October 2017

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PHYSICIAN ASSISTED SUICIDE
A CONSTITUTIONAL RIGHT?

KATHLEEN McGOWAN

No man is an Iland, intire of it selfe; every man is a pece of the Continent,
a part of the maine;
... any mans death diminishes me, because I am involved in Mankinde ...

Modern medical technology allows Americans to live longer, healthier lives. Cures for diseases once considered terminal are now commonplace. Many other lives are extended by means of medicine, operations, organ transplants, and highly technical machines. At the same time, however, these advances present moral, ethical, and legal dilemmas where prolonging life seems only to increase a person’s pain and lengthen the dying process. When infirmities are incurable and the person can be maintained solely in a debilitated condition, he may face a choice of whether to prolong the dying process. The question thus arises

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1 J.D. Candidate, 1998, St. John’s University School of Law. Dedicated to my son, John, who taught me the value of life.
2 John Donne, Devotions XVII, in THE COMPLETE POETRY AND SELECTED PROSE OF JOHN DONNE & THE COMPLETE POETRY OF WILLIAM BLAKE 331 (John Hayward, ed., Random House (1941)).
4 Id. at 1523.
5 Id. at 1522 n.1
7 “[M]ost people cannot accept and plan for the fact of their own death.” JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 67 (5th ed.
whether a competent individual has rights and options concerning decisions affecting his medical treatment and ultimately his death.\textsuperscript{7} The attitudes of family, religion, and society influence that decision-making process and our laws.\textsuperscript{8}

Recently, the Supreme Court of the United States granted certiorari and heard oral arguments\textsuperscript{9} in two cases involving the rights of terminally ill\textsuperscript{10} competent adults\textsuperscript{11} who wish to end their

\textsuperscript{7} A patient has the right to be informed about his medical condition and his treatment options by his doctor. The patient can give his consent or refuse a proposed treatment. Brief of Amici Curiae for the American Medical Association, The American Nurses Association, and The American Psychiatric Association, et al. in Support of Petitioners at *3, Washington v. Glucksberg, No. 96-110 (S.Ct. filed Nov. 12, 1996), 1996 WL 656263 [hereinafter AMA Amicus Brief] (citing AMA Council on Ethical and Judicial Affairs, CODE OF MEDICAL ETHICS). The New York State Task Force on Life and the Law defines the distinction between assisted suicide and euthanasia as follows:

\begin{quote}
Assisted suicide occurs when one person assists another to take his or her own life, either by providing the means to commit suicide or by taking other necessary steps. Euthanasia entails direct measures, such as a lethal injection, by one person to end another person’s life. Euthanasia may be voluntary, performed with the explicit consent of a competent adult, or it can be performed without consent, in which case it is usually called “nonvoluntary” euthanasia. Euthanasia provided over the patient’s objection is generally referred to as “involuntary” euthanasia. Both assisted suicide and euthanasia are distinct from the withdrawal or withholding of life-sustaining treatment.
\end{quote}

\textsc{New York State Task Force on Life and the Law, When Death Is Sought: Assisted Suicide and Euthanasia in the Medical Context 1 (1994) [hereinafter Task Force, When Death Is Sought].} The mission of the Task Force, established in 1985 by Governor Mario Cuomo, is to recommend public policy on issues arising from medical advances, including life sustaining treatment. Id. at vii. The Task Force’s twenty five members include doctors, lawyers, academics, and representatives of the religious community. Id.

\textsuperscript{8} See generally Neeley, supra note 5; TASK FORCE, WHEN DEATH IS SOUGHT, supra note 7, at 77-113.

\textsuperscript{9} On October 1, 1996, the Supreme Court granted certiorari to hear cases from the Ninth Circuit and the Second Circuit on the constitutionality of physician assisted suicide. 117 S. Ct. 37 (1996). On January 8, 1997, the Supreme Court heard two hours of oral arguments in Washington v. Glucksberg (No 96-110) and Vacco v. Quill (No. 95-1858). The cases attracted national attention in the news media; the courthouse was filled to capacity during the arguments. Many individuals, states, and organizations filed Amicus Briefs with the Court. The justices will decide the cases by early summer of 1997.

\textsuperscript{10} “Though widely used, [‘terminal illness’] is not a standard technical term with clear and precise criteria.” Ronald Bayer et al., The Care of the Terminally Ill: Morality and Economics, 309 NEW ENGL. J. MED. 1490, 1491 (1988).

\textsuperscript{11} “The elements of competence to make medical decisions are the possession of
lives with the assistance of a physician. In Washington v. Glucksberg, the U.S. Court of Appeals for the Ninth Circuit, and Vacco v. Quill, the U.S. Court of Appeals for the Second Circuit, held, respectively, that the laws of the states of Washington and New York prohibiting one person from aiding another to commit suicide violated rights guaranteed by the United States Constitution. Each court held that terminally ill patients have the right to physician assisted suicide but reached their conclusions on separate Constitutional grounds.

The Ninth Circuit en banc, in Washington v. Glucksberg, held that a terminally ill, competent adult has a constitutionally guaranteed, "liberty interest in determining the time and manner of one's own death." The Washington statute prohibiting assisted suicide, therefore, violated the Substantive Due Process...
Clause of the Fourteenth Amendment. Writing for the court, Judge Reinhardt emphasized that an individual's "right to choose" outweighed the state's interest in protecting life. The court reasoned from the legal standards presented in two prior Supreme Court cases: Planned Parenthood v. Casey and Cruzan v. Director, Missouri Department of Health.

In a dissenting opinion, Judge Beezer argued that state interests outweighed the asserted liberty interest of the individual because the statute rationally advanced legitimate governmental purposes. Judge Beezer stated that, historically, there was no precedent allowing physicians to assist patients in killing themselves, that the laws of the state regulating the medical profession prohibited such acts, and that the finding of a constitutional right to suicide will lead down the "slippery slope" to voluntary euthanasia and, ultimately, to involuntary euthanasia.

In other dissenting opinions, Judge Fernandez declared that there is no "constitutional right whatever to commit suicide" while Judge Kleinfeld "doubted" there is a constitutional right to commit suicide. Judge Kleinfeld continued that it was "wrong" for the majority to say there is no difference between giving medicine to relieve pain and giving medication to cause death.

The Second Circuit in Vacco v. Quill held that a terminally

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19 Id. at 793-94, 838.
21 Glucksberg, 79 F.3d at 836-39 ("We are allowing individuals to make the decisions that so profoundly affect their very existence—and precluding the state from intruding excessively into that critical realm.").
23 497 U.S. 261 (1990) (finding state's requirement of clear and convincing evidence of patient's wishes to permit discontinuance of artificial life-support is not violation of Substantive Due Process).
24 Glucksberg, 79 F.3d at 839 (Beezer, J., dissenting). Judge Beezer asserted that an individual has "an ordinary nonfundamental, liberty interest" in physician assisted suicide. Id. However, that state has the right on a rational basis to prohibit assisted suicide. Id.
25 Id. at 856-57 (Beezer, J., dissenting).
26 Id. at 857 (Fernandez, J., dissenting).
27 Id. at 857 (Kleinfeld, J., dissenting).
28 Id. at 858 (Kleinfeld, J., dissenting).
29 80 F.3d 716 (2d Cir. 1996). The trial court granted summary judgment to the defendants, the Attorney General of the State of New York, the Governor, and the District Attorney for New York County. 870 F.Supp. 78 (S.D.N.Y. 1994). The plain-
ill patient has the right, under the Fourteenth Amendment's Equal Protection Clause, to have a physician aid the hastening of death by suicide. While deciding there was no fundamental constitutional right to assisted suicide, the court found that all terminally ill persons were similarly situated. Those denied medication to end life, therefore, were denied equal protection of laws that allowed other terminally ill patients on life support to shorten their lives by refusing further medical treatment.

Writing for the court, Judge Miner declared that the state cannot have an interest in prolonging "a life that is all but ended." He stated that hastening one's death by refusing life-sustaining treatment was indistinguishable from ending one's life with a lethal dose of medication, thereby concluding that the state's prohibition of physician assisted suicide was irrational.

In a concurring opinion, Judge Calabresi agreed that the New York statutes against assisted suicide, as enacted, presently "cannot stand" but did not believe that the validity of the statutes are ready for "final judgment under either Due Process or Equal Protection" analysis. Judge Calabresi left open the question of whether new and different statutes prohibiting assisted suicide, if enacted by New York, would survive constitutional scrutiny.

The Ninth and Second Circuits clearly agreed on a right of tiffs were three medical doctors and their patients who had asked the trial court to declare unconstitutional the state laws banning assisted suicide as violating 42 U.S.C. § 1983. The court found that there was no fundamental constitutional right to physician assisted suicide. The trial court reasoned that the state's distinction between refusing treatment and taking prescribed lethal medication was clear and rational, and that the state had a legitimate interest in preserving life. Moreover, the court thought the debate on assisted suicide should be left to the legislative process.

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30 *Quill*, 80 F.3d at 731.
31 "[I]t seems clear that New York does not treat similarly circumstanced persons alike." *Id.* at 729.
32 *Id.*
34 *Quill*, 80 F.3d at 743.
35 *Id.*
36 *Id.* at 732 (Calabresi, J., concurring). The statutes prohibiting assisted suicide were enacted in conjunction with statutes outlawing suicide itself. *Id.* Since criminal penalties against suicide have been removed Judge Calabresi asserted that the assisted suicide statutes need re-examination. *Id.* at 732-35.
37 *Id.*
38 *Quill*, 80 F.3d at 729.
terminally ill patients to have physician aid in suicide. The Ninth Circuit, however, found a constitutionally guaranteed liberty interest while the Second Circuit found no fundamental right or liberty interest. The Ninth Circuit found a Substantive Due Process violation by state law while the Second Circuit rejected a Substantive Due Process right to physician assisted suicide. The Ninth Circuit did not reach the Equal Protection analysis because it concluded that one constitutional violation of Due Process was sufficient to reach its decision. The Second Circuit found that state prohibition of physician assisted suicide for the terminally ill lacks any rational basis and violates the Equal Protection guarantees of the Constitution. Apparently, the Supreme Court granted certiorari either to resolve the conflict in reasoning between the Circuits or to rule that both courts were incorrect.

This Comment suggests that there is no constitutionally guaranteed right to suicide and there is no Substantive Due Process or Equal Protection violation of the Constitution by the states in prohibiting physician assisted suicide. Thus, the Supreme Court should reverse both the Ninth and Second Circuit decisions. Part One of this Comment examines the Substantive Due Process argument of Washington v. Glucksberg. Part Two examines the Equal Protection argument of Vacco v. Quill. Part Three provides an overview of the public policy issues implicated in the legalization of physician assisted suicide and focuses on solutions other than suicide for the terminally ill in our society. Finally, this Comment concludes that suicide, although quick and efficient, is not an acceptable solution to terminal illness in a civilized society. The end of life is a part of the process of living and should not be feared and distorted by the courts and our legal system. As a society we should choose life affirming care and pain management for the terminally ill instead of accepting the despair and hopelessness of suicide.

39 Glucksberg, 79 F.3d at 793-94.
40 Quill, 80 F.3d at 724.
41 Glucksberg, 79 F.3d at 793-94, 798 (9th Cir. 1996).
42 Quill, 80 F.3d at 724-25 (2d Cir. 1996).
43 Glucksberg, 79 F.3d at 798.
44 Quill, 80 F.3d at 731.
I. SUBSTANTIVE DUE PROCESS

The Fourteenth Amendment of the United States Constitution guarantees that the state may not deprive anyone of "life, liberty or property without due process of law." The Supreme Court has interpreted this Amendment to encompass not only Procedural Due Process rights but also Substantive Due Process rights. Two standards of review comprise the Substantive Due Process analysis: either a "rational basis" or "strict scrutiny" analysis. State legislation of an economic or social nature must be "rationally related" to the state's interest in regulating the activity in question. If state regulations impinge on a "fundamental right," however, they must be supported by a "compelling" state interest and the law must be narrowly tailored to achieve the state's objective. The "strict scrutiny" analysis requires a court to weigh the fundamental right of the individual against the compelling interest of the state in regulating the fundamental right. A determination is then made as to whether the state regulates more than is necessary to achieve its

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45 U.S. CONST. amend. XIV, § 1.
46 The Fourteenth Amendment's Due Process Clause in the procedural context has been interpreted to mean that the state government cannot deny any person certain safeguards or procedures before taking away their property, their liberty or their life. See generally ALBERT H. PUTNEY, UNITED STATES CONSTITUTIONAL HISTORY AND LAW § 245 (1985). Examples include a trial by jury in criminal cases, the right to appeal an adverse decision, payment for personal property taken by the state, and the right to have counsel present at a hearing. Id. at §§ 246-49.
47 The Supreme Court has interpreted Substantive Due Process rights under the Fourteenth Amendment as those rights, although not specifically enumerated, which implicate "fundamental liberties so 'implicit in the concept of ordered liberty' that 'neither liberty nor justice would exist if they were sacrificed.'" Quill v. Vacco, 80 F.3d 716, 723 (2d Cir. 1996) (quoting Palko v. Connecticut, 302 U.S. 319, 325-26 (1937)). The fundamental liberties identified by the Second Circuit include freedom of association, the right to vote, the right to interstate travel, the right to fairness in criminal process, and the right to privacy. Quill, 80 F.3d at 724.
48 United States v. Carolene Products Co., 304 U.S. 144, 152 (1938) (stating that "legislation affecting ordinary commercial transactions is not to be pronounced unconstitutional unless ... it is of such a character as to preclude the assumption that it rests upon some rational basis... ").
49 See, e.g., Loving v. Virginia, 388 U.S. 1 (1967) (finding marriage, though not mentioned in the Constitution, is a fundamental civil right and any state regulation of it must serve a compelling state interest).
50 Griswold v. Connecticut, 381 U.S. 479, 485 (1965) (finding law forbidding use of contraceptives unconstitutional because state regulation may not reach so broadly as to invade areas of "protected freedoms"); Maher v. Roe, 432 U.S. 464 (1977) (upholding state regulation that favors childbirth over abortion by using state funds to encourage childbirth as not violating substantive due process).
goal and whether the state regulation should be permitted to stand.\textsuperscript{51} Notwithstanding the Court's traditional "fundamental right" analysis, the Supreme Court has recently discussed Substantive Due Process rights in terms of a "liberty interest."\textsuperscript{52} It seems unclear, however, as to whether a liberty interest is subject to "strict scrutiny" review as a fundamental right or subject to a new middle level of scrutiny as an important right.\textsuperscript{53}

In \textit{Glucksberg}, the Ninth Circuit found a Due Process


\textsuperscript{52} \textit{Casey}, 505 U.S. 833, 851 (1992). The Court described the "liberty interest" in this way:

[The full scope of the liberty guaranteed by the Due Process Clause cannot be found in or limited by the precise terms of the specific guarantees elsewhere provided in the Constitution. This 'liberty' is not a series of isolated points pricked out in terms of the taking of property; the freedom of speech, press, and religion; the right to keep and bear arms; the freedom from unreasonable searches and seizures; and so on. It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints, ... and which also recognizes, what a reasonable and sensitive judgment must, that certain interests require particularly careful scrutiny of the state needs asserted to justify their abridgment."

\textit{Id.} at 848-49 (quoting \textit{Poe v. Ullman}, 367 U.S. 497 (1961) (Harlan, J., dissenting on other grounds)).

The \textit{Casey} Court continued, "We invoke [the Constitution] once again to define the freedom guaranteed by the Constitution's own promise, the promise of liberty." \textit{Id.} at 901. The Supreme Court of the United States, in the assisted suicide context, is grappling once again with the definition of liberty in the Substance Due Process context. At Oral Arguments, the question arose time and again. Professor Lawrence Tribe of Harvard, arguing in favor of assisted suicide, defined it this way for the Court:

Liberty interest in this case is the liberty, when facing imminent and inevitable death, not to be forced by the government to endure a degree of pain and suffering that one can relieve only by being completely unconscious. Not to be forced into that choice, that the liberty is the freedom, at this threshold at the end of life, not to be a creature of the state but to have some voice in the question of how much pain one is really going through.


\textsuperscript{53} \textit{Quill}, 80 F.3d at 723-24. ("[T]he list of rights the Supreme Court has actually or impliedly identified as fundamental, and therefore qualified for heightened judicial protection include" those in Bill of Rights as well as others) (emphasis added to show mixed use of terms). The Ninth Circuit may have characterized the right to assisted suicide as a liberty interest rather than a pure fundamental right for the purpose of passing muster with the Supreme Court especially in view of the Supreme Court's asserted reluctance to find new fundamental rights. \textit{Glucksberg}, 79 F.3d at 799-804 (relying on Justice Harlan's definition of liberty interest in his dissent in \textit{Poe v. Ullman}, 367 U.S. 497 (1961) (Harlan, J., dissenting)).
“liberty interest” in the “right to die.” This finding of a liberty interest, if a fundamental right, subjects the state law prohibiting assistance in suicide to strict scrutiny by the Court. To withstand strict scrutiny, the state must show a compelling interest in regulating the activity. If the liberty interest is less than a fundamental right, the Court will use a “heightened” scrutiny analysis. For a regulation to withstand this scrutiny, the state must show a “heightened” or important interest in regulating the activity and that preservation of that interest can not be achieved in a less burdensome manner. The Ninth Circuit stated that the state’s important interests are subject to balancing against the individual’s asserted liberty interest. Under either standard, Substantive Due Process, in effect, limits the power of the government to regulate certain rights guaranteed by the Constitution.

Relying on the Supreme Court’s decisions in Cruzan and Casey to define the right to determine “the time and manner of one’s death,” the Ninth Circuit analysis was flawed in several respects. First, the court relied on Casey to establish an overbroad right to self-determination, analogizing a right to suicide with a right to abortion. Second, through questionable balancing of interests, the court concluded that the patient’s interest in death outweighed the state’s interest in preserving life. Third, the court’s historical analysis was inaccurate. Fourth, the court failed to distinguish between a physician providing a lethal dose

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54 Glucksberg, 79 F.3d at 816.
55 “The determination that must now be made is whether the state’s attempt to curtail the exercise of that interest is constitutionally justified.” Id.
57 Casey, 505 U.S. at 853.
58 Id.
59 Glucksberg, 79 F.3d at 836.
60 Cruzan v. Director, Mo. Dep’t of Health, 497 U.S. 261 (1990). The Glucksberg court interpreted Cruzan as recognizing that a liberty interest in rejecting unwanted medical treatment exists - even if that rejection of medical treatment would lead to death. Glucksberg, 79 F.3d at 814-16. The court, therefore, went on to “conclude that Cruzan, by recognizing a liberty interest that includes the refusal of artificial provision of life-sustaining food and water, necessarily recognizes a liberty interest in hastening one’s own death.” Id. at 816.
61 Planned Parenthood v. Casey, 505 U.S. 833 (1992). “Casey ... provide[s] persuasive evidence that the Constitution encompasses a due process liberty interest in controlling the time and manner of one’s death....” Glucksberg, 79 F.3d at 816.
62 Glucksberg, at 793.
of medication and a patient's refusal of further medical treatment. Finally, the court restricted the right to suicide to the terminally ill, whereas a Constitutional right to suicide, if found, should seemingly adhere equally to all persons regardless of age, health, or other life circumstance.

A. Planned Parenthood v. Casey: Abortion as a Precedent for Suicide

In Planned Parenthood of Southeastern Pennsylvania v. Casey, the Supreme Court, following precedent established in Roe v. Wade, reaffirmed a woman's right to an abortion. Additionally, the Casey Court discussed the substantive component of the word “liberty” in the Fourteenth Amendment. “It,” the Court stated, “is a promise of the Constitution that there is a realm of personal liberty which the government may not enter.” Nevertheless, the Court's holding in Casey needs to be viewed in light of the particular facts of that case, namely, a woman's right to an abortion, especially since the Court stated that “[a]bortion is a unique act.” Moreover, the liberty interest defined in Casey pertained to choosing the mother's life over that of her fetus, not physician assisted suicide. The Casey Court does not authorize any person to assist in the killing an independent human life.

In prior decisions, the Court defined liberty interests in the fundamental rights in marriage, bearing and begetting a child.

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63 505 U.S. 833 (1992) (finding liberty interest in woman's right to abortion while not using term “fundamental right” as Court did in Roe v. Wade).
64 410 U.S. 113, 154 (1973) (holding “the right of personal privacy includes the abortion decision....”).
65 “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.” Casey, 505 U.S. at 851.
66 Id. at 847.
67 Id. at 852.
68 In Roe v. Wade, 410 U.S. 113, 150 (1973), the Court described a fetus as “potential life”, not a person. The Casey Court describes the fetus in a similar manner. Casey, 505 U.S. at 870. The Casey Court explained “that the concept of viability, as we noted in Roe, is the time at which there is a realistic possibility of maintaining and nourishing a life outside the womb.” Id.
69 See AMA Amicus Brief, supra note 7, at *24 (stating that “[n]either Roe nor Casey authorizes any person to assist in killing an independent human life because "a woman's right to choose to have an abortion differs materially from a patient's right to physician assisted suicide.").
70 Loving v. Virginia, 388 U.S. 1 (1967) (striking down ban on interracial marriage because state cannot interfere with fundamental right to marry).
71 Eisenstadt v. Baird, 405 U.S. 438, 453 (1972) (stating “right of privacy means...to be free from unwarranted government intrusion into matters so funda-
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and contraception. The Court, however, had not previously addressed suicide as a liberty interest. The Ninth Circuit, nevertheless, extended the language of the Court discussing intimate family matters of marriage and procreation to include all points in a person's life, ultimately finding a liberty interest in suicide. Furthermore, the Ninth Circuit quickly clarified the right as not only a liberty interest in suicide, but also a broader right to determine "the time and manner of one's death" and "a right to hasten one's death." Viewed in this light, a liberty interest could arguably extend to any matter in which an individual asserts a "right to choose." The issue then arises whether a state can ban, for example, personal use of illicit drugs, prostitution, or unapproved experimental medical procedures when an individual asserts a "right to choose." Thus, an analysis of the basic distinction between abortion rights and suicide rights is necessary. The Court, in finding a right to abortion in the right to privacy, balanced the interests of a woman against what the court termed "potential life." The state's preserved its interest in the life of the woman because before and after the abortion the woman was alive. By not recognizing the fetus as a person, mentally affecting a person as the decision whether to bear or beget a child."; see Carey v. Population Servs. Int'l, 431 U.S. 678, 684-85 (1977) (stating that "[t]he decision whether or not to beget or bear a child is at the very heart of this cluster of constitutionally protected choices.").

72 Griswold v. Connecticut, 381 U.S. 479 (1965) (finding zone of privacy created several fundamental constitutional guarantees not specifically enumerated in Constitution).

73 Glucksberg, 79 F.3d 790, 800-01. "In right to die cases the outcome of the balancing test may differ at different points along the life cycle as a person's physical or medical condition deteriorates...." Id. at 800; see also Marc Spindelman, Are the Similarities Between A Woman's Right To Choose an Abortion and the Alleged Right To Assisted Suicide Really Compelling, 29 U. Mich. J.L. Reform 775 (1996).

74 Glucksberg, 79 F.3d at 802. "It is a rational continuum which, broadly speaking, includes a freedom from all substantial arbitrary impositions and purposeless restraints...." Id. at 800. The Ninth Circuit then asserts the "compelling similarities between right-to-die cases and abortion cases" and "an individual's right of choice." Id. at 800-01.

75 Roe v. Wade, 410 U.S. 113, 163 (1972). The Roe Court stated that it would not decide the question of when life begins. Id. The Court, however, did assert that "[w]ith respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability." Id. The Court continued that the state could regulate abortion and even prohibit abortion after viability because of the state's compelling interest in life. Id. It is curious that the Ninth Circuit would use the abortion cases, which certainly affirm the state's compelling interest in preserving life of those already born, as its bedrock for a right to permit one person to help another kill himself.

76 [T]he risk to the woman increases as her pregnancy continues. Thus, the
the Court, in its analysis, did not permit the death of a person. If, however, an individual were to be successful in asserting and exercising a liberty interest in suicide, the result would be death and the state's interest in preserving life would be defeated completely. Thus, to base a right to assisted suicide on the right to abortion is misplaced.

Moreover, as a constitutionally guaranteed liberty interest, the right to abortion extends to every pregnant person,78 regardless of age or other condition. Similarly, it would follow that the right to assisted suicide would not be limited by age or condition. Since, for example, a pregnant child has the right to an abortion,79 a terminally ill child would have the right to physician assisted suicide. Since a parent cannot forbid a child to have an abortion,80 by implication a parent should be unable to forbid a terminally ill child to obtain medical assistance in committing suicide.

B. The Balancing Test and the Undue Burden Test

In defining its balancing test, the Ninth Circuit enumerated the following state interests:81 first, preserving of life;82 second, preventing of suicide;83 third, avoiding involvement of third parties such as doctors and precluding the use of arbitrary, unfair, or undue influence on the infirm or elderly to use suicide to reduce the stress and cost of extended medical care;84 fourth, preventing adverse effects on the children and loved ones of those State retains a definite interest in protecting the woman's own health and safety when an abortion is proposed at a late stage of pregnancy.85

77 Id. at 157-58.
78 Id.; Casey, 505 U.S. 833, 899 (1992). The Casey Court concluded that the parental consent provision of the Pennsylvania abortion statute was constitutional, however, if not given, there were alternatives for a minor:

Except in a medical emergency, an unemancipated young woman under 18 may not obtain an abortion unless she and one of her parents (or guardian) provides informed consent as defined above. If neither a parent nor a guardian provides consent, a court may authorize the performance of an abortion upon a determination that the young woman is mature and capable of giving informed consent and has in fact given her informed consent, or that an abortion would be in her best interests.

80 Id. at 899; see supra note 78 and accompanying text for discussion of availability of abortion to minors.

81 Id.
82 Glucksberg, 79 F.3d at 790.
83 Id. at 817.
84 Id. at 820.
85 Id. at 825.
who commit suicide;\textsuperscript{55} fifth, protecting the medical profession from engaging in conduct that is at odds with their role as healers;\textsuperscript{56} and finally, the inability to restrict the right to suicide to the terminally ill and the difficulty in regulating physician assisted suicide.\textsuperscript{57} These are well defined, weighty state interests. In applying the balancing test, however, the Glucksberg court, chose, on the other side of the scale, to loosely define an individual's "liberty interest in hastening one's death."\textsuperscript{58} Despite the court's express acknowledgment of the difficulty in regulating physician assisted suicide, the Ninth Circuit opined that a state can safeguard its interests by enacting proper regulations and that by implementation of these regulations the "possibility for error will be remote."\textsuperscript{59} Any error, however remote, would be irreversible and result in an innocent person's death.\textsuperscript{60}

Additionally, the Glucksberg court described the terminally ill as "[physically frail, confined to wheelchairs or beds,]"\textsuperscript{61} and that their natural deaths will be "protracted, undignified and extremely painful."\textsuperscript{62} The court's description, however, is not limited to the terminally ill. Many people in wheel chairs or in "intolerable pain"\textsuperscript{63} are not terminally ill while many terminally ill patients do not have pain and are not physically confined. Thus, the dilemma of identifying those entitled to physician assisted suicide is further complicated. Moreover, notably absent from the court's discussion was whether a person, not in pain, would be allowed to receive aid in dying.

The Ninth Circuit conceded that physician assisted suicide

\textsuperscript{55} Id. at 827.
\textsuperscript{56} Glucksberg, 79 F.3d at 827.
\textsuperscript{57} Id. at 830.
\textsuperscript{58} Id. at 830
\textsuperscript{59} Id. at 833.
\textsuperscript{60} The Ninth Circuit further reassures us that should an error actually occur it is likely to benefit the [non-terminal/incompetent] individual by permitting a victim of unmanageable pain and suffering to end his life peacefully and with dignity at the time he deems most desirable. Would any American court dare to opine, in the context of a capital punishment case, that erroneous imposition of the death penalty would benefit the condemned, by sparing him the miserable existence of life without parole? Brief of Amici Curiae for the District Attorney of Milwaukee County, Wisconsin , in Support of Petitioners at *2-3, Washington v. Glucksberg, No. 96-110 (S.Ct. filed Nov. 12, 1996), 1996 WL 657807.
\textsuperscript{61} Id. at 832.
\textsuperscript{62} Glucksberg, 79 F.3d at 793.
\textsuperscript{63} Id. at 814.
will lead to voluntary euthanasia. The court stated that the identity of the person who administers the lethal drugs matters less than the identity of the person choosing to administer them. The court thus opened the door for other courts to find a liberty interest in allowing mercy killing of the terminally ill, the infirm, the disabled, and even those who may be physically healthy and young, but mentally depressed and requesting suicide assistance.

The court further asserted that the prohibition of physician assisted suicide amounts to "an insuperable obstacle" to the liberty interests of terminally ill "who wish to hasten their deaths by peaceful means." These patients either do not have access to peaceful means to kill themselves or are unable psychologically to use violent means. An additional burden extends to family and friends who are called upon to aid illegally in their suicide attempts. The court concluded that abolishing the ban on assisted suicide would alleviate the burden on the individual's liberty interest and solve the problems of the terminally ill. The court thus seemed to view the terminally ill and their families as a group distinct from the rest of society. Each person, however, is ultimately terminal and each person is a member of society. Society is burdened by a law that permits our doctors to be the designated killers of those who are terminally ill. We must ask whether there is a liberty interest for persons who want to live in a society that does not allow doctors, who are supposed to be healers, to give lethal doses of medication.

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94 "We recognize that in some instances, the patient may be unable to self-administer the drugs and that administration by the physician, or a person acting under his direction or control, may be the only way the patient may be able to receive them." Id. at 831.
95 "We consider it less important who administers the medication than who determines whether the terminally ill person's life shall end." Id. at 832. (Emphasis added in text).
96 Id. at 834.
97 Id. at 834-36.
98 Glucksberg, 79 F.3d at 836.
99 As Justice Scalia said, during oral arguments of the cases, that "the dying process of all of us has begun and is underway. It's just a matter of time." Washington v. Glucksberg, No. 96-110, 1997 WL 13671, at *28 (United States Supreme Court Official Transcript of Oral Argument Jan. 8, 1997) [hereinafter GLUCKSBERG ARGUMENTS].
100 AMA Amicus Brief, supra note 7, at *26. "[P]hysician-assisted suicide is a public act with wide-ranging and profound consequences for families, health care professionals, and society." Id.
when a person purposely kills himself, the liberty of each of us is burdened by that loss.  We must examine the difficulties in managing the physical and emotional pain of the terminally ill and why this group may feel that their only alternative is self destruction.

C. The Historical Analysis

An historical analysis is one method the Court can use to determine if our nation’s tradition supports a guaranteed right not specifically enumerated in the Constitution. The Ninth Circuit began by stating that for many years abortion and suicide were prohibited. Today an abortion performed by a physician is legal and therefore it follows that physician assisted suicide should be legalized. This argument is persuasive only if the Court finds an overbroad liberty interest in an individual’s right to choose anything he desires.

The Glucksberg court’s historical journey began with examples of suicide in Greek and Roman history, mythology, and literature. However, it noted if a person who had a criminal conviction committed suicide, confiscation of his property followed as punishment. Next, the court distorted and reinvented the history of suicide in Christianity. The Ninth Circuit, for example, stated “the suicide of Judas Iscariot” after the betrayal of Christ “is not treated as a further sin, rather as an act of repentance.”

The Christian churches, however, have always

\[\text{AMA Amicus Brief, supra note 7 at *26.}\]

\[\text{Fundamental liberties are those that are "deeply rooted in this Nation's history and tradition." Moore v. East Cleveland, 431 U.S. 494, 503 (1977). Recognition of rights not readily identifiable in the express language of the Constitution depends on whether they are "of the very essence of a scheme of ordered liberty" so that "neither liberty nor justice would exist if they were sacrificed." Palko v. Connecticut, 302 U.S. 319, 325-26 (1937) (citations omitted).}\]

\[\text{Glucksberg, 79 F.3d at 804-06.}\]

\[\text{See David Crump, How Do The Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy, 19 HARV. J.L. & PUB. POLY 795, 852-62 (discussing lack of objective criteria in “importance to the individual” approach in defining fundamental liberty interests).}\]

\[\text{Glucksberg, 79 F.3d at 806.}\]

\[\text{Id. at 807.}\]


\[\text{Glucksberg, 79 F.3d at 808 n.25.}\]
taught that Judas' suicide was not an act of repentance, but an act of despair because he thought his betrayal was unforgivable.\textsuperscript{109} 

The court continued by noting that Saint Thomas More, in his book, \textit{Utopia}, "strongly supported the right of the terminally ill to commit suicide and also expressed approval of the practice of assisting those who wished to hasten their deaths."\textsuperscript{110} \textit{Utopia}, however as one scholar has recently noted, was a satire and the person advocating suicide was More's literary foil, named Hythlodaeus, meaning "speaker of nonsense."\textsuperscript{111}

Judge Beezer's dissent, utilizing the same sources as the majority,\textsuperscript{112} found no tradition of suicide or suicide assistance in our nation's history. Interestingly, the Second Circuit, in \textit{Vacco v. Quill}, stated that "the right to assisted suicide claimed by plaintiffs is" not "deeply rooted in the nation's traditions and history. Indeed, the very opposite is true."\textsuperscript{113}

Finally, the \textit{Glucksberg} court stated that "no state" today "has a statute prohibiting suicide" but that a majority of states have laws against assisting another person to commit suicide.\textsuperscript{114} The court quoted several studies and polls that showed societal support for physician assisted suicide and declared that physician assisted suicide was a "time-honored but hidden practice of physicians helping terminally ill patients to hasten their deaths."\textsuperscript{115} The American Medical Society vehemently disputed this assertion.\textsuperscript{116} Moreover, logic dictates that if the medical pro-

\textsuperscript{109} \textit{Id.} at 808 n.25; see Msgr. Smith, \textit{supra} note 107, at 76; Thomas J. Marzen, \textit{Assisted Suicide What's At Stake}, COLUMBIA, January 1997, at 12.
\textsuperscript{110} \textit{Glucksberg}, 79 F.3d at 808.
\textsuperscript{111} Msgr. Smith, \textit{supra} note 107, at 77 (pointing out Ninth Circuit apparently missed More's intended pun).
\textsuperscript{112} \textit{Glucksberg}, 79 F.3d at 845. The majority in \textit{Glucksberg} quotes portions of the work of Thomas Marzen on the history of suicide in western society. Thomas Marzen et al., \textit{Suicide: A Constitutional Right?}, 24 DUQ. L. REV. 1, 17-100 (1985). Using this same source Judge Beezer, in his dissent, fills in the majority's omissions and finds that suicide is now seen as an "indicum of mental illness...The modern consensus consists of an overall disapproval of suicide which is manifested through ... treating [suicide] as a medical or psychological problem" while retaining "criminal statutes prohibiting the aiding or assisting of suicide." \textit{Glucksberg}, 79 F.3d at 847 (Beezer, J., dissenting).
\textsuperscript{114} \textit{Glucksberg}, 79 F.3d at 810.
\textsuperscript{115} \textit{Id.} at 811.
\textsuperscript{116} The notion that everybody looks the other way while physicians eliminate the terminally ill patients was flatly denied in briefs to the Supreme Court by the
fession currently ignores prohibitions against doctor assisted suicide, society should have no expectations that doctors will obey a new set of regulations concerning assisted suicide.\textsuperscript{117} Clearly, that the court’s limited and distorted historical interpretation should not be a basis upon which to find a new constitutional right nor should an alleged illegal, hidden practice be transformed into a constitutional right because several surveys detect a change in societal attitudes.\textsuperscript{118} If there truly is societal support for physician assisted suicide, the state legislatures are the proper places to debate the issue and to determine whether to retain the prohibition on assisted suicide.

\textit{D. Cruzan: The Refusal of Medical Treatment Equals Suicide}

The Ninth Circuit recognized no difference between refusing life sustaining treatment and physician assisted suicide when the result of each was the death of a person.\textsuperscript{119} The right to refuse medical treatment, however, is not limited to the terminally ill.\textsuperscript{120} Each of us can refuse to take a prescription given by a doctor, continue smoking or eating fatty foods against a doctor’s advice, refuse to have an operation, refuse chemotherapy deemed necessary for survival, or discontinue kidney dialysis. We do this simply by refusing the treatment, seeking another opinion until


\textsuperscript{117} \textit{See} Yale Kamisar, \textit{The Reasons So Many People Support Physician-Assisted Suicide—And Why These Reasons Are Not Convincing}, 12 ISSUES L. \& MED. 113, 119-120 (Fall, 1996) (noting physician’s aren’t convicted under present statutes for assisting patients to die, therefore, no reasons exist to believe new laws would alter current practices).

\textsuperscript{118} An example of societal support for physician assisted suicide can be inferred from the refusal of grand juries to indict physicians who have admitted to assisting patients in committing suicide. \textit{See} Robert J. Brendon et al., \textit{Should Physicians Aid Their Patients in Dying?}, 267 JAMA 2658, 2658 (1992).

\textsuperscript{119} “[T]he common law doctrine of informed consent is viewed as generally encompassing the right of a competent individual to refuse medical treatment.” Cruzan v. Director, Mo. Dept of Health, 497 U.S. 261, 277 (1990).

\textsuperscript{120} “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.”’ \textit{Id.} at 269 (quoting Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129-30 (1914)).
finding a doctor who will do what we like, or believing that we are not sick. Refusal of medical treatment is a common law right that extends to all persons. The Ninth Circuit based the right to refuse medical treatment in the liberty interest expressed in Casey as part of choosing one's personal existence. The Court in Cruzan, however, found that the common law granted the right to refuse unwanted bodily invasion and to deny consent to medical treatment.

E. The “Slippery Slope” Argument

Defining terminal illness is difficult. Doctors provide an estimated life expectancy for patients and their families but there is no absolute certainty of death’s exact time short of an affirmative act of suicide. The Ninth and Second Circuits avoided the issue by leaving that decision to the states.

There are also terminally ill patients too weak or debilitated to take doctor prescribed medicine so that another individual must be called upon to administer the lethal dose. This act is more properly termed euthanasia than physician assisted suicide.
Restricting a constitutionally guaranteed right to a particular group seemingly would be an unconstitutional denial of equal protection. Thus, a physically well but mentally and emotionally depressed person who wants to die should be permitted to claim the same right to physician assisted suicide as a physically ill person unless the Court makes a subjective determination that physical suffering is worse than mental suffering.\textsuperscript{128}

If, as the Ninth Circuit decided, there is no difference between refusal of treatment, which is not limited to a particular group, and assisted suicide, it seems unreasonable to limit assisted suicide to the terminally ill adult.\textsuperscript{129} A child, for example, in excruciating pain from a terminal disease should not have to suffer while an adult would be relieved of pain after ingesting a prescribed lethal dose of medication. This raises the further problem of who - the court, the parent, the child, or the doctor - would decide to allow suicide in the case of a terminally ill child in agonizing pain. The \textit{Casey} Court declared that the state may require a child to have the consent of a parent or guardian to have an abortion, but if neither provides consent then a court may allow the minor to consent or determine that "an abortion would be in her best interests."\textsuperscript{3} A Supreme Court decision allowing assisted suicide that rests on the same liberty interest that allows a minor to choose abortion without parental consent seemingly should allow a minor to choose death without parental consent after a similar judicial inquiry.

An additional problem arises with regard to progressive, long term, debilitating diseases that cause a patient great physi-
cal pain and physical confinement but do not cause death for many years. It would seem that, if there is a fundamental right to physician assisted suicide, these patients have a heightened right to prevent what the Ninth Circuit termed “painful, protracted, and agonizing deaths” and “remaining days [that] are unmitigated torture.” Indeed the Ninth Circuit declared in its decision that “[o]ur conclusion is ... not limited to the plight of mentally competent, terminally ill adults. We are influenced ... by ... those whose existence is reduced to a vegetative state or a permanent and irreversible state of unconsciousness.”

These “slippery slope” arguments are significant. Although the Ninth Circuit declared that the magnitude of the liberty interest and the countervailing state’s interest vary, finding a constitutionally guaranteed right to assisted suicide may lead only to controversies for society and the terminally ill and result in endless cases for the courts.

II. EQUAL PROTECTION OF THE LAWS

The Fourteenth Amendment of the United States Constitution guarantees that a state will not deny to any person “the equal protection of its laws.” The state may not make any classification that gives favorable treatment to one group while denying the same treatment to others. Even if the express words of a state regulation are non-discriminatory, the statute is unconstitutional if applied in a discriminatory manner. Generally this means that all persons similarly situated must receive equal treatment from the state government. The Supreme Court of the United States recognizes three levels of scrutiny in

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131 Glucksberg, 79 F.3d at 839.
132 Id. at 834.
133 Id. at 816.
134 Glucksberg, 79 F.3d at 836.
135 See generally David France, This Doctor Wants To Help You Die, NEW YORK, Jan. 13, 1997, at 25 (noting debates on circumstances and methods of performing assisted suicides will ensure a right to suicide is found).
136 “[N]or shall any State “deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.
138 Yick Wo v. Hopkins, 118 U.S. 356 (1886) (invalidating local ordinance that government enforced against ‘subjects of China’ but not other persons as unconstitutional denial of equal protection of law).
139 Plyler, 457 U.S. at 261.
examining the validity of classifications.\textsuperscript{140} Strict scrutiny, the highest level, requires the state to show that its regulation is necessary to achieve a compelling state interest.\textsuperscript{141} Strict scrutiny applies only when the classification interferes with a fundamental right\textsuperscript{142} or disadvantages a suspect class.\textsuperscript{143} The Court has limited suspect classes to race\textsuperscript{144} and national origin.\textsuperscript{145} The middle level of scrutiny, which applies to classes involving gender\textsuperscript{146} or illegitimacy,\textsuperscript{147} necessitates that the regulation be substantially related to an important state interest.\textsuperscript{148} Rational basis review, applied to ordinary social and economic legislation, requires only that the regulation be rationally related to the state's interest.\textsuperscript{149} But if the economic or social legislation also involves a "fundamental right," strict scrutiny applies.\textsuperscript{150} The Supreme Court has restricted fundamental rights outside of the ones specifically mentioned in the Constitution to a very few: the

\textsuperscript{140} Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-42 (1985) (delineating three levels of scrutiny for Equal Protection Analysis).

\textsuperscript{141} Id. at 440.

\textsuperscript{142} San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (defining fundamental rights as "explicitly or implicitly guaranteed by the Constitution.").

\textsuperscript{143} Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976) (recognizing that strict scrutiny applies to fundamental rights and suspect classifications); San Antonio Indep. Sch. Dist., 411 U.S. at 16 (same).

\textsuperscript{144} Strauder v. West Virginia, 100 U.S. 303 (1879) (finding unconstitutional law forbidding blacks from serving on juries).

\textsuperscript{145} Yick Wo v. Hopkins, 118 U.S. 356 (1886) (holding local ordinance unconstitutional because it discriminated on basis of national origin).

\textsuperscript{146} Craig v. Boren, 429 U.S. 190 (1976) (finding relationship of gender to traffic safety too tenuous for gender-based difference in treatment to be substantially related to state interest); Frontero v. Richardson, 411 U.S. 677, 686 (1973) (indicating that "sex characteristic frequently bears no relation to ability to perform or contribute to society.").

\textsuperscript{147} New Jersey Welfare Rights Org. v. Cahill, 411 U.S. 619, 621 (1973) (finding that benefits extended to legitimate children would be just as beneficial to illegitimate children and Equal Protection Clause demands both receive them).


\textsuperscript{149} "The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440 (1985).

\textsuperscript{150} Id. (stating that when legislation involves social or economic issues, states have tremendous latitude).
right to interstate travel,¹⁶¹ the right to vote,¹⁵² the right to court access in a criminal case,¹⁵³ the right to marry,¹⁵⁴ and the right to use contraception.¹⁵⁵ As a practical matter, if a right is fundamental the government should not interfere with the exercise of that right. Therefore, if the Supreme Court extends fundamental constitutional rights to include the right to take one's life, states will be prohibited from regulating that right.

In Vacco v. Quill, the Second Circuit found that there was no fundamental constitutionally protected right to physician assisted suicide,¹⁵⁶ and also declined to classify the terminally ill as a suspect or quasi-suspect class.¹⁵⁷ The court, however, applied only a rational relationship test to the New York statutes prohibiting physician assisted suicide¹⁵⁸ and found, nevertheless, that the laws lacked any rational basis.¹⁵⁹ The court asserted that the state denied “the equal protection of the law” because terminally ill patients had no “right to choose to hasten inevitable death, while terminally ill persons whose treatment includes life sup-

¹⁶¹ Shapiro v. Thompson, 394 U.S. 618 (1969) (finding interstate travel is fundamental right, therefore regulation is subject to strict scrutiny); United States v. Guest, 383 U.S. 745, 758 (1966) (“Freedom to travel throughout the United States has long been recognized as a basic right under the Constitution.”); Twining v. New Jersey, 211 U.S. 78, 97 (1908) (recognizing that right to travel interstate is among rights and privileges of national citizenship).
¹⁵⁴ Zablocki v. Redhail, 434 U.S. 374 (1978) (finding right to marry was fundamental right); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942) (“Marriage [is] fundamental to the very existence and survival of the [human] race.”).
¹⁵⁵ Griswold v Connecticut, 381 U.S. 479 (1965) (finding fundamental right of married couples to use contraception in constitutional right to privacy).
¹⁵⁶ Quill, 80 F.3d at 724-25.
¹⁵⁷ Id. at 726-27.
¹⁵⁸ Id. at 726. The state’s interest in the protection of the lives of its citizens, however, would seem to be completely rational. The difficulty in determining who is terminally ill and if that person truly wishes to commit suicide or is just depressed, is fraught with ambiguity and difficulty. Therefore, a complete ban on assisted suicide solely on the ambiguity issue seems rational. See supra note 124 for discussion of difficulty in determining class of “the terminally ill.”
¹⁵⁹ The Second Circuit stated that, “[T]o the extent that the statutes in question prohibit persons in the final stages of terminal illness from having assistance in ending their lives by the use of self-administered, prescribed drugs, the statutes lack any rational basis and are violative of the Equal Protection Clause.” Quill, 80 F.3d at 727.
port are able to exercise this choice with necessary medical assistance by directing termination of such treatment.\textsuperscript{160} The Second Circuit thereby equated a patient's choice to terminate life-sustaining treatment, including artificial nutrition and hydration, with a patient's request for a doctor's affirmative act of prescribing a lethal medication.

The Second Circuit misinterpreted some very important principles: first, the state's reason for allowing advance care directives; second, the application to all persons, not a select class, of the right to refuse medical treatment and the prohibition against assisting another to commit suicide; third, the legal basis for the right to refuse medical treatment; and lastly, the doctor's intentions while treating the patient and the patient's intentions in choosing or refusing medical treatment.

A. Advance Care Directives

The court looked to New York State laws which allow a person to make an advance directive not to resuscitate him in the event of cardiac or respiratory arrest,\textsuperscript{161} to appoint a health care proxy to make medical decisions in the event of his incapacity,\textsuperscript{162} and to write a living will specifically detailing the type of care to be provided if he becomes incapacitated in the future.\textsuperscript{163} These

\textsuperscript{160} Id. at 729.

\textsuperscript{161} Id. at 727 (citing "Article 29-B of the New York Public Health Law, entitled "Orders Not to Resuscitate." N.Y. PUB. HEALTH LAW § 2964 (McKinney 1987)). Cardiopulmonary resuscitation is defined as "measures ... to restore cardiac function or to support ventilation in the event of cardiac or respiratory arrest."). Id. § 2964. For a full discussion of the topic see NEW YORK STATE TASK FORCE ON LIFE AND THE LAW: DO NOT RESUSCITATE ORDERS (1986) [hereinafter TASK FORCE DNRI.

\textsuperscript{162} Quill, 80 F.3d at 728 (citing Article 29-C of the Public Health Law, entitled "Health Care Agents and Proxies"). N.Y. PUB. HEALTH LAW § 2964 (McKinney 1987). "This statute allows for a person to sign a health care proxy ... for the purpose of appointing an agent with authority to make any and all health care decisions on the principal's behalf that the principal could make." Quill, 80 F.3d at 728. Since the decision making power includes the right to refuse life-sustaining nutrition and hydration the Second Circuit concluded that this empowers a person to commit suicide. \textit{Id. But see} NEW YORK STATE TASK FORCE ON LIFE AND THE LAW, WHEN OTHERS MUST CHOOSE: DECIDING FOR PATIENTS WITHOUT CAPACITY, 23-45 (1992) [hereinafter TASK FORCE, OTHERS MUST CHOOSE] (contending that signing of health care proxy does not empower one to commit suicide).

\textsuperscript{163} New York does not have a statutory scheme for living wills but the Court of Appeals in several cases stated that written and oral evidence demonstrating by clear and convincing evidence the wishes of the incompetent person before he became incompetent is sufficient to allow another to make decisions that the incompetent person would have made for himself. \textit{See In re Eichner}, 52 N.Y.2d 363, 379
are all choices that a person can make about his care in case of a terminal or severely debilitating illness. The Second Circuit, however, did not affirm these as choices allowing a person to control his care but rather labeled these choices as equivalent to self-destruction.

B. Definition of the Class of Persons Treated Unequally

The right to refuse medical treatment applies to all persons whether healthy or terminally ill. The prohibition against assisting another to commit suicide also applies to all persons. Although the relevant statutes actually applied equally to everyone in the state, the Second Circuit as well as the Ninth Circuit fashioned 'artificial' classifications. These courts created a class called 'the terminally ill' and then subdivided it into those who receive artificial life-sustaining treatment and those who do not. After establishing the class, the Ninth Circuit, nevertheless, conceded that it is difficult to define precisely the terminally ill. The Second Circuit deferred to doctors who, through their expe-
rience, know when a patient is terminally ill. Doctors, however, are notoriously wrong in their predictions about how long a particular patient will live. Thus there is difficulty in identifying the class.

C. The Right To Refuse Medical Treatment

The medical profession and the law both require physicians to consider the patient's wishes about his own care. In Vacco v. Quill, the Second Circuit relied on the Supreme Court's decision in Cruzan to assert its notion that refusal of medical treatment was indistinguishable from physician assisted suicide. The Court in Cruzan, however, found that the right to refuse medical treatment rested on the common law right not to be touched by another without consent, the common law notion of informed consent for medical treatment, and a liberty interest. The Cruzan Court reasoned that the right to informed consent included the right to withhold consent. A doctor cannot compel his patient to continue chemotherapy if the patient chooses to discontinue treatment. If the patient wants to discontinue artificial nutrition and hydration the doctor must abide by his wishes. When a doctor withdraws artificial life support, however, his intent is to provide the care requested by the patient, not to kill him. Nevertheless, the Second Circuit determined that the ending of life in this manner would constitute assisted

169 Quill, 80 F.3d at 731 (commenting that physicians generally agree on definition of "terminally ill").
170 The American Medical Association, the professional organization of American physicians, declares that there is difficulty in determining who are the terminally ill. AMA Amicus Brief, supra note 7 at *12. It is perplexing to give people a right to assisted suicide when the doctors who are assisting are not sure who is entitled to the help.
171 Id. at *270.
172 "The right to control one's medical treatment is among the most important rights that the law affords each person." AMA Amicus Brief, supra note 7, at *1. Further, medical treatment done without the patient's permission has been treated by law as battery. Id. at *20.
173 Quill, 80 F.3d at 728-29 (discussing Cruzan v. Director, Mo. Dep't of Health, 497 U.S. 261 (1990)).
174 By ordering the discontinuance of these artificial life-sustaining processes or by refusing to accept them in the first place, a patient hastens his death by means that are not natural in any sense. It certainly cannot be said that the death that immediately ensues is the natural result of the progression of the disease or condition from which the patient suffers.
175 Cruzan, 497 U.S. at 269-70.
suicide. The reasoning of the Second Circuit, taken to its logical conclusion, means that anytime a physician terminates artificial life-sustaining treatment or a patient refuses the treatments, it would be assisted suicide. This inevitably leads to the illogical conclusion that a patient, unable to be revived by cardiopulmonary resuscitation, would nevertheless require continuous resuscitation to avoid death. Otherwise, his death would be considered physician assisted suicide. Similarly, when a family with a doctor’s support decides to care for a terminally ill child at home instead of treating him with artificial nutrition and hydration in an acute care facility, possibly shortening the child’s life and pain by a few days, the court could conclude that the family assisted the child in committing suicide. It is important to recognize that refusing medical treatment is a permissible option especially because medical techniques can become invasive and abusive to a person’s body. A patient may decide, at anytime during medical treatment, that he wants to be alive and at peace detached from tubes and machines.

D. The Intention of the Parties: Doctor and Patient

The courts incorrectly decided that the intention of the doctor did not matter. It is significant to note that “physician assisted suicide always involves an intent to terminate a life, while forgoing medical treatment does not.” In criminal law, the mens rea of a crime is essential. If a person intends to kill and thus causes another’s death, his actions and intention taken together will amount to some degree of homicide.

Treatment by a physician, however, can have a “double effect.” While trying to cure a patient of cancer through aggres-
sive chemotherapy the patient can become debilitated and ultimately die from the side effects of chemotherapy. Yet, the oncologist, a cancer specialist, would not be guilty of murder; his intent was to cure the patient. In relieving pain for the terminally ill, a doctor prescribes medication that depresses respiration and blood pressure and brings on death sooner than would have occurred without the medication. The intention, however, of the doctor is to relieve pain, not to kill the patient. Similarly, a doctor's decision to remove artificial nutrition and hydration may be to relieve the patient of the undue burden of dealing with a painful treatment and does not reflect the doctor's intent to kill the person. Despite evidence to the contrary, the Ninth Circuit emphatically denies the intent distinction of this “double effect” and asserts that a physician intends a patient's death when he removes artificial life support or prescribes large doses of morphine to control pain.

The controversy surrounding the refusal of additional life-sustaining treatment is a multi-faceted one requiring a consideration of numerous factors. First, the terminal patient who wants to survive but does not want more extensive and painful treatment, may instead of viewing artificial hydration and nutrition as life-sustaining, consider them obstacles to a natural

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181 See AMA Amicus Brief, supra note 7, at *28 (stating that provision of treatment, even if intended to heal, could have a fatal effect).
182 See TASK FORCE, WHEN DEATH IS SOUGHT, supra note 7, at 163-65 (discussing the principle of ‘double effect’ in relation to the administration of opioids, a primary form of pain relief for those in severe pain). The Task Force recognizes that there is a difference of opinion on the element of ‘double effect’ but all agree that “intentions can be a significant and decisive factor in evaluating actions.” Id. at 164. See also Choice In Dying Amicus Brief, supra note 124, at *11 (noting that ‘double effect’ is “morally acceptable risk”).
183 “[T]he provision of pain medication is medically and professionally acceptable even when such treatment may hasten death, if the medication is intended to alleviate pain and severe discomfort, not to cause death.” TASK FORCE, WHEN DEATH IS SOUGHT, supra note 7, at 162.
184 See CMA Amicus Brief, supra note 176, at *21 (stating that “medical science can offer numerous [other] examples in which the decision to forego medical treatment does not involve an intent to kill or die.”)
185 Glucksberg, 79 F.3d at 823-24.
186 “[P]eople who refuse life-sustaining medical treatment may not harbor a specific intent to die; rather they may fervently wish to live, but to do so free of unwanted medical technology, surgery, or drugs, and without protracted suffering.” Brief of Amici Curiae For The Medical Society of New Jersey In Support of Petitioners, at *13, Vacco v. Quill, No. 95-1858 (S. Ct. filed Nov. 12, 1996) 1996 WL 656348 [hereinafter NJ Med Amicus Brief].
death. Most cancer patients, for example, near the end of life are not interested in food or capable of eating. Feeding these patients artificially may only burden them. Yet, removal of a feeding tube is not the cause of death because the individual ultimately dies from destruction of their bodies by cancer. Death in this manner is different from that caused by ingestion of lethal medication where the person ultimately dies from self-inflicted poisoning.

A second factor to consider is that the removal of life-sustaining treatment may not bring about death. In the famous case of Karen Ann Quinlan, a long court battle ended when the court granted permission for removal of a respirator that was keeping Ms. Quinlan alive in a persistent vegetative state. Doctors predicted that Ms. Quinlan's death would follow soon after removal of the respirator. Nevertheless, after the respirator was removed, Ms. Quinlan lived for years in that same persistent vegetative state. Thus, the facts of the Quinlan case seemingly contradict the Second Circuit's position that physicians do not become killers "by prescribing drugs to hasten death any more than they do by disconnecting life-support systems." If Karen Ann Quinlan's doctors had given her a lethal dose of medication, based on their belief that her death was imminent she would have died years before she actually did.

A final factor is that the decision to cease artificial nutrition, unlike the decisions to commit suicide with the assistance of a

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188 "These life-sustaining treatments artificially postpone natural death, and the withholding or withdrawing of these treatments removes the obstacle." *Choice In Dying Amicus Brief*, supra note 124, at *9. *Id.*

189 *Choice in Dying Amicus Brief*, supra note 124 at *9 n.20 (stating that treatments such as artificial nutrition and hydration in patients with diseases like cancer may only serve to prolong their pain and suffering so that they "survive into a more advanced and debilitating stage of the disease.").

190 *See Choice In Dying Amicus Brief*, supra note 124, at *8-10 (noting that "[t]he imposition of artificial nutrition and hydration may actually contribute to an uncomfortable death.").

191 *NJ Med Amicus Brief*, supra note 186, at *13 (stating that "[r]efusing medical intervention merely allows the disease to take its natural course; if death were eventually to occur, it would be the result, primarily, of the underlying disease, and not the result of self-inflicted injury.").


193 *Id.* at 655.

194 It should be noted, however, that Karen Ann Quinlan continued to receive artificial nutrition and hydration during those years.

195 *Quill*, 80 F.3d at 730.
physician, is not final. A patient may change his mind and resume whatever treatment had been stopped previously. However, death by assisted suicide is final and does not allow a change of heart. As such, it creates a definite risk of "irreversible error." The aforementioned distinctions between refusal or termination of life-sustaining treatment and assisted suicide certainly are rational and should be relied upon by the Supreme Court in upholding the state prohibition of assisted suicide.

III. PUBLIC POLICY CONSIDERATIONS

While this Comment is primarily an analysis of the Ninth and Second Circuit decisions regarding physician assisted suicide, certain public policy issues surrounding this debate are integral to the discussion and thus are examined below.

First, trust is the basis of the doctor patient relationship. Patients rely on their doctors to administer proper care and to advise them of the most effective means of controlling their illnesses. Viewed in this context, a doctor's suggestion of assisted suicide may be misconstrued and thus improperly influence a patient's decision to pursue a course he otherwise may not have taken. Because they are trained to be healers, doctors, faced with a patient's impending death, may experience feelings of failure and inadequacy.

The American Medical Society stated that "the ban on physician-assisted suicide helps ensure that patients will never lose the trust that must exist for the relationships between health care professionals and patients to flourish." AMA Amicus Brief, supra note 7, at *29.

See AMA Amicus Brief, supra note 7, at *3 ("Patients come to physicians at times of greatest need.").

AMA Amicus Brief, supra note 7, at *1-3.

AMA Amicus Brief, supra note 7, at *16. "Health care professionals also experience great frustration at not being able to offer the patient a cure." Id. This frustration is indicative of the physician's "inability to tolerate the situation they cannot control." Herbert Hendin, M.D., Seduced by Death: Doctors, Patients and the Dutch Cure, 10 Issues L. & Med. 123, 129 (1994). Thus, many doctors may perceive assisted suicide as a means of regaining some control over the patient's illness. By deciding when patients die, by making death a Medicare decision, the physician has the illusion of mastery over the disease and the accompanying feelings of helpless-
tor may regard offering a lethal prescription to a patient as conquering the disease rather than letting the illness conquer the patient. Since communication between doctors and patients is limited and especially difficult when there is no cure for the disease, suicide may give the doctors a feeling of empowerment. Such a perception on the part of the physician may lead them to prescribe assisted suicide as a positive course of treatment. Patients, relying on the physician's assessment, may feel compelled to choose suicide rather than exploring other viable options including living long enough to be cured of the illness.

Second, in recent years the cost of health care in the United States has skyrocketed and our health care system is moving rapidly into a system of managed care that provides doctors with business-like financial incentives to reduce costs by refusing to treat patients. Specifically, doctors who limit costs receive a personal financial bonus. Thus, when deciding whether to treat a terminally ill patient aggressively with an expensive procedure, such as chemotherapy, or to suggest relatively less costly assisted suicide, a doctor may present the assisted suicide as a much more appealing option thereby unduly influencing a patient's decision to choose death rather than life.

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201 AMA Amicus Brief, supra note 7, at *16.
202 Glucksberg, 79 F.3d at 826-27.
203 AMA Amicus Brief, supra note 7, at *16 (quoting Hendin, Seduced by Death, 10 Issues in L. & Med. 123, 129 (1994)).
204 "Transforming physician-assisted suicide into a medical procedure would create momentum in favor or its use that regulation could not reverse." AMA Amicus Brief, supra note 7, at *18.
205 The American Medical Society believes that if physician assisted suicide is legalized there will be tremendous pressure upon patients to justify why they don't want to kill themselves when they have a serious illness. The pressure would come from the feelings of being a financial and emotional burden on their families. Patients, moreover, would feel that they were responsible for their own suffering. AMA Amicus Brief, supra note 7, at *17.
207 Int'l Task Force Amicus Brief, supra note 206, at *5.
208 "At a time when managed care cost containment provisions make even emergency care difficult to obtain, it would be incredibly naive to assume that the same
States, where no system of national health care exists, assisted suicide may emerge as the best option for those people without medical insurance or alternative financial resources. Others, capable of paying for care, may still choose suicide in an effort to ease the financial and emotional burdens on their families.

Third, some proponents of assisted suicide try to paint any opposition to it as a religious argument and any prohibition of it in the law as an establishment of religion in violation of the First Amendment. Although some view suicide as contrary to religious teaching, there is no automatic constitutional violation when religious teaching and the law coincide as they often do. Despite the contentions of its proponents, opposition to assisted suicide is firmly rooted in the state's vital interest in preserving the life of its citizens. While the Ninth Circuit acknowledged the legitimacy of the state's interest, they considered it to be outweighed by one's liberty interest in choosing how and when one dies. The Ninth Circuit regarded the state's interest in preserving managed care programs would authorize access to all medical options, some of which may be expensive, before approving the cost of effective treatment of assisted suicide. Int'l Task Force Amicus Brief, supra note 206, at *15; "Health care insurers would consciously seek to avoid suggesting to patients or physicians that they consider financial costs in making decisions to hasten death, the continuing pressure to reduce costs can only constrain the availability and quality of palliative care and support services that patients and families need." AMA Amicus Brief supra note 7, at *13-14.

"One of the most common reasons why patients request suicide is to spare their families and loved ones the burdens and expense of caring for them." AMA Amicus Brief supra note 7, at *14.

Glucksberg, 79 F.3d at 839. The court declared that persons are not free to "force their religious convictions" on all members of society and thereby force "those whose values differ with theirs to die painful, protracted, and agonizing deaths." Id. See GLUCKSBerg ARGUMENTS, supra note 99 at *49. "Ms. Tucker" [for petitioners] said “that this decision is so profoundly personal, so intimate to the individual, so much based on their own values and beliefs and perhaps religious beliefs ....” Id. But see Kamisar, supra note 117, at 118-19 (rejecting contention of proponents that reasons of those opposing assisted suicide are strictly religious and can only be defended on religious grounds).

U.S. CONST. amend. I. “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.” Id.

It is suggested that religion and the law agree that murder, robbery, and rape are wrong. Justice Kennedy said at oral arguments of the cases that “[w]hy can’t a society determine as a matter of public morality that it is wrong to kill yourself just as it is wrong to kill someone else.” GLUCKSBerg ARGUMENTS, supra note 99, at *48.
ing the life of a person who is terminally ill as "dramatically diminished" while at the same time admitting that it is difficult to determine who is terminally ill. 214 Contrary to the court's reasoning, it seems that the state's interest in preserving the life of its citizens should reach its pinnacle when people are sick and vulnerable rather than when they are healthy and able to care for themselves. 215 Furthermore, the court's inability to ascertain definitively who are the terminally ill will lead society to question whether the state's interest in preserving life diminishes when a person is chronically ill, demented, disabled, retarded, or simply old and close to the age of dying. In order to avoid these controversies, we, as citizens, should require state legislatures to make the preservation of its citizens' lives its most important, overriding interest and leave the laws prohibiting assisted suicide intact.

Fourth, the state may properly decline to make any evaluation as to whose life is worth living. 216 This type of subjective determination will be influenced inevitably by a particular judge's personal beliefs. The Second Circuit illustrated this subjective bias when questioning "what interest can the state possibly have in requiring the prolongation of a life that is all but ended?" 217 Under such a subjective criteria the state could conclude that the

214 Glucksberg, 79 F.3d at 820.
215 Brief of Amici Curiae for the States of California, Alabama, Colorado, Florida, Georgia, Illinois, Iowa, Louisiana, Maryland, Michigan, Mississippi, Montana, Nebraska, New Hampshire, Oklahoma, South Carolina, South Dakota, Tennessee, Virginia and Washington and the Commonwealth of Puerto Rico In Support of Petitioners at *23, Vacco v. Quill, No. 95-1858 (S. Ct. filed Nov. 8, 1996), 1996 WL 650925 [hereinafter States Amicus Brief] (stating "it is at this critical time when life is 'all but ended,' that the person whose life is at stake is in greatest need of the State's protection."); TASK FORCE, OTHERS MUST CHOOSE, supra note 162, at 25. The Task Force refers to the formula quoted from In re Quinlan: "the State's interest [in preserving life] weakens and the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims." The Task Force goes on to remind us that the New Jersey Supreme Court later rejected this formula in In re Conroy, 486 A.2d 1209 (1985) when it "ruled that life-sustaining treatments cannot be legally distinguished from other treatments based upon their level of intrusiveness." Id.
216 States Amicus Brief, supra note 215, at *23 (stating that court's analysis was flawed by improper insertion of "quality-of-life considerations which it used to discount the State's important interests in the protection and preservation of human life."). But see PETER SINGER, RETHINKING LIFE & DEATH: THE COLLAPSE OF OUR TRADITIONAL ETHICS 65-80 (1994) (supporting physician assisted suicide and euthanasia especially to relieve the burden on society of those whose life is of lesser value).
217 Vacco v. Quill, 80 F.3d at 729.
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life of a person confined to a wheelchair, living in a nursing home, or afflicted with Alzheimer's disease is 'all but ended.' The state in Nazi Germany made such subjective evaluations as to which of its citizens should be allowed to survive.\textsuperscript{218} The result taken to an extreme was the 'legal' mass murder of millions. The Ninth and Second Circuits assured themselves that proper state regulation would resolve any concerns about the practice of assisted suicide. The Second Circuit, nevertheless, acknowledged that there are abuses in the Netherlands, the one western European country that regularly practices assisted suicide and euthanasia.\textsuperscript{219} Such abuses serve as an indication that regulation will be an inadequate means of protecting members of our society.

Fifth, hospice care\textsuperscript{220} for the terminally ill is beginning to be accepted and advanced by the medical community. Hospice care aims to preserve the dignity of the individual by respecting individual choices about medical care and providing the dying with an alternative to death in acute care facilities where they may be isolated from their families, attached to machines, and subjected to invasive medical procedures. This type of care also is just beginning to receive the financial support of insurance companies.\textsuperscript{221} If the law accepts the alternative of quick, efficient, and

\textsuperscript{218} It started with the acceptance of the attitude, basic in the euthanasia movement, that there is such a thing as life not worthy to be lived. This attitude in its early stages concerned itself merely with the severely and chronically sick. Gradually, the sphere of those to be included in this category was enlarged to encompass the socially unproductive, the ideologically unwanted, the racially unwanted and finally all non-Germans. Brief of Amici Curiae for the Schiller Institute in Support of Petitioners, at *7, State of Washington v. Glucksberg, No. 96-110 (S. Ct. filed Nov. 12, 1996), 1996 WL 656260 (discussing Nazi policies of physician assisted suicide and mercy killing).


\textsuperscript{220} "Hospice refers not to a place, but rather to a program of care, based on a philosophy that recognizes dying as part of the normal process of living and focuses on enhancing the quality of remaining life." Hospice Amicus Brief, supra note 125, at *2. Hospice care coordinates supportive care for patients who are terminally ill and their families. The care includes medical, emotional, psychological, physical and spiritual support. \textit{Id.}

\textsuperscript{221} Hospice Amicus Brief, supra note 125, at *3 n.2.
inexpensive suicide, insurance companies may exclude hospice care from policyholders’ choices and doctors may be reluctant to advise their patients about the benefits of hospice care. Dying is only one step in the life process. For some people death comes silently without notice. For others death is a long journey. It can be a positive part of life in which the dying person re-evaluates his life, reunites with family and friends, and gives strength and guidance to those he is leaving. With emotional support for the patient and the family and medical care including pain management, despair at the end of life may even give way to acceptance and peaceful death. Suicide should not be deemed an appropriate or preferred medical treatment. A realistic, open, and complete evaluation of alternatives needs to be made before the Court chooses suicide for us.

IV. CONCLUSION

Medical technology has advanced so rapidly in recent years that the law is racing to catch up. While the modern approach to death is physician assisted suicide, there is no historical tradition supporting suicide or allowing doctors affirmatively to help their patients to die. The finding of a constitutionally guaranteed right to physician assisted suicide would be tantamount to finding an overbroad liberty interest of the individual to choose whatever he wants while entirely negating the states’ interest in preserving the lives of its citizens. Moreover, no Equal Protection violation exists because the laws against assisted suicide and those allowing refusal of medical treatment apply equally to the whole population while the class of terminally ill who assert the discriminatory treatment cannot be identified with any certainty.

The legalization of physician assisted suicide would generate numerous medical and legal dilemmas. In particular, it would undermine the practice of medicine, the relationship of trust be-

\footnotesize{\textsuperscript{222} Hospice Amicus Brief, supra note 125, at *7.  
\textsuperscript{223} Hospice Amicus Brief, supra note 125, at *10-11.  
\textsuperscript{224} George Annas & Michael Grodin, There’s No Right To Assisted Suicide, N.Y. Times, Jan. 8, 1997 at A15.  
\textsuperscript{225} Homes For Aging Amicus Brief, supra note 196, at *3. “Striking down dozens of State laws against assisted suicide would create a risk, which no regulatory safeguards could eliminate, of decisions for death that are made while a person is clinically depressed, incompetent or overly vulnerable to coercion by others and by societal expectations.” Id.}
tween patient and doctor, and the states' enforcement of laws against murder. The states will be unable to regulate effectively a right given to an indeterminate class of persons. Furthermore, the states should not evaluate whose life is worth living, but should preserve its overriding interest in preserving the lives of all its citizens. Consideration must be given to the realities of the scarce resources of the American medical community, the right to life of our aging population, and the cost factors that will influence institutions to promote suicide of the terminally ill, the infirm, and the disabled. The Supreme Court should not rush to find an easy solution to the end of life debate particularly when nothing in the Constitution makes it the Court's business to do so. Further, if the Court finds a right to assisted suicide, public debate and assessment will be cut short. People will be denied their right to open and informative discussion on all aspects of the issue as well as the ability to choose positive life affirming alternatives to suicide.