually related.

92. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 n.15 (1973); *Lutz v. United States*, 434 A.2d 442 (D.C. App. 1981) (holding that there is no constitutional right to engage in prostitution).

93. See *Poe v. Ullman*, 367 U.S. 497, 552 (1961) (Harlan, J., dissenting) (suggesting that the right to privacy would not include a right to engage in incest).

94. The Supreme Court in *Hardwick* pointed out that "[v]ictimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home." 478 U.S. 186, 195 (1986). See also *Paris Adult Theatre I*, 413 U.S. at 67-68 ("The fantasies of a drug addict are his own and beyond the reach of government, but government regulation of drug sales is not prohibited by the Constitution.").

95. *Paris Adult Theatre I*, 413 U.S. at 68 n.15 (noting that "state statute books are replete with constitutionally unchallenged laws against . . . voluntary self-mutilation . . . although [this] crime may only directly involve 'consenting adults'"); *Grossman v. Baumgartner*, 218 N.E.2d 259 (N.Y. 1966) (holding constitutional a state law prohibiting tattooing of a human being by a person not licensed to practice medicine or osteopathy).

96. See, e.g., 42 U.S.C. § 274e (1994) (making it "unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in transplantation if the transfer affects interstate commerce").

97. No United States case has ever held that there is a right to commit active voluntary euthanasia. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *HORNBOOK ON CRIMINAL LAW* § 5.11(a) n.3 (1986). Consent by the victim to such an act has never amounted to a recognized defense to a charge of murder in this country. *Id.* § 5.11(a).

98. Cf. *Picou v. Gillum*, 874 F.2d 1519, 1519-20 & n.1 (11th Cir. 1989) (opinion by Powell, J., sitting by designation) (upholding state motorcycle helmet law and noting that all earlier cases holding to the contrary had been either reversed or overturned); *People v. Kohrig*, 498 N.E.2d 1158 (Ill. 1986), *appeal dismissed*, 479 U.S. 1073 (1987) (dismissing seat belt law challenge based on privacy grounds).

99. See Marc Spindelman, *Roe vs. Wade Recognizes No 'Right' to Die*, DET. NEWS, Oct. 16, 1994, at 3B.

Not only does the personal autonomy model prove too much, but it also does not resonate with Supreme Court doctrine. The Court's decisions in *Roe v. Wade* and *Planned Parenthood of Southeastern Pennsylvania v. Casey*, as well as *Carey v. Population Services International*,¹⁰⁰ *Bowers v. Hardwick*, and *Cruzan v. Director, Missouri Department of Health*—all cases that involved the reach of constitutional precepts of personal autonomy—stand squarely for the proposition that the Constitution's recognition of personal liberty is not as broad as the personal autonomy model would suggest.

Although the Court's abortion decisions contain elegant and expansive language that assisted suicide proponents exploit in their cause,¹⁰¹ a close reading of the Court's most important abortion decisions—*Roe* and *Casey*—suggests that the meaning and relevance of such language is limited.¹⁰²

Without question, *Roe* is the most far-reaching of the Court's abortion decisions. Not even *Roe*, however, established that one has a nearly unlimited right to personal

100. 431 U.S. 678 (1977).

101. See, e.g., *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citations omitted). The Court observed:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and 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.

This language, repeated wholesale or in parts, has been invoked as a virtual mantra by proponents of assisted suicide. See, e.g., Sedler, *I Say No*, *supra* note 4, at 728.

102. The *Casey* joint opinion suggested the limited nature of its holding when it explained:

In any event, because *Roe*'s scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under *Griswold* and later cases, any error in *Roe* is unlikely to have serious ramifications in future cases.

autonomy like the right the autonomy model proposes. In finding that the right to privacy guaranteed a pregnant woman's right to decide to have an abortion, the Supreme Court, through Justice Blackmun, confronted and renounced the claim that one has an unlimited right to do with one's body as one pleases.¹⁰³ Such a right, Blackmun explained, was broader than any encompassed by the Due Process Clause. According to Justice Blackmun:

The privacy right involved, therefore, cannot be said to be absolute. In fact, it is not clear to us that the claim asserted by some *amici* that one has an unlimited right to do with one's body as one pleases bears a close relationship to the right of privacy previously articulated in the Court's decisions. The Court has refused to recognize an unlimited right of this kind in the past.¹⁰⁴

By virtue of its ultimate holding, *Roe* offers the strongest basis from which to argue that the terminally ill (or others) enjoy a constitutional right to commit assisted suicide. In reality, *Roe* offers very little to succor proponents of the right to die.

The Supreme Court's opinion in *Casey* similarly provides little meaningful authority for the proposition that the Due Process Clause embraces anything akin to the personal autonomy model's view. In the course of evaluating the state's interests in restricting a woman's right to abortion, the joint opinion in that case found:

The woman's liberty is not so unlimited, however, that from the outset the State cannot show its concern for the life of the unborn, and at a later point in fetal development the State's interest in life has sufficient force so that the right of the woman to terminate the pregnancy can be restricted.¹⁰⁵

If individuals had a generous right to personal autonomy, one suspects that a state's "concern for the life of the unborn" could not—even in the earliest stages of pregnancy—properly

103. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

104. *Id.* at 154 (citations omitted).

105. *Casey*, 505 U.S. at 869.

present any limitation on a woman's right to have an abortion.¹⁰⁶

This is not all that the joint opinion had to say about the nature of a woman's liberty to end a pregnancy, however. In all fairness, the proponents of assisted suicide have unearthed some very broad language from the *Casey* joint opinion that is quite favorable to their position. Consider, for example, the following passages from *Casey* that are often quoted in support of the right to assisted suicide:

It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. . . .

. . . .

. . . It is settled now that the Constitution places limits on a State's right to interfere with a person's most basic decisions about family and parenthood . . . as well as bodily integrity. . . .

. . . .

. . . 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.¹⁰⁷

This language is expansive. Standing alone, such language might well be read for the proposition that an individual has a right to make self-defining decisions about life and death. When read in light of everything else the *Casey* Court had to say, however, it becomes difficult to argue that this language supports a right to assisted suicide. In fact, when taken in context, this language does little to help the case of assisted suicide proponents at all.¹⁰⁸

106. Perhaps limitations during later stages of pregnancy on the exercise of the abortion right might succumb as well to a broad right to personal autonomy, i.e., the right to personal autonomy might overbear the state's interests in regulation *contra*.

107. *Casey*, 505 U.S. at 847-51.

108. See *Compassion in Dying v. Washington*, 49 F.3d 586, 590-91 (9th Cir. 1996). The Ninth Circuit observed:

The language taken from *Casey* . . . should not be removed from the context in which it was uttered. Any reader of judicial opinions knows they often attempt a generality of expression and a sententiousness of phrase that extend far beyond the problem addressed. It is commonly accounted an error to lift sentences or even paragraphs out of one context and [to] insert the abstracted

The *Casey* Court expressly limited the impact of its holding in future cases, commenting that

because *Roe's* scope is confined by the fact of its concern with postconception potential life, a concern otherwise likely to be implicated only by some forms of contraception protected independently under [other Supreme Court rulings], any error in *Roe* is unlikely to have serious ramifications in future cases.¹⁰⁹

If the Justices who wrote the joint opinion in *Casey* are to be taken literally, as assisted suicide advocates insist, it is hard to read their opinion as endorsing the model of personal autonomy.

Although, in the last analysis, *Casey* upheld the abortion right, assisted suicide proponents demonstrate their misunderstanding of *Casey* when they read that case as if it involved only—or nearly only—the issue of women's reproductive liberty (central though that question was in the case). For better or worse, the three Justices who controlled the outcome of *Casey* reaffirmed a woman's right to abortion for reasons having to do with the role of the Supreme Court in our federal scheme, as much as for reasons having to do with women's liberty. As the Court observed:

thought into a wholly different context. To take three sentences out of an opinion over thirty pages in length dealing with the highly charged subject of abortion and to find these sentences "almost prescriptive" in ruling on a statute proscribing the promotion of suicide is to make an enormous leap, to do violence to the context, and to ignore the differences between the regulation of reproduction and the prevention of the promotion of killing a patient at his or her request.

The inappropriateness of the language of *Casey* in the situation of assisted suicide is confirmed by considering what this language, as applied by the district court, implies. The decision to choose death, according to the district court's use of *Casey's* terms, involves "personal dignity and autonomy" and "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life." The district court attempted to tie these concepts to the decision of a person terminally ill. But there is no way of doing so . . . If such liberty exists in this context, as *Casey* asserted in the context of reproductive rights, every man and woman in the United States must enjoy it . . . The conclusion is a *reductio ad absurdum*.

Id. (citations omitted).

109. *Casey*, 505 U.S. at 859. *Cf.* *Webster v. Reproductive Health Serv.*, 492 U.S. 490, 523 (1989) (O'Connor, J., concurring) ("It may be correct that the use of postfertilization contraceptive devices is constitutionally protected by *Griswold* and its progeny.")

A decision to overrule *Roe*'s essential holding under the existing circumstances would address error, if error there was, at the cost of both profound and unnecessary damage to the Court's legitimacy, and to the Nation's commitment to the rule of law. It is therefore imperative to adhere to the essence of *Roe*'s original decision, and we do so today.¹¹⁰

These are not the words of Supreme Court Justices who decided to uphold *Roe* and were eager to support a notion of personal autonomy that even the *Roe* Court thought untenable. Despite assisted suicide proponents' urgings to the contrary, the Supreme Court that decided *Casey* likely will not find the principle contained in the autonomy model supported by its abortion jurisprudence.

Along with the Supreme Court's abortion jurisprudence, recent substantive due process doctrine has signaled that the Court stands prepared to interpret the right to personal autonomy quite narrowly, and certainly no more broadly than necessary to support those decisions already protected by the Due Process Clause. In *Carey v. Population Services International*,¹¹¹ where the Court struck down a state law regulating the distribution and sale of contraceptive devices, the Court demonstrated that its prior abortion decisions did not suggest that an individual had an unqualified right to do with her body as she pleased, even where matters of adult sexuality were concerned.¹¹² The *Carey* Court explained:

Contrary to the suggestion advanced in Mr. Justice Powell's opinion, we do not hold that state regulation must meet this [strict scrutiny] standard "whenever it implicates sexual freedom," or "affect[s] adult sexual relations," but only when it "burden[s] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision." As we observe below, "the Court has not definitively answered the difficult question whether and to what extent the Constitution prohibits state statutes regulating [private consensual sexual] behavior among adults." . . .¹¹³

110. *Casey*, 505 U.S. at 869.

111. 431 U.S. 678 (1977).

112. *See id.* at 688.

113. *Id.* at 688 n.5 (citations omitted).

The "difficult question" left unanswered by the Court in *Carey* was answered in part in *Bowers v. Hardwick*.¹¹⁴ In *Hardwick*, the Court made clear that it would not constitutionalize a broad conception of personal autonomy even where private, adult, consensual sexual conduct was concerned.¹¹⁵ Relying on the above-quoted passage from *Carey*, and going one step beyond it, the *Hardwick* Court dismissed the contention that the Constitution affords protection to any kind of private sexual conduct between consenting adults.¹¹⁶

Hardwick distinguished the right of two adult men to engage in consensual sexual activity from the right involved in *Roe* and other privacy cases.¹¹⁷ As the Court observed, none of the decisions protected by the right to privacy

bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated, either by the Court of Appeals or by respondent.¹¹⁸

Moreover, the Court explained, the right of two adult men to engage in consensual sodomy was neither implicit in the concept of ordered liberty,¹¹⁹ nor deeply rooted in the nation's history and tradition.¹²⁰ Any claim to the contrary, the Court jabbed, was "at best, facetious."¹²¹ Thus, *Hardwick*, in principle, eschewed any holding that all consensual sexual activity

114. 478 U.S. 186 (1986).

115. *Id.* at 190-91 (rejecting contentions that previous cases had construed the Constitution to confer a right of privacy that extends to homosexual sodomy).

116. *Id.* For criticism of *Hardwick*, see Kamisar, *supra* note 9, at 763 (quoting CHARLES FRIED, ORDER AND LAW 82 (1991)); Kendall Thomas, *Beyond the Privacy Principle*, 92 COLUM. L. REV. 1431 (1992).

117. *Hardwick*, 478 U.S. at 190-91.

118. *Id.* Evidently, no claim was made before the Supreme Court on Michael Hardwick's behalf that the decision of two men to engage in the act of sodomy with each other was a decision about whether to bear or beget a child, and that, therefore, the decision came within the scope of the right to privacy. *Carey v. Population Serv. Int'l*, 431 U.S. 678, 688-89 (1977) (describing the last of the right to privacy cases as involving the decision whether to bear or beget a child). Such a claim, at the least, is not plausible.

119. *Hardwick*, 478 U.S. at 191.

120. *Id.* at 192.

121. *Id.* at 194.

between adults was protected by the Due Process Clause of the Fourteenth Amendment.¹²²

The *Hardwick* Court went on to note that institutional reasons also justified the rejection of the constitutional right asserted in that case. The Court determined that too great an expansion of non-textually-based constitutional law threatened to undermine the Court's institutional legitimacy.¹²³ Therefore, the Court explained, it would take care to avoid expanding the substantive reach of the Due Process Clause.¹²⁴

The Court continued that, because the right at issue in *Hardwick* did not fit into any of the categories of decisions protected by the right to privacy, to recognize a right to consensual same-sex sodomy would have required a redefinition of the category of rights protected by the Due Process Clause. Whereas before the Court had reconciled *Griswold*, *Eisenstadt v. Baird*, and *Roe* and its progeny as decisions all regarding matters of personal choice in marriage, family, and procreation,¹²⁵ to uphold the right claimed in *Hardwick* (or so the Court maintained)¹²⁶ would have

122. It remains an open question whether the right to engage in consensual homosexual sodomy *could* be a constitutionally protected "liberty interest," despite the fact that *Hardwick* found that the right to do so was not fundamental. To the extent that the Court has breathed life into a new category of liberty interests since it decided *Hardwick*, *Hardwick* cannot, as a formal matter, absolutely foreclose the possibility that individuals have a liberty interest to engage in consensual homosexual sodomy. Still, it is unlikely that the Supreme Court (at least as presently constituted) would hold that individuals have such a right. The Supreme Court's decision in *Romer v. Evans*, 116 S. Ct. 1620 (1996), does not indicate to the contrary.

123. *Hardwick*, 478 U.S. at 194.

124. Through Justice White, the Court explained:

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution . . . There should be, therefore, great resistance to expand the substantive reach of [the Due Process Clauses of the Fifth and Fourteenth Amendments], particularly if it requires redefining the category of rights deemed to be fundamental. Otherwise, the Judiciary necessarily takes to itself further authority to govern the country without express constitutional authority. The claimed right pressed on us today falls far short of overcoming this resistance.

Id. at 194–95. This concern had troubled Justice White for quite some time. See *Moore v. City of East Cleveland*, 431 U.S. 494, 544 (1977) (White, J., dissenting) (expressing similar concerns).

125. *Hardwick*, 478 U.S. at 190–91.

126. See *supra* note 118.

required it to reconcile these cases as protecting a right to engage in any kind of sexual relations.¹²⁷ Without devoting any attention to the issue of when the resistance to such a redefinition of rights might be overcome, but pointing to one reason it would not be, namely that the activity took place in the privacy of a home,¹²⁸ the Court stated that the claim in *Hardwick* fell short of doing so.¹²⁹

The personal autonomy model (and for that matter the right to physician-assisted suicide) does not any more closely resemble the category of rights the *Hardwick* Court deemed protected by the Due Process Clause than the right at issue in *Hardwick* did. No amount of good lawyering or judicial fiat could convincingly transform the right to assisted suicide into a question of marriage, procreation, family relationships, child rearing, or education. As a result, in order to establish that the right to assisted suicide is protected as a Fourteenth Amendment liberty interest would require redefining the category of constitutionally protected liberty.

Professor Yale Kamisar has taken the position that the right to consensual homosexual sexual activity lies closer to the heart of *Roe* than do any of the principles, such as the personal autonomy model, advanced in support of a right to physician-assisted suicide.¹³⁰ As Professor Kamisar's position implies, it is a shorter move from (a) affording constitutional protection to decisions relating to marriage, family, procreation, and the like, to (b) affording constitutional protection to any decision involving sexual activity, including homosexual sodomy, than it is from (a) to (c) affording constitutional protections to any body- and destiny-controlling decision an individual might make. *Hardwick's* refusal to make the move from (a) to (b) ought to be reason enough for courts not to make the bigger leap from (a) to (c).¹³¹ All the same, there is more.

127. *Hardwick*, 478 U.S. at 195–96.

128. *Id.* at 195.

129. *Id.* at 195.

130. Kamisar, *supra* note 9, at 767; Kamisar, *supra* note 3, at 228 (“A sphere of conduct like that at issue in *Hardwick* seems much closer to marriage, procreation, the use of contraceptives and abortion than the right to assisted suicide.”).

131. The same institutional concerns that led the Court to reject the claimed right in *Hardwick* also should lead courts to reject the claim that the federal Constitution protects a right to assisted suicide. At least as much as the right at issue in *Hardwick*, the personal autonomy model has, at best, “little or no cognizable roots in the language or design of the Constitution.” *Hardwick*, 478 U.S. at 194.

In the age of *Roe*, if *Hardwick* held that the Constitution did not protect any type of sexual activity or consensual sodomy, there cannot be much to the claim that, in the age of *Casey* (a narrower opinion than *Roe*), the Constitution protects an individual's right to make body- and destiny-controlling decisions, including the right to assisted suicide. That assertion is particularly true when one takes into account that the right to make body- and destiny-controlling decisions constitutes a more general right than the right to engage in any type of sexual activity.

Additionally, to announce a hitherto unknown constitutional right to personal autonomy ample enough to include a right to assisted suicide would fly in the face of *Hardwick's* holding, as well as its admonition against expanding the categories of non-textually-based liberties. However appealing one might consider such a result because of *Hardwick's* flaws, *Hardwick* remains the law. Indeed, the dissenting Justices in *Casey*, who called for *Roe* to be overturned, relied on *Hardwick* to support their positions on the abortion question.¹³²

Nevertheless, if the Constitution protected the principle of liberty embodied in the autonomy model, there would be no basis for concluding that the right *Hardwick* rejected did not similarly merit protection.¹³³ The principles that proponents of assisted suicide have advanced in support of that right all support a right to consensual homosexual sodomy, as well. Thus, for the time being, *Hardwick* precludes recognizing a right to assisted suicide.

Lastly, *Cruzan v. Director, Missouri Department of Health*,¹³⁴ the Supreme Court's sole right-to-forego-treatment case, further confirms that the Court's substantive due process doctrine forecloses the model's notion of constitutionally protected personal autonomy.¹³⁵ It is important to note a fact that often

Thus, if the concerns articulated in *Hardwick* about redefining the class of protected rights amounts to a principle of constitutional adjudication to which courts should adhere, courts should turn back present and future challenges to state laws banning assisted suicide.

132. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 953 (1992) (Rehnquist, C.J., concurring in the judgment in part and dissenting in part).

133. As Professor Kamisar has pointed out, proponents of assisted suicide quite often make their constitutional arguments as if *Hardwick* were not on the books. See Kamisar, *supra* note 3, at 228.

134. 497 U.S. 261 (1989).

135. A number of state court decisions cited by the Court make plain that those courts did not mean to establish or even to suggest a right to active euthanasia, including a right to suicide, when deciding to recognize a right to passive euthanasia.

receives inadequate attention when assisted suicide advocates use *Cruzan* to support their argument: the *Cruzan* Court upheld the state's restriction on the right to withdraw lifesaving medical treatment.¹³⁶ Of course, this holding turned on the state's interests implicated by the refusal-of-treatment decision involved in that case. Nevertheless, the point is relevant for reasons that shall become apparent momentarily.

Although *Cruzan* assumed that the Fourteenth Amendment protected a liberty interest in refusing unwanted but lifesaving medical treatment,¹³⁷ it would be a mistake to conclude that *Cruzan* comports with the personal autonomy model. First, the result in the case implies that the right to refuse unwanted medical treatment is not without limits, or is not in any way as broad as the constitutional model of personal autonomy presented by assisted suicide advocates.¹³⁸ Otherwise, the Court would likely have struck down the state's evidentiary requirement as an impermissible constraint on Nancy Cruzan's liberty.

Second, proponents of assisted suicide cannot claim *Cruzan* as authority for their position without considering the reasons that led the Court to assume a Fourteenth Amendment liberty interest in refusing lifesaving medical treatment. The *Cruzan* Court found that the right to informed consent, the

See In re Quinlan, 355 A.2d 647, 670 (N.J. 1976), cert. denied, Ganger v. New Jersey, 429 U.S. 922 (1976). *See also* Marzen, *supra* note 9, at 806 & n.24. State courts may continue to recognize the state interest in preventing suicide in order to block any attempts to extend the principle on which the right to passive euthanasia is based to the case of assisted suicide. Cf. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1366-67 (2d ed. 1988). Although courts attempt to do this by recognizing the state interest in preventing suicide, *see, e.g., Quinlan*, 355 A.2d at 663, this method is but another way of suggesting that neither the common law nor the federal Constitution protects a right or liberty to commit suicide or assisted suicide.

136. 497 U.S. at 284. The *Cruzan* majority believed that the right was Nancy Cruzan's. *Id.* at 280. Cf. *infra* note 164.

137. Commentators generally regard Justice O'Connor's concurrence in *Cruzan* as going a step beyond the majority opinion to endorse the view that competent adults do have a liberty interest in terminating or refusing lifesaving medical treatment. *See, e.g.,* Louis Michael Seidman, *Confusion at the Border: Cruzan, "The Right to Die" and the Public/Private Distinction*, 1991 SUP. CT. REV. 47, 51 n.12. If so, one might well maintain that a majority of the Court in *Cruzan* (Justice O'Connor plus the four dissenters) recognized such a right.

138. The scope of the liberty interest involved in *Cruzan* is anything but clear. For example, the *Cruzan* court left open the question of whether and when a state could prevent a competent individual from terminating or refusing lifesaving medical treatment by virtue of its interests contra.

“logical corollary” of the right to refuse unwanted medical treatment, had long been recognized at common law.¹³⁹ The majority opinion began its analysis with the common law notion of bodily integrity, observing:

At common law, even the touching of one person by another without consent and without legal justification was a battery. Before the turn of the century this Court observed that “[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clean and unquestionable authority of law.” This notion of bodily integrity has been embodied in the requirement that informed consent is generally required for medical treatment. Justice Cardozo, while on the Court of Appeals of New York, aptly described this doctrine: “Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient’s consent commits an assault, for which he is liable in damages.” The informed consent doctrine has become firmly entrenched in American tort law.¹⁴⁰

The Court then noted how entrenched the right to refuse treatment had become since *In re Quinlan*,¹⁴¹ the first major case regarding refusal of treatment. After reviewing a number of lower court decisions building on *Quinlan*,¹⁴² the Court observed that these cases “demonstrate [that] the common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.”¹⁴³

While the *Cruzan* opinion relied on those lower court decisions to find the right to refuse treatment, it failed to mention that many of the same lower courts whose decisions it cited had not held that every decision to end one’s life was encompassed by the doctrine of informed consent.¹⁴⁴ Many of

139. *Cruzan*, 497 U.S. at 270.

140. *Id.* at 269 (citations omitted).

141. *Id.* at 270–71 (citing *In re Quinlan*, 355 A.2d 647 (N.J. 1976)).

142. *See id.* at 271–77.

143. *Id.* at 277.

144. *Id.* at 271–77. *See also supra* note 135.

these lower court decisions, starting with *In re Quinlan*,¹⁴⁵ took great care to state that they were not recognizing a right to commit suicide.¹⁴⁶

Despite the very broad language of Justice Cardozo's decision in *Schloendorff v. Society of New York Hospital*,¹⁴⁷ quoted by the *Cruzan* opinion, the right to bodily integrity has never been taken to the limits of its logic.¹⁴⁸ Indeed, although *Cruzan* could support the contention that a competent individual has a liberty interest in making some decisions about medical treatment, nowhere in that case did the Court suggest that an individual has a right to refuse *any* form of medical treatment.¹⁴⁹ More significantly, *Cruzan* did not hold that a competent individual has a common law or constitutional right to obtain any form of medical treatment she wishes. Therefore, in light of the limitations lower courts have placed on the right to informed consent, there is no basis for the position that anyone, including the terminally ill, has a common law right,¹⁵⁰ much less a Fourteenth

145. 355 A.2d 647 (N.J. 1967).

146. See *TRIBE*, *supra* note 135, at 1365 n.14.

147. 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body . . ."), *overruled* by *Bing v. Thunig*, 143 N.E.2d 3 (N.Y. 1957).

148. See *supra* text accompanying notes 89–94. Moreover, in quoting *Schloendorff*, 105 N.E. at 93, for the proposition that Justice (then Judge) Cardozo would have supported a conception of bodily integrity vast enough to include a right to assisted suicide, one must also explain away the fact that Cardozo joined the majority in *Schloendorff*.

149. Even a very generous reading of *Cruzan* does not necessarily lend support to the claim that there is a constitutional right to physician-assisted suicide. The *Cruzan* majority understood the right involved in that case as the right of a competent individual's decision to reject unwanted but lifesaving *medical treatment*. If *Cruzan* provides authority for the proposition that the Constitution guarantees a right to physician-assisted suicide, then it must be because physician-assisted suicide involves some kind of "medical treatment." Aside from the fact that the medical establishment does not regard physician-assisted suicide in this way, see *infra* text accompanying notes 223–24, it is difficult to see why providing a prescription of lethal medication is any more a form of "medical treatment" than a physician's decision to help a patient commit suicide by use of carbon monoxide. It is exceedingly unpersuasive that a physician's mere involvement in providing a lethal prescription or in helping a patient to self-administer a lethal dose is enough, without more, to convert physician-assisted suicide into a form of medical treatment. The fact that one situation involves medical formalities seems irrelevant.

150. Although common law may have provided a right to informed consent, there certainly was no common law right to suicide. See Thomas J. Marzen et al., *Suicide: A Constitutional Right?*, 24 DUQ. L. REV. 1, 63, 69, 85–86, 88–89 (1985). Nor was there any common law right to assisted suicide. See *State v. Roberts*, 178 N.W. 690 (Mich. 1920), *overruled* by *State v. Kevorkian*, 527 N.W.2d 714, 738–39 (Mich. 1994) (*overruling Roberts* to the extent that it supports the view that the common law

Amendment liberty interest, to receive medical assistance from a doctor to commit suicide. Any claim to the contrary would constitute a vast departure from the Supreme Court's past jurisprudence that has never held that a competent individual has an affirmative constitutional right to obtain medical treatment.¹⁵¹

Cruzan provides still another reason to think that there is no broad right to personal autonomy that would include a right to commit assisted suicide. In the course of reaching its decision, the Court relied on state laws against homicide and assisted suicide as evidence of the states' commitment to human life.¹⁵² As Professor Kamisar has remarked, "If a majority of the Supreme Court meant to suggest that laws against assisted suicide are constitutionally suspect, it chose a strange way of doing so."¹⁵³ If a majority of the Supreme Court in *Cruzan* did not mean to suggest that one has a

definition of murder encompasses the act of intentionally providing the means by which a person commits suicide and holding that there is a separate common law offense of assisted suicide).

151. Arguably, if one has a right to refuse or terminate unwanted medical treatment, one must also have a right to receive medical treatment. Supreme Court doctrine, however, scarcely supports such a position. Perhaps the strongest authority for such a proposition can be found in the Court's abortion jurisprudence. The author of *Roe*, Justice Blackmun, in his separate opinion in *Casey*, seemed to interpret the right to abortion as a right to obtain medical treatment. As he observed: "Just as the Due Process Clause protects the deeply personal decision of the individual to refuse medical treatment, it also must protect the deeply personal decision to obtain medical treatment, including a woman's decision to terminate a pregnancy." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 927 n.3 (1992) (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part). Even if this assertion were correct, the question of whether an individual's decision to commit physician-assisted suicide involves a right to obtain medical treatment would remain.

For the sake of argument, let us assume that the Constitution does include a right to obtain medical treatment. Let us further assume that such a right includes an individual's decision to obtain a doctor's assistance in committing suicide. Would not such a right conflict directly with the Court's abortion funding decisions? See, e.g., *Harris v. McRae*, 448 U.S. 297 (1980) (holding that denial of public funding for some medically necessary abortions does not unconstitutionally infringe on a woman's abortion rights); *Maher v. Roe*, 432 U.S. 464 (1976) (holding that states are not required to provide Medicaid benefits to women seeking non-therapeutic abortions). How far would such a right go? Would the Constitution compel the states or the federal government to provide patients who wished to commit assisted suicide with a physician to help them do it? Would FDA regulation of medications that could be used to commit physician-assisted suicide pose an unconstitutional abridgement of such a right? See *Benton v. Kessler*, 505 U.S. 1084 (1992); Debora C. Fliegelman, Comment, *The FDA and RU486: Are Politics Compatible with the FDA's Mandate of Protecting Public Health and Safety?*, 66 TEMP. L. REV. 143 (1993).

152. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 280 (1989).

153. Kamisar, *supra* note 9, at 34.

protected liberty interest in committing suicide, it stands to reason that the liberty protected by the Due Process Clause cannot include the sort of liberty the personal autonomy model suggests.¹⁵⁴

Time and again, the Supreme Court has indicated that, although the Fourteenth Amendment's Due Process Clause includes a substantive component that imposes limits on the legislative power of the states, the instances in which that substantive component comes into play are few and far between. The personal autonomy model suggested by assisted suicide advocates, which posits that the liberty of the Due Process Clause prohibits states from interfering with the body- and destiny-controlling decisions an individual may make, represents a marked shift away from the Court's cautious exposition of rights protected by the Constitution's promise of liberty. As the few cases touched upon demonstrate, the Court has eschewed the sort of approach to individual liberty embodied in the personal autonomy model. These few cases imply that based on current Supreme Court doctrine, courts must reject the personal autonomy model and the right to assisted suicide that it includes.

III. DISTINCTIONS BETWEEN ABORTION AND PHYSICIAN-ASSISTED SUICIDE

The preceding argument notwithstanding, the Supreme Court could still recognize a right to physician-assisted suicide based on the reasoning of its abortion cases. To do so, however, the Court either would have to ignore or downplay the important distinctions between assisted suicide and abortion.

This Part analyzes some of the distinctions. First, Part III.A notes that the Court's recognition of the right to abortion in *Roe v. Wade* was predicated upon the finding that the abortion procedure did not end the life of a constitutional "person." In contrast, there is no question that the practice of assisted suicide involves the termination of the life of a

154. Even Justice Brennan, who considered a competent individual's right to refuse lifesaving medical treatment fundamental, *Cruzan*, 497 U.S. at 304 (Brennan, J., dissenting), did not consider that right "absolute." *Id.* at 312.

constitutional person. Next, Part III.B argues that the emerging understanding of the right to abortion as a sex equality right further distinguishes abortion from assisted suicide. And last, Part III.C distinguishes abortion from assisted suicide in terms of the social meanings of the two practices. This Part concludes by arguing that the differences between abortion and assisted suicide warrant maintaining the constitutional *status quo* protecting the right to abortion but not assisted suicide.

A. The Personhood Distinction

The first and perhaps most obvious distinction between abortion and assisted suicide is that the former does not entail ending the life of a person protected by the Constitution but the latter does. Central to the Court's recognition of a constitutional right to abortion was the Court's finding in *Roe* that a fetus is not a constitutionally recognized person whose rights, and among them, its "right to life," the Fourteenth Amendment protects. The Court noted that, if the fetus were a constitutional person, the argument for a right to abortion would, "of course, collapse[], for the fetus' right to life would be guaranteed specifically by the [Fourteenth] Amendment."¹⁵⁵

Had the Court found that the word "person" in the Fourteenth Amendment included the unborn, it might have upheld the state's prohibition on abortions. The theory of such a ruling probably would have been that it does not offend the Constitution for a state to protect the life of a person by prohibiting such a life from being ended.¹⁵⁶ The Court toyed

155. *Roe v. Wade*, 410 U.S. 113, 156-57 (1973).

156. Justice Stewart during the second oral argument in *Roe* elucidated the argument:

THE COURT: Well, if you're right that an unborn fetus is a person, then you can't leave it to the legislature to play fast and loose dealing with that person. In other words, if you're correct, in your basic submission that an unborn fetus is a person, then abortion laws such as that which New York has are grossly unconstitutional, isn't it?

MR. FLOWERS: That's right, yes.

THE COURT: Allowing the killing of people.

MR. FLOWERS: Yes, sir.

with the rudiments of such a theory, questioning whether a law permitting abortion would be *unconstitutional* were the fetus a person for the purposes of the Fourteenth Amendment. Ultimately, though, the Court avoided these troublesome questions by squarely holding that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn."¹⁵⁷

Roe's reverberations do not justify the right to commit assisted suicide.¹⁵⁸ *Roe's* holding that the word person has "application only postnatally,"¹⁵⁹ provides powerful evidence that *all* postnatal persons are persons for constitutional purposes. And the text of the Fourteenth Amendment, which provides that, "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside,"¹⁶⁰ buttresses the point. Although *Roe* did not involve the termination of the life of a person as defined by the Constitution, the act of physician-assisted suicide surely does.

Even the *Cruzan* Court did not suggest that Nancy Cruzan was not a person protected by the Constitution, even though she lived in a persistive vegetative state.¹⁶¹ Can one reasonably suppose that the Court would entertain the idea that a terminally ill individual was not a person entitled to constitutional rights and constitutional protections when it was not prepared to do so in the case of Nancy Cruzan?¹⁶² Unlike a

75 LANDMARK BRIEFS AND ARGUMENTS OF THE SUPREME COURT OF THE UNITED STATES: CONSTITUTIONAL LAW 827 (Philip B. Kurland & Gerhard Casper eds., 1975).

157. *Roe*, 410 U.S. at 158.

158. See Marzen, *supra* note 9, at 805 (arguing that a right to assisted suicide is not analogous to a right to abortion because fetuses, as unborn, have no liberties).

159. *Roe*, 410 U.S. at 157.

160. U.S. CONST. amend. XIV, § 1. See also *Roe*, 410 U.S. at 156-59 (discussing the meaning of the word "person" in the Constitution).

161. The Court adopted the following definition of a vegetative state:

Vegetative state describes a body which is functioning entirely in terms of its internal controls. It maintains temperature. It maintains heart beat and pulmonary ventilation. It maintains digestive activity. It maintains reflex activity of muscles and nerves for low level conditioned responses. But there is no behavioral evidence of either self-awareness or awareness of the surroundings in a learned manner.

Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261, 266 n.1 (quoting *In re Jobes*, 529 A.2d 434, 438 (N.J. 1987)).

162. But see *Cruzan*, 497 U.S. at 354 (Stevens, J., dissenting) (suggesting that the Court's opinion derives "from the premise that chronically incompetent persons have no constitutionally cognizable interests at all, and so are not persons within the meaning of the Constitution").

patient in Cruzan's condition, the terminally ill are capable of deciding to commit physician-assisted suicide; they are also capable, at least in theory, of performing the last death-causing act themselves.¹⁶³ Because the terminally ill possess what Professor Louis Michael Seidman has called the essential attributes of personhood—the capacity for “independent thought, desire, and action”¹⁶⁴—they must be persons just like those who are not terminally ill.

This question is not meant to suggest that there is or should be a hierarchy of persons such that some persons get constitutional rights and protections while others receive none at all. Under the Equal Protection Clause, the lives of all persons are of basic, equal value concerning matters of death, if not life. Thus, for example, if the terminally ill have a right to commit assisted suicide, the non-terminally ill must have a colorable equal protection argument that they, too, have a right to die. See *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1996) (“If such a liberty exists in this context . . . every man and woman in the United States must enjoy it.”).

163. See Kamisar, *supra* note 3, at 233.

164. See Seidman, *supra* note 137, at 63. For a radically different view of what makes a person a “person,” see John Harris, *Euthanasia and the Value of Life*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES* 6 (John Keown ed., 1995). Harris believes that “a person is a creature capable of valuing its own existence.” *Id.* at 9. On this view, Nancy Cruzan would not have been a person. Harris admits as much, though he does not mention Cruzan by name. *Id.* at 19. A less obvious example of a person who might not constitute a person under Harris’ definition would be a patient who, wracked with pain, has lost the capacity of valuing her existence. Harris nowhere suggests that the reasons a person cannot value her existence limit his definition of personhood.

Even more shocking are Harris’ views about what may be done to those who are no longer persons. Regarding a hypothetical individual in a persistive vegetative state, whom Harris calls “John,” Harris explains:

Respect for persons requires that it is persons who will be respected and hence their interests, whether those interests are experiential or critical. Where, however, the person no longer exists, the critical interests of the former person, while still worthy of our respect, must of necessity give way to the significant interests or preferences of actual people. Thus John’s critical interest in a further thirty years of life in PVS [persistive vegetative state] would give way to the significant critical interests or preferences of any actual persons, persons to whom the satisfaction, or not, of their desires can continue to matter. And this would surely accord with our intuitions here. We would not, I imagine, think that someone who could no longer benefit from, or appreciate, the life he was leading should have that life sustained when to do so would cost the lives of others who could appreciate, and benefit from, their existences.

Id. at 19. It would seem consistent with Harris’ view to harvest a kidney or to take scrapings of bone marrow to provide grafts for someone with leukemia without consent from an individual in a persistive vegetative state. See *Cruzan*, 497 U.S. at 313 n.13 (Brennan, J., dissenting). Few, if any, of those who support the practice of euthanasia would want to argue that our constitutional scheme would permit the sort of practices that would seem to accord with Harris’ intuitions. See *id.* (explaining that permitting procedures such as those just mentioned, among others, “would be too brave a new world for . . . our Constitution”).

Professor Robert Sedler, to the contrary, has intimated that the terminally ill may not be constitutionally protected persons.¹⁶⁵ Part of Sedler's views are conventional enough: the state's interest in preserving and protecting human life cannot outweigh the decision of a terminally ill individual to commit assisted suicide.¹⁶⁶ But taking the next step, Sedler unconventionally opines that the reason that a state's interest in preserving and protecting human life does not prevail under such circumstances is that such a person has "no life left to preserve."¹⁶⁷ Sedler writes:

The government typically tries to justify a ban on "assisted suicide" on the ground that it has an interest in "preserving life." *But for the terminally ill there is no life left to preserve* The government can have no valid interest whatsoever in prolonging dying, and in forcing terminally ill people to go on suffering until they have breathed their last agonizing breath.¹⁶⁸

Professor Yale Kamisar has responded to Sedler remarking: "Surely, Sedler is not saying that one who is terminally ill is no longer a 'person' or a 'human being'?"¹⁶⁹ This is, however, not so clear from Sedler's writings. Sedler's argument relies on two inconsistent positions. While he argues that the terminally ill are not persons protected by the Constitution because they have "no life left to preserve," he maintains that the terminally ill retain the constitutional right to commit physician-assisted suicide.¹⁷⁰ Sedler does not explain how a terminally ill individual can retain the essential attributes of personhood and still have no life left to preserve.

There is a plausible explanation for the inconsistency of Sedler's argument. Sedler confuses a claim often advanced in support of the right of a patient in a persistive vegetative state to authorize passive euthanasia (based on the "nonpersonhood" of such a patient) with a claim customarily advanced in support of a right to assisted suicide (based on a notion of personal autonomy). Passive euthanasia has sometimes been

165. See Sedler, *I Say No*, *supra* note 4, at 729-31.

166. *Id.* at 729-30.

167. *Id.* at 730.

168. *Id.*

169. Kamisar, *supra* note 3, at 235.

170. See, e.g., Sedler, *I Say No*, *supra* note 4, at 730.

defended by the argument that “as sick patients at the end of their lives become more fetus-like—as they lose their capacity for independent thought, desire, and action—their rights . . . diminish as well.”¹⁷¹ It may satisfy some to describe individuals like Nancy Cruzan as “fetus-like” because they have lost their capacity for “independent thought, desire, and action,” and to permit the lives of such individuals to be ended by passive euthanasia. But the terminally ill are not fetus-like; they may have a number of months or years left to live, and their “mental powers can hardly be substantially impaired” if they would freely and “rationally” choose death by assisted suicide.¹⁷²

The failure to distinguish between the reasons that some might think that fetus-like individuals have a right to commit passive euthanasia and one of the reasons some believe that the terminally ill have a right to commit physician-assisted suicide forces those who make this mistake, including Sedler, to take a position unprecedented in the Supreme Court’s jurisprudence: the terminally ill have a constitutional right to end their lives with a physician’s assistance because they are not persons protected by the Constitution. Of course, this position ignores the obvious point that if, like fetuses, the terminally ill are not protected persons, they have no constitutional rights at all.

The argument in support of a constitutional right to physician-assisted suicide must be no stronger than the argument for a right to abortion because a terminally ill individual, unlike a fetus, can decide for herself to end her life (meaning she has a clearer claim to personhood).¹⁷³ *Roe* demonstrates

171. Seidman, *supra* note 137, at 63.

172. Kamisar, *supra* note 3, at 235.

173. The fact that an individual possesses the capacity to decide to end her life does not mean that she has a constitutional right to do so. *See, e.g.,* Yale Kamisar, *Are Laws Against Assisted Suicide Unconstitutional?*, 23 HASTINGS CENTER REP., May–June 1993, at 33. Were the capacity to make a decision the touchstone of constitutional rights, nearly anyone—not just the terminally ill—would have a constitutional right to commit assisted suicide. *See* *Compassion in Dying v. Washington*, 49 F.3d 586, 591 (9th Cir. 1996). Perhaps this potential result explains why the Supreme Court has never held that one’s capacity to give consent to a certain procedure establishes a right to such a procedure or that only those who have the capacity to give such consent have a right to do so.

Recall that *Cruzan* involved an individual without the capacity to make any decision, much less a decision to withdraw lifesaving medical treatment. The claim in the case, therefore, was that Nancy Cruzan had a right to have others carry out her previously expressed wish not to have her life sustained by artificial means. Laws permitting advanced directives, or “living wills” as they are often called, have been

that *who exercises* a right is not the only relevant consideration in the constitutional analysis; *who is affected* by the exercise of that right is important, as well. As discussed earlier, *Roe* implies that when the individual affected by the exercise of a right is a constitutionally protected person, no right to end life exists. Because a terminally ill individual's decision to commit physician-assisted suicide undeniably will end the life of a constitutionally protected person, courts should find that, unlike the right to abortion, the Constitution does not protect such a decision.¹⁷⁴

B. The Sex Equality Distinction

A second important distinction between the rights to abortion and assisted suicide is that abortion, unlike assisted suicide, can be justified on sex equality grounds. As one major textbook of American constitutional law has observed: "[T]here seems to be a growing consensus that the best argument for the right to abortion is based on principles of sex equality rather than due process."¹⁷⁵ A number of commentators have argued that the Supreme Court's reliance on the right to privacy, or more recently, on Fourteenth Amendment liberty interests, to support the right to abortion inadequately reflects the sex equality implications of the abortion right.¹⁷⁶ Of

adopted by many states. *See, e.g.*, ALA. CODE § 22-8A-2 (1990); GA. CODE ANN. § 31-32-1 (Supp. 1995); 755 ILL. COMP. STAT. ANN. 35/1 (West 1993); IOWA CODE ANN. § 144A.3 (West Supp. 1996); MISS. CODE ANN. § 41-41-101 (1993); N.H. REV. STAT. ANN. § 137-H:3 (Supp. 1995); N.Y. PUB. HEALTH LAW § 2960 (McKinney 1993). The theory of such laws is that we ought to respect the forward-looking wishes of individuals out of respect for an individual's autonomy. *See* DWORKIN, *supra* note 6, at 226. But as Professor Dworkin concedes, there is a distinct possibility that by the time the death-causing course of events begins, the patient may have changed her mind, but because of her medical condition, may no longer have the ability to express her desire to continue living. *Id.*

174. *See* John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920, 932 n.81 (1973) (comparing abortion to murder of an unwanted two-year-old or a senile parent in a well-known article published just three months after *Roe* was decided).

175. WILLIAM B. LOCKHART ET AL., CONSTITUTIONAL LAW: CASES—COMMENTS—QUESTIONS 448 (7th ed. 1991).

176. *See* TRIBE, *supra* note 135, at 1353–59; Kristin Booth Glen, *Abortion in the Courts: A Laywoman's Historical Guide to the New Disaster Area*, FEMINIST STUD., Feb. 1978, at 9 (arguing that *Roe* was really a physicians' rights case); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1308–24 (1991); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion*

course, the more the right to abortion is grounded in notions of sex equality, the weaker the comparison—and correspondingly, the stronger the distinction—between abortion and physician-assisted suicide.

Some have criticized *Roe v. Wade*¹⁷⁷ for basing the right to abortion on a theory of privacy. Professor Catharine A. MacKinnon explains: “The argument is that privacy doctrine reaffirms and reinforces what the feminist critique of sexuality criticizes: the public/private split.”¹⁷⁸ Although the Court no longer grounds the right to abortion in privacy doctrine as it did when Professor MacKinnon lanced *Roe*’s theoretical underpinnings, the Court’s redefinition of the abortion right as a Fourteenth Amendment liberty interest has not rendered such criticism obsolete.

The liberty currently undergirding the right to abortion is, for purposes of stressing the sex equality distinction between abortion and assisted suicide, conceptually indistinguishable from the “right to privacy,” which used to do the job.¹⁷⁹ Liberty shares privacy’s underlying assumptions about individuals and individuality, and about notions of autonomy, bodily integrity, and self-determination.¹⁸⁰ Some commentators have expressed

Regulation and Questions of Equal Protection, 44 STAN. L. REV. 261, 350–80 (1992); Cass R. Sunstein, *Neutrality in Constitutional Law (With Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 31–44 (1992).

177. 410 U.S. 113 (1973).

178. CATHARINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in FEMINISM UNMODIFIED 93 (1987).

179. *But see, e.g.*, Erin Daly, *Reconsidering Abortion Law: Liberty, Equality, and the New Rhetoric of Planned Parenthood v. Casey*, 45 AM. U. L. REV. 77, 118–26 (1996) (drawing a distinction between abortion as privacy and abortion as liberty).

180. The joint opinion in *Casey* illustrates this point in that it simply recolored the Court’s cases involving “marriage, procreation, contraception, family relationships, child rearing, and education,” as involving “the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, [which] are central to the liberty protected by the Fourteenth Amendment.” *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (citation omitted). *See also id.* at 856. *Casey* indicated no major retooling of the assumptions about why certain liberties are constitutionally protected. Indeed, *Casey* relied quite heavily on the theories of the Court’s earlier privacy jurisprudence to justify continued constitutional protection for a woman’s right to abortion. *See id.* at 851 (relying on the Court’s jurisprudence regarding reproduction and familial relationships to conclude that the Fourteenth Amendment’s promise of protected liberty includes a right to abortion); *id.* at 857 (explaining that *Roe* can be regarded “not only as an exemplar of *Griswold* liberty but as a rule (whether or not mistaken) of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection”); *id.* at 877 (“What is at stake is the woman’s right to make the ultimate decision, not a right to be insulated from all others in doing so.”).

concerns over the Court's unwillingness to conceive of the right to abortion in terms of its implications for women or to view the right to abortion as a sex equality right. These concerns remain as valid today as a decade ago. Thus, while the redefinition of the abortion right may have serious ramifications in constitutional or legal terms, it has little impact on the due process theory that informs the abortion right.

The right to privacy articulated in *Roe*, like the concept of individual liberty intimated in more recent cases,¹⁸¹ imposes limits on the state's authority to intrude into an individual's private conduct or choice. Privacy and liberty theories assume that individuals are autonomous decision makers who conduct themselves freely and equally in the private realm.¹⁸² Commentators argue that women's experience and social status call this presupposition into question,¹⁸³ and point to the evidence of women's experience to establish the rather unremarkable proposition that women are not as free as men to conduct themselves in society and to make decisions.¹⁸⁴

Aside from permitting some women under some circumstances to decide to have an abortion, neither the privacy nor liberty theories does anything to remedy women's social inequality. For example, neither theory specifically addresses women's social inequality to enable women to exercise meaningful control over their sexuality before they are faced with the decision whether to have an abortion.

The privacy and liberty theories do not address women's social inequality because they do not perceive inequality, or worse, they assume that such inequality does not exist. Worse still, even if either of these theories did contemplate the existence of inequality, they would be powerless to remedy such inequality. Once something is within the sphere of private choice or individual liberty, the state may not do anything about it.¹⁸⁵ What is not in the public sphere is, after all, not a matter of public concern. In short, the privacy and liberty approaches to the right to abortion are an inadequate

181. See, e.g., *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992).

182. See MACKINNON, *supra* note 178, at 99.

183. See *id.* at 100-02.

184. See *id.*

185. Except, of course, where the state has an exceedingly strong reason (in constitutional terms, a "compelling" reason) for doing so. See, e.g., *Roe v. Wade*, 410 U.S. 113, 155-56 (1973).

theoretical foundation on which to base the abortion right. Neither approach conceptualizes the abortion right in gender-specific terms, and neither takes full account of women's social inequality.¹⁸⁶

A number of Supreme Court Justices have demonstrated their sensitivity to such criticism. In reaffirming what they deemed the essential holding of *Roe*, the authors of the *Casey* joint opinion observed that women play a unique role in society, which encompasses the decision to terminate an unwanted pregnancy:

Though abortion is conduct, it does not follow that the State is entitled to proscribe it in all instances. That is because the liberty of the woman is at stake in a sense unique to the human condition and so unique to the law. The mother who carries a child to full term is subject to anxieties, to physical constraints, to pain that only she must bear. . . . Her suffering is too intimate and personal for the State to insist, without more, upon its own vision of the woman's role, however dominant that vision has been in the course of our history and culture. The destiny of the woman must be shaped to a large extent on her own conception of her spiritual imperatives and her place in society.¹⁸⁷

186. See MACKINNON, *supra* note 178, at 97–100. In light of the foregoing arguments, some commentators and judges (including members of the Supreme Court) have suggested that the constitutional theory of sex equality, barely a generation old, more accurately reflects the effect that laws restricting abortion have on the maintenance of women's social inequality than does a Fourteenth Amendment liberty or privacy view, and that, therefore, the theory of sex equality better supports the constitutional protection afforded the abortion decision. See GUIDO CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 99–102 (1985); CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 272–85 (1993); TRIBE, *supra* note 135, at 1353–55; Ruth Bader Ginsburg, *Speaking in a Judicial Voice*, 67 N.Y.U. L. REV. 1185, 1199–1202 (1992); Kenneth L. Karst, *Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 57–59 (1977); MacKinnon, *supra* note 176, at 1319; Francis Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 117–26 (1989); Giles R. Scofield, *Rethinking Roe*, 8 TRENDS IN HEALTH CARE, L. & ETHICS, Summer 1993, at 17, 19–20; Siegal, *supra* note 176, at 350–80; David A. Strauss, *Abortion, Toleration and Moral Uncertainty*, 1992 SUP. CT. REV. 1, 18–22.

Unlike the law of privacy, the theory of sex equality assumes that women live under prevailing conditions of legal and social inequality, or, at least, does not assume that they do not. Therefore, to the extent that restrictive abortion laws pose a substantial obstacle to women's social standing, such laws might not withstand constitutional scrutiny under a sex equality analysis.

187. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 852 (1992).

Addressing why principles of *stare decisis* required affirming *Roe*, the Court explained that a generation of American women have relied on being able to terminate an unwanted pregnancy and that the right to abortion has enhanced women's equal participation in society. The Court observed that

for two decades of economic and social developments, people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives.¹⁸⁸

By recognizing the relationship between women's economic and social inequality and the abortion right, the *Casey* Court seemed to signal that it considered gender concerns an illuminating, albeit not a controlling, factor, in the continued constitutional protection afforded a woman's right to abortion.

Several Justices have gone further, indicating that they would be willing to consider the right to abortion a sex equality right. Justice Ginsburg has most clearly demonstrated her commitment to the idea.¹⁸⁹ Justice Blackmun, too, has demonstrated that he was not only aware of, but also not opposed to, the idea.¹⁹⁰

Even though the right to abortion may still be protected as a due process, as opposed to a sex equality, right, there are hints in current doctrine that individual Justices have noted the conceptual inadequacies of the constitutional doctrine and have begun to incorporate sex equality concerns into their analysis of the abortion right.¹⁹¹ In sharp contrast to the abortion decision, a right to assisted suicide could not properly be grounded in principles of sex equality. As Professor Seth Kreimer has recently observed, "The class of individuals who

188. *Id.* at 856.

189. *See, e.g.*, Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. REV. 375 (1985); Ginsburg, *supra* note 186, at 1185.

190. *See, e.g.*, *Casey*, 505 U.S. at 927-28 & n.4 (Blackmun, J., concurring in part, concurring in the judgment in part, and dissenting in part).

191. *See Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 323 (1993) (Stevens, J., dissenting).

seek physician-assisted suicide is not defined by sex. . . .¹⁹² To date, there have been no sex equality claims to a right to assisted suicide.¹⁹³

As the abortion decision comes more and more to be understood as a sex equality right, the claimed analogy between abortion and assisted suicide grows weaker.

C. Social Meaning of Physician-Assisted Suicide and Abortion

A significant problem in any discussion of sensitive medico-legal issues is the marked, perhaps unconscious, tendency of many to distort what the law is in pursuit of what they would like the law to be. Nowhere does this tendency prove a larger barrier to the intelligent resolution of legal questions than in the debate over patient rights at the end of life.¹⁹⁴

This Article has examined the distinctions between abortion and assisted suicide from the perspective of Supreme Court doctrine, using that doctrine to explain that, although the Due Process Clause protects (at least in the early stages) a woman's right to an abortion, it does not necessarily protect an individual's decision to enlist the aid of others to commit suicide. This Article will now look at the relationship between abortion and assisted suicide from a different perspective—one based on broader social and legal distinctions.

A number of experts—doctors, ethicists, and lawyers—contend that the right to assisted suicide should not be recognized because of its social justice implications.¹⁹⁵ These experts maintain that, in the case of terminally ill patients,

192. Kreimer, *supra* note 9, at 850.

193. Although some feminists appear sympathetic to the right to assisted suicide, see, e.g., Leslie Bender, *A Feminist Analysis of Physician-Assisted Dying and Voluntary Active Euthanasia*, 59 TENN. L. REV. 519 (1992), whether the radical feminist critique of power relations would be sympathetic to a right to physician-assisted suicide remains uncertain.

194. *In re Quinlan*, 355 A.2d 647, 663–64 (N.J. 1967) (discussing constitutional and legal issues that, although asserted, did not apply to the *Quinlan* case).

195. See, e.g., John D. Arras, *The Right to Die on the Slippery Slope*, 8 SOC. THEORY & PRAC. 285, 302–19 (1982) (arguing that a right to active voluntary euthanasia would lead to great injustice, particularly for poor citizens).

the economically, racially, ethnically, or physically disadvantaged could be forced to exercise an "assisted suicide option" should one become available¹⁹⁶ because they will be unable to afford adequate palliative care. The more "advantaged" would have more "free will" to determine whether and when to commit assisted suicide because they will be able to afford adequate care, and thus, their "choice" to exercise an "assisted suicide option" will be more meaningful than that of the more disadvantaged members of society.¹⁹⁷

Compare this "social justice" argument against physician-assisted suicide with the main line of attack on the death penalty: Because the death penalty is more likely to be sought and obtained in cases in which a minority defendant has been charged in a capital case, the administration of the death penalty may be racist and it should be banished until such time as the inequality of retributive justice can be remedied.¹⁹⁸

This "social justice" argument has some appeal, but it is not without flaws. Cannot the same sort of argument be made in the case of abortion?¹⁹⁹ If poor or minority women face the reality that they will not be able to afford to bear and rear children and will, therefore, be more likely than middle-class or non-minority women to avail themselves of the "abortion option" rather than to suffer the unaffordable or unbearable alternative, do the dictates of social justice applied to their unborn children not suggest that the right to abortion should be rejected altogether? This Article does not resort to this sort of refrain as the basis for its position

196. In a related vein, Professor David Velleman has argued that creating an assisted suicide option in our culture, obsessed as it is with youth, vigor, and productivity, would be like

establishing a right to duel in a culture obsessed with personal honor. . . . By eliminating the option of dueling (if we can), we can eliminate the reasons that make it rational for people to duel in most cases. To restore the option of dueling would be to give people reasons for dueling that they didn't previously have. Similarly, I believe, to offer the option of dying may be to give people new reasons for dying.

J. David Velleman, *Against the Right to Die*, 17 J. MED. & PHIL. 665, 676 (1992).
197. *Id.*

198. For the seminal argument against the death penalty, see CHARLES C. BLACK, JR., *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (2d ed. 1981).

199. *Compassion in Dying v. Washington*, 79 F.3d 790, 825 & n.99 (9th Cir. 1996).

against assisted suicide. Rather, it raises the point because it provides some helpful insights into why we might favor the status quo where there is a right to abortion but not a right to assisted suicide.

The remainder of this section will look at the distinction between abortion and assisted suicide from a broad perspective. The arguments that follow are not purely "legal" in the doctrinal sense. Nevertheless, the Supreme Court's modern Fourteenth Amendment jurisprudence has taken account of such arguments.²⁰⁰ First, Part III.C.1 considers the differences between abortion and assisted suicide from the decision maker's perspective. Then Part III.C.2 addresses "society's" perspective on the distinction between abortion and assisted suicide. Finally, Part III.C.3 examines the medical establishment's views on abortion and assisted suicide, and makes some concluding observations.

1. The Decision Maker's Viewpoint—A woman's decision whether to have an abortion is not made in the abstract. A woman's decision whether to have an abortion is not merely some philosopher's (or lawyer's) hypothetical Hobson's choice. When a woman decides to terminate a pregnancy, the dilemma, the act, and the consequences are real. Much the same would undoubtedly hold true of an individual's decision to commit assisted suicide, should such an option become available.

Although one could characterize the right to abortion as an autonomous choice, rarely, if ever, would that characterization be correct. Consider two cases in which a pregnant woman makes the "choice" to have an abortion. First, take the case of an affluent, married woman with a career. Suppose that this woman stands unprepared to sacrifice her career, her marriage, or her other interests, for the sake of the potential life of her fetus and decides to have an abortion. One might argue that she has made an autonomous choice, but has she really? Would not the choice be more meaningful, and therefore more autonomous, if she did not have to choose between a career and motherhood? Is this woman's choice to have an abortion in fact a choice to have an abortion, or is it a choice not to lose a career or marriage, or both?

200. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Loving v. Virginia*, 388 U.S. 1 (1967); *Brown v. Board of Educ.*, 349 U.S. 294 (1955).

Or take the case of a poor single woman who "chooses" to have an abortion. (Let us assume that she does not have a career and is simply down on her luck, so as to place her in a position of sharper contrast to the first hypothetical woman.) Why might this woman make such a "choice"? There are many possible reasons. She might, for example, decide that, although an abortion is expensive, she can ill-afford to raise a child. She might choose an abortion because bearing and rearing the child would cast her even more deeply into poverty. Or she might decide she would prefer not to raise this child alone. Whatever the reasons, we may deem her decision, like the career woman's, an exercise of personal autonomy or choice. Is it fair to do so? Are her options all equally available or equally attractive to her? If consideration for the necessities of life figure prominently in her decision so that she cannot plausibly consider the option of raising the child, has she made a choice to have an abortion? Or has this woman chosen to forego the travails attending the decision *not* to have an abortion?

Like the right to abortion, the right to assisted suicide has been defended on the basis of an argument resting on personal autonomy.²⁰¹ Right-to-die advocates who press the analogy between abortion and assisted suicide talk about choosing death as if the decision would be truly autonomous.²⁰² Can it

201. The argument is sometimes based on the claim of a right to bodily integrity. See Sedler, *I Say No*, *supra* note 4, at 730 ("An absolute ban on a terminally ill person's receiving any assistance from a physician, or any other person, in implementing her choice to hasten inevitable death is obviously an undue burden on her fundamental right of bodily integrity."). The argument sometimes stems from a claim of a right to self-determination. See *Compassion in Dying v. Washington*, 49 F.3d 586, 596 (9th Cir. 1996) (Wright, J., dissenting) ("The right to die with dignity accords with the American values of self-determination and privacy regarding personal decisions."). As explained earlier, concepts such as bodily integrity and self-determination, however inappropriately, have been used interchangeably. See *supra* Part I.

202. See, e.g., Sedler, *I Say No*, *supra* note 4, at 731. Cf. John Harris, *The Philosophical Case Against the Philosophical Case Against Euthanasia*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES* 36 (John Keown ed., 1995). As Harris contends:

If free choice matters . . . it matters because of the effects of choosing, whether those effects are defined as "side" or not. It is important to choose, because choosing makes a difference. Now choosing makes a difference to the person who chooses and it makes a difference to the world. The chooser is a world maker and a character builder at the same time. The chooser is the sort of character who creates this sort of world rather than that. . . . The disagreement is over what counts as world building. . . . [For some] an agent only builds, and is hence only responsible for, the worlds he intends. For me the agent chooses

be? Would there be an argument in favor of legalizing (or constitutionalizing) a right to euthanasia, “[s]o long as there are *any* persons dying in weakness and grief who are refused their request for a speeding of their end?”²⁰³

No one can promise that a person “dying and in grief” would make the choice to commit assisted suicide truly autonomously, independently, voluntarily, and without threat, burden, or persuasion from those around her. Considerations for autonomy have not always figured so prominently in the pro-assisted suicide position. To take but one example, Professor Glanville Williams, a criminal law scholar, once maintained:

If a patient, suffering pain in a terminal illness, wishes for euthanasia partly because of his pain and partly because he sees his beloved ones breaking under the strain of caring for him, I do not see how this decision on his part, agonizing though it might be, is necessarily a matter of discredit either to the patient himself or to his relatives. The fact is that, whether we are considering the patient or his relatives, there are limits to human endurance.²⁰⁴

the world which she voluntarily creates, the world she could have chosen not to create or to create differently, the world which results from her actions (or conscious omissions).

Id. at 39–40. *But see* John Finnis, *Misunderstanding the Case Against Euthanasia: Response to Harris's First Reply*, in *EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES* 62 (John Keown ed., 1995). Finnis notes:

At the end of my first essay . . . I argued that if one is really exercising autonomy (not merely yielding to impulse or compulsion) in choosing to kill oneself or to be deliberately killed, one will be proceeding on one or both of two philosophically and morally erroneous judgments; (i) that human life in certain conditions or circumstances retains no intrinsic value or dignity; and/or (ii) that the world would be a better place if one's life were intentionally terminated; and that these erroneous judgments, being inherently universal, have grave implications for the weak and disabled. . . . The first of the two types of erroneous judgment which I identified could be stated more exactly: (i) that one's human life in certain conditions or circumstances retains no intrinsic value or dignity, or on balance no net value, so that one's life is not worth living and one would be better-off dead.

Id. at 70.

203. Glanville Williams, “*Mercy Killing*” *Legislation—A Rejoinder*, 43 *MINN. L. REV.* 1, 8 (1958).

204. *Id.* at 5.

Professor Williams noted that the argument favoring euthanasia rested on two values: prevention of cruelty and liberty.²⁰⁵ But imagine for a moment that Professor Williams' views had been grounded solely or primarily on an argument from liberty or personal autonomy. If so, would Professor Williams not surely have been misguided for failing to accept that a would-be assisted suicide's consideration for his family or his beloved ones makes his decision not a purely autonomous one? And if the choice to commit euthanasia is not an autonomous one, would it not necessarily discredit the claim that it is? A matter of discredit to the practice itself? Professor Williams, of course, did not explicitly premise the claim for a right to assisted suicide solely (or primarily) on a concept of personal autonomy. Unlike Williams, however, modern right-to-die proponents premise their constitutional theory on just such a claim.

It is just as much of a mistake to talk about a right to assisted suicide as a meaningful exercise of personal autonomy as it is to talk about the right to abortion in such terms. Even if the right to commit assisted suicide could be defended on principles of autonomy, it would not principally be a decision made autonomously. Indeed, when has a defender of that right said it is? But what if it is not? Assisted suicide is no less autonomous a decision than a woman's decision to have an abortion, and the abortion decision receives constitutional protection. Whatever force such a position may have, it does not amount to a theory about why abortion and assisted suicide ought to be treated similarly as a constitutional matter.²⁰⁶

Despite the fact that neither the abortion nor the assisted suicide decision is meaningfully autonomous, there is reason

205. *Id.* at 1-2.

206. If abortion and assisted suicide are in any way analogous, why should the assisted suicide decision be viewed (as assisted suicide advocates must think) as more like the seemingly autonomous decision of the married woman with a career to have an abortion, and less like that of the poor single woman making the same decision? Such questions are unsavory, but cannot be avoided. Before too quickly moving from a constitutional right to abortion to a constitutional right to assisted suicide, we must come to terms with what personal autonomy, or even autonomy means.

If some people cannot bear their pain and suffering and cannot obtain the relief medical science can provide, how can we say that they have voluntarily and autonomously decided to commit assisted suicide? Or if some people will exercise a right to assisted suicide because they can no longer live, as they have, a life in relation to others, is the decision to end their lives really autonomous? Admittedly the answers to these questions are far from clear, but we must start asking the questions.

to suppose that as a social (or constitutional) matter, we need not engage in the fiction that they are. Consider, first, the right to abortion. We may have our moral doubts about this right. But any error we might make by placing the abortion decision in a woman's hands will not foreclose the possibility that, at some future date, when that woman's circumstances or way of thinking has changed, she will go on to bear and to rear a child. Moreover, our conviction about the good achieved by leaving the choice in the woman's hands and, thereby, promoting women's social equality, prevents us from taking the choice away from her. Accordingly, as a society, we may permit abortions.

The case of assisted suicide presents us with an entirely different equation. If, as a society, we are uncertain about the propriety of allowing an individual to commit assisted suicide, we might not be willing to indulge in the fiction that her decision to do so is an autonomous choice. Unlike with abortion, we cannot assuage our moral uncertainty that it is an error to allow an individual to commit assisted suicide with the belief that someday the person will make a different decision under different circumstances. The choice to commit assisted suicide, once carried out, is always irreversible.²⁰⁷ Moreover, unlike the case of abortion, we cannot rely on any deeply felt and deeply held moral conviction that it is best to allow the individual to make this decision. Any sense we may have that enabling individuals to decide whether, when, and how to avoid suffering, does not rise to the level of our conviction about the righteousness of promoting women's equality—especially because the best medical evidence strongly suggests that much of the suffering of those most likely to commit assisted suicide occurs needlessly.²⁰⁸

Based upon those differences, we need not (and should not) strike the same balance in the case of abortion as in the case of assisted suicide. Neither abortion nor assisted suicide is a purely autonomous decision, however. When viewed from the decision maker's perspective it becomes clear that there are

207. Recall that this argument is meant to explain how we, as a society, may distinguish the abortion and assisted suicide decisions from the decision maker's perspective. The fact that from a fetus' point of view the abortion decision is irreversible does not affect this point.

208. For a thorough discussion of the clinical responses to pain and suffering, see THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN DEATH IS SOUGHT: ASSISTED SUICIDE AND EUTHANASIA IN THE MEDICAL CONTEXT 35-47 (1994).

reasons to defend a woman's right to abortion but balk at a right to assisted suicide.

2. *Society's Perspective on the Lives Ended by Abortion and Assisted Suicide*—Abortion and physician-assisted suicide differ from one another not only in terms of what these two decisions may mean for the decision maker, but also in terms of the social value attached to the lives they end. Although as a philosophical, moral, or theological proposition, all life, pre- and post-natal alike, may have the same intrinsic value, much of our society, as well as a majority of the Supreme Court, does not regard potential and post-natal life as equal.

This section treats two examples of this social understanding. It first demonstrates the different values attached to potential and post-natal human life by suggesting that, although many may think that economic considerations justify a woman's decision to terminate an unwanted pregnancy, few, if any, would argue that such considerations should play into an individual's decision to end her life. It then points to the distinction our society draws between abortion and infanticide as evidence that our society attaches different values to potential and post-natal human life.

Advocates of a right to physician-assisted suicide would rarely, if ever, admit that that right would turn human life into a commodity. Rarely does one hear an argument that someone should decide to end her life because of the financial cost of continuing it or the savings that could be realized from her decision to do so.²⁰⁹

It is no accident that the literature on the Dutch experiment with euthanasia,²¹⁰ especially that part of the literature defending the continuation of the experiment, takes pains to

209. *But see* Lee v. Oregon, 891 F. Supp. 1429, 1434 (D. Or. 1995) (arguing in support of the constitutionality of the Oregon law allowing a terminally ill adult to get a doctor's prescription to end her life, the state defended the law on the ground that the state has an interest in "protecting the terminally ill and their loved ones from financial hardships they wish to avoid"). For useful discussions of the Oregon law, see Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1, 22-69 (1996) and Edward R. Grant & Paul Benjamin Linton, *Relief or Reproach?: Euthanasia Rights in the Wake of Measure 16*, 74 OR. L. REV. 449 (1995).

210. *See, e.g.*, John Keown, *Euthanasia in the Netherlands: Sliding Down the Slippery Slope?*, in EUTHANASIA EXAMINED: ETHICAL, CLINICAL, AND LEGAL PERSPECTIVES 261 (John Keown ed., 1995). For a highly regarded report of the Dutch euthanasia experience, see CARLOS F. GOMEZ, *REGULATING DEATH: EUTHANASIA AND THE CASE OF THE NETHERLANDS* (1991).

point out that because of the nationalized system of health care in the Netherlands, individuals who decide to exercise the right to die do not make the choice on account of their inability to afford adequate health care.²¹¹ For example, Henk Rigter reports that

foreign commentators occasionally wonder whether economic motives play a role in the [Dutch] practice of euthanasia. The answer is no. In the relatively well-funded health care system of The Netherlands there is no economic stimulus for doctors or institutions to end the lives of patients. Dutch general physicians even lose money by performing euthanasia because of the per capita reimbursement system.²¹²

However accurate Rigter's remarks, they do not preclude the possibility that economics may play a role in an individual's decision to hasten his death actively—even in the Netherlands. Although Rigter's remarks may, if true, go some distance toward dispelling the concern that financial considerations might motivate physicians to help their patients kill themselves, they do not address the full panoply of concerns about the economic motivations that could prompt an individual to end her life.

Opponents of the practice of assisted suicide still have legitimate concerns that economics may play an untoward role in a legal system in which such a practice is permitted. They worry that individuals would decide to end their lives for the "wrong reasons," such as: (a) the financial circumstances that would not permit her to afford available forms of medical treatment that could alleviate her pain and suffering, (b) the financial burden on her family, or (c) the coercion by those around her for the purpose of financial gain from insurance.

There is also the less immediate, though by no means unfounded concern that allowing economics to play a role in end-of-life decisions might reduce life to some quantifiable sum of money. Though our society quantifies the value of life through,

211. See, e.g., Leonard M. Fleck, *Just Caring: Assisted Suicide and Health Care Rationing*, 72 U. DET. MERCY L. REV. 873, 889 (1995); Kamisar, *supra* note 9, at 768.

212. Henk Rigter, *Euthanasia in the Netherlands: Distinguishing Facts from Fiction*, HASTINGS CENTER REP.—A SPECIAL SUPPLEMENT, Jan.—Feb. 1989, at 31, 32.

for example, wrongful death awards²¹³ or life insurance policies, these are not generally considered to represent the value of actual life, or to constitute a substitute for the living person.²¹⁴ The reduction of the value of life to a quantifiable figure raises concerns that in the process, life becomes merely another commodity to be bought, sold, or dispensed with as the marketplace—or worse, politics—demands.²¹⁵

Although it may be thought inappropriate or detrimental to permit economic considerations to play a role in an individual's decision to end her life, the same cannot be said of a woman's reasons for choosing to have an abortion. Even the Supreme Court has recognized that it may not be improper for a pregnant woman to decide to obtain an abortion out of a concern that she will be unable to provide for the child. In drawing a parallel between the abortion decision and those decisions regarding the use of contraception, the *Casey* joint opinion pointed out that reasonable people may hold different views about whether the decision to bear or beget a child should properly be influenced by economic concerns, commenting:

As with abortion, reasonable people will have differences of opinions about these matters [the meaning of procreation and human responsibility and respect for it]. One view is

213. *Cf. Green v. Bittner*, 424 A.2d 210, 215 (N.J. 1980) (limiting measure of recovery for wrongful death of high school senior because state statute limited recovery to "pecuniary injuries," which did not include emotional loss).

214. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* 197 (4th ed. 1992). As Judge Posner observes:

Damage awards for pain and suffering, even when apparently generous, may well undercompensate victims seriously crippled by accidents The problem is most acute in a death case. Most people would not exchange their lives for anything less than an infinite sum of money if the exchange were to take place immediately, since they would have so little time in which to enjoy the proceeds of the sale. Yet it cannot be correct that the proper award of damages in a death case is infinite. This would imply that the optimum rate of fatal accidents was zero, or very close to it . . . and it is plain that people are unwilling, individually or collectively, to incur the costs necessary to reduce the rate of fatal accidents so drastically.

Id.

215. This view of what effects assisted suicide may cause is similar in important respects to the feminist anti-pornography argument that perceives the real harm to be that inflicted upon the human being whose life is objectified and reduced to a commodity. *See, e.g.,* ANDREA DWORKIN, *PORNOGRAPHY: MEN POSSESSING WOMEN* 101-28 (1981).

based on such reverence for the wonder of creation that any pregnancy ought to be welcomed and carried to full term no matter how difficult it will be to provide for the child and ensure its well-being. Another is that the inability to provide for the nurture and care of the infant is a cruelty to the child and an anguish to the parent. These are intimate views with infinite variations, and their deep, personal character underlay our decisions in *Griswold*, *Eisenstadt*, and *Carey*. The same concerns are present when the woman confronts the reality that, perhaps despite her attempts to avoid it, she has become pregnant.²¹⁶

Even though society generally deems economic considerations an improper factor to consider in deciding to commit assisted suicide, it may not have the same qualms regarding the abortion decision. The reason for the difference may be attributed to the different values society assigns to potential and post-natal life.

That our society may attach a different value to potential and post-natal life can also be seen in the different ways our society treats abortion and infanticide.²¹⁷ While abortion is constitutionally protected under a variety of circumstances, infanticide remains a crime in every state.²¹⁸ As the Supreme Court noted in *Roe*, at common law, abortion was not an indictable offense before quickening; it did not constitute an act of homicide.²¹⁹ Infanticide, on the other hand, was always an indictable offense at common law, and constituted an act of homicide.²²⁰

One reason offered to explain why we treat abortion and infanticide differently is that we are more able to identify our interests in infants than in fetuses.²²¹ If so, the case for

216. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 853 (1992).

217. Compare MICHAEL TOOLEY, *ABORTION AND INFANTICIDE* (1983) (arguing for the equivalence of the lives of fetuses and infants and suggesting that both abortion and infanticide be permitted) with Strauss, *supra* note 186, at 9 (arguing that "the intuition against infanticide is so strong and widespread that a theory that can 'resolve' the abortion issue only by justifying infanticide has not resolved the abortion issue (or perhaps has supplied a strong argument against allowing abortion)").

218. 40 AM. JUR. 2D *Homicide* § 9 (1964).

219. *Roe v. Wade*, 410 U.S. 113, 132 (1973).

220. 40 AM. JUR. 2D *Homicide* § 9 (1964).

221. See, e.g., Seidman, *supra* note 137, at 63. Some criticize this view by pointing out that, just as we will never again become fetuses, limiting our ability to identify with *them*, neither will we ever again become infants. *Id.*

distinguishing between abortion and assisted suicide is that much stronger because the interests in this context are our own.

3. *Differences from the Viewpoint of the Medical Profession*—In *Roe v. Wade*, the Supreme Court expressly relied on the official position of the medical establishment, which approved abortion under certain circumstances, to bolster its constitutional ruling.²²² Following the *Roe* Court's lead, then, courts should consider the rules governing the conduct of physicians in the practice of medicine. The most powerful statement from the medical establishment in opposition to physician-assisted suicide comes from the American Medical Association's Council on Ethical and Judicial Affairs (AMA), which unflinchingly declares that "physicians must not . . . participate in assisted suicide."²²³ Other medical organizations, as well, have gone on record expressing similar, though less strongly worded, views.²²⁴ If the stance of several major medical organizations, including the AMA, influenced the Supreme Court in *Roe* to recognize a woman's right to terminate a pregnancy,²²⁵ the stance of the AMA and other medical organizations likewise should lead courts to reject a right to assisted suicide.

222. *Roe*, 410 U.S. at 141–47 (noting the positions of the American Medical Association and the American Public Health Association).

223. See THE NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, *supra* note 208, at 108–09 & n.115 (discussing the AMA's position and citing the official language of the AMA's position on euthanasia and assisted suicide). Just this past June, the AMA's 430-member House of Delegates, the policy-making body of the organization (with near unanimity) "reaffirmed its adamant opposition to physician-assisted suicide." *AMA Soundly Reaffirms Policy on Opposing Physician-Assisted Suicide*, U.S. NEWSWIRE, June 25, 1996, available in 1996 WL 5622248. Nancy W. Dickey, M.D., chair of the American Medical Association's Board of Trustees, stated:

'To allow or force physicians to participate in actively ending the lives of Patients would so dramatically and fundamentally change the entire patient/physician relationship that it would undermine the principles we, as a society, hold most dear. We must never lose sight of the caveat that physicians are healers, and where we cannot heal, our role is to comfort.'

Id. This is perhaps as momentous a set-back for assisted-suicide proponents as recent federal court developments have been victories. One doubts that the federal courts will trump the judgment of the AMA with a constitutional ace.

224. See *id.* at 108–09 & nn.111–15 (discussing the views of the American College of Physicians, the American Geriatrics Society, the Committee on Bioethical Issues of the Medical Society of the State of New York, the National Hospice Organization, and the American Nurses Association).

225. See *supra* note 222.

It is sometimes said that doctors must participate in assisted suicide because they can prescribe medication and advise a patient on what will constitute a lethal dose. As a result, so the argument goes, doctors can help guarantee against the possibility that an individual will not succeed in ending her life by suicide.

This argument misses its mark. Most would-be suicides are quite capable of concocting or consuming a death-inducing potion, or of otherwise ending their lives without a doctor's assistance. Undoubtedly, the assistance of a spouse, pharmacist, close friend, or enemy, is as likely as a physician's script and advice to result in a "safe delivery from life."²²⁶

Indeed, the argument for assisted suicide rests on the safeguards that inhere in the very act itself: It is the would-be suicide, and not some third party, that undertakes the last, death-causing act herself.²²⁷ But if a doctor's involvement in assisted suicide is limited to providing medication and instructions on how to take it in lethal doses, there can be no promise that a patient will accomplish the task of ending her life. Short of guiding a patient's hand during the course of a suicide, physicians can do little to guarantee against the possibility of a failed suicide attempt. If avoidance of this sort of mistake is what assisted-suicide advocates mean to prevent, why should the patient's right be limited to assisted suicide? Surely, fewer botched suicides would take place if physicians were permitted to take the next, and more reliable, step of administering the deadly dose themselves.

In marked contrast, a pregnant woman who attempts to procure an abortion without a physician's assistance could cause herself serious injury in the process, and still might not succeed in completing the act. Thus, a physician is required to ensure that a pregnant woman's decision is safely executed.²²⁸ Physician-assisted suicide and abortion differ in the need for a physician to participate in the act.²²⁹

226. See Callahan & White, *supra* note 209 (quoting Herbert Hendin, *Selling Death and Dignity*, HASTINGS CENTER REP., May-June 1995, at 19).

227. See Kamisar, *supra* note 3.

228. A physician's assistance in dispensing and supervising the consumption of abortifacients, such as RU 486, is more than a simple convenience. As David M. Smolin writes, "RU 486 technology requires several visits to a medical facility and extensive medical supervision." David M. Smolin, *Cultural and Technological Obstacles to the Mainstreaming of Abortion*, 13 ST. LOUIS U. PUB. L. REV. 261, 279 (1993). Moreover, Smolin continues, RU 486 "in some ways requires more medical care and time than that required for early surgical abortion." *Id.*

229. For a more comprehensive study of the role physicians should (or should not) play in assisted suicide, see *Ninth Circuit Ignores Medical Experience at Our Peril*, [July-Aug. 1996] II BioLaw (Univ. Pub. Am), at S159.

This Part has argued that even if the Supreme Court's recognition of the abortion right were broad enough to include a right to assisted suicide as a matter of logic or principle, there are important legal and cultural distinctions between the two practices. It has pointed out that these distinctions provide courts ample grounds on which to maintain the constitutional status quo in which a woman's right to choose abortion is constitutionally protected though a right to assisted suicide is not. The implicit premise has been that not only can courts distinguish between abortion and assisted suicide, but also that they should do just that.

The Supreme Court's opinion in *Hardwick* and the joint opinion in *Casey* underscored the point that concerns over the institutional legitimacy of the Court properly play a role in constitutional adjudication. In *Hardwick*, the Court emphasized that the Court's interest in preserving its institutional legitimacy cut in favor of resisting any expansion of the category of unenumerated constitutional rights, because the right at issue in the case had no longstanding history or tradition in our country and bore no resemblance to the category of rights previously recognized as protected by the Due Process Clause. In contrast, the *Casey* joint opinion suggested that concerns over institutional legitimacy counseled in favor of continuing to recognize a woman's right to abortion, lest the Court be perceived to be succumbing to political pressure to overturn *Roe*. The Supreme Court has made clear in these and other cases that courts should take care to tread with extreme caution in the shadows of the Constitution's unwritten text. Thus, courts should resist the temptation to ignore the legal and cultural distinctions between abortion and assisted suicide detailed above, and should rule squarely that the right to assisted suicide does not flow flawlessly as a constitutional matter from the Supreme Court's recognition that pregnant women have a Fourteenth Amendment "liberty interest," under certain circumstances, to terminate an unwanted pregnancy. And courts should hold that no one—not even the terminally ill—has a Fourteenth Amendment "liberty interest" in committing assisted suicide.

CONCLUSION

When courts decide constitutional cases of major social importance involving enumerated, as well as unenumerated rights, they do so (or should) based on the best available evidence of what the text, the structure, and the principles of the Constitution require. There are very few cases of major social importance, however, in which the text, the structure, and the principles of the Constitution speak with the precision of an architect's blueprint. The proper resolution of most constitutional cases is not patently obvious; the easy cases are not usually those courts are called upon to decide.

To state that a right is constitutionally protected, for the most part, has lost its punch in our rights-obsessed culture. Still, when the Supreme Court exercises its "authority finally to speak of [the Constitution],"²³⁰ it still must do so in principles "capable of unremitting application,"²³¹ and the lines it draws must be clear, unequivocal, and defensible. Because the Constitution is "a covenant running from the first generation of Americans to us and then to future generations,"²³² the Supreme Court's pronouncements regarding its meaning must be sure-footed enough to withstand the test of time²³³—especially when the Court makes constitutional

230. ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 32 (1986).

231. *Id.* at 58. As Bickel explains:

If, in order to be workable in our society as it actually exists, a rule of action must be modulated by pragmatic compromises, then that rule is not a principle; it is no more than a device of expediency. And it is for legislatures, not courts, to impose what are merely solutions of expediency. Courts must act on true principles, capable of unremitting application. When they cannot find such a principle, they are bound to declare the legislative choice valid. No other course is open to them.

Id.

232. *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 901 (1992).

233. As Professor Ely wrote:

To the extent "progress" is to concern the Justices at all, it should be defined not in terms of what they would like it to be but rather in terms of their best estimate of what over time the American people will make it—that is, they should seek "durable" decisions.

Ely, *supra* note 174, at 946 (footnote omitted).

judgments in the absence of a clear constitutional mandate, such as when it relies on malleable concepts like liberty or substantive due process.²³⁴ The Supreme Court, which lacks power to enforce its holdings, must ensure that the Constitution functions as a "coherent succession."²³⁵ It ought, therefore, to resolve constitutional cases "with an ear to the promptings of the past and an eye strained to a vision of the future much more than with close regard to the present."²³⁶ In short, it is part of the Court's obligation to deduce, and then announce, constitutional rules and rights, particularly new ones, which, because they are based on principled justifications that are "beyond dispute," will endure over the years. As the Court explained in *Casey*:

The underlying substance of [the Court's] legitimacy is of course the warrant for the Court's decisions in the Constitution and the lesser sources of legal principle on which the Court draws. That substance is expressed in the Court's opinion, and our contemporary understanding is such that a decision without principled justification would be no judicial act at all. But even when justification is furnished by apposite legal principle, something more is required. Because not every conscientious claim of principled justification will be accepted as such, the justification claimed must be beyond dispute. The Court must take care to speak and act in ways that allow people to accept its decision on the terms the Court claims for them, as grounded truly in principle, not as compromises with social and political pressures having, as such, no bearing on the principle choices that the Court is obliged to make.²³⁷

The Court's track record of announcing durable decisions in the area of substantive due process has been marred by missteps and reversal. In the early part of the century, for example, the Supreme Court declared in *Lochner v. New York*²³⁸ and its progeny²³⁹ that the Constitution imposed substantive limitations on legislative decision making concerning individuals'

234. See ALEXANDER M. BICKEL, *THE MORALITY OF CONSENT* 25-30 (1975).

235. *Casey*, 505 U.S. at 901.

236. BICKEL, *supra* note 234, at 26.

237. *Casey*, 505 U.S. at 865-66.

238. 198 U.S. 45 (1905).

239. *E.g.*, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), *overruled by West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

freedom of contract.²⁴⁰ This view had a relatively short life, lasting only about thirty years.²⁴¹

Reflecting on the *Lochner* era, several Supreme Court Justices recently remarked that by the time the Court reduced its scope in *West Coast Hotel Company v. Parrish*,²⁴² *Lochner*'s economic theories were widely perceived as unmistakably flawed.²⁴³ The Great Depression had demonstrated the error of relying on the "capacity of a relatively unregulated market to satisfy minimal levels of human welfare."²⁴⁴ Commenting on the propriety of rejecting *Lochner*'s theory, these Justices explained that

the facts upon which [*Lochner*] had premised a constitutional resolution of social controversy had proven to be untrue, and history's demonstration of their untruth not only justified but required the new choice of constitutional principle that *West Coast Hotel* announced. Of course, it was true that the Court lost something by its misperception, or its lack of prescience, and the Courtpacking crisis only magnified the loss; but the clear demonstration that the facts of economic life were different from those previously assumed warranted the repudiation of the old law.²⁴⁵

240. *Id.* at 545 (declaring that it was settled that the due process clause of the Fifth Amendment protected one's right "to contract about one's affairs").

241. *Adkins* was overturned by *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), ending the *Lochner* era that began in 1905.

242. 300 U.S. 379 (1937).

243. See *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 861-62 (1992).

244. *Id.*

245. *Casey*, 505 U.S. at 862. That the Supreme Court so candidly acknowledged that its constitutional adjudication involves a dose of prescience, although somewhat surprising, should not come as a revelation. Legal commentators have long maintained that the Court's constitutional judgments involve such a calculation. Consider what Professor Bickel had to say on the matter:

We tend to think of the Court as deciding, but more often than not it merely ratifies or, what is even less, does *not* disapprove, or less still, decides not to decide. And even when it does take it upon itself to strike a balance of values, it does so with an ear to the promptings of the past and an eye strained to a vision of the future much more than with close regard to the present.

This Article has argued that there are strong reasons to think that the theory that buttresses a woman's right to choose an abortion, the theory of personal autonomy or bodily integrity, is flawed,²⁴⁶ but the Supreme Court has never squarely held so.²⁴⁷ Still, while affirming *Roe's* "essential holding," the *Casey* joint opinion acknowledged that the criticisms of *Roe* were not wholly unfounded.²⁴⁸ Responding to the sharp edge of such criticisms, the joint opinion explained that the abortion right could not be weeded out of the Constitution simply because *Roe* drew "a specific rule from what in the Constitution is but a general standard."²⁴⁹ As the authors of the joint opinion concluded:

[T]he urgent claims of the woman to retain the ultimate control over her destiny and her body, claims implicit in the meaning of liberty, require us to perform that function [of drawing a specific rule, i.e., the right to abortion, from a general constitutional standard]. Liberty must not be extinguished for want of a line that is clear.²⁵⁰

One should not mistake the powerful elegance of the joint opinion's remarks as embracing a mode of constitutional adjudication that would permit the Court to draw specific constitutional rules from general constitutional standards while disregarding whether such rules would likely endure.²⁵¹ In fact, in reining in the abortion right as it did, the authors of the *Casey* joint opinion sought to end the national debate over the constitutional right to abortion, and to mold a constitutional right to abortion that would last for generations.

It is one thing to hold, as the *Casey* joint opinion did, that "[l]iberty must not be extinguished for want of a line that is clear,"²⁵² but it is another matter entirely to conclude that the Court should announce a previously unknown aspect of liberty, such as the right to assisted suicide, in the absence of a

246. See *supra* Part I (explaining that the theories of privacy and liberty are flawed).

247. See, e.g., *Casey*, 505 U.S. at 846.

248. *Id.* at 869.

249. *Id.*

250. *Id.*

251. For a wonderful discussion of rules and standards, see generally Kathleen M. Sullivan, *The Supreme Court, 1991 Term—Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22 (1992).

252. *Casey*, 505 U.S. at 869.

clear line.²⁵³ And it must be noted, once again, that there are no clear lines where assisted suicide is concerned.²⁵⁴

To extrude even an extremely narrow, circumscribable right to physician-assisted suicide for the terminally ill from the Fourteenth Amendment's promise of liberty is no small undertaking.²⁵⁵ Proponents of assisted suicide have not crafted a constitutional theory that approaches such a high standard. They have not because they cannot—and they know it. Instead, assisted suicide advocates maintain that the common law and constitutional traditions of bodily integrity already have created a rule easily applied to the case of the terminally ill who wish to “hasten inevitable death.”²⁵⁶ They are mistaken.²⁵⁷ As the continued ferocity of the abortion debate well demonstrates, even if all Americans agreed that individuals have a right to liberty or bodily integrity, they would seriously disagree about what that right would entail in individual cases.

Admittedly, the argument extending the logic of the Court's abortion jurisprudence to support a constitutional right to assisted suicide has some appeal. Taken to its extreme, though, the logic of the Court's abortion jurisprudence would support numerous other rights, including a right to active voluntary euthanasia.²⁵⁸ It is important to underscore that the logic of *Roe* becomes more controversial and disputed when applied to situations substantially different from the abortion decision. Those who would take the Constitution and our society beyond *Roe* to a right to assisted suicide must establish beyond doubt that the reasons for recognizing the right and the right itself will prove durable.²⁵⁹

This Article has devoted considerable attention to the ways in which courts can distinguish between the right to abortion

253. The Supreme Court has intimated that when a clear constitutional line cannot be found, *Bowers v. Hardwick*, 478 U.S. 186, 194–95 (1986), or when found, cannot be sustained, *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring), it may be error to hold that the general constitutional standard of liberty is implicated in a concrete way.

254. See *supra* Part I.

255. As Daniel Callahan and Margot White have observed, creating a system permitting a limited exercise of physician-assisted suicide under precise, clinical circumstances verges on the impossible. Callahan & White, *supra* note 209, at 1.

256. See *supra* Part II.A. See also Sedler, *Hastening Inevitable Death*, *supra* note 2, at 20.

257. See *supra* Part II.

258. See *supra* Part II.A.

259. See Ely, *supra* note 174.

and the right to assisted suicide,²⁶⁰ and in light of the preceding observations, it again urges that courts *should* distinguish between the two. Not only is this result directed by the Supreme Court's recent substantive due process jurisprudence,²⁶¹ but it is also the wisest course for courts to follow as a matter of constitutional rule making. Affirming a distinction between abortion and assisted suicide may be the last, best chance for courts to avoid tacking into the center of a political whirlwind that would make the one occasioned by *Roe* look like a blown kiss.

260. *See supra* Parts I and III.

261. *See supra* Part I.

SOME OBSERVATIONS ON RECENT CASES

This past March, two cases that had been wending their way through the judicial pipeline burst forth with a force that was impossible to ignore. In separate rulings, two federal courts of appeals held prohibitions on the commission of physician-assisted suicide unconstitutional. The Ninth Circuit, sitting en banc in *Compassion in Dying v. Washington*²⁶² was the first to announce its decision, but the Second Circuit in *Quill v. Vacco*²⁶³ quickly followed suit, though on a different constitutional theory. Then, on October 1, 1996, (just as this Article was going to press) the Supreme Court granted certiorari in both cases.

The two appellate decisions constitute a marked shift in the legal battle over the so-called right to die. Although at the moment, the balance may seem to favor proponents of such a right, I continue to believe that this particular balance will not endure.

Compassion in Dying v. Washington

The Ninth Circuit's opinion in *Compassion in Dying* blazed a brand new trail. Not convinced that the Fourteenth Amendment could protect only the right of a terminally ill individual to commit assisted suicide, the Ninth Circuit explained that such a narrow right could not exist in the absence of a broader "liberty interest in controlling the time and manner of one's death" (a liberty interest not exclusively limited to the terminally ill).²⁶⁴ Undeterred by the expansiveness of the right, or the lack of support for such a right in the text or structure of the Constitution, the Ninth Circuit boldly declared that it is protected by the Due Process Clause of the Fourteenth Amendment.²⁶⁵

The Ninth Circuit based its unprecedented ruling in large measure on the Supreme Court's abortion jurisprudence. Noting past abortion decisions, including *Roe* and *Casey*,²⁶⁶ the

262. 79 F.3d 790 (9th Cir. 1996) (en banc), cert. granted, *Washington v. Glucksberg*, 65 U.S.L.W. 3085 (U.S. Oct. 1, 1996) (No. 96-110).

263. 80 F.3d 716 (2d Cir. 1996), cert. granted, *Vacco v. Quill*, 64 U.S.L.W. 3795 (U.S. Oct. 1, 1996) (No. 95-1858).

264. 79 F.3d at 816.

265. See *id.*

266. See *id.* at 801.

court invoked the "compelling similarities"²⁶⁷ between abortion and assisted suicide. The court noted that the two practices resemble one another in that "the relative strength of the competing interests [in each case] changes as physical, medical, or related circumstances vary," and "[e]qually important," that "both types of cases raise issues of life and death, and both arouse similar religious and moral concerns."²⁶⁸ According to the court even "[h]istorical evidence" demonstrates the similarities between abortion and assisted suicide: "Deprived of the right to medical assistance [historically], many pregnant women and terminally ill adults ultimately took matters into their own hands, often with tragic consequences."²⁶⁹ Thus, the court reasons that "[i]n deciding right-to-die cases, we are guided by the [Supreme] Court's approach to the abortion cases."²⁷⁰

The Ninth Circuit adopts the analogy between abortion and the "right to die" without any mention of the distinctions between the practices.²⁷¹ When a court sits to render a sensitive constitutional judgment in a case that it believes "may touch more people more profoundly than any other issue the courts will face in the foreseeable future,"²⁷² it seems reasonable to expect that it would provide a thorough explanation of the rationale for its decision. At a minimum, such a discussion ought to include at least passing references to the differences between the two practices.

*"The Most Intimate and Personal Choices:"
Of Casey and Hardwick*

One of the disturbing aspects of the Ninth Circuit's opinion is its reading of the Supreme Court's opinion in *Casey*. Early in its opinion, the court writes:

Although *Casey* was influenced by the doctrine of *stare decisis*, the fundamental message of that case lies in its statements regarding the type of issue that confronts us

267. *Id.* at 800.

268. *Id.* at 800-01.

269. *Id.* at 801.

270. *Id.*

271. See discussion *supra* Part II.

272. *Compassion in Dying*, 79 F.3d at 793.

here: "These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment."²⁷³

To reduce *Casey*'s detailed and deliberate treatment of stare decisis to a mere "influence" on the "fundamental message" of the case, is to misunderstand *Casey*. Only by dismissing the impact of stare decisis on *Casey* could the court use that case as a springboard for the further expansion of substantive due process rights.

The "personal choices" language from *Casey* provides more than just a leitmotif for the court's discovery of a liberty interest in determining the time and manner of one's death. In a passage as noteworthy for its chilling, if biased, rhetoric as for its substance, the court states:

Like the decision of whether or not to have an abortion, the decision how and when to die is one of "the most intimate and personal choices a person may make in a lifetime," a choice "central to personal dignity and autonomy." A competent terminally ill adult, having lived nearly the full measure of his life, has a strong liberty interest in choosing a dignified and humane death rather than being reduced at the end of his existence to a childlike state of helplessness, diapered, sedated, incontinent. How a person dies not only determines the nature of the final period of his existence, but in many cases, the enduring memories held by those who love him.²⁷⁴

Not content to leave off there, the court continues:

Prohibiting a terminally ill patient from hastening his death may have an even more profound impact on that person's life than forcing a woman to carry a pregnancy to term. . . . For . . . patients, wracked by pain and deprived of all pleasure, a state-enforced prohibition on hastening their deaths condemns them to unrelieved misery or torture. Surely, a person's decision whether to endure or avoid such an existence constitutes one of the most, if not

273. *Id.* at 801 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992)).

274. *Id.* at 813-14.

the most, "intimate and personal choices a person may make in a life-time," a choice that is "central to personal dignity and autonomy." Surely, such a decision implicates a most vital liberty interest.²⁷⁵

Within the span of a few paragraphs, the Ninth Circuit converts the "personal choices" language from *Casey* into what amounts to a talisman for determining which decisions are protected by the Due Process Clause. The court incants that "[t]here is no litmus test for courts to apply when deciding whether or not a liberty interest exists under the Due Process Clause."²⁷⁶ But the court's lavish reading of "personal choices" checks one's willingness to believe that the Ninth Circuit, at least, has no substantive due process "litmus test" to apply.

Not only does the Ninth Circuit opinion overplay the "personal choices" language from *Casey* by underplaying *Casey's* discussion of *stare decisis*, it also shreds the fabric of the Supreme Court's substantive due process quilt. In this regard, notice how the court questions the force of *Hardwick*.

The Ninth Circuit opens with two observations unbecoming of a careful exposition of constitutional doctrine. The court notes that Justice Powell, who provided the fifth vote in the 5-4 *Hardwick* decision, "subsequently announced on several occasions that he regretted that vote,"²⁷⁷ and that "[u]pon re-reading the opinion a few months after it was issued, he reportedly remarked, 'I thought the dissent had the better of the argument.'²⁷⁸ The court then states that *Hardwick* "has been widely criticized by commentators."²⁷⁹ If these statements are arguments supporting the Ninth Circuit's decision not to follow *Hardwick*, they do not make sense.

A bit more persuasively, the court strikes at *Hardwick* a second time. After confirming that the Supreme Court's earlier privacy cases all "involve decisions that are highly personal and intimate, as well as of great importance to the individual," the court adds in a footnote that *Hardwick* "would appear to be aberrant and to turn on the specific sexual acts at issue." Entirely without explanation, the opinion concludes:

We do not believe that [*Hardwick's*] holding controls the outcome here or is in any way inconsistent with our

275. *Id.* at 814 (citation omitted).

276. *Id.* at 802.

277. *Id.* at 803 n.16.

278. *Id.*

279. *Id.*

conclusion that there is a liberty interest in dying peacefully and with dignity. We also note, without surprise, that in the decade since [*Hardwick*] was handed down the Court has never cited its central holding approvingly.²⁸⁰

Now, it may be true enough that the Supreme Court has not cited *Hardwick's* central holding approvingly in the decade since that decision was handed down—but *neither has the Supreme Court cited Hardwick's central holding disapprovingly in the past decade*. Even if, as the Ninth Circuit's opinion implies, the Supreme Court were in the process of allowing *Hardwick* to wither slowly on the vine (a withering I would not be at all sorry to witness) until the High Court expressly overrules that decision, it continues to bind lower courts.²⁸¹ Without more, the court's skeletal conclusion that *Hardwick* does not control the outcome in *Compassion in Dying*, and is not "in any way inconsistent with" that decision is unpersuasive.

The Ninth Circuit's opinion maintains that the Supreme Court's abortion jurisprudence supports its conclusion that individuals have a constitutionally protected liberty interest in "determining the time and manner" of their deaths.²⁸² This contention is not true, however, if one faithfully adheres to prevailing Supreme Court doctrine and precedent.

State's Interest Analysis as Policy Judgment

Having found a liberty interest in choosing the time and manner of one's death, the Ninth Circuit undertakes to balance this liberty against the state's interests, ultimately ruling that the terminally ill have a right to physician-assisted suicide. Under either the balancing test that the Ninth Circuit employs, or the "undue burden" standard it should have employed, the court ought to have reasoned that the state's compelling interest in preserving and protecting human life permits a state to prohibit assisted suicide.

280. *Id.* at 813 n.65.

281. *Quill v. Vacco*, 80 F.3d 716, 725 (2d Cir. 1996) (noting that "[o]ur position in the judicial hierarchy constrains us to be even more reluctant than the Court to undertake an expansive approach" while broadening the concept of substantive due process to include a right to physician-assisted suicide).

282. *Compassion in Dying*, 79 F.3d at 812-14.

The Ninth Circuit commences its analysis of the state's interest in preserving and protecting human life with a concession: "[T]he state's interest in preserving life may be unqualified, and may be asserted regardless of the quality of the life or lives at issue. . . ." ²⁸³ But the opinion quickly adds a peculiar caveat: "that interest is not always controlling." ²⁸⁴ The strength of the state's interest in preserving life, the court explains, is not "of the same strength in each case"; ²⁸⁵ rather, its strength depends "on relevant circumstances, including the medical condition and the wishes of the person whose life is at stake." ²⁸⁶ The court writes:

[E]ven though the protection of life is one of the state's most important functions, the state's interest is dramatically diminished if the person it seeks to protect is terminally ill or permanently comatose and has expressed a wish that he be permitted to die without further medical treatment (or if a duly appointed representative has done so on his behalf). When patients are no longer able to pursue liberty or happiness and do not wish to pursue life, the state's interest in forcing them to remain alive is clearly less compelling. Thus, while the state may still seek to prolong the lives of terminally ill or comatose patients, or more likely to enact regulations that will safeguard the manner in which decisions to hasten death are made, the strength of the state's interest is substantially reduced in such circumstances. ²⁸⁷

Why is the state's interest in protecting and preserving human life "diminished if the person it seeks to protect is *permanently ill* or permanently comatose and has expressed a wish that he be permitted to die without further medical treatment"? ²⁸⁸ Why, if "the state may still seek to prolong the lives of terminally ill or comatose patients," ²⁸⁹ may it not do so through an absolute ban on assisted suicide? Why, if a state may regulate assisted suicide, may it not ban the practice

283. *Id.* at 817.

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.* at 820.

288. *Id.*

289. *Id.*

altogether? After all, any regulation will have the unavoidable consequence of keeping some unlucky terminally or "permanently" ill or comatose patients alive longer than they would have wished.

There can be no doubt that the Ninth Circuit's judgment about the relative strength of the state's interest in preserving and protecting human life in individual cases is, at bottom, one of policy. Surely *Roe's* determination that the state's interest in preserving or protecting human life waxes during the course of a pregnancy was also a policy judgment. But if *Roe* rejected the business of making such policy judgments once the fetus was capable of existence outside of the womb,²⁹⁰ what basis is there for the Ninth Circuit to maintain that an individual's actual existence is not "existence enough" for a state's interest in her life to be compelling? The opinion does not say.

As surely as *Roe* teaches that the state's interest in the potential life of a fetus grows as the fetus approaches term, it teaches also that the state's interest in the preservation of a woman's health grows.²⁹¹ Indeed, *Roe* held that after the first trimester of pregnancy, "a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health."²⁹² Following the logic of this holding, it stands to reason that if a state may make the policy judgment to regulate, or even prohibit altogether, an abortion procedure that would pose a grave risk to a woman's life or health, it may also make the policy judgment to regulate, or prohibit altogether, a procedure such as assisted suicide, which is both intended and designed to result in death.²⁹³

290. *Roe v. Wade*, 410 U.S. 113, 163-64 (1973) (holding that the state's interest in the potential life of a fetus becomes compelling when the fetus reaches viability).

291. *Roe*, 410 U.S. at 150, 162-63 (recognizing the state's interest in the health and safety of the pregnant woman and the state's interest in the potential life of the fetus and explaining when the state's interest in the health of the mother becomes "compelling"). The *Casey* joint opinion did not disturb *Roe's* holding that the state has "important and legitimate interest[s] in preserving and protecting the health of the pregnant woman [and] in protecting the potentiality of human life." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 875-76 (1992) (quoting *Roe*, 410 U.S. at 162). While rejecting *Roe's* trimester framework, *id.* at 876, 878, the *Casey* joint opinion expressly affirmed that "[a]s with any medical procedure, the State may enact regulations to further the health or safety of a woman seeking an abortion," *id.* at 878, but made clear that "[u]nnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." *Id.*

292. *Roe*, 410 U.S. at 163.

293. See Spindelman, *supra* note 99.

Quill v. Vacco

Following quickly on the heels of *Compassion in Dying*, a three-judge panel of the Second Circuit ruled 2-1 in *Quill v. Vacco* that New York state's prohibition on assisted suicide violated the Equal Protection Clause.²⁹⁴ The opinion in the case rejected a substantive due process rationale for the right claimed in the case.²⁹⁵

In essence, the Second Circuit's equal protection theory rests upon two rather controversial findings. First, the court found that all competent persons who are in the final stages of illness and wish to hasten their deaths are similarly situated,²⁹⁶ whether they wish "to hasten their deaths" by refusing lifesaving medical treatment, or by "self-administering" physician-prescribed medication intended to induce death.²⁹⁷ Second, the *Quill* court found that the state's law banning assisted suicide lacked any rational relationship to a legitimate governmental interest that would justify the unequal treatment of the "similarly situated" terminally ill.²⁹⁸

"Similar Situations": The Cruzan Wrinkle.

The Second Circuit's finding that all terminally ill individuals in the final stages of terminal illness are "similarly situated" when it comes to "hastening their deaths" flows from the court's unwillingness to accept that there is any constitutionally cognizable difference between refusing life-sustaining medical treatment and committing physician-assisted suicide.²⁹⁹ To the *Quill* court, this looks like a simple syllogism. Because both (a) the decision to refuse lifesaving medical treatment and (b) the decision to commit physician-assisted suicide amount to (c) the "conscious decision" to hasten one's death, those terminally ill individuals who

294. *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir. 1996).

295. *Id.* at 723-25.

296. *Id.* at 727, 729.

297. *Id.* at 729.

298. *Id.* at 727, 729-31.

299. *Id.* at 729-30.

would make (a) the decision to refuse lifesaving medical treatment must be "similarly situated" to those terminally ill individuals who would make (b) the decision to commit physician-assisted suicide.

This is the same syllogism, of course, to which the *Compassion in Dying* court adverts when arguing that *Cruzan* recognized a broad right to hasten inevitable death, including death by assisted suicide.³⁰⁰ For the same reasons that it is not persuasive there, it is not persuasive in the equal protection context.³⁰¹

Does the State Have Even a Legitimate Interest in the Lives of the Terminally Ill?

Assuming arguendo that all those in the final stages of a terminal illness (whatever that might mean in constitutional terms) are similarly situated, there still remains the Second Circuit's finding that New York's law against assisted suicide has no rational relationship to a legitimate state interest.³⁰² The Second Circuit takes the position that the state's interest in preserving and protecting the lives of the terminally ill is not legitimate. The court writes: "But what interest can the state possibly have in requiring the prolongation of a life that is all but ended? Surely, the state's interest lessens as the potential for life diminishes."³⁰³ Terminally ill people are alive, and are not individuals lacking the "potential for life."³⁰⁴ *Compassion in Dying* teaches that the state has no "compelling" interest in the lives of the terminally ill;³⁰⁵ *Quill* goes even further, holding that the state may even lack a "legitimate" interest in such lives.

300. See *Compassion in Dying v. Washington*, 79 F.3d 790, 814-16 (9th Cir. 1996).

301. Note the irony of the Second Circuit's reliance upon Justice Scalia's separate concurrence in *Cruzan* as support for this proposition. It is true that Justice Scalia thought the "dichotomy between action and inaction" unpersuasive. But Justice Scalia would have left *all* such judgments about which forms of suicide to permit and which forms to prohibit within the legislative bailiwick.

302. *Quill*, 80 F.3d at 727, 729-31.

303. *Id.* at 729 (emphasis added).

304. See also *supra* text accompanying notes 165-72 (discussing Sedler's comment that "the terminally ill have 'no life left to preserve.'").

305. *Compassion in Dying v. Washington*, 79 F.3d 790 (9th Cir. 1996).

*Do State Laws Banning Assisted Suicide
Draw a Valid Line?*

The Second Circuit appears to argue in the alternative that, if the state's interest in the lives of the terminally ill *is* legitimate, this interest bears no rational relationship to the state's ban on assisted suicide:

[W]hat business is it of the state to require the continuation of agony when the result is imminent and inevitable? What concern prompts the state to interfere with a mentally competent patient's "right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life," when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state in preserving life compels the answer to these questions: "None."³⁰⁶

Ordinarily, the rational relationship test presents no inordinately high threshold.³⁰⁷ Although there have been a few Supreme Court cases in which the rational relationship test has showed its teeth,³⁰⁸ the numerous reasons commentators have given in defense of bans against assisted suicide³⁰⁹ would have been enough to convince the Second Circuit that New York's law easily met the rational relationship test, as the Supreme Court will likely agree.

If Not This Line, What?

Other commentators will no doubt seize upon the most basic flaw in the Second Circuit's reasoning: the court's equal

306. *Quill*, 80 F.3d at 730 (citations omitted).

307. See RONALD D. ROTUNDA & JOHN E. NOWAK, 3 TREATISE ON CONSTITUTIONAL LAW 23 (1992) ("A majority of the justices will uphold governmental classifications under this standard unless no conceivable set of facts could establish a rational relationship between the classification and an arguably legitimate end of government."); *id.* at 27 ("Even though the classification may seem unreasonable or unfair, a majority of the justices will not strike the law so long as it is conceivable that the classification might promote a legitimate governmental interest.").

308. See, e.g., *Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985); *Romer v. Evans*, 116 S. Ct. 1620 (1996).

309. See *supra* note 223.

protection theory proves too much.³¹⁰ If a state, according to the Second Circuit, cannot draw a constitutionally permissible line between refusal of lifesaving medical treatment and physician-assisted suicide, it would seem to follow that a state may not draw a distinction between assisted suicide and active voluntary euthanasia.

And if a state may not treat the terminally ill who would choose to refuse lifesaving medical treatment any differently from the terminally ill who would choose to commit physician-assisted suicide, what is to be said of those who now have the right to refuse lifesaving medical treatment? Under *Quill*, do they also have a right to physician-assisted suicide? To active voluntary euthanasia? If the Equal Protection Clause does not countenance a line between action and inaction in this context, would that clause countenance a line between state inaction on the one hand and state action on the other?³¹¹

Some proponents of assisted suicide, no doubt, would dismiss such assertions as scare tactics. If, however, these individuals insist that principle demands that the Constitution recognize that it is the end and not the means that defines what is at stake in the current court challenges to state laws against assisted suicide, then principle also demands that the Constitution erase the lines between state inaction and state action. Although some might consider this an avenue of constitutional jurisprudence worth pursuing, "[t]his would be too brave a new world for me and, I submit, for our Constitution."³¹²

310. See, e.g., Alexander M. Capron, *Easing the Passing*, HASTINGS CENTER REP., July-Aug. 1994, at 26.

311. Professor Louis Michael Seidman, in the course of analyzing Justice Scalia's concurring opinion in *Cruzan*, has ventured to answer this last question in the negative.

Just as there is no difference between an individual who kills herself and an individual who allows herself to die, so too, it would seem, there is no distinction between passive state acquiescence in the suicide of one of its citizens and active state assistance.

Seidman, *supra* note 137, at 68.

312. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 313 n.3 (1990) (Brennan, J., dissenting).